

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 January 2025

Public Authority: Ministry for Housing, Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information relating to a cladding remediation programme at the Kingsland Wharves complex from the Ministry for Housing, Communities and Local Government ("the MHCLG"). The MHCLG refused the request on the basis that Regulation 12(5)(e) (commercial confidentiality), and Regulation 12(5)(b) (course of justice) of the EIR applied.
2. The Commissioner's decision is that the MHCLG was correct to withhold the requested information under the exceptions in Regulation 12(5)(e) and Regulation 12(5)(b).
3. The Commissioner does not require further steps.

Request and response

4. On 2 May 2024, the complainant wrote to the MHCLG and requested information in the following terms:

“Further my previous request under EIRs (ref:11923689) please can you provide the following information:

 - (i) a copy of all agreements entered into between L&Q Housing Trust and the original builder (Durkan) in connection with completion of a cladding remediation programme at Kingsland Wharves;
 - (ii) assessments provided by L&Q to DLUHC to show reasonable efforts were made to recoup money from third parties in connect with completion of a cladding remediation programme at Kingsland Wharves;
 - (iii) details of amounts recouped by L&Q from third parties and amounts of BSF money that has been repaid to DLUHC by L&Q in connect with completion of a cladding remediation programme at Kingsland Wharves;
 - (iv) details of assessments made by DLUHC that the attempts made by L&Q to recover money from third parties in connect with completion of a cladding remediation programme at Kingsland Wharves were sufficient and/or represent value for money.”
5. The MHCLG responded on 5 July 2024. It applied section 42 (legal professional privilege, section 43(2) (commercial interests), and section 40(2) (personal data) of FOIA to withhold the requested information.
6. Following an internal review MHCLG wrote to the complainant on 2 August 2024. It amended its response to the complainant’s request and at this stage cited Regulation 12(5)(e) and Regulation 12(5)(b) of the EIR and refused to provide the information.

Scope of the case

7. The complainant contacted the Commissioner on 2 August 2024 to complain about the way their request for information had been handled. They disagreed that the exceptions cited applied.

8. The scope of the following analysis is to determine whether the MHCLG was correct to withhold the information under Regulations 12(5)(e) and 12(5)(b).

Reasons for decision

Background to the request

9. The MHCLG is responsible for managing and awarding payments to companies which are in the process of remedying buildings falling within the scope of the Social Sector ACM Cladding Remediation Fund and the Building Safety Fund (the 'BSF')
10. As part of this process, the MHCLG expects the companies which are replacing the cladding to seek to recover costs from the company which initially installed it. Companies are therefore expected to demonstrate that they have taken action to do so to the MHCLG. Where applicants successfully recover funds relating to the removal and replacement of unsafe cladding, they are expected to pay back any amounts recovered which relate to the removal of the unsafe cladding up to the amount provided through the fund. The MHCLG also expects applicants to provide it with updates about ongoing cost recovery action.
11. The request in this case is for information relating to one such application. The withheld documents were shared with MHCLG by London & Quadrant Housing Trust ("L&Q") as evidence of their cost recovery action against Durkan Limited, the company responsible for the initial installation of the cladding at Kingsland Wharves.
12. The withheld documents include:
 - i. Pre construction service agreements between L&Q and Durkan.
 - ii. A BSF cost recovery form explaining L&Q's cost recovery actions and potential future actions.
 - iii. A copy of legal advice provided to L&Q by its legal advisers, providing a summary of the contract and their advice on this. The MHCLG said that this document falls within the scope of part (iv) of the request. The summary also includes details of Durkan's contribution (responding to part (iii) of the request).
13. The Commissioner notes, therefore, that the withheld information relates primarily to information provided to the MHCLG by L&Q which describes, in detail, the agreement it has negotiated with Durkan. It is not information which is negotiated or generated by

the MHCLG. It is information provided to the MHCLG following the Social Sector ACM Cladding Remediation Fund process.

Regulation 12(5)(e) – commercial confidentiality of environmental information.

14. The MHCLG applied Regulation 12(5)(e) to withhold information falling within the scope of parts (i), (ii), (iii) and (iv) of the request. It also applied Regulation 12(5)(b) to withhold information falling within parts (ii) and (iv).
15. This reasoning covers whether the MHCLG was correct to withhold the requested information under Regulation 12(5)(e) of the EIR.
16. Information can be withheld under Regulation 12(5)(e) if its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
17. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of Regulation 12(5)(e), the authority must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
18. Regulation 12(5)(e) is also subject to a public interest test if the exception is engaged.

Is the information commercial or industrial in nature?

19. The Commissioner is satisfied that the information is commercial in nature. It relates to commercial agreements between various parties which have been supplied to the MHCLG by L&Q for the purposes of the MHCLG's monitoring and decision-making processes. The withheld information describes details of the relationship between L&Q and Durkan as regards the remediation work to be completed.

Is the information subject to confidentiality provided by law?

20. The MHCLG clarified that the information was provided to it in confidence by L&Q in order to assist it in monitoring the progress of remediation at the site, and to aid it in making assessments about costs recovery.

21. The complainant argues that much of the information is already available, such as the MHCLG's funding contracts with L&Q. However, the withheld information is not a copy of the MHCLG's contract with L&Q, nor details of its funding for the work carried out. It is details of L&Q's actions and agreements with Durkan regarding the remediation work at Kingsland Wharves. The information which the complainant holds is therefore different information to that withheld in response to their request.
22. The Commissioner is satisfied that the withheld information is subject to the common law duty of confidence. The information is sensitive in nature, and was only provided to the MHCLG for the purposes of its monitoring and decision making. Both parties would have understood that that was the sole purpose for the MHCLG needing that information at the time it was provided to the MHCLG, and that the information should not be disclosed further. The information is not trivial, and it is not otherwise in the public domain.

Is the confidentiality provided required to protect a legitimate economic interest?

(i). The MHCLG's arguments

23. The MHCLG argues that confidentiality is in place to protect the economic and legal interests of L&Q.
24. The MHCLG confirmed that, at the time of the request, it consulted with L&Q about a potential disclosure of the information. L&Q confirmed that if the information were published it would reveal the commercial position that it was willing to accept as an outcome during its negotiations. It therefore argued that a disclosure of the information would have an adverse effect upon its economic interests as other companies could use that information to affect future negotiations about other remediation projects to better their own position. The MHCLG confirmed that L&Q do have other such projects planned.
25. The withheld information also contains legal advice which relates to L&Q's legal positions as regards other third-party companies which it might consider seeking redress from in the future. The MHCLG argues that a disclosure of this advice would highlight to those companies that L&Q might approach them in the future.

(ii). The complainant's arguments

26. The complainant argues that contracts for remediation are building specific.

27. The complainant also argues that the contract agreements and funding between the MHCLG and L&Q are already within the public domain, and so a disclosure of the requested information would not prejudice L&Q's ability to negotiate with other contractors. The Commissioner notes, however, that the withheld information does not relate to the money paid by the MHCLG to L&Q for work carried out; it relates to L&Q's agreements with Durkan, detailing how they have resolved the situation.
28. The complainant further argues that the majority of the work on surrounding buildings in King's Wharves were due to be completed by December 2024. He therefore argues that the MHCLG's arguments regarding the commercial sensitivity of the information are unfounded as the work is nearly completed.

The Commissioner's analysis

29. The Commissioner has considered the MHCLG's arguments in this respect. He recognises that disclosing the lowest position which a company would be willing to accept from negotiations prior to, or during the negotiations would significantly undermine the company's position during those negotiations – the other parties to the negotiations would push towards seeking those terms for their own benefit.
30. The Commissioner also recognises that, although the contracts are location specific, the lowest terms for L&Q may also apply to other remediation contracts which they are in negotiations for, or intend to enter into. Whilst the Commissioner notes the complainant's arguments that the contracts are building specific, he also considers that some information may be relevant to future contracts. Although the work involved between may differ in some ways between different properties, they will all centralise around the removal of the old cladding and the installation of new, safe cladding on buildings, and so strong similarities in various costs and charges are likely to occur between buildings.
31. Additionally, highlighting the possibility of future action being taken against companies might allow them to take steps to prevent that action being taken, or to lower the potential payments they might be liable to pay.
32. The Commissioner has therefore decided that a disclosure of the withheld information would adversely affect the confidentiality of commercial information and that the confidentiality was provided by law to protect a legitimate economic interest.

33. His decision is therefore that the exception in Regulation 12(5)(e) is engaged. He has therefore gone on to consider the public interest test required by Regulation 12(1) of the EIR. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest the information being disclosed.

Public interest test

The public interest in the information being disclosed

34. The MHCLG recognised that there is a particularly strong public interest in the disclosure of information over the issue of unsafe cladding on buildings given the large number of buildings and individuals that have been affected by it.
35. There is also a strong public interest in shedding light on the actions of the MHCLG in terms of its responsibilities in managing the funds relating to the unsafe cladding remediation program.
36. There is an additional public interest in disclosure relating to the use of public funds to carry out the remediation work, and in being transparent about the efforts taken to retrieve costs from those involved in installing unsafe cladding in the first instance.
37. The Commissioner considers that the above creates a strong public interest argument for the disclosure of the withheld information.

The public interest in the exception being maintained

38. The Commissioner recognises that the information was provided to the MHCLG as part of its monitoring and decision-making functions over the Social Sector ACM Cladding Remediation Fund.
39. The MHCLG argues that if the information is disclosed, it would disrupt the flow of information to the MHCLG. The MHCLG argued that disclosing commercially sensitive information that was shared with it in confidence could undermine its relationships with L&Q and other third parties. Other building owners would be less likely to share commercial agreements with it in the future without some assurances that confidences would be respected. It considered that this would cause detriment to its ability to hold developers to account and ensure that BSF funds are used where needed.

40. The Commissioner recognises that the provision of the information to the MHCLG is carried out as part of the fund application process. Therefore, those seeking access to the fund are obliged to provide it to the MHCLG in order to access funds from it. Nevertheless, this does not prevent the information provided as part of that process from being sensitive, and a wider disclosure of that sensitive information in response to an FOI request is likely to undermine the process to some degree.
41. The Commissioner is satisfied that the issue was live at the time that the request was received. The complainant confirmed that work on the buildings within the area was not due to be completed until December 2024. Work was therefore ongoing at the time of the request.
42. The MHCLG argued that there is an overriding public interest in protecting L&Q's position in the context of its existing or future negotiations. Releasing the terms of their settlement with Durkan would prejudice other ongoing attempts to recoup remedial costs from those responsible for installing cladding previously, which would clearly not be in the public interest. The MHCLG has clearly stated that L&Q were intending to take on further work under the fund in the near future, and highlighted some of the future work which it is considering undertaking.
43. The MHCLG also considered that there is a strong onus on confidentiality being retained as disclosure would affect L&Q's other contracts and potentially impact upon ongoing litigation.

The balance of the public interest

44. The Commissioner has to take into account the timing of the request; work on the properties forming Kingsland Wharves was ongoing at the time that the MHCLG received the request.
45. The Commissioner notes the importance of remedial work occurring, and the public interest in allowing transparency over the work so that residents in affected properties are aware of what is occurring, and the timeline for the completion of the work.
46. However, the withheld information in this case relates to the financial aspects of the remedial work taking place, and details of the liabilities of the parties in this respect.
47. The Commissioner has accepted, above, that a disclosure of the information would have an adverse effect upon the future negotiations which L&Q enter into for similar remedial projects. The Commissioner considers that there is a very strong public interest

in allowing the market, and the legal liabilities of the parties concerned, to determine the costs without affecting it by disclosing L&Q's bottom line prior to negotiations.

48. The MHCLG is the body responsible for managing BSF funding. A disclosure which prejudices the commercial interests of those working to carry out remedial work and to recover costs from companies which initially installed unsafe cladding is not in the public interest. There is a very strong onus in protecting the ability of the companies to work to complete remediation work.
49. There is also an associated public interest in the MHCLG having the necessary information, and the space, in order to be informed about the issues involved and to properly manage the BSF funds to achieve this.
50. Whilst the Commissioner accepts that there is a strong public interest in the MHCLG being as transparent as possible over its decisions on the site, a disclosure of the withheld information would in fact be detrimental to the continuation of this activity. He therefore considers that there is a stronger public interest in the exception being maintained.
51. He is therefore satisfied that, on balance, at the time of the request the public interest in the exception being maintained outweighed than in the disclosure of the information.
52. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions. Whilst the Commissioner has taken into account the requirements of Regulation 12(2), he considers that the public interest that lies in favour of maintaining the exception clearly outweighs that in the information being disclosed in this instance. As the withheld information concerns a live issue, the Commissioner does not consider that the presumption in Regulation 12(2) tips the balance in favour of disclosure in this instance.
53. Therefore, the Commissioner's decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(5)(e) was applied correctly.

Regulation 12(5)(b) – Course of Justice

54. This reasoning covers whether the MHCLG is entitled to rely on Regulation 12(5)(b) to refuse to disclose some of the requested information.

55. Regulation 12(5)(b) allows a public authority to refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
56. The exception is wider than simply applying to information which is subject to legal professional privilege ('LPP'). Even if the information is not subject to LPP it may still fall within the scope of the exception if its disclosure would have an adverse effect upon the course of justice or the other issues highlighted.
57. Regulation 12(5)(b) was applied to withhold information falling within the scope of parts (ii) and (iv) of the request.
58. The MHCLG provided the Commissioner with a copy of the withheld information. It said that the relevant documents were withheld on the basis that they contain information which is subject to legal advice privilege.
59. The withheld information is legal advice sought and received by L&Q in relation to the summary of the contract with Durkan, and an indication of potential future claims outlined in the cost recovery form.
60. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information which is subject to privilege is disclosed on a regular basis under the FOIA or the EIR. Clients and their advisers' confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.
61. The Commissioner is satisfied from viewing the withheld information that it constitutes confidential communications between a client and a professional legal adviser made for the dominant purpose of seeking and/or providing legal advice.
62. Although L&Q shared the information with the MHCLG this does not amount to a loss, or a waiver of legal advice privilege. It is a controlled disclosure which does not affect the overall confidentiality of the withheld information as regards the wider public. The

Commissioner's guidance on the application of section 42¹, highlights that, in an FOI context, LPP will only be lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered confidential.

63. If the legal advice were to be disclosed, the MHCLG argues that it would reveal the potential for action being started in the future, and some of the strengths and weaknesses of L&Q's position to recover costs from the companies.
64. The Commissioner is satisfied that a disclosure of the information would therefore risk undermining the level playing field upon which legal proceedings are intended to be carried out.
65. The Commissioner has next considered the likelihood that disclosing the information would have the adverse effect envisaged. The withheld information relates to an ongoing issue, and the MHCLG argued that L&Q are looking into taking further action to recover costs from other companies. Therefore, the likelihood of the prejudice occurring is a real and tangible risk.
66. The Commissioner is therefore satisfied that disclosure of the requested information would have an adverse effect on the course of justice. He has therefore decided that the exception at Regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

The public interest

67. The public interest arguments in favour of the information being disclosed relate to those highlighted in the Commissioner's consideration of Regulation 12(5)(e) above – essentially, there is a strong public interest in creating greater transparency over an issue which relates to public safety, and the actions which the MHCLG is taking to address this. The withheld information, however, only relates to the agreements reached between L&Q and Durkan relating to the remedial work.
68. On the counter side, there is a very strong public interest in allowing clients to speak freely and frankly with their legal advisers

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege/#lost>

on a confidential basis. This is a fundamental requirement of the English legal system.

69. The ability of public authorities to seek confidential legal advice from their advisers provides informed decision making and ensures that authorities make legally robust decisions. However, in this case, the legal advice in question was sought by L&Q from their advisers, and confided with the MHCLG as part of its monitoring functions.
70. L&Q's sharing of the advice allows the MHCLG greater surety on its decision making as regards its actions, and informs it of L&Q's potential future actions.
71. The Commissioner has seen no evidence that there has been a lack of transparency by the MHCLG. Nor has he seen any evidence that there has been any misrepresentation of the legal advice by either L&Q or the MHCLG.
72. The Commissioner has taken into account the circumstances surrounding the request, both the MHCLG's and the complainant's arguments, the timing of the request and the nature of the withheld information.
73. He is satisfied that the public interest in maintaining the confidentiality of the legal advice, over a matter which remained live at the time of the request, lies with the exception being maintained in this instance.
74. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions. Whilst the Commissioner has taken into account the requirements of Regulation 12(2), he considers that the public interest that lies in favour of maintaining the exception clearly outweighs that in the information being disclosed in this instance. As the withheld information concerns a live issue, the Commissioner does not consider that the presumption in Regulation 12(2) tips the balance in favour of disclosure in this instance.
75. Therefore, the Commissioner's decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(5)(b) was applied correctly.

Right of appeal

76. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

77. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
78. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Ian Walley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF