

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 February 2023

Public Authority: Department for Levelling Up, Housing and Communities

Address: Fry Building
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information about an application to the Building Safety Fund in respect of a particular building. The above public authority ("the public authority") relied on section 38 of FOIA (health and safety) to refuse to confirm or deny whether the information was held.
2. The Commissioner's decision is that the public authority is entitled to rely upon section 38 to refuse to confirm or deny whether the information is held and the balance of the public interest favours maintaining this exemption. The public authority breached section 17 of FOIA as it failed to issue its refusal notice within 20 working days.
3. The Commissioner does not require further steps.

Request and response

4. On 19 April 2022, the complainant wrote to the public authority and requested information in the following terms:

"I would like to request all documents including emails and any meeting records relating to the building safety fund application, decision and appeal for [building address redacted]."
5. The public authority responded on 15 June 2022. It refused to confirm or deny that the information was held, relying on section 38 of FOIA in order to do so. It upheld this position following an internal review.

Reasons for decision

6. Section 38 of FOIA allows a public authority to refuse to confirm or deny whether it holds particular information if the mere act of confirming (or denying) that the information was held would, in itself, endanger the safety of any individual.
7. In decision notice FS50759048, the Commissioner agreed that revealing whether a particular building was fitted with particular cladding that increased the fire risk would endanger the safety of the people living within that building.¹
8. The public authority explained in its refusal notice that confirming publicly whether funding had been sought, from this specific fund, in respect of a particular building would, in effect, confirm that the building had a heightened fire risk – either because of its construction, or the materials used.
9. The complainant argued that the fact that this building used unsafe cladding was in the public domain and therefore there was no additional risk in confirming that the information was held. She pointed to a letter, written by her local MP, to the then-Secretary of State for Housing, Communities and Local Government, in which the MP highlighted testimonies from a number of their constituents living in buildings deemed unsafe. One of the testimonies came from a person living in the building in question.
10. The Commissioner has carefully considered this letter. However, he cannot treat such testimony as having the same status as an official public confirmation – especially where there is a potential risk to public safety.
11. Therefore, for the same reasons as given in decision notice FS50759048, the Commissioner considers that revealing that the building in question has a heightened fire risk would endanger the safety of its residents. Even if the public authority does not in fact hold any information, it must still refuse to confirm or deny consistently – it cannot refuse to confirm or deny only in situations where the information is actually held.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614178/fs50759048.pdf>

Public interest test

12. In this case the Commissioner agrees that the public authority has met the considerable public interest in this information by setting up a service through which residents can access information about their particular building. So long as they know the building number, they can track the progress of any application affecting them. The public authority encouraged the complainant to make use of this service in both its responses.
13. The public authority has also pointed out that it places a responsibility on anyone applying for funds, on behalf of a particular building, to update residents on any progress.
14. In the Commissioner's view, such a service strikes an appropriate balance between ensuring residents have access to information about the building they live in and protecting such buildings from a risk of terrorism or arson.
15. The Commissioner is therefore satisfied that section 38 is engaged and that the public interest favours maintaining the exemption.

Procedural Matters

16. The public authority breached section 17 of FOIA because it failed to issue its refusal notice within 20 working days of receiving the request.

Right of appeal

17. 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

18. 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.
19. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Roger Cawthorne
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