

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2023

Public Authority: Department for Levelling Up, Housing and Communities

Address: Fry Buildings
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information about applications in respect of the Building Safety Fund (BSF). The Department for Levelling Up, Housing and Communities (DLUHC) provided some information and withheld other information under section 38 (health and safety) of the FOIA. During the course of the Commissioner's investigation, DLUHC withdrew reliance on section 38 and stated that it was relying on section 14(1) (vexatious requests), based on the grossly oppressive burden that complying with the request would impose. The Commissioner's decision is that DLUHC is entitled to rely upon section 14(1) to refuse to comply with the request. The Commissioner does not require any steps to be taken.

Request and response

2. On 6 March 2023, the complainant wrote to DLUHC and requested information in the following terms:

"Following your completion of internal review 22699855 I wish to submit a refined FOI request for information about the Building Safety Fund.

My request is as follows:

1. Please state how many private companies to date have had applications approved for the funded removal of non-ACM cladding.
2. For each approved application, please state
 - a. The funding allocated to the company
 - b. The name of the company which has had an application approved”.
3. DLUHC responded on 4 April 2023 and provided information relating to questions 1 and 2(a) but withheld information relating to question 2(b) under section 38 of the FOIA.
4. On 17 April 2023 the complainant requested an internal review of the handling of their request.
5. DLUHC provided the outcome of its internal review on 26 May 2023 and upheld its position that section 38 of the FOIA applied to question 2(b).

Scope of the case

6. The complainant contacted the Commissioner on 8 June 2023 to complain about the way their request for information had been handled.
7. During the course of the Commissioner’s investigation, DLUHC withdrew reliance on section 38 and stated that it was relying on section 14(1) (vexatious requests), based on the grossly oppressive burden that complying with the request would impose.
8. In light of the above, the scope of the Commissioner’s investigation into this complaint is to determine whether DLUHC is entitled to rely upon section 14(1) FOIA as a basis for refusing to comply with the request.

Reasons for decision

Section 14(1) – vexatious requests

9. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
10. In the Commissioner’s view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually involve weighing the evidence about the impact on the authority and balancing this against the

purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.

11. In particular, the Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by DLUHC in this case.
12. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
 - The requester has asked for a substantial volume of information **and**
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **and**
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
13. In circumstances where a public authority wishes to apply section 14(1) based on the grossly oppressive burden that compliance with a request would cause, it must balance the impact of the request against its purpose and value to determine whether the effect on the authority would be disproportionate

DLUHC's representations

14. DLUHC advised that, in the process of responding to the Commissioner's enquiries concerning this complaint, which included a request for a copy of the withheld information, it became apparent that the process of compiling a list of the private companies that have had applications approved for the funded removal of non-ACM cladding was an onerous task. It explained that, in order to gather the information, officials would need to "cross check numerous spreadsheets and registration document with information held by external delivery partners".
15. DLUHC provided the Commissioner with some background information about applications to the BSF. It explained that applications can be made by a number of different types of responsible entity, including building freeholder, head leaseholder, a management company or a Right to Manage (RTM) company. As such, it is not necessarily the case that a private company has direct receipt of funds for the removal of non-ACM cladding in all cases where funding approval is given.

16. In order to identify the connection with each building and a private company, DLUHC advised that a significant amount of analysis would be required, as detailed below:

“Officials would need to complete extensive cross checks of management structures for each of the 334 non-ACM and 42 ACM/Non-ACM private sector applications for which funding has been approved. Applications are managed by caseworkers at Delivery Partners Homes England and Greater London Authority, therefore the Department would need to cross check information regarding responsible entities with these external partners in order to establish if a 'private company' had ultimately been in direct receipt of funds for the removal of non-ACM cladding. This would take significant time and would also distract caseworkers from their primary role managing the delivery of building remediation”.

17. DLUHC also explained that some projects are transferred into the control of the developers that are responsible for them and developers are required to reimburse the Department in respect of grants which have made in respect of buildings for which they are responsible. As such, these grants will not have been received by a private company.
18. As well as identifying whether a private company was in receipt of approved funding for removal of non ACM cladding, DLUHC explained that it would also be necessary to determine whether any exemptions under the FOIA are applicable to the information. This is because DLUHC considers that, if it is possible to identify particular buildings which have not had flammable cladding removed, disclosure would be likely to endanger the safety of residents. This is because the information could be used by individuals with malicious intent to attack or compromise the safety of those buildings, and their residents. DLUHC referred to this in its initial responses to the request when it considered section 38 of the FOIA to apply. It also referred to a previous decision notice issued by the Commissioner which upheld this approach¹.
19. DLUHC stated that, in respect of each of the 376 funding applications the following criteria/steps would need to be undertaken to both establish the information falling within the scope of the request and to consider that information for disclosure under the FOIA:

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

- Whether cladding had been removed from the building.
 - Whether funding had been given directly to a private company (as opposed to a RTM company, for example).
 - Whether that private company owned more than 5 buildings within the BSF, thus negating the risk of identification through disclosure of the company name.
 - Whether disclosure of approved funding amounts would prove commercially sensitive.
 - Whether the developer responsible is due to reimburse the BSF for grant funding previously approved.
20. In order to gather the information above, DLUHC explained that officials would need to cross reference buildings with external delivery partner caseworkers in order to determine the stage of remediation works for each building (ie whether remediation works had been completed), and to determine "any links to a private entity". It would also be necessary to "establish any parent company links between each private entity in order to accurately assess whether they breached the minimum number for safe disclosure". DLUHC advised that officials would also then need to liaise with policy colleagues and commercial experts who deal with the transfer of buildings from the BSF to developers in order to determine whether any reimbursements had been received in respect of each of the 376 applications.
21. DLUHC advised that the information gathering exercise, which would likely be completed 'in bulk', would involve a significant amount of time and it would divert officials from their daily casework. It estimates that, on average, the information gathering exercise would take 30 minutes per application. As such, it estimates that it would take 188 hours in total (376 X 30 minutes) to complete the process.
22. DLUHC recognises that there is a public interest in transparency in relation to building safety concerns. However, it maintains that at least some of the information held would be exempt under one or more exemptions under the FOIA. In order to comply with the request, at least in part to satisfy the public interest, it would be necessary to carry out the processes and information gathering it has identified. DLUHC does not consider that any public interest considerations in disclosure of the information are outweighed by the grossly oppressive burden in respect of compliance with the request.
23. DLUHC explained that it is engaging with relevant local authorities and building owners in order to ensure that remediation work is arranged as quickly as possible. Residents in affected buildings have been informed

that interim safety measures have been put in place. In light of this DLUHC considers that the public interest that both owners and occupiers of affected buildings and other interested parties has been met. It does not consider that there are any overriding public interest considerations which would necessitate it spending such a significant amount of time dealing with this request, and the associated diversion of resources.

The Commissioner's view

24. When considering the application of section 14(1), where compliance with the request would impose a grossly oppressive burden, the Commissioner expects the public authority to provide clear evidence to substantiate its claim.
25. The Commissioner is satisfied that the complainant has requested a large volume of information as it relates to 376 applications. He is also satisfied that DLUHC would need to undertake a significant amount of work in order to determine the information that falls within the scope of the request and whether any of the information held is exempt. The Commissioner accepts that it would be necessary to carry out the steps DLUHC has referred to in order to determine whether any of the information held could be disclosed or whether any exemptions are applicable. This includes identifying whether cladding has been removed from a building and whether any building(s) could be identified through disclosure of the company name. The Commissioner is also satisfied that the exempt information would be scattered throughout the information and could not be easily isolated.
26. Section 12 of the FOIA provides an exemption from the duty to comply with a request where doing so would exceed the appropriate limit. This is £600 for a central government department such as DLUHC which equates to 24 hours of work at £25 per hour. This limit is laid down by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations)
27. The 188 hours estimate is substantially above the 24 hour limit which would be applied in cases involving section 12 of the FOIA. Whilst the limit laid down by the Fees Regulations is not directly relevant to the application of section 14 FOIA, this gives a clear indication of what Parliament considered to be a reasonable charge duration of work that staff should be expected to undertake. The Commissioner notes that, even if DLUHC's estimate for compliance with the request was halved, it would still be significantly above the appropriate limit. Even though the threshold is high for refusal of a request under section 14 FOIA, due to the grossly oppressive burden compliance would impose, given the time estimate in this case, the Commissioner considers this threshold can be met.

28. Even where it is established that compliance with a request would impose a grossly oppressive burden, the public authority must still balance the impact of the request against its purpose and value to determine if the request is vexatious or not.
29. The complainant has not submitted any specific representations in respect of the purpose and value of their request. However, in their complaint to the Commissioner, the complainant asked the Commissioner to consider whether they were entitled to receive some of the information requested, ie any cases where the identity of specific buildings was not possible through disclosure of the company names. They also suggested that the risks associated with disclosure of information were lower in cases where any building had had the cladding replaced. This suggests to the Commissioner that the complainant accepts that at least some of the information requested may be exempt from disclosure.
30. The Commissioner understands that there is a great deal of public interest in the issue of cladding on buildings, particularly given the large number of buildings and individuals that have been affected by this. He also recognises the public interest in ensuring that remedial measures either have been, or are in the process of being, completed to make certain that, where necessary, properties conform to Building Regulation guidance.
31. The Commissioner is aware that DLUHC publishes detailed information and regular updates on the issue of the remediation of non-ACM buildings in the UK, which includes a monthly data release² on progress. The Commissioner is of the view that this information goes some way to meeting the public interest in information regarding the removal of non-ACM cladding on buildings. With this in mind, balanced against the number of applications that would be caught by the request, all of which would need to be considered prior to any disclosure, the Commissioner does not consider that the value or purpose in the requested information outweighs the burden that compliance with the request would impose upon DLUHC.
32. In this case, the Commissioner is satisfied that DLUHC is entitled to refuse to comply with the request, citing section 14(1) as its basis for doing so.

² <https://www.gov.uk/guidance/remediation-of-non-acm-buildings>

Other matters

33. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
34. DLUHC initially applied section 38 of the FOIA to part of the request. During the course of the Commissioner's investigation DLUHC then sought to rely on section 14(1) due to the grossly oppressive burden in complying with the request. It is therefore clear to the Commissioner that, at the time that DLUHC applied section 38, it had not identified the information held relevant to the request in order to properly consider whether any of the information was exempt.
35. The Commissioner would like to remind DLUHC of the importance of considering what information is held relevant to a request before applying any exemptions. A failure to do so can result in an incorrect response being issued, as happened in this case.

Right of appeal

36. 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

37. 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.
38. 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

Joanne Edwards
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