

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **1 November 2018**

Public Authority: **Ministry of Housing, Communities and Local Government**

Address: **2 Marsham Street
London
SW1P 4DF**

Decision (including any steps ordered)

1. The complainant has requested recorded information from the Ministry for Housing, Communities and Local Government, which concerns the number and tenure of buildings known to have Category 2 cladding/insulation. Having first refused to disclose information falling within the scope of the complainant's second question, in reliance on section 35 of the FOIA, the MHCLG has advised the Commissioner that it now considers the information published in September 2018 satisfies his request.
2. The Commissioner has decided that the MHCLG has contravened the requirements of Regulations 5(1) and 5(2) of the EIR by failing to provide the complainant with the information he asked for in question 2's of his request of 20 September 2017 and for failing to do so within the twenty day compliance period. The Commissioner has also decided that the MHCLG has contravened Regulation 9(1) by failing to provide the complainant with advice and assistance.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide advice and assistance regarding the level of detail of the information sought to 'question 2' and issue a fresh response in accordance with the EIR.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted a request for information to the MHCLG via the WhatDoTheyKnow website on 20 September 2017. The terms of the complainant's request were:

"On your Grenfell Tower website, <https://www.gov.uk/government/collection...>, you refer to a number of announcements about the results of the large-scale tests you have conducted following the Grenfell Tower fire.

The announcements for the polyethylene core (Category 3) tests give the number of Local Authority or Housing Association buildings that are known to have this type of construction (47 and 90 for the two types of insulation), in addition to the total numbers of buildings known (82 and 111 respectively).

For the mineral core (Category 1) tests, you say no buildings are known to have this construction, and I assume that means neither private nor LA or HA have this construction.

However, for the fire-retardant core (Category 2) you only provide the total number of buildings known to have this construction (13, 22 and 13 for the three types of insulation).

Would you please:

(1) Confirm that the "no buildings known" for Category 1 refers to both private and 'public' housing.

(2) Provide the numbers of Local Authority or Housing Association owned or managed buildings that have each type of insulation with Category 2 ACM cladding.

(3) If the sum of the numbers is not the same as the 173 social housing buildings, 89 private residential buildings and 85 that have failed and 4 that have passed mentioned in Sajid Javid's statement on 5 September 2017, please provide an explanation of the differences."

The complainant asserted that the Department "clearly have these figures as they go to make up the numbers reported by Javid".

6. The MHCLH responded to the complainant's request on 21 November 2017. The MHCLG confirmed that it held information falling within the

scope of the complainant's request and it provided responses to each of the request's three parts:

"(1) Confirm that the "no buildings known" for Category 1 refers to both private and 'public' housing.

This is correct but only for residential blocks over 18m tall.

(3) If the sum of the numbers is not the same as the 173 social housing buildings, 89 private residential buildings and 85 that have failed and 4 that have passed mentioned in Sajid Javid's statement on 5 September 2017, please provide an explanation of the differences.

The latest numbers (published in the Secretary of State's letter to the select committee) are 274 buildings with ACM cladding, 262 of which have cladding systems that failed the large scale test. Any differences with previous numbers are likely to be the result of further inspections.

(2) Provide the numbers of Local Authority or Housing Association owned or managed buildings that have each type of insulation with Category 2 ACM cladding.

This information is exempt from disclosure under section 35(1)(a) of the FOI Act as it relates to the formulation and development of government policy."

7. In recognition of the general public interest in Building Regulations policy following the fire at Grenfell Tower, the MHCLG directed the complainant to the updates published on its website at:

<https://www.gov.uk/government/collections/grenfell-tower>

And

<https://www.gov.uk/guidance/building-safety-programme>.

8. The complainant wrote to the MHCLG on 30 November 2017 and asked it to conduct an internal review. The complainant drew the Department's attention to the information published in Fire Test Reports and in the "Government Building Safety Programme – update and consolidates advice for building owners following large scale testing [5 September 2017]".
9. The complainant pointed out that the figures published in the second report differ from those published in the first set of reports and he complained that the Department had given him no explanation as to why these figures differ. The complainant also made a number of other queries concerning the published figures, including the figures quoted in

the Secretary of State's letter to the select committee dated 18 October 2017.

10. The complainant went on to request the following:

"...what I would now like is for you to expand the table in paragraph 28 of the update and consolidated advice to provide separate columns for each combination of ACM and insulation viz:

Cat 2 ACM with combustible insulation (test 3)
Cat 2 ACM with phenolic insulation (test 7)
Cat 2 ACM with mineral wool insulation (test 4)
Cat 3 ACM with combustible insulation (test 1)
Cat 3 ACM with mineral wool insulation (test 2)
(and any other categories that are relevant),

and to give the numbers of social housing, public buildings, Private: residential and private: student residential in each case.

I would also like you to provide separate table for the other parts of the UK, since the table only cover England, although you apparently have information about the other parts of the UK."

11. The complainant asserted that there was no "conceivable reason why some parts of the breakdown of buildings should be exempt, but not other parts".

12. Having completed its internal review, the MHCLG wrote to the complainant on 27 December 2017 to provide him with further explanation of the figures previously published and also its final decision. The Department said:

13. "Each release of information from the Building Safety programme provides the latest figures on the number of buildings with confirmed ACM cladding. As samples from further buildings are sent in for testing the numbers will change. The Secretary of State's letter to the Select Committee dated 18 October 2017 confirmed that the number of social housing buildings reported as having ACM cladding systems that were unlikely to meet Buildings Regulation Guidance had dropped from 165 to 161 due to further inspections. These further inspections have verified that some buildings should not be included in the reported figures and consequently the figures have decreased. I agree that the use of the word 'likely' in the response from the FOI team was misleading, however the reason they gave was a valid explanation for differences in the figures published on different dates."

14. Turning to its refusal to provide the numbers of Local Authority or Housing Association owned or managed buildings that have each type of

insulation with Category 2 ACM cladding, the MHCLG informed the complainant that:

"The collection of data from the testing of cladding samples is to inform policy development to understand requirements for updating building standards and to identify the need for any necessary remedial work. Hence, the exemption at section 35 reasonably applies to this information."

15. The MHCLG advised the complainant of its intention to continue to provide updates at appropriate times and in appropriate levels of detail, and that, "the Government is following up with the owners of each of the affected buildings to ensure that interim measures are in place to ensure the safety of residents, and that there is a plan for remediation". Furthermore, as the testing process is ongoing, "there is a greater public interest in ensuring that the work is completed without hindrance or outside interference so that informed decisions can be made about policy development".
16. The MHCLG said that, "For the Department to prepare the breakdown of information requested outside any planned publication would divert resource from this work and may lead to information being released which had not been fully considered. This would not be in the public interest". For these reasons the MGCLH determined that it was not in the public interest to disclose the information it has withheld in reliance on section 35 of the FOIA.
17. Notwithstanding this decision, the Department informed the complainant that "the information you requested was published in a data release on 18 December 2017, available at:

<https://www.gov.uk/government/publications/building-safety-programme-monthlydata-release-december-2017>.
18. The MHCLG advised the complainant that, "This provides figures current at 24 November 2017 and gives an update on the testing programme for Aluminium Composite Material cladding and progress in identifying buildings with unsafe cladding combinations"

Scope of the case

19. The complainant contacted the Commissioner on 12 March 2018 to complain about the way his request for information had been handled. The complainant provided the Commissioner with documents taken from the WhatDoTheyKnow website, which included an annotation he made on 3 January 2018. The annotation was:

"I want to know details of the breakdown of ACM cladding buildings by both cladding and insulation type and building tenure."

20. On 22 August 2018 the complainant wrote to the Commissioner and advised her that: "In regard to question 2, MHCLG have not published the information I had requested, it is not just a question of publishing the data in a different format".
21. The complainant acknowledged that the MHCLG has published regular updates to the building safety data, but asserted that each update does not contain the information he has requested. The complainant explained to the Commissioner what information he is seeking through his question 2.
22. Having reviewed the complainant's documentation sent in support of his complaint, the Commissioner advised the complainant that the focus of her investigation would be to determine whether the MHCLG has handled his request in accordance with the FOIA, and specifically whether the MHCLG is entitled to refuse question 2 of his request in reliance on section 35(1)(a) of the FOIA.

Reasons for decision

Regulation 5(1) of the EIR – general right of access to information held by public authorities

23. Having considered the nature of the information requested by the complainant, the Commissioner considers it to fall within the ambit of the EIR. In the Commissioner's opinion the requested information falls within the definition of environmental information provided by Regulation 2(f) –

"The state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);"

24. In the light of the above, the Commissioner must consider the complainant's request under the provisions of the EIR, rather than under the FOIA which she initially advised the complainant.
25. Regulation 5(1) of the EIR states requires a public authority that holds environmental information to make it available on request.
26. The complainant wrote to the Commissioner on 22 August 2018. In his email, the complainant said, "In regard to question 2, MHCLG have not

published the information I had requested, it is not just a question of publishing the data in a different format". The complainant explained to the Commissioner what information he is seeking through his question 2:

27. "DCLG have published in <https://www.gov.uk/government/publicatio...> a summary of numbers by cladding and insulation type, and a summary of numbers by tenure. But they have not provided details of both breakdowns together. For example, how many public building have ACM category 3 and Foam Insulation.

Basically, they have refused my request.

(1) They say that they were misleading in explaining the differences in published data. Actually they said the differences were 'likely' due to different dates. This is not unclear - the wording means they have not bothered to determine the reasons for the differences, but have just assumed that it is due to differences in dates. They then say the reason was "a valid explanation for differences". It is not acceptable to be imprecise. Either the differences in dates was THE explanation, or there was another explanation. I requested a detailed explanation of the differences and they should have provided that. They must surely have kept records of how the numbers have changed over time.

(2) DCLG refused to provide the information as "as they considered this information to be exempt under section 35(1)(a) of the FOI Act relating to the formulation and development of government policy."

Following my appeal, they say "For information to be withheld under this exemption the public interest must favour non-disclosure". They have not provided any evidence as to how this was the case.

(3) Following my appeal they say "However, the testing process is ongoing and there is a greater public interest in ensuring that the work is completed without hindrance or outside interference so that informed decisions can be made about policy development. For the Department to prepare the breakdown of information requested outside any planned publication would divert resource from this work and may lead to information being released which had not been fully considered. This would not be in the public interest. Therefore I agree with the FOI team's assertion that at the time of your request it was not in the public interest to disclose this information."

"Hindrance or outside interference" is an insulting and wholly unwarranted slur on a legitimate FOI request. That is simply not how FOI requests are supposed to work.

"Diverting resources" is simply not an acceptable reason for failing to meet an FOI request. That is not what the law says.

"Information being released which had not been fully considered" is simply not true. They had provided (different) summary figures several times as well as on 18 December, which clearly had been derived from more detailed figures, so there was nothing to 'fully consider'. They had already released the summary figures.

(4) They say the refusal was "correct at the time of the request". Nothing has changed in terms of section 35(1)(a) exemption, indeed they do not provide anything to support this exemption, but instead go on to mention other data releases, and the ongoing nature of the Programme. If the data is released on 18 December (which was not actually the data I requested), then it could have been released at the time of my original request.

(5) Following my appeal they say the data release of 18 December <https://www.gov.uk/government/publicatio...> provides the information I requested, but it does not, because it only provides summary breakdowns of number of buildings by cladding/insulation, and by tenure, but not details of the two together.

(6) They say "The DCLG FOI team did not respond within this time frame and as such were in breach of section 10(1) of the Act. Please accept our apologies for this." It is simply not acceptable to treat such a simple FOI request in such a cavalier manner, and the DCLG should be severely censured for their failure."

28. The Commissioner wrote to the MHCLG about the complainant's request for information on 30 July 2018. The Commissioner's email set out the chronology of the complainant's request including the responses made by the Department.
29. Having received the Commissioner's email, the MHCLG responded by querying the scope of the complainant's complaint. The MHCLH said, "We seem to have provided responses to Q1 and Q3 and I am not sure what else we can add". This prompted the Commissioner to seek further clarification from the complainant.
30. The complainant advised the Commissioner that: "*[The MHCLG] provide a table "Summary: Social and private sector high-rise residential and publicly-owned buildings with ACM cladding systems unlikely to meet current building regulations guidance England". This says (monthly data release 23 July 2018), for example, that on 12 July 2018 there were 301 such buildings in the "private sector residential" category, and that 147 were BRE tested and then table 2 says that of these 112 were "Private:*

residential" and 35 were "Private: student residential". Table 2 says (continuing the same example) that of these 35 "Private: student residential", 21 were confirmed fail.

31. *Table 3 then gives the number of buildings in each large-scale test and the number in each inferred fail and inferred pass category. However, they do not provide, for example, the raw data of the number of "Private: student residential" buildings with confirmed fails (21) that have each of the different types of large-scale system test cladding/insulation. For example, of those 21, x have large-scale system test 1, y have system test 2, etc.*
32. *In the case of inferred fail only, the information I had requested is provided in Table 2, for example, for "Private: student residential", there are 5 with category 2 cladding and 9 with category 3 cladding. Given that they provide the breakdown for these cladding types, it seems even more unreasonable not to provide it for the other cladding/insulation types.*
33. *They had also provided some of the breakdown for some types of cladding/insulation in their original fire test reports, for example, "Cat 3 ACM with mineral wool insulation 111 buildings of which 90 LA or HA owned/managed". These 90 are now just subsumed within the total of 105 with category 3 and mineral wool, without breaking down the dominant tenure of each of the 105. Again, if this information could be disclosed at one time, there is no reason why it should not be disclosed now.*
34. *To summarise, MHCLG provide an analysis of the 320 buildings that failed by dominant tenure (table 2), and they provide an analysis of the same 320 buildings by large-scale tests (table 3). But they don't provide a breakdown for each type of dominant tenure of the large-scale test type. They also don't provide analysis of the dominant tenure of the 11 buildings that passed, nor analysis of type of private residential of the 154 local authority confirmed or the large-scale test type for those 154 buildings." The complainant added: "...there is no further substantive question remaining from questions 1 and 2".*
35. In the light of the complainant's clarification, the Commissioner wrote to the MHCLG and advised the Department that she understands the complainant is seeking recorded information concerning how many buildings of each type of tenure have each type of cladding/insulation. In the complainant's words: "I want to know details of the breakdown of ACM cladding buildings by both cladding and insulation type and building tenure.
36. The MHCLG has explained to the Commissioner why it initially applied Section 35 to question 2 of the complainant's request. The Department

said: "With respect to the decision to withhold data at question 2 of the request, [...] the collection of data from the testing of cladding samples is to inform policy development to understand requirements for updating building standards and to identify the need for any necessary remedial work". In the opinion of the MHCLG, the section 35 exemption reasonably applied to this information.

37. The Department said that it "advised the complainant of its intention to continue to provide updates at appropriate times and in appropriate levels of detail", and as the testing process was ongoing at the time, "there was a greater public interest in ensuring that the work was completed without outside interference so that informed decisions could be made about policy development".
38. Notwithstanding its initial application of section 35, the MHCLG's position is that the information requested by the complainant is now published in the Department's first building safety data release on 18 December 2017.
39. The Department has advised the Commissioner that the information released on 18 December provides figures which were current at 24 November 2017 and give an update on the testing programme for Aluminium Composite Material cladding and progress in identifying buildings with unsafe cladding combinations.
40. The Department further advised the Commissioner that, in respect of the complainant's question 2, the MHCLG collects and holds information about residential buildings over 18 metres in England and some buildings owned by the public sector, in particular those which have Aluminium Composite Material (ACM) cladding. The MHCLG says, "The data enables the Department to formulate a policy response to the discovery of what appears to be unsafe cladding on a number of buildings in the immediate aftermath of the Grenfell Tower fire and to assure itself and its stakeholders that fire safety risks to these buildings are being managed.
41. The MHCLG has informed the Commissioner that the aggregate data which is related to the Building Safety Programme is now published at regular intervals. The first of these releases took place in December 2017 and it was this release that the Department first sent to the complainant following the Department's internal review on the basis that it showed high rise buildings and public buildings with ACM cladding by tenure (including local authority and housing association breakdown) and by category of cladding.

42. The MHCLG points out that table 4 in Annex 2 of the latest data release (September 2018)¹, provides information in the "Social buildings" column which includes both local authority and Housing association owned or managed buildings and also provides a breakdown for category 2 ACM cladding. The MHCLG considers that the release of this data fully answers the complainant's request at question 2.
43. The Commissioner has examined the data published by the MHCLG in table 4 of Annex 2. She disagrees with the MHCLG's assertion that the data in table 4 fully answers the complainant's request.
44. The Commissioner has read the complainant's request objectively, and particularly his question 2, as described in paragraph 5 of this notice. That request clearly requires the MHCLG to provide him with the numbers of Local Authority or Housing Association owned or managed buildings that have each type of insulation with Category 2 ACM cladding.
45. It is clear to the Commissioner that the data now published by the MHCLG does not provide the complainant with data from which he can identify with certainty those properties which have Category 2 ACM cladding and which are owned or managed by Local Authority or Housing Association. The column headings do not correspond to the terms used by the complainant in his request: Rather, they refer to 'Private Buildings', 'Social Buildings' and 'Public Buildings'.
46. It is also clear to the Commissioner that the information which the complainant requires is very likely held by the MHCLG. This is strongly suggested by the Department's response to the complainant referred to in paragraph 16 above.
47. The Commissioner has therefore decided that the MHCLG has contravened Regulation 5(1) of the EIR by failing to provide the complainant with the information he has requested.
48. The Commissioner has also decided that the MHCLG has contravened Regulation 5(2) of the EIR by failing to provide the information requested by the complainant within the prescribed twenty day compliance period.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741971/Building_Safety_Data_Release_September_2018.pdf

49. In reading the complainant's correspondence, both with the MHCLG and with her office, the Commissioner recognises that the scope of his request has either changed or it has had the effect of confusing the Department. Where this has happened the MHCLG should have advised the complainant that his revised request is being treated as a new request, or it should have sought clarification from the complainant under the duty to provide advice and assistance under Regulation 9 of the EIR.
50. The Commissioner has found no evidence of the MHCLG having provided the complainant with any advice and assistance in respect of his request. She has therefore decided that the MHCLG has contravened Regulation 9(1).

Right of appeal

51. 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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. 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.
53. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF