

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 2019

Public Authority: Royal Berkshire Fire and Rescue Service
Address: Newsham Court
Pincent's Kiln
Calcot
Reading
RG31 7SD

Decision (including any steps ordered)

1. The complainant has requested information about ten buildings in Berkshire with aluminium composite material ("ACM") cladding from Royal Berkshire Fire and Rescue Service ("RBFRS"). During the Commissioner's investigation, RBFRS provided most of the requested information but refused to provide the remainder, citing section 38(1)(b) (health and safety) of the FOIA. It also considered that some information it had identified fell outside the scope of the request.
2. In respect of the one high rise building for which RBFRS has refused to disclose any information, the Commissioner finds that section 38 is only partially engaged. Where engaged, the public interest lies in maintaining the exemption.
3. In respect of the two buildings which RBFRS considers fall outside the scope of the request, the Commissioner's decision is that they do fall within the request's scope. In failing to clarify this aspect of the request, RBFRS breached section 16(1) of the FOIA.
4. The Commissioner requires RBFRS to take the following steps to ensure compliance with the legislation:
 - in respect of the one high rise building, disclose the type of building;
 - in respect of the two buildings found to be in the scope of the request, RBFRS is required either disclose this information or issue a valid refusal notice in line with section 17 of the FOIA.

5. RBFRS 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.

Background

6. The requested information relates to buildings with ACM cladding, which is the type of cladding which was in use at Grenfell Tower. Some background information about the current numbers of buildings with ACM cladding can be found online¹.

Request and response

7. On 22 March 2019, the complainant wrote to RBFRS and requested information in the following terms:

"I would like to request the following information under the Freedom of Information Act.

Of the 10 buildings in Berkshire with aluminium composite material cladding systems, unlikely to meet building regulations, yet to be remediated:

What are the names and addresses of those buildings?

Who owns them?

What type of building are they? (eg hospital, hotel, social residential, private residential, student flats, etc.)

How many of those buildings are considered as high rises?"

8. On 25 March 2019, RBFRS responded. It refused to provide the requested information, citing section 38 (health and safety) of the FOIA. It failed to provide any explanation of the public interest arguments it had considered when deciding to apply the exemption.
9. Following an internal review, RBFRS wrote to the complainant on 8 April 2019. It maintained its position, again failing to provide any public

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/838050/Building_Safety_Data_Release_September_2019.pdf

interest considerations or to respond to any arguments put forward by the complainant.

Scope of the case

10. The complainant contacted the Commissioner on 29 May 2019 to complain about the way his request for information had been handled. He asked her to consider the citing of section 38(1) of the FOIA to withhold the requested information. The Commissioner will consider this below.
11. The Commissioner was able to find some information about ACM cladded buildings on line and she presented this to RBFRS for its views. As a result, further information was disclosed to the complainant by RBFRS during the investigation. Of the eight properties it deemed to fall within the scope of the request, it withheld details of one in full and details of the owners of three others.
12. The number of buildings deemed to be within the scope of the request was queried by the Commissioner and it became apparent that RBFRS did not know where the complainant had sourced the figure of 'ten' buildings "*unlikely to meet building regulations*" cited in the request. RBFRS advised the Commissioner that it only has eight such buildings on record. However, it was able to identify two further buildings with ACM cladding, albeit these are not 'high rise' buildings. Because of this, RBFRS advised that the buildings are not subject to the same building regulations and it did not therefore consider these two buildings to fall within the scope of the request.
13. Following the partial disclosure of information, the Commissioner contacted the complainant for his views. He responded, saying:

"... the three buildings which were withheld [this includes the two deemed out of scope], they should still be made public. This is because it's very much in the public interest, on the grounds of public safety. The people who live/stay in these buildings have the right to know of the huge risk to their safety".
14. The Commissioner will therefore consider whether details of the one remaining 'high rise' building, which are withheld under section 38 of the FOIA, should be disclosed. She will also consider whether or not the other two buildings fall within the scope of the request. As the complainant did not comment on the withholding of the owners' details in respect of those buildings which have been disclosed, the Commissioner will not consider this point further.
15. The Commissioner has viewed the withheld information in this case.

Reasons for decision

16. The Commissioner's investigation will start with an analysis of whether RBFRS identified the correct objective reading of the request in respect of the two buildings which it deemed to be out of scope.
17. The Commissioner also notes that the complainant has not challenged RBFRS's interpretation of his request, however, until it wrote out to him during this investigation he would have been unaware that RBFRS had not included these buildings within its original response.

Section 1 – general right of access **Section 8 – request for information** **Section 16 – advice and assistance**

18. Section 1(3) of the FOIA states that:

"Where a public authority—
(a) reasonably requires further information in order to identify and locate the information requested, and
(b) has informed the applicant of that requirement,
the authority is not obliged to comply with subsection (1) unless it is supplied with that further information".

19. Section 16 of the FOIA places a duty on a public authority to provide "reasonable" advice and assistance to those making and wishing to make information requests.
20. In the Commissioner's view, this duty requires a public authority to seek clarification of requests which are unclear or which are capable of multiple objective readings.
21. The first part of the complainant's request states: *"Of the 10 buildings in Berkshire with aluminium composite material cladding systems, **unlikely** to meet building regulations, yet to be remediated..."* (Commissioner's emphasis), ie it does not stipulate only those buildings which do not meet regulations. Furthermore, the final sentence of the request goes on to specify that RBFRS should stipulate *"How many of those buildings are considered as high rises"*, further emphasising that the request is not limited to high rise buildings only.
22. RBFRS has clearly been able to identify that it is aware of ten such buildings, but has deemed two to fall outside of the scope of the request, on the basis that they do comply with building regulations. The Commissioner does not agree with this interpretation of the request. In her view, the complainant has been made aware, from some unknown source, that there are ten ACM clad buildings and he is trying to seek information about them.

23. If RBFRS did not consider the request to be sufficiently clear, the Commissioner considers that it was under an obligation to seek clarification, ie it should have explained to the complainant that there are eight buildings which would not meet building regulations and two which would, asking whether or not he required all of this information. In failing to do so, it breached its section 16 duty.

24. Section 8(1) of the FOIA states:

"In this Act any reference to a "request for information" is a reference to such a request which –

(a) is in writing,

(b) states the name of the applicant and an address for correspondence, and

(c) describes the information requested".

25. The Commissioner considers that the request in question fulfilled these criteria and therefore constituted a valid request for recorded information under the FOIA.

26. RBFRS is therefore required to either disclose the details of the two remaining buildings which the Commissioner deems to fall within the scope of the request, or issue a refusal notice explaining why this information is exempt from disclosure.

Section 38 – health and safety

27. This exemption is being considered in respect of one high rise building which would not meet with building regulations. The Commissioner could find no related information about this building in the public domain.

28. RBFRS told the Commissioner it was relying on section 38(1)(b) in relation to this information, which states:

"Information is exempt information if its disclosure under this Act would, or would be likely to –

(b) endanger the safety of any individual."

29. For the exemption to be engaged, it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

30. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment, and the likelihood of it occurring as a result of disclosure of the

information in question, is "real, actual and of substance", rather than trivial or insignificant. As part of this, she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.

31. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that it is envisaged would, or would be likely to occur, should relate to the applicable interest described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of the prejudice, or more precisely the endangerment, arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure 'would be likely' to result in prejudice or that disclosure 'would' result in prejudice - 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.
32. The relevant applicable interest cited in this exemption is the safety of any individual. The Commissioner's guidance² sets out that endangering safety is usually connected to the risk of accident and the protection of individuals.
33. The complainant has argued:

"The precise locations of several buildings with ACM cladding across the UK are already in the public domain, and to date there has not been an arson or terrorist attack against any of these buildings, despite their location being known. This means disclosure would not be likely to endanger public safety.

There is already a high risk to health and safety of the occupants of the building, as evidenced by the Grenfell Tower fire. Note that that fire was not caused by arson or terrorism, but started off with a fridge-freezer catching fire. The risk of another kitchen fire in one of these buildings is far greater than that of arson, and this would not be affected by disclosing the requested information".

34. RBFRS has argued that the disclosure of the remaining information would be likely to endanger public safety. It advised the Commissioner:

"... we believe the disclosure of the requested information would be likely to result in endangerment to the health and safety of the Occupants, visitors, or Owners of the relevant buildings. We believe

² <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

that this is because there is a likelihood of buildings being targeted by persons with malicious intent (for example arsonists or terrorists) should the requested information be disclosed. We have concerns that making the names and addresses of in-scope buildings public could be used to attack or compromise the safety of these buildings, their residents and also their owners. We believe that the disclosure of the requested information will result in an unnecessary increase in risk to the residents and/or occupants and/or owners of the buildings in question, and therefore would result in needless endangerment to public safety”.

35. RBFRS also relied on an earlier decision notice³ issued by the Commissioner in relation to ACM cladding at high-rise residential buildings. In that case, the Commissioner found in favour of non-disclosure of the requested information by the Ministry of Housing, Communities and Local Government on the basis of section 38(1)(b). The Commissioner considers there to be some comparison between the two requests and many of the arguments relied on in that case are therefore repeated below. However, it is also noted that that request was for information about *all* high-rise residential developments, not localised to the area being considered here, and that this notice is now only considering a single building.
36. In that decision notice, the Commissioner took into account certain statistics relating to fires in tower blocks and residential buildings, views also specifically referred to by RBFRS. She noted the following:
- “... a total of 3172 deliberate fires occurred in residential dwellings in the year up to June 2018⁴, with a further 3932 deliberate fires occurring in other buildings. Fires in tower blocks increased in the year 2017-2018 with '801 fires in residential high rises of 10 storeys or taller in 2017/18, up from 713 the year before.”*
37. The Commissioner also drew attention to a number of media articles⁵ that have reported on various arson attacks on tower blocks since the Grenfell Tower tragedy, which were also referred to by RBFRS in this case.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614178/fs50759048.pdf>

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/754340/fire-statistics-data-tables-fire0401-nov2018.xlsx

⁵ <https://www.coventrytelegraph.net/news/coventry-news/fire-bell-green-flats-coventry-1532532>

38. As in that earlier case, whilst the Commissioner accepts that the recorded statistics referred to above are not directly related to those buildings relevant to the complainant's request (ie that they necessarily contain ACM cladding), she does regard it to be of some relevance to her consideration of the level of risk associated with high rise buildings and a risk of deliberate fire, and whether the disclosure of information 'would be likely' to cause endangerment to the safety of any individual.
39. RBFRS also referred to the UK threat level for international terrorism⁶. The Commissioner is aware that this currently set at 'severe' and has either been at this level, or the highest level of 'critical', since August 2014. In addition, MI5 refers to varying tactics adopted by terrorist groups, including the targeting of public places with low security which contain a large group of people, and where there will be maximum casualties.
40. The Commissioner is mindful that the Grenfell Tower tragedy, its cause, and the fact that there are a significant number of other buildings that have the same, or a similar system of, cladding, has been well publicised both within, and outside of, the UK.
41. She is also aware that a number of local authorities have concerns about the consequences of making public a full list of buildings featuring cladding similar to that of Grenfell Tower, by name and address⁷.
42. RBFRS advised the Commissioner:
- "The increase in arson attacks in high rise buildings as evidenced by home office IRS statistics since Grenfell coupled with the current severe terrorist alert level and prior evidence of the selection of "soft" targets by terrorist groups DOES, however, demonstrate increased likelihood of the such [sic] activities which would be facilitated by the disclosure of the requested information".*
43. The Commissioner is of the view that disclosing details of a property, identified by name and address, which is known to be vulnerable to the effects of a fire, would be useful intelligence and therefore likely to be of assistance to a terrorist group, or similar, should they be contemplating an attack on such a building.

⁶ <https://www.mi5.gov.uk/terrorist-targets>

⁷ <https://www.propertyweek.com/insight/after-grenfell-acm-claddinginvestigation/5098039.article>

44. However, she is not persuaded that disclosure of the type of building would allow for its identification and she considers that this could be disclosed without any endangerment to health and safety. In this respect, the exemption is not engaged and the type of building should therefore be disclosed.
45. Regarding disclosure of the other information which would specifically identify the building, the Commissioner is satisfied that the evidence is sufficient to conclude that there is more than just a risk of endangerment to an individual and that it 'may very well occur', should the information requested be disclosed.
46. Given the above, the Commissioner regards the lower threshold of 'would be likely' to endanger the safety of individuals to be met and that the exemption at section 38(1)(b) is engaged.
47. The Commissioner has gone on to consider the public interest test as required by section 2(2) of the FOIA.

The public interest test

48. The test is whether "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*".
49. The Commissioner's guidance states that, in the case of section 38, the public interest test would involve weighing up the risks to the health and safety of an individual, or group, against the public interest in disclosure in all circumstances of the case. The test must be applied on a case by case basis.

Arguments in favour of disclosure

50. The complainant has provided the following arguments in favour of disclosure of the requested information:

"The public interest is in disclosing the information as it affects public health and safety, given the aforementioned high risk of kitchen fires and other unintentional fires, that could likely result in another Grenfell Tower fire tragedy, and people losing their lives.

The public interest is in disclosure also because the inaction on removing ACM cladding, the fact it has taken almost two years, and why it has taken so long, is a matter of public debate. Knowing the precise locations of the 10 buildings in Berkshire would further the understanding and participation of that public debate.

The fire service should be held accountable and be transparent. The general public and the individual occupants of the buildings deserve

to see exactly which buildings still have ACM cladding, and why they still have the cladding. Disclosure would also promote accountability and transparency in the spending of public money.

Residents living in these buildings, hotel guests and hospital patients staying in these buildings should be allowed to understand decisions made by public authorities which affect their lives. If I am staying in a hospital which is at risk of burning down, I have the right to understand the decisions that have led to that hospital still having ACM cladding.

Disclosure of the information would reduce potential danger to people by making them aware of various risks and enabling them to take appropriate action. This could be choosing not to stay in a hotel or hospital which is at risk of burning down. Or it could be galvanising public support for action on removing the cladding from residential tower blocks with ACM cladding.

Consider the context of the information. Residents in Grenfell Tower were well aware of the fire risks in the building before it burned down and killed 72 people. A group of residents repeatedly highlighted safety concerns to the local authority. But nothing was done”.

51. RBFRS has argued:

“RBFRS strives to be as transparent as possible when responding to Freedom of Information requests, in order to build and preserve trust in the service by the people it serves: the people who live in; work in; or travel through Royal Berkshire. We believe in transparency and accountability of public services and therefore the decision to withhold the requested information in this case was a deeply considered one”.

Arguments in favour of maintaining the exemption

52. RBFRS has argued:

“In this case, we believe that on balance the public interest of disclosure is outweighed by the interests of the individuals potentially impacted because the likelihood of an arson or terrorist attack is increased by disclosure.

Having sought guidance from Senior Officers within RBFRS, the risk of accidental fire in in-scope buildings has been partially mitigated through the implementation of multiple countermeasures such as waking watches, revised evacuation strategies and heightened awareness of both impacted residents, fire & rescue services and control rooms.

As the likelihood of an event happening is a key factor when determining risk, and because disclosure of the requested information will increase the likelihood of a deliberate act of fire setting, whereas non-disclosure will not materially increase the likelihood of an accidental fire event, it is our determination that disclosure presents an unnecessary additional risk to individuals.

Current MHCLG, National Fire Chiefs Council guidance supports this view. The decision notice associated with ICO case number FS50759048 also supports this position. This leads us to the conclusion that RBFRS should not release this information as the public interest does not outweigh the increased risk to public safety likely to result on disclosure”.

Balance of the public interest test

53. The Commissioner understands that there is still a significant amount of public interest in the issue of the cladding on buildings, particularly given the large number of buildings and individuals that have been, and continue to be, affected by this. She 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. There may therefore be further debate and engagement were the requested information disclosed. However, the Commissioner notes that MHCLG continues to report back on the situation, highlighting areas and numbers of buildings - without specifically naming them - the latest report being issued in September 2019 (see paragraph 5 above).
54. Whilst the complainant is of the view that knowing the precise locations of the remaining buildings in Berkshire would further the understanding and participation of that public debate, the Commissioner is not convinced that this is necessary. Work is still being undertaken and the bigger picture continues to be managed by MHCLG.
55. The Commissioner also accepts the complainant’s view that there is a strong public interest in individual occupants of the buildings affected being made aware as to whether or not the buildings they are in have ACM cladding and if there are any associated risks. However, as she understands it, residents have been made aware of the issues.
56. In respect of the remaining building, RBFRS has advised the Commissioner that:

“The premises responsible person is aware of the ACM cladding and has started the process for remediation (through the provision of a method statement), although no actual works have started and we have not been given a timescale for any remediation works to be

completed. This may be subject to an enforcement notice, depending on the outcome of current discussions”.

57. This evidences that the issues associated with ACM cladding are still being monitored and that RBFRS is involved in ongoing measures to ensure the wider safety of the public.
58. The Commissioner has carefully considered the arguments in favour of disclosing and withholding the remaining information in this case. Although narrowly, she has concluded that, in this particular instance, and at this particular point in time, the public interest weighs in favour of maintaining the exemption contained within section 38(1)(b) of the FOIA.

Other matters

59. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.
60. The Commissioner notes the particularly poor responses issued to the complainant at both refusal stage and internal review stage. RBFRS did not provide any rationale whatsoever to support its citing of section 38 and no public interest arguments, despite the complainant's well-reasoned arguments.
61. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy⁸ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy⁹.

⁸ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁹ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

62. 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@justice.gov.uk

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

63. 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.
64. 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

Carolyn Howes
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