

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 April 2021

Public Authority: Ministry of Housing, Communities and Local Government

Address: Fry Building
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information about night watches and buildings insurance in the wake of the Grenfell Tower Fire. The Ministry of Housing, Communities and Local Government (MHCLG) initially said it did not hold any information falling within the scope of the request, but on review withheld information citing section 12 of the FOIA – costs of compliance exceeds the appropriate limit.
2. The Commissioner's decision is that MHCLG has breached section 16 of the FOIA by failing to provide help and assistance to the complainant to enable him to bring the request within the costs limit.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Engage with the complainant to explore what information of relevance / interest can be provided to him within the costs limit.
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. On 20 April 2020, the complainant wrote to the Ministry of Housing, Communities and Local Government and requested information in the following terms:

'1. Please can you provide me (in Microsoft excel format or similar) any information which the Department holds regarding the costs of waking watches. So far as possible please provide details of:

- the cost of the waking watch*
- confirmation of whether this is an annual, monthly, weekly or daily cost*
- the year or other period to which this cost relates*
- confirmation of whether this figure provided is per dwelling, development or some other basis*
- a description of the properties to which this relates (eg number of buildings, dwellings, etc)*
- the location of the properties (the first three or four digits of the postcode will suffice - eg N17)*
- a description of the services provided (eg number of individuals making up the waking watches, whether this is 24 hour)*

2. Please can you provide me (in Microsoft excel format or similar) any information which the Department holds regarding the increased costs of insurance associated with, or possibly attributable to, building cladding issues. So far as possible please provide details (I) on a general / average basis or (II) any specific cases covering the following matters:

- the pre-2017 costs of insurance for the building / development*
- details of the increase in costs of insuring the building*
- details of whether any insurer had declined cover*
- confirmation of whether and in what proportion this amount had been recovered from leaseholders*
- a description of the properties to which this relates (eg number of buildings, dwellings, etc)*

- *the location of the properties (the first three or four digits of the postcode will suffice - eg N17)*
- *a description of the specific issues associated with the building / compliance with building regulations in particular whether the relevant building was (I) in compliance with building regulations at the time of build or (II) not in compliance.*

3.i) Please provide all correspondence from 1 January 2017 to the date of this request between (I) the Department including the Secretary of State, Ministers and officials and (II) an insurer, property developer or company acting as managing agent relating to:

- *the use of 'waking watches' or other interim fire safety measures including the procurement, expertise required and costs of such steps;*
- *the effects of changes in building regulations following Grenfell on insurance costs and willingness to insure.*

ii) Please provide any internal documents or briefings connected with the preparation of such correspondence at item 1 above.'

6. The MHCLG responded on 18 May 2020. It stated that it did not hold any information falling within the scope of the request, but included a link to the Ministry's latest monthly data release showing the number of buildings with ACM cladding that are yet to be remediated, which may give some indication of those that have a waking watch. It also made reference to section 38 of the FOIA – health and safety, and said that the Ministry's general approach was not to release information which could identify particular buildings.
7. The complainant requested an internal review on 19 May 2020. The Ministry responded on 30 July 2020, and revised its position. It stated that between receiving the request and undertaking the review, information was now being collected for point 1 of the request – the costs of waking watches, but was being withheld under section 22 of the FOIA – information intended for future publication. It also said that for point 2 – the cost of insurance, it had received relevant information since the request was made but that it was being withheld under section 38(1)b – disclosure would endanger the safety of any individual. For point 3, correspondence, the Ministry said that it had taken a 'smaller' view of the request in its initial consideration, but on review determined that it was now too broad to be considered and was applying section 12 – the cost of compliance exceeds the appropriate limit.

8. The Ministry also said that it determined that section 12 applied to the whole request under the Act, so points 1-3. It made reference to the section 16 requirement – advice and assistance, saying that *'it was reasonable to confirm that that we did not at the time hold information falling within the scope of your other requests. We should have invited you to submit a narrower request'*.

Scope of the case

9. The complainant contacted the Commissioner on 3 August 2020 to complain about the way his request for information had been handled. When initially responding to the request, he was concerned that the Ministry appeared to be applying an exemption to information it did not hold, and thought it unlikely that no information was held for any part of the request, particularly regarding point 3 – correspondence, when only nine days after his request the Secretary of State had asked the Building Safety Minister to look into this specific issue. He also did not think that the Ministry had discharged its section 16 duty. In relation to the Ministry's review response, he considered that it had simply ignored its duty to provide advice and assistance having determined that section 12 applied, and could not see how sections 22 and 38(1)b could be applied to information that had not been considered due the application of section 12.
10. The Commissioner considers the scope of the case to be whether the MHCLG has met the procedural requirements of the FOIA, and specifically if it has fulfilled its duty to provide the complainant with advice and assistance under section 16.

Reasons for decision

Section 16 – duty to provide advice and assistance

11. Section 16 of FOIA states:

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case

12. The section 45 Code of Practice makes specific reference to the use of section 16 when section 12 has been applied:

'Where a request is refused under section 12, public authorities should consider what advice and assistance can be provided to help the applicant reframe or refocus their request with a view to bringing it within the cost limit. This may include suggesting that the subject or timespan of the request is narrowed.'

13. The Ministry applied section 12 to the request at the point of review, and acknowledged then that it should have invited the complainant to submit a narrower request.
14. The Commissioner is confused by the Ministry's response. It initially told the complainant it did not hold any information falling within the scope of the request, and therefore inviting the complainant to submit a narrower request is illogical, even more so given that it had itself taken a 'smaller' view of the request than it should. When the Ministry reviewed the request and determined that section 12 applied, it should have approached the complainant and in line with the section 45 code helped *'the applicant reframe or refocus their request with a view to bringing it within the cost limit.'* It did not do this but instead immediately referred the complainant to the Commissioner.
15. The Commissioner therefore finds that the Ministry breached section 16 of the FOIA by applying section 12 to the request, and subsequently failing to provide the complainant with advice and assistance which would assist him in bringing the request within the costs limit.

Other matters

16. The Commissioner has a number of other procedural concerns about the handling of this request which she wishes the Ministry to note.
17. Firstly, the Ministry made reference to the application of section 38 in its initial response to the request, when it had stated it did not hold any information. She does not need to tell the Ministry that with the exception of NCND (not applicable in this case) exemptions cannot be applied to information that is not held. Exemptions can only be applied on a case by case basis, and the caveat approach of 'if we had we wouldn't anyway' seemingly adopted by the Ministry is not in the spirit of openness and transparency intended by the Act.

18. Secondly, the Ministry has applied section 12 to all of the request, but also exemptions 22 and 38(1)b. The section 45 code states:

'The cost limit should be applied before any exemption in Part II of the Act. This is because it will generally be necessary to establish whether information is held and to collate it before applying an exemption.'

19. The Commissioner accepts that in some cases information may be found before the costs limit has been met. However, by definition of section 12 it is not possible to know whether all the information falling within the scope of the request has been identified before the limit is met and therefore application of any other exemptions is premature. If the costs limit were met, there would be no need to consider other exemptions. If the Commissioner determined that the costs limit was not met, then the Ministry would be required to undertake all relevant searches for information, after which part II exemptions could be applied.
20. Thirdly, the Ministry stated that for points 1 and 2 of the request, information had been received in between the request being made and the review being undertaken. The Commissioner has not explored this position in any more detail, as at this stage it has not been necessary, but she reminds the Ministry that for the purpose of information held, consideration should be given only up until the point the request is received. This therefore casts doubt over whether section 12 at the review stage can be applied to the whole request. It is possible that the Ministry might have considered that including information after the request was received to be helpful to the complainant, but this is not the case due to the subsequent use of section 12, and then possible exemptions under part II.
21. Fourthly, the Commissioner is also concerned that a central government department with significant experience of handling FOIA requests struggled with identifying the breadth of the information sought under point 3 when first considering it. The Commissioner considers the wording and scope to be specific and unambiguous and suggests that the Ministry pays closer attention to requests before responding.
22. Lastly, but not least, the Commissioner notes that the complainant requested a review on 19 May 2020. The Ministry responded on 30 July, 52 working days later. It did not provide either an apology or explanation for the delay. Whilst there is no statutory time limit for carrying out an internal review, the Commissioner's guidance states that they should normally be carried out within 20 working days, or 40 working days in exceptional circumstances. The Commissioner can see

no exceptional circumstances as to why the review of this request might warrant anything over 20 days.

23. The Commissioner reminds the Ministry of its duty to respond to internal reviews within a reasonable and timely fashion.

Right of appeal

24. 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

25. 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.
26. 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
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SK9 5AF