

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 May 2022

Public Authority: Department for Levelling Up, Housing and Communities

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information from the Department for Levelling Up, Housing and Communities ('DLUHC') on building safety advice provided to the government by an Independent Panel of Experts, following the Grenfell fire tragedy. DLUHC confirmed that it held information but said it was exempt from disclosure under section 35(1)(a) (Formulation of government policy) of FOIA.
2. The Commissioner's decision is that DLUHC was entitled to rely on section 35(1)(a) to refuse the request. However, DLUHC breached sections 1 and 10 of FOIA by failing to respond within the statutory 20 working day time for compliance. There were also delays in providing the internal review.
3. The Commissioner requires no steps as a result of this decision.

Background

4. The GOV.UK¹ website states the following about the Independent Panel of Experts:

"The government appointed an expert panel to provide advice to the Secretary of State for Communities and Local Government, on immediate building safety measures following the Grenfell Tower fire.

The independent expert advisory panel, chaired by Sir Ken Knight, was established to recommend to the government any immediate action it thinks that the government should take that will improve public safety and help to identify buildings of concern.

The panel have a wealth of experience in fire and building safety, including testing processes, and are drawing in wider technical expertise as necessary to inform this advice.

The panel is chaired by Sir Ken Knight, former London Fire Commissioner and former Government Chief Fire and Rescue Adviser. Other core members of the panel are:

- Roy Wilsher, Chair of the National Fire Chiefs Council
- Professor Colin Bailey FEng, President and Principal of Queen Mary University of London".

5. On 5 September 2017, the Panel's remit was extended to include broader issues of building safety.
6. At the time the complainant submitted his request to the public authority, it was known as the Ministry of Housing, Communities and Local Government. It was renamed DLUHC in September 2021. For clarity and consistency, the public authority is referred to as DLUHC throughout this decision notice.

¹ <https://www.gov.uk/government/collections/building-safety-independent-expert-advisory-panel>

Request and response

7. On 11 February 2021, the complainant wrote to DLUHC and requested information in the following terms:

"In his announcement to Parliament on 10th Feb 2020, Robert Jenrick repeatedly mentioned that the government's policy response to the building safety crisis has been led by advice from an "independent expert panel".

Please provide a full copy of all the advice that this "independent expert panel" has provided since its inception, including (but not limited to) the particular artifacts which informed the 10th Feb policy statements around the greatest risk being to buildings of >18m in height, and the greatest risk being due to cladding deficiencies (as opposed to other serious fire safety defects)."

8. DLUHC responded on 22 April 2021. It said that it held information falling within the request's scope, but it was exempt from disclosure under section 35(1)(a) (Formulation of government policy) of FOIA.
9. The complainant requested an internal review on 27 May 2021 and DLUHC provided the outcome on 5 August 2021. It maintained its application of section 35 to withhold the requested information.

Scope of the case

10. The complainant contacted the Commissioner on 5 August 2021 to complain about the way his request for information had been handled. He disagreed with the decision to withhold the requested information. He was also concerned about the time DLUHC had taken to conduct the internal review.
11. The analysis below considers whether DLUHC was entitled to rely on section 35(1)(a) of FOIA to refuse the request. The Commissioner has also considered DLUHC's compliance with sections 1 and 10 of FOIA, in respect of the timeliness of its response. He has commented on the time taken to conduct the internal review in the 'Other matters' section at the end of this decision notice.

Reasons for decision

Section 35 – Formulation of government policy, etc.

12. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and to the process of reviewing or improving existing policy.
13. The purpose of subsection 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a 'safe space' to consider policy options in private.
14. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged. The exemption is subject to the public interest test.
15. In accordance with the Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/0006, 19 February 2007²) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.
16. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.
17. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - The final decision will be made either by the Cabinet or the relevant Minister;

- The government intends to achieve a particular outcome or change in the real world; and
- The consequences of the decision will be wide-ranging.

18. The withheld information in this case comprises a series of letters and advice notes from the Independent Expert Advisory Panel to the Secretary of State, summarising the outcomes and recommendations resulting from recent meetings.

Does the information relate to the formulation or development of government policy?

19. The complainant suggested that section 35(1)(a) could not be engaged because government policy on Building Safety had already been finalised at the point the Minister made his announcement on 10 February 2020. Policy was therefore no longer being 'formulated' or 'developed'.

20. DLUHC said:

"...the policy to which the information relates is Building Safety. The policy is one of "government policy" as the final policy approach to Building Safety is subject to clearance by the Department's Ministers.

...

However, for the sake of clarity, we consider the fact that the Department has been undertaking a period of discussion and communication with the expert panel and other bodies, and final detailed decisions by Ministers have yet to be taken on the decided policy in the light of such considerations, means the "formulation" stage has not yet been concluded.

...

The policy formulation/development stage had not at the time of the request been completed and has not yet been completed. Although the Department has published a great deal of information about building safety following the Grenfell fire, there are areas about which Ministers still need to make decisions. For example, the Building Safety Bill is still going through Parliament at this time, so in this case the final policy approach remains subject to clearance by the Department's Ministers and Cabinet by way of the Home Affairs Cabinet Committee. The information requested relates to the policy in question and will inform the final policy decisions to be taken by Ministers."

21. The Commissioner has considered the complainant's reasoning as to why policy formulation or development is not relevant here. However, it is his view that DLUHC's submission satisfactorily addresses the above points. He is satisfied that it has shown that the withheld information relates directly to the formulation of government policy on Building Safety and that each of the criteria set out in paragraph 17 is met, as follows:

- First, the Commissioner accepts that the final decision regarding Building Safety measures is to be made by the relevant Minister.
- Secondly, the Commissioner accepts that, at the time of the request, and currently³, the government intends to achieve a particular outcome or real world change; namely, that high rise buildings are safe for their residents.
- Thirdly, the Commissioner considers it self evident that safety changes to high rise properties will have wide-ranging consequences for their residents and for the construction industry.

22. Building Safety is a policy area with multiple streams of work and this is reflected in the variety of issues which are considered in the withheld information. The Expert Panel's Terms of Reference⁴ make clear that the Panel exists to provide advice from which official policy can be devised. It is the case that a high-level policy objective (that of Building Safety) has been established. Flowing from that, advisory documents and guidance have already been issued (and withdrawn⁵ – such is the pace of change that the area is subject to). However, detailed policy options are still being assessed and debated as a means of delivering this overall objective, including policy which will be needed to underpin the Building Safety Bill when it passes into law. Information relating to the formulation of detailed policy underpinning a wider objective will engage the exemption, as will any significant review of any established position on an issue.

³ through Building Safety Advice Notes, the Safe Building Bill and policy which will underpin the eventual legislation

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741398/Building_safety_-_independent_expert_advisory_panel_-_terms_of_reference.pdf

⁵ <https://www.gov.uk/government/publications/building-safety-advice-for-building-owners-including-fire-doors>

23. Having viewed the withheld information, the Commissioner is therefore satisfied that section 35(1)(a) of FOIA is engaged.

Public interest test

24. Section 35 is a qualified exemption and so it is necessary to go on to consider whether the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosing the information.
25. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed. As such, the exact timing of a request will be very important.

Arguments in favour of disclosing the withheld information

26. In his submission to the Commissioner, the complainant explained that he believed that the government was placing incorrect emphasis on building height as a likely indicator of risk, when considering Building Safety strategies:

“The reason behind the request is that I believe the policy decision is deeply flawed in establishing height as the primary driver of risk, wasting considerable sums of taxpayer money on remediating low-risk buildings >18m, whilst leaving higher-risk buildings <18m without. As I have already highlighted to [DLUHC]: Public interest is overwhelmingly served better by releasing this information than withholding it. This is an issue which affects the safety and livelihood of hundreds of thousands of citizens. This information is essential to assure good decision-making by public bodies, ensure justice and fair treatment for all, and in securing the best use of public resources.”

27. DLUHC recognised the general public interest in the disclosure of information, acknowledging that:

“There is always a degree of benefit in making information held by public authorities available as it increases public participation in decision making and aids the transparency and accountability of government”.

28. It further acknowledged that:

"...the public interest will be served by there being transparency, at the appropriate time, around information that has informed Minister's [sic] considerations and decision on the policy, and by Ministers and the Government then being accountable, at the appropriate time, for the decisions they have taken".

Arguments in favour of maintaining the exemption

29. Having explained that the policy formulation and development process was 'live' at the time of the request, DLUHC cited what are known as 'safe space' arguments for maintaining the exemption.
30. Traditionally, safe space arguments relate to internal discussions but modern government sometimes invites external organisations (eg consultants, lobbyists, interest groups or academics) to participate in their decision-making process. Safe space arguments can still apply where external contributors have been involved, as long as those discussions have not been opened up for general external comment.
31. DLUHC argued that government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction:

"...there is a strong public interest in ensuring that there is an appropriate degree of safe space in which officials are able to gather and assess information and provide advice to Ministers which will inform their eventual policy decisions. In turn Ministers must feel able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and free from distraction that such information will be made public. Such safe space, it is widely accepted, is needed where it is appropriate in order to safeguard the effectiveness of the policy process.

...

Whilst protection of the policy process merits safe space, the need not to adversely affect the policy itself is another important consideration. It will be obvious that this is a high-profile area of the government's policy, attracting much public and media attention, and that its effectiveness and success is of real importance to public safety. Nothing therefore should detract from Ministers' ability reasonably to take policy decisions that will help to tackle those issues. However, disclosure of the requested information would inevitably have attracted national media coverage and public speculation which would be harmful as it would have given the public a potentially inaccurate and misleading impression...

Whilst it can be argued that the fact information may be misinterpreted is not itself reason not to disclose it, there are powerful

arguments to the contrary in this case. To try and avoid potential adverse repercussions, Ministers and officials would need to focus effort on explaining the advice that had been provided. Such unnecessary effort is avoidable and, even if deployed, might not be successful in correcting misunderstanding and its consequences. It is possible that such an unhelpful state of affairs may even lead officials and Ministers, under media and public pressure, to consider attaching less or more weight to certain factors, otherwise necessary to ensuring that objective, reliable analyses could be arrived at. Clearly these are all factors that would serve to undermine the policy aims and delivery.”

32. DLUHC concluded that, at the time of the request, the public interest in protecting the government’s ability to develop ideas, debate live issues, and reach policy decisions on Building Safety away from external interference and distraction was stronger than the arguments favouring transparency.

Balance of the public interest

33. The Commissioner’s assessment of the balance of the public interest has been made in the context of the facts and circumstances that were prevailing at or about the time that the complainant made his request (11 February 2021).
34. The Commissioner acknowledges that, generally speaking, there is a public interest in transparency, openness and accountability in relation to decisions taken by government on a sensitive and important area of public safety policy. As discussed above, such decisions have wide ranging consequences.
35. As regards the specific concerns the complainant has expressed about flaws in the government’s approach on Building Safety, the Minister’s speech cited in his request, states:

“We will make further funding available to pay for the removal and replacement of unsafe cladding for all leaseholders in high-rise residential buildings of 18 metres and above, or above six storeys, in England. We continue to take a safety-led approach, and this funding will focus on the higher-rise buildings, where the independent expert advisory panel tells us time and again the overwhelming majority of the safety risk lies...Secondly, for lower and medium-rise blocks of flats, the risks are significantly lower and the remediation of cladding

is less likely to be needed; in many cases, it will not be needed at all..."⁶

36. The Commissioner acknowledges that the complainant considers the government's strategy in this area to be flawed and that he disagrees with its decision to use height as a key designator of risk. That being the case, he is free to make submissions to DLUHC in that regard. He is not prevented from doing so by not having access to the withheld information and this argument for disclosure is not, on its own persuasive. (The Commissioner notes as an aside that the issue of height does appear to feature in official thinking, with a proposal that the height threshold of 18 metres be reduced to 11 metres having been consulted on⁷.)
37. Nevertheless, the Commissioner accepts that disclosure would allow the complainant, and the wider public, to scrutinise the advice on Building Safety that Ministers have received from experts in the field, in the aftermath of the Grenfell fire tragedy. This is an issue, which as the complainant correctly points out, affects a great many people living in accommodation for which serious fire safety issues have been identified. It is a highly sensitive and important area of policy making. The general public interest in government transparency and accountability would therefore be served by disclosure in this case.
38. However, the timing of the request is a crucial factor when considering the balance of the public interest. The Commissioner is satisfied that the policymaking process was live at the time of the request, and it remains live at the date of this notice. The Safe Building Bill was still in the early stages of making its way through Parliament and would be subject to amendments, perhaps considerable ones, before receiving Royal Assent. The Commissioner's guidance on section 35 states that the legislative process is an example of the governmental policymaking process:

"The classic and most formal policy process involves turning a White Paper into legislation. The government produces a White Paper setting out its proposals. After a period of consultation, it presents draft legislation in the form of a bill, which is then debated and amended in Parliament. In such cases, policy formulation can continue all the way up to the point the bill finally receives royal assent and becomes legislation."

⁶ <https://hansard.parliament.uk/commons/2021-02-10/debates/010B9751-BCBE-48F5-AEEC-6F3416777D73/BuildingSafety>

⁷ <https://www.gov.uk/guidance/building-safety-programme#overview>

39. Once Royal Assent has been received, policy which underpins the individual requirements imposed by the legislation will also need to be formulated.
40. The age of the information in question and the stage reached in the policy formulation process is relevant when considering safe space arguments. The correspondence in this case spans a two and a half year period prior to the date of the request. It might be argued that the policy formulation process relating to older correspondence will have been completed by the time of the request and so the preservation of the safe space was no longer necessary. However, the Commissioner has accepted, from DLUHC's submissions and from information in the public domain about the status of the Bill at the time of the request⁸, that policy formulation in relation to matters which fall under the Building Safety strategy is ongoing. Disclosure while it is still underway would be harmful, as it would be likely to interfere with the process and distract officials from the key task of delivering the best outcomes in this important area. As such, he accepts that even the older correspondence was very relevant to that process at the time of the request.
41. Whilst this does not mean that there is an indefinite requirement for this safe space, the Commissioner accepts that there remained a public interest in preserving that space at the time of the request. He notes that the foreword to the Building Safety Bill states:

"The extensive reforms brought forward in this large and complex Bill represent the most significant and fundamental changes to building safety legislation in decades."
42. Preserving a safe space for the policy formulation process in support of this important Bill (and the targeted policies which will flow from it), is therefore a valid and weighty factor in favour of maintaining the exemption.
43. As to the specific content of the withheld information, it gives a detailed analysis of the Expert Panel's response on various Building Safety issues. The Commissioner accepts that this content is sensitive and was provided in confidence to DLUHC with the purpose of informing government deliberations on Building Safety. He is satisfied that it has not been formally 'opened up' for wider comment. The relevance of this to the interests that section 35(1)(a) is intended to protect (effective government policy making) is that the Commissioner also accepts that for the analysis conducted by the Expert Panel to effectively inform the

⁸ <https://bills.parliament.uk/bills/3021/stages>

government's policy making process (which he considers is in the public interest) it must be full and frank. The Commissioner further recognises that the preservation of a safe space for this work will assist in ensuring that its advice and recommendations continue to be full and frank, and he counts this as a further, significant public interest factor in favour of maintaining the exemption.

44. Taking all the above into account, the Commissioner considers that the need for a 'safe space' in this case to debate policy and reach decisions without external comment or interference, is a valid argument. It will facilitate the open discussion of all policy options, including those that might be considered unpalatable. It has been generally accepted by both the Commissioner and the Tribunal (detailed in the section 35 guidance referenced above) that significant weight should be given to maintaining the exemption where a valid need for safe space is identified. A compelling public interest in favour of disclosure is required when a significant need for safe space is demonstrated. The complainant has not presented any compelling public interest argument for disclosure and the Commissioner has been unable to identify one of equal weight.
45. Having given consideration to the above, and to the purpose of section 35(1)(a) (to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies) the Commissioner's decision is that the public interest in maintaining the exemption is stronger than the public interest in disclosing the withheld information. DLUHC was therefore entitled to rely on section 35(1)(a) to withhold the requested information.

Section 1 – General right of access

Section 10 - Time for compliance

46. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
47. Section 10(1) of FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
48. The complainant submitted his request on 11 February 2021 and DLUHC provided its response on 22 April 2021, 48 working days later.
49. DLUHC has therefore breached sections 1(1) and 10(1) of FOIA by failing to respond to the request within 20 working days.
50. The Commissioner uses intelligence gathered from individual cases to inform the ICO's insight and compliance function. This aligns with the

goal in his draft "Openness by design"⁹ strategy 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 systemic non-compliance, consistent with the approaches set out in the ICO's "Regulatory Action Policy"¹⁰.

Other matters

51. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Internal review

52. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
53. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
54. The complainant requested an internal review on 27 May 2021 and DLUHC provided the outcome on 5 August 2021, 49 working days later.
55. The Commissioner considers that by failing to complete the internal review within the timescales set out above, DLUHC did not comply with

⁹ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

¹⁰ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

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the section 45 code. He would refer DLUHC to his comments regarding his regulatory approach in paragraph 50, above.

Right of appeal

56. 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

57. 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.
58. 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

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