

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 August 2022

**Public Authority:** Department for Levelling Up, Housing and Communities

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to a statement issued to the House of Commons by the Secretary of State for the Department of Levelling Up, Housing and Communities (the DLUHC) about proposals to finance the removal of unsafe Aluminium Composite Material (ACM) cladding on residential buildings.
2. The Commissioner's decision is that, on the balance of probabilities, the DLUHC does not hold information relevant to part 1 of the complainant's request. He is also satisfied that the DLUHC is entitled to rely on section 42(1) (legal professional privilege), of the FOIA when withholding information relevant to part 2 of the request.
3. The Commissioner does not require the DLUHC to take any steps as a result of this decision notice.

## Background

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4. Following the Grenfell Tower tragedy in June 2017, the government took a series of steps to deal with the removal of unsafe ACM cladding on residential buildings.
5. On 10 February 2021, the Secretary of State for Housing, Communities and Local Government (now known as the DLUHC and to be referred to as such in this decision notice), announced, in the House of Commons,<sup>1</sup> plans for a £3.5 billion package to remove ACM cladding.
6. The Housing Secretary confirmed that the government would fully fund the cost of replacing unsafe cladding on residential buildings over 18 meters in height. For those residential buildings that were between 11 to 18 meters high, the Housing Secretary set out plans for a loan scheme for leaseholders to pay for the cladding removal on their buildings; it was stated that these leaseholders would be expected to pay charges of up to £50 per month to pay back these loans.
7. In response to two questions raised in the House of Commons about the loan proposals, the Housing Secretary stated the following:

...we have set an upper limit of £50 a month....that is about the equivalent of the average service charge for a purpose built block of flats.....

....As I say, it will be capped at £50 a month, which is similar to the average service charge. Of course, in many buildings the service charge is already far in excess of that....
8. The request made by the complainant relates to the comments made by the Housing Secretary in their statement.

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<sup>1</sup> [Building Safety - Hansard - UK Parliament](#)

## Request and response

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9. On 14 February 2021, the complainant wrote to the DLUHC and requested information in the following terms:

In last week's announcement in the Commons, Robert Jenrick said on more than one occasion that the average service charge for a flat was £50 a month (the same as the proposed maximum loan to be charged to leaseholders under 18m).

1) Could you please supply any advice or briefing or information that was provided to Mr Jenrick that gave him this figure, and the source of that figure. I have no need for the rest of any advice/briefing, just the part about average service charge please. As this information has now had a decision made on it and announced in the Commons, along with the strong public interest in this matter where up to 11m people could be affected by the cladding scandal, I believe that s35/36 will not apply, particularly the source of the figure.

2) Could you please provide any legal advice the Government has received regarding the making of leaseholders below 18m pay for a loan and those above 18m receiving public funding to remove cladding, plus any legal advice on why it should just apply to cladding and not any other of the fire risks that make homes unsellable. Again, as this information has now had a decision made on it and announced in the Commons, along with the strong public interest in this matter where up to 11m people could be affected by the cladding scandal, I believe that s42, despite normally being a strong exemption to use, should not apply in this case and taxpayers have the right to know why billions of pounds of public money are being spent to bail out some developers' building deathtraps and not others and why.

10. On 14 April 2021, the DLUHC provided its response to the complainant.
11. With regard to part 1 of the request, the DLUHC advised that the Secretary of State was referring to publicly available information published by third parties.
12. The DLUHC then advised that the information held that was relevant to part 2 of the request was subject to the exemption at section 42 of the FOIA, and that it considered the public interest test to lay in favour of withholding this information.

13. Following an internal review, on 5 July 2021, the DLUHC confirmed to the complainant that it did not hold any information relevant to part 1 of the request, and it upheld its decision to refuse part 2 of the request under section 42 of the FOIA.

## **Scope of the case**

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14. On 15 July 2021, the complainant contacted the Commissioner to complain about the way their request for information had been handled by the DLUHC.
15. The complainant said that information must be held, and should be provided, in response to part 1 of the request, and that the DLUHC was not correct to have withheld information relevant to part 2 of the request.
16. The Commissioner will make a decision on the following:
  - Whether, on the balance of probabilities, the DLUHC holds information relevant to part 1 of the complainant's request.
  - Whether the DLUHC is entitled to rely on section 42 of the FOIA when withholding information relevant to part 2 of the complainant's request.

## **Reasons for decision**

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### **Section 1(1) – duty to provide information held**

17. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing whether information is held within the scope of the request, and if so, to have that information communicated to them.
18. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
19. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the public authority to check whether the information is held, and any other

reasons it may provide to explain why the information is not held. He will also consider any reason why it is inherently likely, or unlikely, that information is held.

### **The complainant's position**

20. The complainant has questioned the DLUHC's claim that it does not hold information relevant to part 1 of their request. They believe that information must be held that would support the Housing Secretary's comments that the average service charge paid by a leaseholder is £50.

### **The position of the DLUHC**

21. The DLUHC has confirmed to the Commissioner that it maintains its previous position that it does not hold information that is relevant to part 1 of the request.
22. The DLUHC has advised that all officials which would hold such information have been contacted as part of the searches carried out in response to the request. This included relevant building safety policy officials, private office staff and press officers, as well as building safety lawyers. The DLUHC has confirmed that it is satisfied that if the specific information which was requested by the complainant was held, one or more of these officers would have a record of this. It states however, that it has not been able to identify any relevant information.
23. The Commissioner appreciates why the complainant may have believed that information relevant to part 1 of their request might be held. However, he is not required to investigate the basis upon which the Secretary of State came to make his comments about the average costs of service charges and provide an answer to this; the Commissioner is only required to consider whether, on the balance of probabilities, the public authority does, or does not, hold information relevant to the request.
24. Having considered all the information available, the Commissioner is satisfied that, based on the information supplied by the DLUHC and the searches that it has conducted, on the balance of probabilities, the DLUHC does not hold information relevant to part 1 of the complainant's request.

### **Section 42 – Legal Professional Privilege**

25. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings. LPP protects the confidentiality of communications between a lawyer and client.

26. The two categories of LPP are litigation privilege and legal advice privilege.
27. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is litigation in prospect but where legal advice is needed.
28. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
29. In this case, the Commissioner accepts that the withheld information forms legal advice from a legal adviser to the DLUHC about proposed funding options to remove cladding from residential buildings of various heights/storeys.
30. Furthermore, the Commissioner is satisfied that the withheld information is not in the public domain and remains confidential. Therefore, the privilege attached to this information has not been lost.
31. The Commissioner is satisfied that the exemption at section 42(1) is engaged; as this is a qualified exemption, he will go on to consider the public interest test.

### **Public Interest Test**

#### **The complainant's position**

32. The complainant has said that it is important that the information requested is released; they state that the issue to which the request relates affects up to 11 million people and is leading to suicides, bankruptcy and a risk to the safety of residents. They go on to say that the government had committed £5 billion of public money in order to deal with the issue of unsuitable cladding on buildings, and that if they make the wrong decisions, then this could lead to an increase in costs, which would affect all taxpayers. The complainant argues that, given this, there is a strong public interest in favour of the disclosure of the requested information.

### **The position of the DLUHC**

33. The DLUHC states that it took into account the following public interest factors in favour of the disclosure of the information relevant to part 2 of the request:
- That there is a presumption in favour of disclosure under the FOIA.
  - That the information requested would increase public awareness of the legal advice behind a specific aspect of the building safety fund.
  - Making this information available would supplement other data concerning the building safety programme that the government publishes.
34. The DLUHC states that it took into account the following public interest factors in favour of withholding the information relevant to part 2 of the request:
- That it is in the public interest to ensure frankness between lawyer and client which goes to serve the wider administration of justice.
  - It is in the public interest for ministers, policy officials and lawyers to be able to engage in candid exchanges to ensure that policy decisions are made in full appreciation of all options and legal implications. The DLUHC states that disclosure in this case may hinder the candid nature of communications in future, which would be damaging to policy making in this area, and not in the public interest.
  - If lawyers were unsure as to whether their advice was protected, they may not be prepared to provide advice setting out the potential legal risks of a policy option. Ministers with responsibility for building safety policy would not then have a full appreciation of the legal risks involved with particular options. This would not be in the public interest as it would weaken the quality of the advice being provided to ministers.

35. The DLUHC has said that it has published<sup>2</sup> a wealth of information on the building safety programme, and it believes that the public interest is served in this way.
36. The DLUHC goes on to say that whilst it accepts the importance of transparency, particularly in areas that are of public concern, it believes that it is important that Ministers be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them, without fear of interference. It argues that, in this instance, there is a greater public interest in withholding the information.

### **The Commissioner's position**

37. In the Commissioner's opinion, the general public interest inherent in the exemption at section 42 of the FOIA will always be strong due to the importance of the principle behind legal professional privilege, that is, safeguarding openness in all communications between a client and their lawyer to ensure access to full and frank legal advice.
38. In this case the withheld information relates to a decision which, at the time of the request, would have a direct impact on individuals living in residential buildings where cladding was to be removed. The statement made by the Secretary for Housing on 10 February 2021, also concerned a significant amount of money which was to be spent on a matter relating to the safety and welfare of individuals, and was of great interest to the public. It is understandable that the public would therefore want to be reassured that the right decisions were being made about safety and that they were fair to all.
39. The Commissioner considers it to be important to take into account what information was available to the public at the time of the complainant's request.
40. The Commissioner notes that the particular document referenced by the DLUHC (in paragraph 35 of this decision notice) was last updated on 22 December 2020, (and therefore some time before the statement and request). As far as the Commissioner can see, this does not provide any specific information about the proposals to issue loans to leaseholders to pay for cladding removal in residential buildings less than 18 meters high, as set out within the Housing Secretary's statement of 10 February 2021.

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<sup>2</sup> [Building Safety Programme - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/building-safety-programme)



41. However, the Commissioner does accept that information has been regularly published about matters relating to the safety of high rise residential buildings, and cladding. He has also taken into account that the gov.uk website has published information that directly relates to the Housing Secretary's statement in the House of Commons<sup>3</sup> and the finance proposals.
42. The Commissioner accepts that there is a legitimate public interest in ensuring that public authorities are transparent in their actions. Disclosure of the requested information in this instance may assist the public in understanding further the background and legality of any decisions made by the government in relation to the funding proposals for the removal of cladding.
43. The Commissioner fully appreciates the importance of the issues to which the request relates. However, he considers that there is a very strong public interest in the DLUHC being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the frankness of legal advice provided, and may even have an impact upon the extent that legal advice is sought. This would not be in the public interest.
44. Furthermore, the Commissioner regards it to be of some relevance that the information which was available at the time of the request did provide the public with some detailed understanding of the decisions that had been reached in relation to the finance and loan arrangements relating to the removal of the cladding. The Housing Secretary's statement was also subject to scrutiny by MPs within the House of Commons (questions were raised and answered at the time the statement was issued), by the media and also the public.
45. Having considered all the information available, the Commissioner finds that the public interest in maintaining the exemption at section 42(1) outweighs the legitimate public interest in disclosure of the withheld information in this particular instance. The DLUHC was not, therefore, obliged to disclose the withheld information.

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<sup>3</sup> [Government to bring an end to unsafe cladding with multi-billion pound intervention - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/government-to-bring-an-end-to-unsafe-cladding-with-multi-billion-pound-intervention)

## Right of appeal

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46. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....**

**Suzanne McKay**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**