

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 August 2021

Public Authority: Northern Ireland Housing Executive
Address: 28 Court Street
Newtownards
BT23 7NX

Decision (including any steps ordered)

1. The complainant has requested information about diminishing leasehold terms relating to property. Northern Ireland Housing Executive ('NIHE') refused to provide the requested information, citing section 36(2) of FOIA, the exemption for prejudice to effective conduct of public affairs, for some parts and section 42(1), the exemption for legal professional privilege, for the remainder. A small part of the information has been withheld under both exemptions.
2. The Commissioner's decision is that NIHE has correctly applied sections 36(2)(b)(i) and 36(2)(b)(ii), cited for the majority of the withheld information. She also finds that NIHE properly relied on section 42(1) for the remainder of the withheld information and that the balance of the public interest favours maintaining both sections 36 and 42.
3. She does not require NIHE to take any steps as a result of this notice.

Background

4. From the case correspondence and her own online research, the Commissioner is aware that properties sold with a 125 year lease, of which 30 or so years has expired, would, according to a solicitor quoted in a newspaper article¹, result in it being "*very difficult to obtain a*

¹ Thousands of home owners 'at risk' over short leaseholds, warns DUP's Campbell - BelfastTelegraph.co.uk

mortgage on leasehold properties with less than 85-90 years left on the property”.

5. It is important to reference that FOIA is both applicant and purpose blind. However, in this case, the Commissioner has noted that the complainant was, at the time of the request, a NIHE leaseholder property owner and that he was looking to sell his property; he said he was not aware that he was unable to extend or 'buy out' the 125 year lease as this was not included on his Title or 'Flat Lease' document. NIHE had advised him that it is not "*customary or appropriate*" for such documents to include information about extending or buying out the lease. The complainant has made the Commissioner aware that the diminishing lease issue affects over 6000 individuals. She has included this information in this notice as she considers it provides useful context to his request and the 'bigger picture'.
6. The complainant raised this matter as a formal complaint with NIHE, part of which included the FOIA request which is the subject of this notice.
7. The Commissioner understands that the complainant has now sold his property but he has informed her that he has suffered financial detriment due to the lack of any statutory provision for diminishing leaseholds. It is this provision that NIHE was debating at the time of the request; this is currently still 'live' according to NIHE.

Request and response

8. On 2 July 2020, the complainant wrote to NIHE and requested information in the following terms:

"As you state the Housing Executive is aware of the concerns that have been raised around the requirements of lending institutions and diminishing leasehold terms. Discussions are ongoing with Land & Property Services around the nature and scale of those concerns and the available options to appropriately address same. Please provide me all information under the FOI regarding these discussions?"
9. On 15 July 2020, NIHE acknowledged receipt of this request and explained that, due to the impact of the Covid-19 pandemic, it might not meet the statutory time for responding.
10. NIHE subsequently responded, late, on 10 September 2020 (see 'Other matters' section of this notice). It refused to provide the requested information citing the following procedural sections of the FOIA exemptions:

- Section 36(2) - prejudice to effective conduct of public affairs (specifically subsections 36(2)(b)(i) and (ii)), and
 - Section 42(1) – legal professional privilege
11. NIHE said that the respective public interest tests favoured withholding the requested information.
 12. Following an internal review NIHE wrote to the complainant on 18 September 2020 and maintained its original position.

Scope of the case

13. The complainant contacted the Commissioner on 23 September 2020 to complain about the way his request for information had been handled. His grounds of complaint included the following:

"...the diminishing lease situation will only reduce the value of the property more until a point it becomes worthless. This lease issue also affects approximately 6900 other NIHE lease holders in similar positions".

And

"My main concern is that if the withheld information provides alternatives to the lease issue such as the ability to extend it for example this would increase mine and the other 6900 leaseholder's [sic] property values."

14. The complainant reiterated his suggestion made at internal review, ie that a partial disclosure might be possible as he does not *"believe that all of the information would be eligible for withholding"*.
15. On 31 May 2021, the complainant submitted additional documentation for the Commissioner to consider, but with no supporting narrative. On 22 June 2021, the Commissioner wrote to him advising that she had reviewed the documentation which appeared to her to mainly be background detail to his complaint and correspondence relating to the complaint he had raised against NIHE. However, she asked him to contact her to 'flag' any parts he considered she needed to take into account in relation to this complaint with a brief explanation as to why.
16. On 28 June 2021, the complainant replied as follows:

"The attachments outline that the NIHE have maintained their position with regards any information that I have sought [sic] regarding the property I purchased. The

correspondence outlines an number [sic] of errors, continual missing information ...”.

17. He also said that:

“...the internal departments with the NIHE recognise that the property may not have been maintained under the terms of the lease. It also highlights that despite NIHE stating that discussions are ongoing with LPS [Land and Property Services], LPS don't seen [sic] to know what if any discussions are going on, and initially confirmed none were.

The NIHE Chief Executive would not be drawn on the terms of the lease not containing any stipulations regarding the non ability to extend, which I believe this is the real issue for withholding this information, in that this will lead to a significant issue for the NIHE, if approx. 6900 owners start asking the same questions as I.

This will result in many thousands of people not knowing or about to become aware hat [sic] their property is significantly worth less that [sic] their purchase price and cannot be remortgaged due to the diminishing lease term”.

18. On 29 June 2021, the Commissioner wrote to advise the complainant as follows:

“Please note that the Commissioner can only consider what, if any recorded information is held relevant to the request, and whether a requester is able to see any or all of that, and what may be exempt. She cannot consider accuracy issues, or, as in this case, that properties have not been maintained under the terms of the lease as these matters do not fall within her remit.”

19. During the course of her investigation, NIHE advised the Commissioner that the complainant had now sold his property and asked her to contact him to see if this altered his position regarding his complaint.
20. The Commissioner wrote to the complainant on 7 June 2021; he confirmed he would like her investigation into his complaint to continue.
21. The Commissioner has relayed all the complainant's concerns to NIHE as part of her investigation.
22. At the latter stage of her investigation, the Commissioner asked NIHE to clarify why some of the information within the withheld 'bundle' was deemed to be 'out of scope' of the request. NIHE gave its reasons why it considered these documents to be outwith the scope of the request, which the Commissioner accepts. Although NIHE said it has no objection

to three of the 'out of scope' documents being disclosed to the complainant, the Commissioner cannot make a determination on information which does not fall within this request. However, should NIHE wish to voluntarily provide this 'out of scope' information to the complainant, the Commissioner has no objection.

23. The Commissioner has considered whether NIHE was entitled to rely on sections 36(2)(b)(i) and (ii) and 42(1) to refuse to provide the requested information in scope of this request.

Reasons for decision

24. The Commissioner has reviewed all the withheld information in scope of the complainant's request. She has first considered whether NIHE has properly relied on section 36 which has been cited to withhold the majority of that information.

Section 36 – prejudice to effective conduct of public affairs

25. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation.

26. Section 36 is a unique exemption within FOIA in that it relies on a particular individual (the 'Qualified Person') within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide her own opinion. The Commissioner's role in determining whether or not the exemption has been correctly applied is to establish that an opinion has been provided by the Qualified Person, assure herself that that opinion is "reasonable" and to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

The Qualified Person's opinion

27. In the case of NIHE, the Qualified Person for the purposes of section 36 of FOIA is Mr Clark Bailie, its Chief Executive.
28. NIHE has furnished the Commissioner with copies of the submission that was made to Mr Bailie on 8 September 2020, explaining why section 36 applied to the information. There is also correspondence from Mr Bailie, dated 9 September 2020, agreeing to adopt that submission as his

Opinion. The Commissioner notes that the Qualified Person also wrote to the complainant to advise him of his Opinion as part of his response to the request on 10 September 2020.

29. On the evidence available, the Commissioner is therefore satisfied that an Opinion was given by the Qualified Person on 9 September 2020.

Is the Qualified Person's Opinion reasonable?

30. The Qualified Person identified two limbs of the exemption that he believed were applicable to the withheld information; he said that disclosure would be likely to prejudice the free and frank provision of advice and the free and frank exchange of views.

31. In the Qualified Person's Opinion, disclosure would prejudice the free and frank provision of advice because:

"The information requested relates to internal discussions and external professional advice obtained on a current and developing policy matter. Deliberation of the issue within the organisation is ongoing and no decisions have been made or approvals given.

Disclosure of sensitive information of this type into the public domain would be likely to inhibit the free and frank exchange of views between Housing Executive officers and their advisors when debating the approach to diminishing leasehold terms."

32. Additionally, in the Qualified Person's Opinion, disclosure would prejudice the free and frank exchange of views for the purposes of deliberation because:

"This inhibition could impact upon the willingness of officers and advisors to participate in the deliberation of the matter, and officers would be less likely to express themselves openly, honestly and completely as they continue to work to develop the Housing Executive's approach to this live issue.

Further this inhibition could result in an unwillingness to explore all the options that may be available to address diminishing leasehold terms.

These factors would be likely to impair the quality of the decision making process and inhibit the ability to make an impartial and appropriate decision."

33. As part of its investigation response, NIHE told the Commissioner that it had revisited the Qualified Person's Opinion and the application of

section 36. NIHE maintained that the Opinion is a reasonable one and that section 36 was still engaged.

34. The Commissioner does not consider that it is a wholly unreasonable opinion to consider that disclosure of the requested information might result in some form of inhibition in future – although the likelihood and severity of any inhibition will be considered further in the public interest test.
35. The Commissioner therefore accepts that section 36(2)(b)(i) and (ii) are engaged.

Public interest test

36. Section 36 is a qualified exemption and therefore, even where prejudice is identified as resulting from disclosure, the information can only be withheld if the balance of the public interest favours maintaining the exemption.
37. NIHE applied the lower bar that disclosure “*would be likely to*” cause prejudice, meaning that the likelihood of prejudice is less than 50% but is still more than hypothetical.
38. In carrying out a public interest test, the Commissioner must weigh the public interest in preventing the prejudice, that she has already decided may occur, against the public interest in disclosure. The lower the likelihood, or the lower the severity, of the prejudice that may occur, the weaker the public interest will be in preventing it from occurring.
39. In line with her guidance on the public interest test², the Commissioner must consider the situation at the time at which the public authority originally dealt with the request, or the time of the authority’s internal review. Accordingly, in this case, the circumstances to be considered when carrying out the public interest test are those at the time, of the internal review, namely 18 September 2020.

Public interest arguments in favour of disclosure of the information

40. As set out in paragraph 13 above, the complainant has argued in favour of disclosure of the withheld information. This is in relation to both himself, and for the benefit of approximately 6900 other NIHE leaseholders he believes would be affected by this issue.

² https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

41. He also said argued in favour of transparency, stating:

"...I believe the public body NIHE have to provide the information to ensure transparency of their public service and to ensure that me and the other leaseholders are being treated equally and not discriminated against".

42. In explaining why the public interest should favour disclosure, NIHE noted the following points:

- *"Disclosure of information held by public authorities is in the public interest in order to promote transparency and accountability.*
- *Disclosure of information held by public authorities can aid in understanding the reason why certain decisions were made, including the advice on which they were based.*
- *There is a public interest in demonstrating that the Housing Executive is investigating diminishing leasehold terms as it is an issue that may affect a large number of leaseholders."*

Public interest arguments in favour of maintaining the exemption

43. NIHE submitted the following in favour of withholding the information:

- *"The matter is still live. Deliberation of the issue within the organisation is ongoing and no decisions have been made.*
- *There is a public interest in Housing Executive officials and LPS being able to have free and frank deliberations in a safe space regarding the approach to be taken to diminishing leasehold terms in order to fully consider the available policy options and ensure the quality of any subsequent decisions taken or policy developed.*
- *Disclosure would be likely to impact on the ability of the Housing Executive and LPS to debate the issues and reach impartial and appropriate decisions free from external interference and distraction.*
- *This inhibition could impact upon the willingness of officers and advisors to participate in the deliberation of the matter, and officers would be less likely to express themselves openly, honestly and completely as they continue to work to develop the Housing Executive's approach to this live issue.*

- *Further this inhibition could result in an unwillingness to explore all the options that may be available to address diminishing leasehold terms.*
- *These factors would be likely to impair the quality of the decision making process and inhibit the ability to make an impartial and appropriate decision."*

Balance of the public interest arguments

44. The Commissioner accepts that there is a public interest in disclosing the withheld information, particularly in view of the potential impact of the diminishing leasehold terms on the almost 7000 other NIHE leaseholders. She also accepts the general principles of openness and transparency.
45. She accepts that NIHE is actively seeking to provide a solution to the issue of diminishing leaseholds and notes that the matter is still 'live'.
46. The Commissioner expects public officials to be robust. They should not easily be dissuaded from giving their opinion, regardless of the hypothetical possibility of disclosure. Officers of NIHE should be subject to the same expectations; they are, as stated on NIHE's website (emphasis as shown online), aiming to achieve the following:

"Our goal is that everyone has access to decent, affordable housing and our task is to work with communities and other organisations to meet the housing needs of existing and future generations.

Our key strategic objectives are:

- *delivering better homes*
 - *supporting independent living*
 - *building stronger communities*
 - *delivering quality services"*
47. Nevertheless, the Commissioner also recognises that an official's reasonable expectation of their opinion being disclosed, particularly whilst an issue is still subject to live deliberation, will vary according to their seniority and role within the organisation.
 48. Having reviewed the information withheld under sections 36(2)(b)(i) and (ii), the Commissioner accepts that there would have been a broad expectation that the primarily emails and other information, were not

intended for publication, at least in the short term and particularly whilst the matter is still live.

49. The Commissioner further accepts that, in the event that this information were to be disclosed, NIHE officers and others involved in the discussions may be less likely to express private views or may be less forthright in challenging the current position. There is a strong public interest in preserving the ability of those involved to be robust and forthright in expressing opinions and debating options.
50. Further, the Commissioner recognises that the main driver in relation to disclosing the information requested rests around transparency in decision making. This has to be weighed against the impact that the disclosure would have on the ability of NIHE officials to have free and frank exchanges with their advisors and each other in order to obtain comprehensive advice and debate the matters involved, particularly as these discussions are still in the early stages, and the impact it would have upon the quality of the decision making process.
51. On balance, the greater public interest is, in the view of the Commissioner, held in preserving the ability of NIHE officials to have free and frank discussions with their advisors and each other to ensure thorough and effective decision making on this matter.

Conclusion

52. It follows that the Commissioner upholds NIHE's reliance on sections 36(2)(b)(i) and (ii) of FOIA for all the information withheld under section 36. This includes the small amount of information withheld under both sections 36 and 42.

Section 42 – legal professional privilege

53. 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.
54. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be engaged. This means that the information simply has to be capable of attracting LPP for it to be engaged. There is no need to consider the harm that would arise by disclosing the information.
55. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of *Bellamy v The Information Commissioner and the DTI (EA/2005/0023) (Bellamy)* as:

"...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation".

56. There are two categories of LPP – litigation privilege and legal advice privilege. 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 any litigation in prospect but legal advice is needed. 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.

Is the exemption engaged?

57. As noted above, section 42 is a class-based exemption, which means that if the information is of the type described in the exemption, then it is covered by that exemption.
58. NIHE said that it was relying on the 'advice privilege' part of the exemption, that the advice was "recent" and that it "relates to a live matter that is under appraisal by the Housing Executive".
59. Having had the benefit of viewing the information withheld by virtue of section 42, the Commissioner is satisfied that it constitutes communications between an in-house legal adviser acting in their professional capacity and their client, or evidence of those communications, and that it relates to legal matters. She is also satisfied that the communications were made for the dominant (main) purpose of seeking or giving legal advice in the course of a legal process.
60. Having established that the requested information falls within the definition of LPP, the next matter for the Commissioner to consider is whether privilege has been lost or waived.
61. NIHE has advised that disclosure of the legal advice was made to a "limited audience on a confidential basis for the purpose of obtaining further professional advices" and that it considers "that the relevant legal advice retains its privileged status".
62. NIHE has provided the Commissioner with details of the three individuals who constitute the "limited audience". The Commissioner is not aware of any disclosure of the information under consideration to the world at large. Nor has the complainant put forward any arguments

claiming that privilege has been lost or waived. Therefore she finds that section 42 is engaged in respect of the withheld information.

Public interest test

63. Section 42 is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of FOIA. In accordance with that section the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

64. Again, she must assess the prevailing situation at the time of the request.

Public interest arguments in favour of disclosure of the information

65. The Commissioner has taken into account the complainant's views outlined under her public interest considerations relating to section 36.

66. In explaining why the public interest should favour disclosure, NIHE noted the following points:

- *"Disclosure of information held by public authorities is in the public interest in order to promote transparency and accountability.*
- *Disclosure of information held by public authorities can aid in understanding the reason why certain decisions were made, including the advice on which they were based."*

Public interest arguments in favour of maintaining the exemption

67. NIHE submitted the following in favour of withholding the information:

- *"A client's ability to speak freely, frankly and openly with their legal adviser is a fundamental requirement of the legal system and the administration of justice. Therefore there is a strong element of public interest inbuilt into maintaining and safeguarding legal professional privilege itself.*
- *The legal advice provided is recent and relates to a live matter that is under appraisal by the Housing Executive.*
- *Legal advice must be given by a legal adviser fully apprised of the factual background by their client.*
- *Legal advisers must be free to present the full picture by presenting the arguments for/against a particular view."*

Balance of the public interest arguments

68. In her guidance on section 42³, the Commissioner describes LPP as “a fundamental principle of English law”.

69. Of relevance in this case, the Commissioner’s guidance on the public interest test states:

“As a general rule there is no inherent public interest in class based exemptions. However, there is an inherent public interest in section 42, which exempts legally privileged information. This is because of the importance of the principle of legal privilege; disclosing any legally privileged information threatens that principle.”

70. Similarly, her guidance on section 42 states:

“The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice”.

71. In *Bellamy* the principal question which the Tribunal had to consider was whether it was in the public interest for the public authority to disclose the information sought. Explaining the balance of factors to consider when assessing the public interest test, it said:

“...there is strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.

72. In balancing the opposing public interest factors under section 42 in this case, the Commissioner considers it necessary to take into account the in-built public interest in this exemption; that is, the public interest in the maintenance of LPP. In her view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP, namely safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. In her view, that principle is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.

73. The Commissioner’s guidance on section 2(2) of FOIA states:

³ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_

"...the public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining an exemption".

74. The Commissioner is mindful that the public interest in the context of the FOIA means the public good, not what is of interest to the public.
75. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions. However, she must also take into account that there is a public interest in the maintenance of a system of law which includes LPP as one of its tenets.
76. The Commissioner also recognises that it is important to take into account the significance of the actual information and what it reveals.
77. In reaching her decision in this case, the Commissioner has considered the prior findings of the Commissioner and the Information Tribunal in relation to LPP. She has also had regard to the content of the withheld information.
78. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of LPP is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure. However clear, compelling and specific justification for disclosure would have to be shown that would outweigh the obvious interest in protecting communications between legal adviser and client, which the client supposes to be confidential under legal professional privilege.

Conclusion

79. In all the circumstances of this case, however, the Commissioner is not satisfied, from the evidence she has seen, that there are factors present that would equal or outweigh the strong public interest inherent in this exemption. She has, therefore, concluded that NIHE correctly applied section 42 to those parts of the withheld information for which it was cited.
80. Where NIHE relied on both sections 36 and 42 for a small part of the withheld information, and for which the Commissioner found that section 36 was engaged, she has, therefore, not found it necessary to consider whether section 42 also applied to this information.

Other matters

81. In this case, NIHE advised the complainant in writing that, due to the impact of the Covid-19 pandemic, it might not be able to meet the statutory 20 working days' timeframe for responding to his request.
82. The request was made on 2 July 2020 and NIHE did not respond until 10 September 2020.
83. The complainant did not complain about the delay. Given the unprecedented impact of the pandemic, the Commissioner has not recorded the delay in this instance.

Right of appeal

84. 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

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

85. 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.

86. 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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