

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 July 2018

**Public Authority:** Northern Ireland Housing Executive

**Address:** [records@nihe.gov.uk](mailto:records@nihe.gov.uk)

### Decision (including any steps ordered)

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1. The complainant requested information relating to an organisational restructuring exercise which resulted in the relocation of a number of staff. The Northern Ireland Housing Executive ('NIHE') provided some information and withheld other information under section 40(2) of the FOIA. The Commissioner's decision is that, on the balance of probabilities, NIHE does not hold any further recorded information. The Commissioner has also concluded that NIHE has correctly applied section 40(2) to the information it has withheld. The Commissioner does not require any steps to be taken.

### Request and response

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2. On 18 January 2017, the complainant wrote to NIHE and requested information in the following terms:
  - "1. I would like to be provided with **all** documentation related to the restructuring process that has resulted in the proposed relocation of [name officer 1 redacted] and [name officer 2 redacted]. As I understand they are transferring from 'Invest and Strategy Belfast' unit managed by [name officer 3 redacted] to 'Property Services' unit, managed by [name officer 4 redacted]. All documentation should comprise electronic and hard copy formats, and include: Trade Union consultations; Board/Committee Papers; Strategy documents; Meeting minutes/records; Staff briefings/updates; Emails; Letters/correspondence; Memos; Notes; Phone call records; All other relevant documentation.

2. *I would also like a list of all duties [name officer 1 redacted] and [name officer 2 redacted] currently undertake and all duties proposed for the posts they are transferring to in 'Property Services' unit.*
3. *Please include a copy of job descriptions for both transferring staff for their existing posts and transferring posts, and advise on date job descriptions were completed and agreed.*
4. *I would also like to be provided with a copy of the Northern Ireland Housing Executive documents covering the processes for consultation with staff and their representatives in the event of restructuring departments/units."*

When submitting the request, the complainant listed and named 8 specific members of staff who he considered likely to be in possession of information relevant to the request.

3. NIHE responded on 16 February 2017 and advised that it was still awaiting information relevant to part 1 of the request, it did not hold information relating to parts 2 and 3 of the request and provided information relevant to part 4 of the request.
4. NIHE issued a further response relating to part 1 of the request on 1 March 2017. It provided some information relevant to the request and withheld other information under section 40(2) of the FOIA.
5. On 9 April 2017 the complainant wrote to NIHE and requested an internal review of its handling of the request. He raised a number of queries relating to the responses and information he had received relevant to part 1 of the request, including:
  - *"Incomplete disclosure without proper declaration"* –references within the documents disclosed to other emails. Documents and attachments which had not been provided or referred to.
  - The fact that typed copies of the information had been disclosed as opposed to the original documents.
  - The fact that NIHE had failed to respond to his point about searching and/or restoring information from trash cans, recycle bin folders and back-up tapes to obtain information falling within the scope of the request.
  - Queries about NIHE's application of section 40(2) to the request.
6. NIHE provided the outcome of its internal review on 22 May 2017. It provided some additional information. NIHE also provided a list of the emails which had been withheld under section 40(2). The emails in question had been sent by two of the officers named in the request

(officer 1 and officer 2). NIHE also provided further information about its application of section 40(2) to the request.

7. In its internal review NIHE also explained why it had provided transcribed copies of the information rather than the originals and explained its position in respect of information held within backup storage. NIHE also confirmed that it did not hold a number of documents including job descriptions for existing and proposed jobs and specific emails referred to by the complainant.

## Scope of the case

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8. The complainant contacted the Commissioner on 22 June 2017 to complain about the way his request for information had been handled.
9. In his complaint to the Commissioner the complainant raised a number of points regarding the way his request had been handled, some of which were outside the remit of the Commissioner. For example, the complainant asked the Commissioner to investigate NIHE's failure to acknowledge his internal review request and its failure to establish the purpose behind his request to *"aide [sic] their assessment of whether or not disclosure would be compliant with the first data principle"*.
10. The Commissioner wrote to the complainant to explain what she could and could not investigate in relation to the points he had raised. The Commissioner confirmed that the scope of her investigation into this complaint is to determine whether NIHE held any additional information relevant to the request and whether it correctly applied section 40(2) to the information it had withheld.

## Reasons for decision

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### Section 1 – general right of access

11. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to him.
12. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by

the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held; she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.

13. NIHE confirmed that it conducted full searches for information relevant to the request at the time it was received. These searches included all the staff named in the request. NIHE confirmed that when it contacts staff asking them to identify information relevant to an FOIA request, the template makes it clear that searches should cover all information held, irrespective of location or format. NIHE advised that the main search options open to individual staff (as they relate to electronic information) include key word searches within Microsoft Outlook and the Meridio Electronic Document Records Management System (EDRMS). NIHE also confirmed that it has a strict lock-down policy on mobile devices to avoid corporate information being stored anywhere other than within corporate record keeping systems.
14. In his complaint to the Commissioner, the complainant queried the absence of a number of specific emails which he considered were held but had not been provided by NIHE. He also queried the fact that NIHE had not disclosed the job descriptions requested. The complainant pointed out that job descriptions are "*a legal requirement*" and as such should be held by NIHE.
15. NIHE explained that, following the complaint to the Commissioner, it contacted all relevant staff again to ascertain whether they were aware of any additional information held relevant to the request. Staff confirmed that they had conducted searches of the relevant systems at the time of the request and all information held had been forwarded to the person dealing with the request to consider for disclosure. NIHE's position is that, other than the information it disclosed and the information it has withheld under section 40(2) no additional information relevant to the request was held at the time of the request. Based on the responses it received from staff who held information relevant to the request, NIHE does not consider there is any evidence or reason to believe that any information has been deliberately concealed to avoid disclosure.
16. NIHE explained to the Commissioner that it was "*unable to confirm the position regarding information that may have been held at one point in time but now no longer held*" and referred to its document retention policy. NIHE confirmed that its policy on retention and destruction of records is governed by the Public Records (NI) 1923 and the Disposal of Documents Order (S. R. & O. 1925 No. 167). NIHE explained that

personal email folders are purged on a 6 monthly cycle (reduced to 3 months since January 2018). NIHE's policy is that the sender of an email is obliged to consider whether it contains important corporate information, and if so, the onus is on the sender to save the email into the appropriate folder within the Meridio EDRMS. Emails saved into Meridio are automatically declared as corporate records and cannot be altered. They are then managed in accordance with the retention and disposal rules appropriate to the parent folder where the record is held.

17. In terms of any information which may have been deleted in accordance with NIHE's document retention policy, in his initial request the complainant asked that any information held in recycle bins, trash cans etc be restored/retrieved and provided in response to this request. The Commissioner has advised the complainant that, in accordance with her guidance on determining whether information is held<sup>1</sup>, although information deleted from electronic records may be regarded as being 'held' by a public authority, under section 1(4) of the FOIA there is no duty to communicate it.
18. In terms of the request for "*job descriptions for both transferring staff for their existing posts and transferring posts*", NIHE acknowledged that under part 3 of the Employment Rights Order (NI ) 1996, 'Rights to statements of employment Particulars' (Article 33 to 39) an employer is required to provide an employee with particulars of employment. NIHE advised the Commissioner that the post jointly undertaken by two individuals prior to the re-structuring exercise did not have a specific job description and as such, "*a generalist Lv04 post Lv04 Grading Guidance would have applied to this role*". When a new Asset Management Directorate was created, two new Lv04 posts were identified within the Asset Strategy and Programme Delivery sections. As Asset Management is a new Directorate, there is an intention to create specific job descriptions for each role within the Directorate. However, the job descriptions were not held at the time of the request and work to produce them is still ongoing.
19. Based on the representations from NIHE the Commissioner is satisfied that it has carried out adequate searches of where relevant information would be held. There is no evidence of any inadequate search or grounds for believing there is any motive to withhold information. Based on the searches undertaken and the other explanations provided, the Commissioner is satisfied that, on the balance of probabilities, NIHE

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1169/determining\\_whether\\_information\\_is\\_held\\_foi\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf)

does not hold any further recorded information relating to the restructuring process, other than that which has been disclosed, and the information that NIHE has withheld under section 40(2).

## **Section 40 – the exemption for personal data**

20. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
21. NIHE considers that the information requested constitutes the personal data of the individuals concerned and that disclosure would breach the first data protection principle.

### **Is the requested information personal data?**

22. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:
  - from that data,
  - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
23. In considering whether the information requested is "personal data", the Commissioner has taken into account her own guidance on the issue<sup>2</sup>. The two main elements of personal data are that the information must "relate to" a living person, and that person must be identifiable. Information will "relate to" a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts them in any way.
24. The information which NIHE has withheld under section 40(2) comprises internal emails between staff regarding the proposed restructuring exercise within NIHE. NIHE considers that the information identifies those individuals and therefore comprises their personal data.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/PERSONAL\\_DATA\\_FLOWCHART\\_V1\\_WITH\\_PREFACE001.ashx](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx)

25. NIHE has acknowledged that there had been some inconsistencies in its redaction of personal data contained in documents held relevant to the request. However, it maintains that section 40(2) applies to the remaining withheld information and considers that the inadvertent disclosure of related personal data in a small number of other documents which it has already released is not a compelling reasons for waiving its application of section 40(2) to the remaining information.
26. The Commissioner has examined the information withheld under section 40(2) and notes that much of the information is comprised of individual items, or short exchanges, of private correspondence between employees in respect of NIHE's restructuring exercise and their role within that exercise. The Commissioner therefore accepts that the information in the context of this request is personal data as defined by the DPA.

### **Would disclosure breach one of the data protection principles?**

27. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. She considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:
  - personal data shall be processed fairly and lawfully; and
  - personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

### **Would disclosure be fair?**

28. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. She has then balanced against these the general principles of accountability and transparency as well as any legitimate interests which arise from the specific circumstances of the case.
29. NIHE confirmed that the individuals whose personal data had been withheld had been consulted in relation to the request and refused consent. It considers that this demonstrates a clear expectation on the part of the individuals that their personal data would remain private and not disclosed into the public domain. NIHE also confirmed that the posts



occupied by the individuals are not senior management or management posts and are therefore more junior roles. NIHE also confirmed that the individuals do not have public facing roles nor are they responsible for policy decisions or decisions regarding expenditure of public funds.

30. NIHE stated that the focus of the request is the internal re-structuring of a section within its Asset Management Division in 2017. It advised that the re-structuring process gave rise to a number of disagreements and disputes between individual members of staff and managers. The effect of the disagreements was significant, causing fall-outs between staff.
31. In light of the above, the personal nature of the withheld information and the expectations of the individuals concerned, NIHE considers that disclosure would be likely to cause upset and distress, and therefore be unfair to the individuals in question.
32. NIHE advised that the complainant has a personal interest in the issue associated with the request as he has connections to an employee who was affected by the restructuring. However, NIHE does not consider that there is any wider legitimate interest in disclosure of the remaining withheld information.
33. In view of the content of the withheld information, the Commissioner considers that the individuals would have strong and reasonable expectations that the information would not be disclosed into the public domain. The Commissioner also accepts disclosure of the withheld information into the public domain would give rise to an unfair and unwarranted intrusion on the individuals' privacy in the circumstances of this case and be likely to cause upset and distress.
34. The Commissioner accepts that there is a legitimate public interest in disclosure of information which would promote accountability and transparency. However, in light of the reasonable expectations of the individuals concerned, the Commissioner does not consider that any legitimate interests of the public in accessing the information are sufficient to outweigh their right to privacy.
35. In conclusion, the Commissioner finds that disclosure would be unfair and would therefore contravene the first data protection principle. As the Commissioner has decided that the disclosure would be unfair, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question. The Commissioner therefore upholds NIHE's application of section 40(2) to the information.



## Right of appeal

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36. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

37. 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.
38. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**