

# Freedom of Information Act 2000 (FOIA)

## Decision notice

**Date:** 3 March 2022

**Public Authority:** Northern Ireland Housing Executive  
**Address:** The Housing Centre  
2 Adelaide Street  
Belfast  
BT2 8PB

### Decision (including any steps ordered)

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1. The complainant has requested photographs of work carried out by Northern Ireland Housing Executive ("NIHE") on his property. NIHE disclosed two photographs, which it said was the only information it held, but the complainant argued that, in light of the other occasions contractors had visited his property to carry out certain repairs, it must hold further photographs.
2. The Commissioner's decision is that, on the civil standard of the balance of probabilities, NIHE has disclosed all the information it holds in response to the request. However, he found that in failing to respond to the request within the 20 working day time for compliance, NIHE breached sections 1 and 10 of FOIA.
3. The Commissioner requires no steps as a result of this decision.

### Background

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4. The Commissioner understands that the complainant is the tenant of a property managed by NIHE. He has explained that he had an ongoing problem with leaking guttering at the property. A contractor was scheduled to clean the guttering on 11 September 2020. NIHE said that the work had been carried out as arranged, but the complainant maintained that he was at the property all day and that no contractor had visited to carry out the work. Meanwhile, the problem of the leaking guttering persisted.

## Request and response

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5. On 25 September 2020, the complainant wrote to NIHE and requested information in the following terms:

*"The contractors and Housing Executive have claimed that they have PHOTOS of my spout before and after the job was done on Friday ... So would you please arrange to have these photos sent out to my home right away.*

*According to the Housing Executive, there have been SIX different contractors at my home over the 2 years therefore there should be SIX sets of different photos all with the dates etc showing on photos.*

*Please send out 6 different sets of photos with dates etc".*

6. NIHE wrote to the complainant on 28 October 2020. It said that it had located two photos, which its Downpatrick Office had recently sent to the complainant and which he had confirmed receipt of during the home visit he received from the Area Maintenance Manager on 2 October 2020.
7. The complainant requested an internal review on 5 November 2020. He said his request was for six sets of 2 photographs, taken during contractors' visits to his home on six different occasions to carry out repairs to the front spout. He said that NIHE had provided just one set of 2 photos, dated 11 September 2020 (the day of the disputed work). He said that the Area Maintenance Manager had told him that NIHE held other photos and he asked for copies.
8. NIHE replied on 15 December 2020. It said that it had disclosed all the photographs it held relating to the complainant's request. It said that the contractor providing the maintenance service had recently changed. NIHE had therefore contacted the previous contractor to check whether they held any further photographs, and they had confirmed that they did not.

## Scope of the case

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9. The complainant contacted the Commissioner on 19 April 2021 to complain about the way his request for information had been handled. He believed that NIHE held other photographs which it had not disclosed. He also maintained that no contractor had visited the property on 11 September 2020. He also made comments suggesting he felt NIHE had taken too long to deal with his request.

10. During the Commissioner's investigation the complainant also asked him to investigate NIHE's wider complaints handling practices. Such matters fall entirely outside the Commissioner's powers and have not formed part of his investigation. Nor has the Commissioner concerned himself with whether or not, as a matter of fact, contractors visited the property on 11 September 2020, or whether the agreed work was carried out that day.
11. The Commissioner's duty in this case is to decide whether a request for information made to a public authority was dealt with in accordance with the requirements of Part 1 of FOIA. The Commissioner is mindful of the comments made by the Information Tribunal in the case of Johnson / MoJ (EA2006/0085)<sup>1</sup> that FOIA:  
  
    "... does not extend to what information the public authority **should** be collecting ... but rather it is concerned with the disclosure of the information they **do** hold" [emphasis added].
12. The analysis below therefore considers whether NIHE holds photographs of the complainant's property taken on contractor visits, in the period 25 September 2018 – 25 September 2020 (excluding the two photographs taken on 11 September 2020, which both parties accept have already been disclosed).
13. This amounts to a consideration of NIHE's compliance with section 1 (General right of access) of FOIA. The Commissioner has considered the timeliness of NIHE's responses under sections 1 and 10 of FOIA and in the 'Other matters' section at the end of this notice.

## Reasons for decision

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### Section 1 – General right of access

14. Section 1(1) of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to them.
  15. In this case, NIHE says it has disclosed all the information (ie two photographs) that it holds which falls within the scope of the request. The complainant maintains that NIHE holds other photographs.
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<sup>1</sup><http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i90/Johnson.pdf>

16. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely or unlikely that the public authority holds information relevant to the complainant's request.
17. 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 offered by the public authority to explain why the information is not held. He 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 is held, he is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

#### Complainant's position

18. The complainant says that NIHE has not properly complied with his request. He believes that it would hold photos of the work conducted at his property on five other occasions.

#### NIHE's position

19. NIHE maintains that it has disclosed to the complainant all the information it holds pertaining to the period specified in the request.
20. By way of background, it explained that in the terms and conditions of its maintenance contracts, NIHE requires contractors to submit photographs to confirm that a repair has been completed. The photographs are submitted to NIHE electronically with a request for payment for the work. The photographs are then held on NIHE's Housing Management System repairs module.
21. The only exception to this requirement is that photographs of work done are not required to be provided by contractors in the first 12 weeks of a new contract. This is to allow time for technical adjustments to the IT interface between the contractor and NIHE.
22. A new response contractor was appointed for the area where the complainant resides on 1 September 2020. The contractor was therefore not required to start submitting photographs to NIHE in support of job payments, until 12 weeks after that date (ie 1 December 2020 or thereabouts).
23. A number of visits were made by the new contractor, and by maintenance staff, to the complainant's property during September and

October 2020. One such visit was on 11 September 2020, when the complainant claimed that nobody had called at his house. NIHE raised this apparent discrepancy with the contractor, who was then able to forward photographs which had been taken by one of its operatives, confirming that they had attended the complainant's house on the day in question. These photographs were subsequently provided to the complainant in response to his request. The complainant has not challenged their authenticity, although he continues to maintain that he was in all day and that nobody called.

24. The Commissioner accepts that this would account for the absence of photographs for the period 1 – 25 September 2020 (the latter being the date of the request and, thus, the cut-off point for any information falling within its scope) in NIHE's possession. However, the request asked for photographs taken in the two years up to 25 September 2020. The Commissioner therefore asked NIHE a series of questions aimed at understanding and evaluating NIHE's reasons for believing it did not hold other, older photographs.
25. The Commissioner asked NIHE what searches were carried out to check that no further photos were held and why these searches would have been likely to retrieve any relevant information, if held. NIHE explained that all repair records are held on its Housing Management System. This is a secure, closed system, accessible only to those staff who have the appropriate access permissions and using software deployed to specific NIHE and contractor IT equipment. The system cannot be accessed via personal laptops or computers.
26. The Area Manager carried out a search of the Housing Management Repairs logged on the Housing Management System for the property and found that no photographs were held. The Area Manager did a subsequent, final check. He further consulted with the Area Maintenance Manager and both confirmed that no photographs were held.
27. The Commissioner asked whether information could have been held at one time and subsequently deleted from the Housing Management System. NIHE explained that, if held, photographs could not be removed by a member of management or staff. They could only be removed by a specific request made to the systems administration team. For completeness, a check was made to establish if the systems team had received such a request in relation to photographs of the complainant's property. It was confirmed there had been no requests to remove any information from the records of the complainant's address.

#### The Commissioner's decision

28. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a

complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 16 and 17, above, the Commissioner is required to make a finding on the balance of probabilities.

29. The complainant believes that further photographs are held and he says he was informed of this by a member of staff.
30. Balanced against this, NIHE has provided cogent and clear reasons as to why no photographs for work carried out between 1 - 25 September 2020 were held. It has also provided a clear explanation of the searches of its Housing Management System that it carried out and why it was sure that no relevant information could have been deleted from it. Further, the Commissioner also notes that it told the complainant it had taken the step of contacting the previous contractor, who confirmed they too held no relevant photographs.
31. The Commissioner has seen nothing which contradicts NIHE's explanations to him. In any case, it is not clear what benefit there would be to NIHE in deliberately withholding photographs capable of proving works had been carried out; one of the complainant's main concerns is that (he believes) contractors have not turned up, while NIHE says that they have.
32. The complainant has supplied correspondence to the Commissioner from NIHE which refers to "the sequence of events around the 11<sup>th</sup> to the 16<sup>th</sup> September", which suggests that there were further visits to the property in that period. It also states that a contractor visited on 16 September 2020, to complete the work started on 11 September 2020. This falls within the 12 week 'bedding in' period when NIHE did not require photographs of work done to be provided to it. This would explain why NIHE itself does not hold photos of the work done on those occasions.
33. While appreciating the complainant's frustration that NIHE does not hold further information within the scope of his request, the Commissioner is mindful of the Tribunal's comments, referred to in paragraph 11, above. Although the complainant may have expected NIHE to hold photographs from the previous contractor based on the practices that it says it adopts, the Commissioner can only consider what it does hold, not what the complainant considers that it should hold.
34. Following the making of the request, the Commissioner understands that further investigations were made of the guttering, resulting in an alternative diagnosis of the cause of the problem. The Commissioner understands from the correspondence supplied by the complainant that remedial action was then taken, which fixed the problem.

35. Having considered NIHE's response, and on the evidence provided to him, including NIHE's knowledge of its contract arrangements, and its Housing Management System, the Commissioner is satisfied that, on the balance of probabilities, NIHE does not hold further photographs of works carried out on the complainant's property during the period specified in the request.

## **Section 1 – General right of access**

### **Section 10 – Time for compliance**

36. Section 1(1) of FOIA provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

37. Section 10(1) provides that –

“... a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

38. The complainant submitted his request for information on 25 September 2020 and NIHE responded to it in writing on 28 October 2020, 23 working days later. By failing to respond to the request within 20 working days, NIHE breached sections 1 and 10 of FOIA.

39. However, the Commissioner recognises that, in effect, the complainant received all the information he was entitled to under FOIA, on or before 2 October 2020, the photographs being supplied to him in response to the complaint he pursued with NIHE that nobody had visited on 11 September 2020.

40. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft “Openness by design”<sup>2</sup> strategy to improve standards of

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<sup>2</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

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 his “Regulatory Action Policy”<sup>3</sup>.

## **Other matters**

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### **Section 45 - Internal review**

41. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so and, where an authority chooses to offer one, the section 45 code of practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
42. The complainant requested the internal review on 5 November 2020 and NIHE provided it on 15 December 2020, 28 working days later. While it would have been desirable for NIHE to have responded within 20 working days, the Commissioner notes that in that period, NIHE was actively engaging with the complainant about the concerns that underpinned his request (the repairs to his property) and that some headway was being made there. The Commissioner also recognises that, at the same time, NIHE’s resources were under considerable pressure due to the COVID-19 pandemic. He is sympathetic to the difficult decisions such authorities had to make, between prioritising front-line services and continuing to meet their obligations under FOIA.
43. Taking all the above into account, the Commissioner is satisfied that NIHE’s handling of the internal review was in accordance with the section 45 code.

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<sup>3</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>



## Right of appeal

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44. 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)

45. 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.
46. 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 .....**

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