



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0276

Decided without a hearing

**Before
KAREN BOOTH
JUDGE**

**STEPHEN SHAW and NIGEL WATSON
TRIBUNAL MEMBERS**

Between

AMANDA LINDSAY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decided on the papers on 8th August 2018 at Field House, London

DECISION AND REASONS

DECISION

1. The decision notice issued by the Respondent on 25 October 2017 (Reference: FS50654409) is not in accordance with the law and the appeal is therefore allowed. The Appellant is not, however, entitled to have any further information communicated to her.
2. The Tribunal substitutes the following decision notice in place of the decision notice served by the Respondent.

Substituted decision notice

On the balance of probabilities, the Council did not hold any further information that fell within the scope of parts (a) to (c) of the request for information.

The Council misinterpreted part (d) of the request for information. That request related to the officers of the Council and the tenant management organisation who actioned the repair “call outs” (and not to the residents who reported the issues to them).

The Council may have held further information falling within the scope of part (d) but, to the extent that it did, that information was exempt from disclosure under the Freedom of Information Act 2000 (“FOIA”) by virtue of section 40(2).

The Council breached sections 10(1) and 17(1) of FOIA.

No steps are required to be taken by the Council.

REASONS

Background to the appeal

3. The Appellant is a leaseholder of a flat in a block of 12 flats (6 council tenants and 6 leaseholders) in Southwark, London. Southwark Council (“the Council”) is the Landlord of the block.

The request for information and the response

4. On 31 August 2016, the complainant wrote to the Council and requested information in the following terms:

“With regards to the attachments, which register repairs works at block 4 in [Complainant’s address], please identify which charges belongs to the leaseholders/council and in which financial year(s).

Also, the following information are missing from the attachments:

- a) SAP dates

- b) *Reference numbers*
- c) *the full name of the companies*
- d) *the name(s) of the person responsible for the call outs."*

This was a follow up request to a request she made on 18/7/16 ("Re: [address of flat] Please forward an e-copy of the Responsive repairs (external part and communal area) for the financial year 2015/16 including itemized costs and descriptions.") The Council responded to that request on 16/8/16 and provided her with two documents (the attachments referred to above); the first of which (page 57 of the bundle) listed all repairs for block 4 and the second of which (pages 58-60) listed "block repairs breakdown for communal re-chargeable costs 2014/15 (the breakdown for 2015/16 was not then available).

5. The Council responded to her request of 31/8/16 on 9/12/16 in the following terms:
 - Request (a) and (b) – It is not possible to provide individual SAP dates/references for each repair. Bulk payments are made covering various repairs carried out over a set period of time.
 - Request (c) – They provided the name of the 8 contractors.
 - Request (d) – The information is exempt from disclosure under section 40(2) of the Freedom of Information Act 2000 ("FOIA").
6. On 4/1/17 the Appellant requested a review of the response. On 17/1/17 the Council advised her that whilst they understood that she was looking for a detailed breakdown of the cost of repairs to her block the Council does not record the cost of repairs in that way. They referred her to a leaflet sent from their Leaseholder Service explaining how the service charge is calculated and they provided links to information about how she could challenge the charge if she wanted to.

The complaint to the Information Commissioner

7. The Appellant made a complaint to the Respondent on 7/11/16 about the Council's delay in responding to her request. On receipt of the Council's review response she made a further complaint about their assertions that the repairs to block 4 can't be broken down and identified and that they do not hold a SAP record for each individual repair, saying: "The Council failed to be fair, transparent and accountable in both occasions to the leaseholder(s). I have proof that the Council is not being sincere in its reply to me. In the past it has disclosed (with SAP dates) all the work carried in my block including the name of the council and the TMO employees." and that relevant information would follow. Detailed background information followed in a communication dated 27/3/17 (pages 63-66).
8. On 21/4/17 the Respondent's Case Officer wrote to the Appellant to explain the investigation process. He advised her that the Respondent would decide: (a) whether the Council was entitled to withhold information relevant to part (d) of her request; and (b) what was the best process for obtaining information held by the TMO under FOIA in relation to work it does on behalf of the Council.

9. The Case Officer wrote to the Council on 21/4/17 raising questions about their reliance on section 40(2), requesting a copy of the withheld information and requesting clarification about how FOIA was understood to apply in relation to information held by the TMO.
10. The Council's Information Governance manager sent a detailed response on 15/6/17. In relation to part (d) of the request she explained that no redactions had been made to the records provided to the Appellant. She advised that the Council holds records that can be cross referenced to identify the names of the tenants in the block and that how the provision of those names would be a breach of the first data protection principle. She explained the relationship between the Council and the TMO and confirmed that the usual practice is to request relevant information from the TMO and provide it as part of the FOIA response.
11. On 8/12/17 (after the Appellant had submitted her appeal to this Tribunal) the Council sent a further response (page 80) to the Respondent. The communication to which the Council was responding was not included in the bundle. This response is referred to further below.

The Information Commissioner's decision

12. On 25/10/17 the Respondent issued her decision (Reference: FS50654409). She decided that: (a) the Council had correctly relied on section 40(2) to withhold information; and (b) the Council had breached sections 10(1) and 17(1) by providing a late response.

No steps were required to be taken by the Council.

The appeal to this Tribunal

13. On 21/1/17 the Appellant appealed to this Tribunal against the Respondent's decision notice. Her grounds of appeal can be summarised as follows.
 - The case hinges on two words; i.e. "call outs". The Council deliberately misinterpreted those words which led to a misunderstanding on the part of the Respondent.
 - She did not want the names of any residents. They do not make "call outs". She knows all the residents and they email each other about problems with the shared services. She is interested in the repairs that are included in the "List of Repairs Carried Out in Your Block", which forms part of the estimated and actual annual service charges. Those repairs are undertaken by external contractors and/or the Council's in-house team. The residents do not contact the contractors/in-house team about such repairs. Residents may either report any faults to the TMO office or the Council and are given a reference number for the complaint. The "call outs" to the contractors/in-house team are made by the TMO or council employees.
 - The record of "call outs" should include certain information (work reference number, SAP dates, description of works and name of TMO/Council employee who made the "call out". Since 2014 the Council started to omit the name of the employee (confusingly she later added that sometimes

they omit the name of the external contractor, although she did not previously mention that this information should also be included in the list).

- The Council charges the leaseholders for each call out, at a cost of £19.40. Sometimes there are several call outs for the same repair because the contractor failed to turn up to carry out the work.
- Because information is being omitted from the list the residents are unable to check that if repairs were needed/carried out and whether the cost of repairs listed isn't also covered by the maintenance agreements between the Council and the external contractors. The result might be that the leaseholders pay twice for the same repair.
- The omission from the list of repairs of the name of the employee who made the call out removes his/her accountability ("ownership") for ensuring the work is carried out and to the right standard.
- The residents recently received the actual service charge for the last financial year and requested a further £660 from each leaseholder.
- It is fair and correct to request the Council to disclose a list of repairs which includes all of the information referred to above "to avoid any assumption of bogus and/or sub-standard repairs. She provided an example of sub-standard work and an example of a repair which did not appear to have been actioned and pointed out some apparent discrepancies in the actual service charges for the year ending 31/3/16.
- She reiterated that the purpose of the appeal is for the employees who made the call outs to be identified in the actual service charges.

14. It appears that the Respondent's Case Officer then wrote again to the Council, as the bundle includes (at page 80) a letter dated 8/12/17 from the Council to the Respondent (the Case Officer's communication was not included in the bundle).

The Council's responses to the questions can be summarised as follows.

- The Council did not consider the request to be ambiguous and rejected any suggestion that they misled the Respondent.
- The information that had been provided to the Appellant received included names of staff involved in the reporting/management of the repair (citing an example), but this is not consistently reported in relation to individual repairs.
- As the Appellant had already received those names (to the extent that they were recorded) the Council took the position that the only information that had not been provided was the names of the residents who had asked for a repair to be completed.
- The process of receiving a request for a repair through to completion involves many officers and the Council does not hold records in such a way that it can identify every officer who has had an input. It would be impossible to identify all of the officers who may have been involved within the appropriate cost limit identified in section 12 of FOIA.

15. The Respondent's Response to the appeal dated 19/12/17 is at pages 31-38 of the bundle. Paragraphs 11 and 12 state as follows: "11. It now appears that the

Appellant's intention was to request information relating to the employees of the Council who were "responsible" for the call outs in the sense of arranging them. 12. For the avoidance of doubt, the Commissioner opposes this appeal both (i) on "the basis that that the Decision Notice itself should be upheld given the reasonableness of the Council's (and the Commissioner's) interpretation of the request and (ii) on the basis that no further information is held, or at least not in a form that could be retrieved without breaching the appropriate cost limit, and in any event would also be exempt under section 40 FOIA."

The Respondent went on to submit as follows:

- A requestor is not entitled to information which the public authority does not hold - and whether it *is* held is determined on the balance of probabilities.
- Paragraphs 16-19 make submissions about the application of section 12 (exemption where cost of compliance exceeds appropriate limit) of FOIA.
- Paragraphs 20-24 explain the law relating to the section 40(2) exemption. Paragraph 27 asserts that the Council's (and the Respondent's) understanding of the Appellant's request was "wholly reasonable" given the use of the words "responsible for", the natural understanding of which was that the person "responsible" for a call out was the person who made the complaint/report that led to it.
- We did not understand paragraph 28.
- The Respondent submitted that: it would be a breach of the first data protection principle to disclose the names of the individuals who required work to be carried out on their homes; it would be unfair to do so; and it would not serve any legitimate interest. Private citizens who live in accommodation run by public authorities have no lesser right to privacy than anyone else.
- There is undoubtedly a public interest in transparency around council expenditure etc. in respect of such repairs. However, there is no legitimate interest in publicising the names of private individuals who suffered from the disrepair and who benefitted from the repairs.
- The information provided to the Appellant included details of relevant Council employees *where that had been recorded*. Further information about each repair might be held by the Council elsewhere but finding it would be extremely protracted and cumbersome and this would inevitably exceed the appropriate cost limit.
- Even if relevant Council employee information could be proportionately retrieved, it would also be exempt under section 40. Such employees are likely to be junior and they would have a reasonable expectation that their details would not be disclosed to the public.

16. On 27/3/18 the Appellant emailed the Tribunal requesting a stay of the appeal due to her need to prepare for a case she had brought in the High Court. That application was refused by the Registrar in her case management directions dated 4/4/18, although the date for final submissions was extended to 8/5/18. The Appellant subsequently provided a final submission (after that deadline) but she also provided further documentation that she wanted us to consider. The Registrar added the final submission to the bundle but decided that the other documentation was not relevant to the appeal and would not be provided

to us (case management directions dated 31/5/18, which were upheld by the Chamber President on 20/6/18).

17. The Appellant started her submission by saying that she was confident that we would want to have access to information about the Council's partnerships with the TMO, the external contractors and agency staff regarding "Responsive Repairs (& major works)." She then made various points under the following headings.

"TMO"

She referred to a 1994 Modular Management Agreement ("MMA") made between the council and the TMO. She said that she had requested a copy of the MMA from the Council but that her request had been refused. She went on to say: "I hope the First Tier tribunal would be able to ascertain if the MMA states weekly or monthly inspections of the council estates by the TMO."

"External contractors"

She referred to issues and documentation relating to the external contractor processes.

"Agency staff"

She said: "I hope that the First Tier Tribunal will be able to ascertain if the TMO currently employs any agency staff in a long-term contract and/or indefinite employment contracts, especially in reference to the TMO Manager's position." She then went on to give her reasons for this.

Our task and the issues we had to decide

18. The Appellant appealed against the Respondent's decision notice to this Tribunal.

Our task is set out in section 58 of FOIA:

58 Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers—

- a. that the notice against which the appeal is brought is not in accordance with the law, or
- b. to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

19. The issues we had to decide were as follows.

- **Issue (a):** Whether part (d) of the request for information was interpreted correctly by the Council (and the Respondent).
- **Issue (b):** Whether further information, falling within parts (a) to (c) was held by the Council.
- **Issue (c):** Whether the Council could rely on section 40(2) of FOIA to withhold information about individuals.

20. The issues that were not relevant to the appeal (or that were outside our remit were as follows).

- What information *should* have been recorded in the service charge lists (as opposed to what *was* recorded). The entitlement in section 1(1) of FOIA (subject to sections 2, 9, 12 and 14) is to information that is *held* by a public authority.
- The facts that the Appellant asked us to ascertain in her final submission about the MMA and about TMO staff.
- The breaches by the Council of the time limits specified in sections 10(1) and 17(1) as they had been accepted by the parties.

Determination on the papers

21. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The bundle of evidence includes lengthy submissions made by both parties and the Council, which were helpful and thorough.

22. The evidence before us consisted of an open bundle of documents (81 pages) and a smaller additional bundle (consisting of the case management directions referred to above, related emails and the Appellant's final submission dated 14/5/18).

What we decided and why

Issue (a)

23. We decided that part (d) of the request was ambiguous and that the more obvious interpretation of it was that the Appellant was seeking the names of officers who had activated the repairs process. We did not agree with the Respondent's assertion that the natural understanding of the words "responsible for" meant the person who made the complaint/report that led to a call out. The Appellant's intention did not, however, become absolutely clear in that respect until her appeal was received, although her communication to the Respondent's Case Officer on 27/3/17 (page 63) made references to the practice, prior to 2014, of the Council/TMO disclosing the names of employees who were responsible for the call outs and supervision of repairs. We did not agree with the Respondent's assertion that the Council's interpretation of the request was "wholly reasonable" although we did not accept that the Council had deliberately misinterpreted it. After seeing the appeal grounds and raising

the issue with the Council, the Respondent should in our judgement have concluded that the request had been (unintentionally) misinterpreted.

Issue (b)

24. The Respondent did not specifically investigate this issue, but it seemed to us that the Appellant was still querying the whereabouts of information that, prior to 2014, was included in the list of repairs included in the estimated and actual service charges (including the SAP dates and the reference numbers). We were satisfied, however, from the Council's explanations that that information was no longer always recorded in the lists and, to the extent that that was the case, it was simply not held by the Council. They provided her with the lists which include the information that they record *now*, without redactions. The key requirement under FOIA is to communicate information that is *held*. Neither the Respondent nor the Tribunal can instruct a public authority in relation to what information it should hold (i.e. record). There may be separate legal requirements about what service charge information should be held by a landlord, but that is a separate issue.

That said, we did note that some of the items on the list *did* include some of the information that the Appellant appeared to be seeking. For examples, on page 27 of the bundle there is a complete list of SAP dates and an almost complete list of work order references. Page 57 includes work order reference numbers and all but one SAP dates and pages 58-60 include works order references and raised/completed dates.

Issue (c)

25. The correct question, in our view, was whether information consisting of the names of the Council/TMO officers who made the repair call outs could (to the extent that it was held) be withheld in reliance on section 40(2) of FOIA.

26. We accepted that it was no longer the Council's practice to routinely record that information in the lists of repairs provided with the service charge information. The Council has acknowledged that it may be recorded elsewhere, but we did not consider that they had made a proper case for refusing to comply with the request in reliance on section 12 (or that the Respondent should have accepted case). We were satisfied, however, that even if this information was held, it would be exempt from disclosure under section 40(2) of FOIA.

27. The names of the Council/TMO officers clearly constitute "personal data" within the meaning of (section 1(1) of the Data Protection Act 1998). Section 40(2) provides an absolute exemption from the requirement to provide information in a case where its disclosure to a member of the public otherwise than under FOIA would contravene any of the data protection principles.

For the purposes of disclosure under FOIA, only the first data protection principle is of likely relevance:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and

(b) [not relevant]”

The only Schedule 2 condition of potential relevance is condition 6(1):

6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

28. The leading case law on condition 6(1) has established that it requires the following three questions to be answered:

- Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
- Is the processing involved necessary for the purposes of those interests?
- Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

29. We accepted that the Appellant was pursuing a legitimate interest. She and her fellow leaseholders are paying a significant amount in service charges and they should have access to clear and detailed information about those charges so that they can check that they have been fairly and properly incurred and calculated.

30. We did not, however, consider that disclosure of the names of the Council/TMO officers who made the call outs was reasonably necessary for the purpose of that interest. The officers in question were likely to be junior members of staff. We did not accept the Appellant’s assertion that the provision of their names is necessary for accountability/“ownership” reasons. It is ultimately the Council/TMO management who are responsible and accountable for the services that are provided to the residents. It is for the management to ensure that they have the right systems in place to ensure that they can trace who makes and follows up the call and that the work is undertaken to the right standard. It is the management who are answerable to the residents with regard to any concerns regarding the service charges and not their junior officers. There are other means by which service charges can be challenged.

In any event, disclosure under FOIA is a disclosure to the world at large. We agreed with the Respondent that the officers concerned would have a reasonable expectation that their details would not be disclosed to the public. Disclosure in our view would be both unwarranted and would amount to an unfair invasion of their privacy.

31. For these reasons, we were satisfied that, even if there was a record of the name of the officer who made each call out, that information would be exempt information by virtue of section 40(2).

Conclusion

32. The Council misinterpreted part (d) of the request for information. However, to the extent that the information the Appellant was actually seeking was held by the Council, that information could be withheld in reliance on section 40(2). On the balance of probabilities, the Council did not hold any further information falling within the scope of parts (a) to (c). The Council has changed the way in which it records the repairs that fall within the service charges. The requirements in FOIA relate to information that is held; they do not specify what information *should* be held. The Respondent's decision notice is not in accordance with the law, primarily because the Respondent incorrectly, in our judgement, concluded that the Council's interpretation of part (d) was "wholly reasonable". However, the Appellant is not entitled to have any further information communicated to her.

Signed: Karen Booth

Judge of the First-tier Tribunal

Date: 27th September 2018

Promulgation date: 3rd October 2018