

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

### **Decision notice**

**Date:** 26 May 2015

**Public Authority:** Rochdale Borough Council  
**Address:** Number One Riverside  
Smith Street  
Rochdale  
OL16 1XU

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

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1. The complainant requested copies of correspondence between Rochdale Borough Council (the Council) and an allotment society. The Council refused to provide the requested information citing sections 40 (personal information) and 41 (information provided in confidence) of FOIA.
2. During the course of the Commissioner's investigation, some information was disclosed to the complainant.
3. The Commissioner has investigated the Council's application of section 40. The Commissioner's decision is that the Council correctly relied on section 40(2) of the FOIA to refuse the request. The Commissioner does not require the Council to take any steps.

#### **Background**

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4. According to its website<sup>1</sup>, the Council has just over 200 allotment plots across 25 sites that it manages directly. It also has 10 self-managed allotment sites with their own Allotment Society. The allotment society referred to in the request is a self-managed allotment site society.

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<sup>1</sup> [http://www.rochdale.gov.uk/leisure\\_and\\_culture/allotments.aspx](http://www.rochdale.gov.uk/leisure_and_culture/allotments.aspx)

5. By way of background to such allotment sites, the Council told the Commissioner:

*"The Council have a statutory obligation to provide land for allotments. Self-managed sites are where the Council still own the land, but responsibility to manage the site is devolved to an Allotment Society made up of plot-holders from the site".*

*Complaints about allotments are dealt with by the Allotment Society in the first instance, and then have right of appeal to the Council. The Council can uphold or revoke Allotment Society decisions about complaints. The Council can also issue warning letters and terminate the tenancy if problems are not dealt with".*

## **Request and response**

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6. On 30 November 2014 the complainant wrote to the Council and requested information about correspondence between Rochdale Council and Bamford Road Allotment Society in the following terms:

*"Could you please supply me with all correspondence between Rochdale MBC and BRAS (Bamford Road Allotment Society), in 2014.*

*Please include copies of material which you hold in the form of paper and electronic records including emails".*

7. The Council responded on 5 December 2014. It refused to provide the requested information. It cited the following exemptions of FOIA as its basis for doing so:
- section 40 personal information
  - section 41 information provided in confidence.
8. The complainant requested an internal review on 15 December 2014. The Council sent him the outcome of its internal review on 23 February 2015 upholding its original position.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 23 February 2015 to complain about the way his request for information had been handled. He clarified the nature of his complaint on 2 March 2015: he does not

accept the result of the internal review and is dissatisfied with the length of time it took the Council to provide its response.

10. During the course of the Commissioner's investigation, the Council disclosed some information within the scope of the request to the complainant.
11. The Commissioner has had the opportunity to consider the remaining withheld information – correspondence between RMBC and BRAS in 2014 up to 30 November 2014, the date of the request. He has found it to comprise of email/letter correspondence between individuals and the Council liaising about matters, including complaints, pertaining to the named allotment society.
12. The withheld information includes correspondence from the allotment society to the complainant. The Commissioner has not considered that correspondence within the scope of the request on the basis that the complainant will already have received a copy. In any event, he considers that such information would comprise the complainant's own personal data and would fall to be considered under the Data Protection Act.
13. The analysis below considers the Council's application of sections 40 and 41 of FOIA to the withheld information in scope of the request.

## **Reasons for decision**

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### *Section 40 personal information*

14. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
15. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act (DPA).
16. The Commissioner has therefore considered:
  - whether the withheld information constitutes personal data; and if so
  - whether disclosure would breach one of the data protection principles.

*Is the information personal data?*

17. The definition of personal data is set out in section 1(1) of the Data Protection Act 1998 (DPA). This provides that, for information to be personal data, it must relate to an individual and that individual must be identifiable from that information.
18. 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 on them in any way.
19. The Commissioner is satisfied that, given the nature of the information and the context in which it was created, the withheld information constitutes information that falls within the definition of 'personal data'.
20. In other words, he is satisfied that it relates to living individuals who may be identified from that data and that it constitutes their personal information. He has reached that conclusion on the basis that the focus of the information is those individuals named or otherwise identified in the correspondence and that the information is clearly linked to them.
21. Having accepted that the information requested constitutes the personal data of living individuals other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.
22. The Commissioner considers the first data protection principle is most relevant in this case.

*Would disclosure contravene the first data protection principle?*

23. The first data protection principle states:

*"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) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

24. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions (and one of the Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

*Would disclosure be fair?*

25. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
- the individual's reasonable expectations of what would happen to their information;
  - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
  - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
26. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.

*Reasonable expectations*

27. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy and also the purpose for which they provided their personal data.
28. In this case, the Council told the complainant:
- "Organisations and members of the public that communicate with the council would not expect their information to be released to the wider public"*
29. In its view, BRAS would have an expectation of confidentiality that correspondence between them and the Council would not be disclosed.
30. In correspondence with the Commissioner the Council said:
- "The Council operates a long-established practice that complaints made to the Council are to be treated confidentially in order to protect the identity of complainants, and in order to ensure that prospective complainants are not discouraged from making complaints by virtue of the fact that their details may be provided to other third parties".*
31. It provided the Commissioner with a link to that part of its website where a statement to that effect can be found.
32. In the Commissioner's opinion it is a generally recognised principle that a person's correspondence is private and confidential, even where the content of that correspondence is with a public authority. He recognises that people have an instinctive expectation that a public authority, in its

role as a responsible data controller, will not disclose certain information and that they will respect its confidentiality.

33. Having considered the nature of the correspondence in this case the Commissioner is satisfied that the data subjects - those members of the public who communicated with the Council - did so with the expectation that such matters would be treated with some degree of confidentiality. In his view, it would not be in their expectation that their correspondence would be disclosed to the world at large as a result of a request made under the FOIA.

#### *Consequences of disclosure*

34. As to the consequences of disclosure upon the data subjects, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
35. The Commissioner considers that disclosure in this case would amount to an infringement into the privacy of the individuals identifiable in the correspondence and has the potential to cause damage and distress, particularly as he has found that disclosure of the information would not have been within their reasonable expectations.

#### *The legitimate public interest*

36. Assessing fairness also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.
37. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
38. The Commissioner considers that the public's legitimate interests must be weighed against the prejudices to the rights, freedoms and legitimate interest of the individuals concerned. The Commissioner has considered whether there is a legitimate interest in the public (as opposed to the private interests of the complainant) accessing the withheld information.
39. In other words, in this case, the Commissioner must consider whether there is a sufficient wider legitimate public interest which would outweigh the rights and freedoms of those individuals who corresponded with the Council regarding the allotment society.
40. In this case the Council told the complainant:

*"... although your request evidences a legitimate interest in requesting the data, this request cannot be fulfilled without prejudice to the individuals rights and freedoms, in particular their right to privacy....".*

41. The Commissioner accepts that legitimate interests include the general public interest in transparency. He notes that, in this regard, the Council has disclosed some information within the scope of the request which goes some way to satisfy any wider public interest. However he has not seen any evidence to indicate that there is a sufficient wider legitimate public interest in this case which would outweigh the rights and freedoms of the data subjects and support further disclosure.

### *Conclusion*

42. As disclosure under FOIA is considered to be disclosure to the public at large and not to the individual applicant, it is the legitimate interests of the public in disclosure that must be balanced against the interests of the data subjects, including their right to privacy.
43. Taking all of the above into account, the Commissioner is satisfied that it would be unfair to the individuals concerned to release the requested information. Disclosure would not be within their reasonable expectation and the loss of privacy could cause unwarranted distress.
44. The Commissioner is therefore satisfied that the Council was entitled to withhold the information under section 40(2) by way of section 40(3)(a)(i).
45. As the Commissioner has concluded that the disclosure of this information would be unfair, and therefore be in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

### *Other exemptions*

46. As the Commissioner is satisfied that section 40(2) was applied correctly, he has not gone on to consider the Council's application of section 41 to the withheld information.

### **Other matters**

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*Delay in internal review*

47. In this case, although the complainant requested an internal review on 15 December 2014, it was not until 23 February 2015 that the Council sent him the outcome of that review.
48. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer, but in no case should the time taken exceed 40 working days.
49. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed. The Commissioner notes the Council's apology for the delay and expects that, in future, internal reviews will be dealt with in a timely manner.



## Right of appeal

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50. 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)

51. 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.
52. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**