

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 June 2017

**Public Authority:** Royal Borough of Kensington and Chelsea  
**Address:** Town Hall  
Hornton Street  
London  
W8 7NX

#### Decision (including any steps ordered)

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1. The complainant has requested information from the Royal Borough of Kensington and Chelsea (RBKC) about a specified property owned by a third party individual. RBKC has neither confirmed nor denied whether it holds the requested information citing section 40(5) FOIA.
2. The Commissioner's decision is that RBKC was correct to rely on section 40(5) to neither confirm nor deny whether the information was held.
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

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4. On 25 July 2016, the complainant wrote to RBKC and requested information in the following terms:

*"1. The record of the visit dated 06<sup>th</sup> May 2016 to which [named individual] makes reference in this email dated 07 June 2016.*

*2. The report about this visit*

*3. A copy of the 'notice of intended entry' which according to this email dated 07 June 2016 was served on the 13<sup>th</sup> May 2016*

*4. The day and the time that should be stated in this 'notice of intended entry' i.e. the date and the time when this 'notice of intended entry' should have been executed. That is the day and time when a health environmental officer should have visited this property at [specific address]*

*5 If this 'notice of intended entry' has not been executed on the day and time scheduled can the council give me the reason why the council has changed its mind by not executing it?*

*6. I would like to know if this 'notice of intended entry' has been served on all the occupiers of this property i.e. the owner who live in the flat made up of the first and second floor and the occupiers of the two flats in the ground floor?*

*7. If this 'notice of intended entry' has not been executed I would like to know if it has been officially cancelled*

*8. If this 'notice of intended entry' has been officially cancelled I would like to know if a 'notice of cancellation' has been served on all the occupiers of this property.*

*9 A copy of this 'notice of cancellation'*

*10. I would like to be provided with any correspondence between the Council and the occupiers of this property at [specific address] concerning this 'notice of intended entry' and its possible cancellation. If this 'notice of intended entry' was not executed there should have been some correspondences between the owner, the tenants of this property and the council concerning the cancellation of this 'notice of intended entry' because they expected that it will be executed on the day and time scheduled."*

5. RBKC responded on 22 August 2016. It stated that the information was exempt in accordance with section 40(2) of FOIA – personal information.
6. On 26 August 2016 the complainant wrote to RBKC setting out that it had a duty under FOIA to confirm whether or not it holds the requested information. A further letter was issued by RBKC on 31 August 2016 advising that its position had altered and it now stated that it could neither confirm nor deny whether the information was held. It relied on section 40(5) FOIA.
7. Following an internal review request dated 18 November 2016, RBKC responded to the complainant on 7 December 2016. It upheld its reliance on section 40(5).

## Scope of the case

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8. The complainant contacted the Commissioner on 27 January 2017 to complain about the way his request for information had been handled. He submitted a detailed letter setting out his position.
9. It is the complainant's assertion that information relevant to the address in question had already been disclosed to him as a complainant and therefore the requested information can be disclosed to him following his FOIA request. He has asserted also that his request is borne out of a moral duty to complain due to his concerns for the wellbeing of the occupants of the address and that in accepting a complaint from him, RBKC has accepted that there is a moral duty placed upon members of the public and accordingly it should disclose the requested information.
10. The complainant has set out that paragraph 6 of schedule 2 to the Data Protection Act 1998 (DPA) sets out that information should be disclosed when it is in the public interest to do so and that disclosure under the FOIA will not constitute an unwarranted intrusion of privacy because the complainant needs the information to prepare a further complaint to protect the health of the occupiers.
11. The Commissioner considers the scope of the case is to determine if RBKC was correct to neither confirm nor deny whether the requested information is held..

## Reasons for decision

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12. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the FOIA to tell the requester whether it holds the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.
13. Section 40(5) of FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be if held, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
14. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to

confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) is met. Section 40(5)(b)(i) sets out that the duty to confirm or deny does not arise in relation to other information if, or to the extent that, either confirming or denying to a member of the public that the requested information is held would contravene any of the data protection principles or section 10 of the DPA. In the circumstances of this case, the RBKC is relying on the first part of section 40(5)(b)(i), ie that complying with section 1(1)(a) would breach one of the data protection principles.

15. In order for section 40(5)(b)(i) to be engaged, two criteria have to be met: first, that confirming or denying whether the information is held would in itself reveal the personal data of a third party and second, that confirmation or denial as to whether the information is held would contravene one of the data protection principles.

*Would the confirmation or denial that information was held reveal the personal data of a third party?*

16. The DPA categorises personal data as data that relates to a living individual from which that individual can be identified.
17. RBKC has stated that visits by Environmental Health Officers to a particular property or properties, the service of notices of intended entry under the Housing Act 2004 and correspondence with the occupiers - ie the information sought by this request - would constitute personal data as it would identify individuals. RBKC has asserted that under FOIA, disclosure of the requested information, if it is held, would constitute disclosure of personal information.
18. The Commissioner acknowledges that there may be circumstances, for example requests for information about investigations or complaints, in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not involved in a complaint or investigation.
19. In the circumstances of this case, the Commissioner accepts that if RBKC confirmed under FOIA whether it held the requested information this would result in the disclosure of personal data. This is because confirmation that the information was held, if indeed it was, would reveal that a specific address had been the focus of an investigation by the Council in respect of environmental health concerns. Such a confirmation would therefore tell the public something about the individuals residing at the address and the owner of that property, namely what action, if any RBKC, had taken in response to a concern

raised by a member of the public. Consequently, it is her position therefore that in this case compliance with section 1(1)(a) of the FOIA would disclose personal data relating to a third party.

*Would confirming or denying the information is held breach any of the data protection principles?*

20. It is RBKC's position that confirming or denying whether it holds the requested information would breach the first data protection principle. This states that personal data should be processed fairly and lawfully and that personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met. The sixth condition of schedule 2 is the most relevant to this case, and this states that:

*'(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.*

*(2)The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.'*

21. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what might be the likely consequences resulting from disclosure.
22. It is RBKC's position that individuals do not expect information relating to complaints received about them or about their address and living conditions to be disclosed and disclosure of that information would constitute an unwarranted intrusion of privacy.
23. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality. Therefore the Commissioner considers that the tenants and/or owner have a reasonable expectation of confidentiality in respect of any action taken following any concern raised by a third party, irrespective of the motive of the third party. Moreover, in the circumstances of this case the Commissioner believes that it would constitute an invasion of the tenants' privacy to publicly confirm that their home had had been the subject of a complaint in relation to the potential environmental safety concerns. The Commissioner therefore believes that confirming whether it holds the requested information under FOIA would be unfair to the tenants and/or owner of the property in question.

24. The Commissioner acknowledges that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects whether the public authority holds or does not hold the information.
25. However, FOIA is motive and applicant blind, and the relevant test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only disclose or confirm or deny it holds information under the FOIA if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.
26. Consequently, whilst it the case that the RBKC has been liaising with the complainant following a concern he raised about the particular address and living conditions, it is clear that the correspondence has been between the complainant and the RBKC and that there has been no disclosure of information to the public at large under FOIA. The Commissioner is satisfied that the correspondence between the complainant and the RBKC is private correspondence and does not create a gateway to disclosure of the requested information under FOIA.
27. As set out at paragraphs 9 and 10, the complainant has asserted that Schedule 2, paragraph 6 of the DPA allows for disclosure of the requested information.
28. The Commissioner recognises that the complainant has argued that he needs the requested information in order to prepare a further complaint to RBKC, action he considers necessary in order to protect the occupants of this particular dwelling. The Commissioner notes that the complainant's concerns would appear to focus on a lack of light and ventilation at the property in question. The Commissioner accepts that the complainant's concerns are no doubt well intentioned. However, in the circumstances of this case given the clear – and reasonable - expectations of the occupants/owner of the property, and the consequences of disclosure, the Commissioner is not persuaded that the legitimate interest in confirming under FOIA whether such information is held outweighs the legitimate interests of the tenants and owner of the property in question.
29. The Commissioner is therefore satisfied that complying with section 1(1)(a) would breach the first data protection principle and that RBKC are entitled to rely on section 40(5)(b)(i) to refuse to confirm or deny whether it holds the requested information.

**Right of appeal**

30. 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 7395836

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)

31. 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.

32. 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 .....**

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