

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

### **Decision notice**

**Date:** 15 March 2021

**Public Authority:** London Borough of Waltham Forest

**Address:** Forest Road  
Walthamstow  
E17 4JF

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

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1. The complainant requested information from the London Borough of Waltham Forest ("the Council") about the history of the poor state of repair of her property. The Council initially refused to provide the information, considering that it comprised the personal data of previous occupants. Subsequently, it provided some information, which it extracted from a spreadsheet. However, it withheld some information under section 40(2) of the FOIA – third party personal data.
2. During the course of the Commissioner's investigation, the Council located some further information which it considered to fall outside the scope of the request. This comprised technicians' comments on faults and issues that had been investigated or repaired.
3. The Commissioner's decision is that the Council correctly withheld some information under section 40(2) of the FOIA. However, having considered the scope of the request, she has determined that the technicians' comments fell within its scope.
4. The Commissioner orders the Council to take the following step to ensure compliance with the legislation:
  - Consider the technicians' comments for disclosure, and provide a response to the complainant in respect of these.
5. The Council must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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6. On 11 March 2020, the complainant wrote to the Council and requested information in the following terms:

*"In March 2019 I moved into a property owned by Waltham Forest Council. The property address is: [redacted]. The property has sufficient disrepairs, which were either ignored by the council or couldn't be fixed long term. Since last year I have been asking the council to provide me with the information about the history of disrepairs for the time when other tenants lived in the property. The council has always ignored my request. However, the situation with disrepairs reached the level where it cannot be ignored. Therefore, please provide me the details of all report disrepairs in the property under the address above. I need the information for at least 5 years before I moved into the property. As I moved into the property on [date], I need the information between [dates]. Please note that I am not requesting any personal data of tenants who lived in the property."*

7. On 7 April 2020, the Council responded. It refused to provide the information, stating that it was exempt under section 40(2) of the FOIA (third party personal data).
8. The complainant requested an internal review on 11 April 2020. The Council sent her the outcome of its internal review on 1 May 2020. It upheld its original position.

## Scope of the case

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9. The complainant contacted the Commissioner on 7 May 2020 to complain about the way her request for information had been handled.
10. The Commissioner wrote to the Council in October 2020. She asked for a detailed explanation of its position.
11. The Council replied on 27 October 2020, stating that it had amended its position and would provide some information to the complainant. It also provided a dataset of information to the Commissioner in the form of an Excel spreadsheet, which included some information about the faults and issues at the property, and the dates on which repairs were requested and/or actioned. The Council explained that it considered that the information about dates would render former occupants of the property identifiable, and that it was, therefore, withholding this information from the complainant under section 40(2) of the FOIA (third party personal data).

12. The Council wrote to the complainant on the same day and provided a bullet-pointed list of the reported faults and issues extracted from the dataset, an example being: "*Windows: Fittings T window catch – broken*". The Council explained to the complainant: "*Please note that any person-identifiable data has been redacted and the list of repairs is not presented in date or chronological order in order to preserve the identity of the residents who logged these requests.*"
13. The complainant then advised the Commissioner that she could not be sure that the information covered the period she had asked for, and pointed out that it appeared to include faults and issues which she herself had reported.
14. The Commissioner asked the Council to consider this. The Council agreed that it had provided information covering a wider period than had been asked for, and had included repairs logged by the complainant herself. It therefore issued a further response to the complainant on 17 November 2020, including in its letter a revised, bullet-pointed list extracted from the dataset, to include only the faults and issues listed between the relevant dates referred to in the request. The Council again redacted dates, and randomised the order.
15. The complainant raised further queries; specifically, she wished to check that no "disrepairs" had been omitted, and argued that she would have expected the date information to have been provided, since she disputed that this was personal data.
16. The Council responded to her on 7 December 2019 and confirmed that it had not omitted any information about specific faults or issues (that is, no rows from the spreadsheet had been withheld in their entirety). It stated again that it considered any redacted information to comprise third party personal data.
17. The complainant confirmed that she wished the Commissioner to issue a formal decision on whether the Council had provided her with everything she was entitled to, falling within the scope of her request.
18. The Commissioner wrote again to the Council asking whether it held any further information falling within the scope of the request. Subsequently, the Council explained that it held some technicians' comments about some of the faults and issues, but it considered that these did not fall within the request for "*details of all report disrepairs*".
19. This decision notice covers whether or not the Council has considered for disclosure everything which it holds falling within the scope of the request, and whether some information was correctly withheld under section 40(2) of the FOIA.

## Reasons for decision

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### Section 1 – what information is held?

20. Section 1(1) of the FOIA states 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.
21. In cases where there is a dispute over whether more information is held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal, when it has considered whether more information is held in cases which it has considered in the past.
22. The Commissioner will consider the complainant's evidence and arguments. She 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. She will also consider any reason why it is inherently likely or unlikely that more information is held.
23. In this case, the Commissioner notes that the information provided to the complainant was extracted from a dataset. It was provided to the complainant in the form of a bullet-pointed list.
24. The unredacted dataset was provided to the Commissioner in the form of an Excel spreadsheet. The Commissioner understands that the purpose of extracting the information from the spreadsheet for the complainant (rather than just redacting the spreadsheet itself) was so that the Council could randomise the order in which the issues had been logged, to avoid a particular matter being linked with any particular individual.
25. The Commissioner has ascertained for herself that no rows were withheld from the spreadsheet in their entirety, and is satisfied that the only information on it which was withheld from the complainant is the information which the Council redacted under section 40(2) – third party personal data. This information is considered further on in this notice.
26. The Commissioner, as previously explained in this notice, returned to the Council and asked whether it held any further information falling within the scope of the request, other than the Excel spreadsheet which it had provided to her.

27. She notes that the Council then explained that it had initially asked the relevant service to "*run off a report*". It was this report which it provided to the Commissioner in the form of an Excel spreadsheet, and from which it extracted the data to provide to the complainant, in randomised and redacted form.
28. The Council agreed to carry out further searches for information, at the Commissioner's request. Having carried out further searches and enquiries, it advised the Commissioner in January 2021 that the technicians who investigate faults and undertake repairs sometimes add notes to its system. These notes had not been included in the report that had been run off before.
29. It had located some technicians' notes that were held, relating to the relevant period. However, the Council's view was that these technicians' notes related to "*repairs carried out*" and not to "*reports of disrepair*". Its position was that the notes fell outside the scope of the request.
30. The Commissioner has considered the wording of the request. She notes that the complainant asked for "*details of all report disrepairs*".
31. The Commissioner is aware that "*all report disrepairs*" is not a phrase which is in common usage.
32. On receiving the request, the Commissioner is aware that the Council did not return to the complainant to clarify exactly what was being asked for. Rather, it initially concluded that any information it held would, in any event, be the personal data of previous occupants of the property. However, during the scope of the investigation, the Council revised its position and disclosed some of the information it held, to the complainant.
33. Since the Council did not return to the complainant for clarification of the phrase "*details of all report disrepairs*", nor of the request as a whole, the Commissioner has considered whether it was possible to carry out an objective reading of the request.
34. Taking the request as a whole, as set out in paragraph 6 of this notice, it is evident that the complainant wished to receive some information about the faults and issues in her property which had been reported to the Council as needing to be repaired, within the specified time-frame, prior to her own occupation. She was noticeably frustrated at the state of her property.
35. The Council explained in a letter to the Commissioner that, in its view, the request extended only to details of *reports of disrepair* and would not extend to details of *repairs carried out*. It considered that the technicians' notes, which it had located, belatedly, during the course of

the Commissioner's investigation, were the latter, and therefore fell outside the scope of the request.

36. The Commissioner has considered the potentially ambiguous phrase "*details of all report disrepairs*" in the context of the whole of the request.
37. She notes that the complainant explained, in the request, that her understanding was that some issues "*couldn't be fixed long term*" and that she had been asking for "*the history of disrepairs for the time when other tenants lived in the property*".
38. In the Commissioner's view, this clearly contextualises the phrase "*details of all report disrepairs*" with the effect that "*details of*" would not only include the faults and issues being logged, or reported, but would also extend to any information about inspections, or attempts to repair the faults and issues. In her view, the relevant details would include such matters, since the complainant has made it clear she is asking for "*the history*" of these matters.
39. She considers that the Council did not interpret the words "*details of*" widely enough, in the context of the remainder of the request.

#### **The Commissioner's decision – the scope of the request**

40. The Commissioner has, therefore, determined that the notes added by the technicians fall within the scope of the request.
41. She orders the Council to consider this information for disclosure, and either to disclose it, or issue a response in respect of it which complies with its obligations under the freedom of information legislation.

#### **Section 40(2) – third party personal data**

42. The remainder of this notice concerns the information redacted by the Council after it extracted and randomised the information it held before including it in a letter to the complainant. The information was redacted under section 40(2). The complainant does not accept that the redacted information would comprise personal data, nor that it would be unlawful to disclose it.
43. 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(3A)(3B) or 40(4A) is satisfied.

44. In this case, the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
45. The first step for the Commissioner is to determine whether the withheld information constitutes personal data, as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.
46. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

47. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

48. The two main elements of personal data are, therefore, that the information must relate to a living person, and that the person must be identifiable.
49. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
50. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
51. In this case, the withheld information comprises more details of the reported issues at the relevant property. Specifically, it comprises the precise dates on which the faults or issues were reported, or the dates on which inspection appointments were arranged for.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.



52. The Council had initially considered that all of the requested information would comprise the third party personal data of the property's previous occupants, since it related to a specific property that was identified in the request. However, it subsequently disclosed the nature of the faults and issues during the course of the investigation.
53. The Council's view is that it would be unlawful to disclose the information it redacted; that is, the dates, because it is personal data. In reaching this view, it considered the redacted information alongside other information that is already in the public domain (either because it was disclosed in response to the request, or because it was generally known by individuals in the community, including the address of the relevant property).
54. The Commissioner notes that the redacted information provides more detail about the faults and issues. She agrees that the redacted information makes it easier to link the reported matters to specific occupants, since it comprises specific dates.
55. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to and indirectly identifies the former occupants of the relevant property. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
56. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
57. The most relevant DP principle in this case is set out at Article 5(1)(a) of the GDPR and is known as principle (a).

**Would disclosure contravene principle (a)?**

58. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

59. In the case of an 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 lawful, fair and transparent.

***Lawful processing: Article 6(1)(f) of the GDPR***

60. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent*



*that at least one of the* lawful bases for processing listed in the Article applies.

61. Therefore, in order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

62. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*<sup>2</sup>.

63. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is therefore necessary to consider the following three-part test:-

i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

64. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks"*.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"*.

*(i) Legitimate interests*

65. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
66. In this case, the Commissioner considers that the requester has a private, legitimate interest in the history of the faults and issues at her property, since she evidently remains dissatisfied as to the property's state of repair. The Commissioner is not aware of any wider concerns over the failure of the Council to repair its properties in a timely manner; however, she accepts that there is also a general legitimate interest in transparency over the condition of council properties.

*(ii) Is disclosure necessary to meet the legitimate interests?*

67. 'Necessary' means more than desirable, but less than indispensable or of absolute necessity. Accordingly, the test is one of reasonable necessity, and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
68. In this case, the complainant has been unable to obtain the information via another means and the Commissioner is not aware that it is otherwise available. The Commissioner is therefore satisfied that there is no less intrusive means by which the complainant is likely to receive the requested information. Disclosure under the FOIA is therefore necessary in this case to meet the legitimate interests.

*(iii) Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms*

69. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response

to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

70. In considering this balancing test, the Commissioner may take into account some or all of the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
71. In the Commissioner's view, a key issue is whether the individuals concerned have 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, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
72. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to an individual.
73. In this case, the information relates to faults and issues in a particular property, which has been identified in the request. The Commissioner is satisfied that the issues relate to the previous occupants' home life and to the condition of their home. She has already determined that the redacted information may render these individuals more likely to be identified within the wider community.
74. The Commissioner notes that the information relates to such matters as broken toilet flushes and poor heating. She considers that these details relate to the way the individuals were living in the property, and that disclosure of this information, when linked to the individuals, would be intrusive. She also considers that the individuals would not expect the Council to make public such details of their lives at home.
75. The Commissioner is aware that some information about the faults and issues at the property has already been disclosed by the Council. However, she is mindful that the withheld information about dates makes it more likely that specific individuals can be linked with information about specific faults and issues.
76. The complainant has pointed out that she is already aware of who lived in the property prior to her own occupation. However, the

Commissioner's remit is to determine if the redacted information should be disclosed under the FOIA. Disclosure under the FOIA is disclosure to the public, and is the equivalent of the Council uploading the information to its website, or displaying it on its noticeboard outside its offices.

77. While there is a legitimate interest in knowing whether the Council kept the property in a state of good repair, the Commissioner does not consider that this is sufficient to outweigh the rights and freedoms of the individuals, taking into account the intrusive nature of the information, in this case.
78. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
79. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on, separately, to consider whether disclosure would be fair or transparent.

### **The Commissioner's decision**

80. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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81. 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@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)

82. 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.

83. 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 .....**

**Phillip Angell  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**