

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2023

Public Authority: Regulator of Social Housing
Address: 7-8 Wellington Place
Leeds
LS1 4AP

Decision (including any steps ordered)

1. The complainant has requested information relating to a self-referral by the London Borough of Redbridge. The above public authority ("the public authority") relied on section 31 (law enforcement) and 41 (breach of confidence) of FOIA to withhold the requested information.
2. The Commissioner's decision is that the public authority has correctly engaged section 31 in respect of all the requested information. However, the balance of the public interest only favours maintaining the exemption in respect of some of that information. For the remaining information, the balance of the public interest favoured disclosure at the point the request was responded to.
3. For reasons that will be explained, the Commissioner does not consider that it would be proportionate to order remedial steps.

Request and response

4. On 14 November 2022, the complainant wrote to the public authority and requested information in the following terms:

"I am writing to you under the Freedom of Information Act 2000 to request the following information. Please may you provide me with:

1. What inspection or other regulatory oversight work has been carried out with regards to the London Borough of Redbridge, in the last five years?
2. Please provide documents, emails or other written communications between RSH and LB Redbridge with regards to the 'self-referral' made in June this year.
3. Please specify the duration of time with which the RSH believes that LB Redbridge has not been compliant with the Home Standard, including whether there is any known start date, or what earliest known point of time is that LB Redbridge has been in breach from.
4. Please provide details of 'a programme to rectify these failures' referred to in this notice
[https://www.gov.uk/government/publications/london-borough-of-redbridge--4/regulatory-notice-london-borough-of-redbridge-28-september-2022.](https://www.gov.uk/government/publications/london-borough-of-redbridge--4/regulatory-notice-london-borough-of-redbridge-28-september-2022)"
5. The public authority responded on 12 December 2022. It denied holding information within the scope of element 1, but confirmed that it held information within the scope of the remaining elements. However it withheld this information and relied on section 31 of FOIA in order to do so. It upheld this position following an internal review.

Scope of the case

6. The complainant contacted the Commissioner on 14 April 2023 to complain about the way his request for information had been handled. He challenged the public authority's reliance on section 31, but did not challenge its assertion that it did not hold further information.
7. During the course of the investigation, the public authority changed its stance. It argued that the information within the scope of element 4 had now been published and was therefore technically "exempt" under section 21 of FOIA. It additionally relied on section 41 of FOIA to withhold the requested information.

Reasons for decision

8. Section 31 of FOIA allows a public authority to withhold information whose disclosure could harm either its own or another public authority's ability to enforce the law. Section 31(2)(c) extends that protection to

determining the extent to which any regulatory action is or might be necessary.

9. The public authority explained that it considered that disclosure would be likely to prejudice one or more of its regulatory functions:
- register and de-register providers of social housing subject to them meeting our eligibility requirements and registration criteria;
 - gather intelligence to inform our assessment of a private registered provider by reviewing their submitted quarterly survey returns; carrying out annual stability checks of their business plan and annual accounts; and undertaking periodic In Depth Assessments using a risk-based approach to assess providers' financial strength, risk profile, approach to value for money and their quality of governance;
 - assess and grade, through published Regulatory Judgements, how well [Registered Provider]s are managing their risks;
 - investigate cases where a provider may be in breach of our standards, and where there has been a breach of the standards, we will work with the provider to resolve the issues; and
 - identify and communicate emerging trends and risks at a sector and sub-sector level and maintain confidence of stakeholders, such as lenders

10. The public authority explained in its refusal notice that:

"We have to maintain a level of flexibility in our regulatory approach and working with a non-compliant [Registered Provider] RP requires an iterative approach, since actions can be taken which significantly change the situation. The regulator's response and involvement can be subject to daily or even hourly change.

"Disclosing documents that show how our regulatory activity is evolving at one moment in time would undermine our approach within the sector since the specific context is key. The correspondence may also give a very false picture of the individual organisation and cumulatively if snapshot documents are released, the overall position of the sector would be misunderstood with potential negative consequences...

"Although we have a suite of regulatory powers we can use where RPs are failing to meet our standards, most of our regulatory work, certainly in the initial stages of enhanced regulatory oversight, is done in co-operation with RPs, who supply information to us voluntarily.

This information is almost always provided on the understanding that the individuals will not be identified, and that the information will be protected from future disclosure. We consider this approach to be key to retaining confidence in the regulator and that disclosure of the information would discourage RPs and other sector organisations from co-operating with us and supplying information on a voluntary basis. Co-operation between the regulator and those we regulate is important. Organisations are encouraged to report problems and work with us to resolve them and that co-operation means problems can be sorted out more quickly and effectively. Although we have the powers to compel the supply of information from RPs, there is a clear public interest in not deterring the voluntary supply of information.

“Public knowledge of the details of those discussions and measures taken by RPs to put things right, often at a critical time for the organisation, would inhibit RPs desire to discuss and co-operate openly and confidentially with the regulator about issues as they emerge, potentially leading to more significant risk that our standards will not be met, and reducing the regulator’s ability to ensure effective plans are put in place to resolve the issues at an early stage. Less detailed information could also result in poor decision making by both RPs and the regulator.”

11. The public authority explained that, in its view, there was considerable information in the public domain explaining the decision it had taken and the action being taken by the London Borough of Redbridge (“the Council”) and that disclosure would damage its relationship with the Council in particular and other providers in general – particularly as the referral had been voluntary.
12. The Commissioner accepts that the lower bar of “would be likely to” prejudice is met here.
13. In *Department for International Trade v Information Commissioner & Montague* [2022] UKUT 104 (AAC) “the Montague case”, the Upper Tribunal determined that the correct point at which to assess the balance of the public interest is the point at which the public authority was required to respond to the request (ie 20 working days) or, if earlier, the date on which it actually did respond.
14. Whilst the judgement in the Montague case (which is binding on the Commissioner) only concerned the public interest test, the Commissioner considers that the implication of the judgement is that, where a prejudice-based exemption is relied upon, he must judge the likelihood and severity of that prejudice on the basis of the facts as they stood at the point that the public authority issued (or should have issued) its refusal notice.

15. The public authority responded to this request on 12 December 2022. At that point, it had already issued its regulatory notice but the Commissioner accepts that it would have been monitoring the Council's performance in dealing with the issues that had caused the notice to be issued in the first place.
16. The Commissioner also accepts that, as a general rule, in order to perform their role effectively, regulators (such as the public authority) rely on a continual flow of information to and from those they regulate. The regulated bodies are more likely to hand over information they consider sensitive if they are confident that the regulator will keep it confidential.
17. Whilst most regulators have powers to compel the provision of information they require, the use of those powers can be cumbersome. Therefore the Commissioner accepts, in principle, that, where disclosure of information harms a regulator's ability to access information, other than by exercising its formal powers, harm is caused to the regulator's ability to regulate and hence to enforce the laws it is charged with upholding. However, each case must be looked at on its own individual facts.
18. In this particular case, the Commissioner is sceptical that the likelihood of prejudice is as high as the public authority claims.
19. Firstly, the public authority had already issued its regulatory notice at the point the request was responded to – and the majority of the withheld information concerns the process that culminated in the issuing of that notice. Therefore, whilst the Commissioner accepts that follow-up work may have been ongoing at the time of the request, the first stage of the regulatory process had been completed and an outcome published. The Commissioner is therefore sceptical that the disclosure of information relating to that first stage would be capable of causing significant harm to any ongoing work that the public authority may be doing with the Council.
20. Secondly, the Commissioner notes that, as a public authority itself, the Council should be well aware that any information it provides to another public authority may be subject to an information request. The Council would (or, at least, should) also have known that, in referring itself to the public authority, it was exposing itself to the risk of adverse publicity – yet it chose to do so anyway. The Commissioner is therefore not persuaded that possibility of information being disclosed under FOIA significantly increases the risk or the severity of any adverse publicity beyond that which would follow as a result of any regulatory notice that identified failings. Given that any additional harm would be marginal,

the Commissioner is not persuaded that this should be a significant factor in a provider's decision to self-refer or not.

21. That being said, the Commissioner does accept that disclosure could still cause some harm. Whilst disclosure in this case might not necessarily discourage other providers from self-referring, there is a realistic possibility that, having self-referred, they are less willing to share more sensitive information with the public authority. Whilst the public authority could make use of its formal powers, that would be likely to take longer.
22. Finally, the Commissioner notes that disclosure of the withheld information may also reveal some of the tactics the public authority uses to determine where regulatory intervention may be necessary. Disclosing such information could make it easier for providers in future to shape their answers in such a way as to avoid regulatory attention.
23. Therefore, on balance the Commissioner is persuaded that the exemption is engaged.

Public interest test

24. The public authority has explained to the Commissioner (and the Commissioner agrees) that there should be a strong public interest in protecting the ability of a regulator to go about its business and to uphold the law as effectively as it can.
25. However, the Commissioner considers there to also be a very strong public interest in disclosure of information relating to standards in social housing – particularly when, as is the case here, basic health and safety standards were not met, potentially putting tenants at risk.
26. Those living in social housing are more likely to be in a vulnerable group (such as those with disabilities or those with lower proficiency in English). Although this is certainly not the case for every social housing tenant, the Commissioner also considers that, as a group, they are also less likely to be properly aware of the extent of their rights and less likely to be aware of how to exercise those rights or to be able or willing to do so. Therefore, where a large provider of social housing admits that it may not have been adhering to the standards required of it, there is a strong public interest in understanding how that came about and what is being done to fix things. That better allows tenants to hold that provider to account.
27. Where the balance is to be struck between those competing interests should be determined on the individual facts of each case.

28. As has previously been mentioned, the Montague case requires the Commissioner to make an assessment of where the balance of the public interest lay at the point at which the public authority responded to the request: 12 December 2022.
29. The public authority has drawn the Commissioner's attention to numerous documents that the Council's cabinet considered in a meeting it held on 24 January 2023. These include a background report setting out the history of the issue and summarising contact with the public authority. They also include a copy of the Council's action plan and its current performance dashboard. The Commissioner understands that a further version of the Council's action plan has since been published.
30. Whilst the Commissioner accepts that this information is in the public domain now, he does not accept that it was there at the point the public authority responded.
31. The Council is required by law to publish the agenda and any background papers for a public meeting, at least five days before that meeting is due to take place.¹ Even if the Council were particularly efficient and published the information a month in advance of the meeting, it would still not have been in the public domain on 12 December 2022 – the point at which the public authority responded to the request. The Commissioner has therefore placed no weight on this information in his consideration of where the balance of the public interest should lie (although he will return to this matter later).
32. On 21 December 2022, the Council's cabinet was presented with a report covering the replacement of fire doors on its properties – this was an aspect of the regulatory notice, but only one aspect. This meeting took place just nine days after the public authority responded so it is not clear whether it would have been in the public domain when the refusal notice was issued.
33. Even if the Commissioner were to accept that the Council had been diligent and published the report for the 21 December meeting sufficiently early for it to have been available at the point the request was responded to (which seems unlikely), he still does not consider that the public interest in the matter was fully satisfied.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/207528/Your_councils_cabinet_-_going_to_its_meetings_seeing_how_it_works.pdf

34. The information that has been withheld contain much more detail about the extent of the issues identified, how they came about and the action the public authority was and is taking to rectify those issues than the information that was in the public domain at the time of the request.
35. The public authority's regulatory notice does contain some details of the extent of the issues, but it contains no detail about how these issues came about and no details about what steps the Council is taking to put things right – except for a vague reference to a "programme to rectify these failures." That programme, according to the statutory notice, was sufficient for the public authority to conclude that more formal action was not necessary – even though a failure to meet the required standards had occurred.
36. It is clearly for the public authority (and not the Commissioner) to determine when and what regulatory action is justified in any given scenario. However, given that this matter relates to steps required to ensure that people's homes are safe, the Commissioner considers that there is a strong public interest in understanding what undertakings the Council gave to the public authority in order to avoid regulatory action. That then allows the public to hold the Council to account for meeting those undertakings.
37. Within the withheld information, there are numerous back-and-forth emails which discuss arranging meetings, considering the wording of a draft notice and acknowledging other correspondence. The Commissioner is satisfied that such information would add little to public understanding and therefore he considers that the balance of the public interest would favour maintaining the exemption in respect of such information.
38. However, in the Commissioner's view, what was in the public domain when the request was responded to does not go far enough to satisfy the public interest in understanding why the Council's tenants were put at "risk of serious detriment" and, crucially, what steps it was taking to put matters right.
39. The Commissioner therefore takes the view that the balance of the public interest would favour disclosing the notes from meetings at which the Council's compliance was discussed, the emails from the Council explaining the current situation and the updates from the Council as to its current and intended future progress.

Remedial steps

40. In situations where the Commissioner determines that a public authority has withheld information when it was not entitled to do so, the Commissioner would normally order the public authority to disclose the information. On this occasion, he has exercised his discretion and decided not to do so.
41. The information the Council published prior to its cabinet meeting of 25 January 2023 provided considerable detail about how the Council's issues had come about and, for the first time, the work it was undertaking in order to address the issues identified.² Had this information been available at the point the request was refused, it is likely that the Commissioner's decision would have been different.
42. FOIA provides a right of access to information – not documents. Whilst the documents that the Council has published are not the same as the documents the public authority is withholding, much of the information they contain is substantially the same.
43. The public authority is not (as it tried to claim) now entitled to rely on section 21 (reasonably accessible) to "withhold" the information: it was not reasonably accessible at the point the request was refused. Nor is the Commissioner entitled to take the material into consideration when assessing where the balance of the public interest lies.
44. However, in the Commissioner's view, it would be disproportionate to require the public authority to prepare documents for disclosure (bearing in mind that the public authority will need to redact personal information from the documents and their metadata before they can be disclosed) when their contents are now substantively in the public domain – and were there before the public authority had concluded its internal review.
45. In the particular circumstances, the Commissioner has therefore exercised his discretion and notwithstanding his decision above, has decided not to require any remedial steps to be taken.

² <http://moderngov.redbridge.gov.uk/ieListDocuments.aspx?CIId=267&MIId=8500&Ver=4>

Other matters

46. Given his decision not to require remedial steps, the Commissioner does not need to make a formal determination of whether section 41 of FOIA was engaged. However, had he been required to do so, it is likely that he would have found that it was not engaged.
47. Firstly, it is a basic requirement of the exemption that information can only be covered if it has been provided by another party. The public authority relied on this exemption to withhold meeting notes and emails it had sent to the Council itself. Whilst some of the information these documents contained had been provided by the Council, much of it had not and therefore section 41 could not have applied.
48. Secondly, in order to establish the conditions for a breach of confidence, the confider must demonstrate that an unauthorised use of the information had, or would, cause them detriment. In the Commissioner's view, no proper detriment was established. The public authority did not specify what the detriment was or why it might arise, but it appeared to be suggesting that the detriment would have been the reputational damage the Council might suffer if the information were to be made public.
49. The Commissioner considers that any reputational damage to the Council would emerge from the fact that it had been found to have breached the Home Standard and put its tenants at "risk of serious detriment." He therefore takes the view that, to the extent that the withheld information would further damage the Council's reputation, that damage would not be unwarranted.

Right of appeal

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: 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

Roger Cawthorne
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