

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 September 2014

**Public Authority:** Rugby Borough Council  
**Address:** Town Hall  
Evreux Way  
Rugby  
CV21 2RR

#### Decision (including any steps ordered)

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1. The complainant has requested information about Rugby Borough Council's monitoring of building work at an adjoining property. Rugby Borough Council refused the request, stating that the information was exempt from disclosure under section 40(2) of the FOIA.
2. The Information Commissioner's decision is that the Council was correct to refuse the request as the exemption provided by section 40(2) of the FOIA was engaged.

#### Background

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3. The complainant lives in a terraced house and has concerns about work done by the tenant of the adjoining property, which is owned by Rugby Borough Council ("the Council").
4. The complainant considers that the work breaches building regulations and is unsafe. The Council's position is that the work has been properly checked by the Council and is safe.

5. In investigating this matter, the Commissioner has not been made aware of whether or not the work in question complies with building regulations. No statement in this decision notice should be taken as indicating whether or not the building regulations have been complied with.

## Request and response

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6. On 2 February 2014 the complainant wrote to the Council and requested the following information:

*"We made a Freedom of Information request in December 2013 to establish when building control visited the property to view a shed in the garden of the property. We were informed that this visit took place on 12<sup>th</sup> June 2013.*

*Further to this, can the following request be answered:*

*After building control were contacted on 3 May 2013 and then again on 15 May 2013 about a breach of building regulations at [address redacted], when was the property visited and the necessary checks made to the internal works, namely electrical work and structural work."*

7. The Council responded on 7 March 2014. It stated that the information was exempt from disclosure and cited the exemption at section 40 of the FOIA. It commented on the earlier disclosure as follows:

*"The date of the inspection by building control to inspect the shed at [address redacted] was supplied to you, as this was following a complaint from you that the shed had been constructed in such a way that it was causing damage to the shed on your property."*

8. The Council provided contact details for an officer with whom the complainant could discuss the matter and details of how to complain about the outcome of the request.

9. The complainant emailed the officer on 12 March 2014 and requested an internal review. The officer acknowledged receipt of the request on 17 March 2014 and confirmed that an internal review was being conducted, but the complainant heard nothing further.

## Scope of the case

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10. The complainant contacted the Commissioner on 15 May 2014 to complain that he had not received an internal review of the Council's decision.
11. In the first instance, the Commissioner asked the Council to let the complainant know the outcome of the internal review. The Council failed to do this so the Commissioner has used his discretion and considered the complaint in the absence of an internal review.
12. The Commissioner has considered whether the information requested is environmental, and thus covered by the Environmental Information Regulations 2004 (EIR) rather than the FOIA. Whilst information relating to building matters will sometimes be classed as "environmental" under regulation 2(1)(c) of the EIR, this is due to the effect that the measures recorded within this information would have on environmental elements and factors referred to in regulations 2(1)(a) and (b). Where information records measures that would not have an impact upon any of those elements and factors, this information would not be environmental.
13. In this case the information relates to alterations to the interior of a property. The view of the Commissioner is that the measures to which this information relates would not have any effect upon the elements and factors listed in regulations 2(1)(a) and (b) and so the information is not environmental. The Council was therefore correct to deal with the request under the FOIA.
14. The Commissioner therefore went on to investigate whether the Council was entitled to apply section 40(2) of the FOIA to withhold the requested information.

## Reasons for decision

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### Section 40 – Personal information

15. The Council has relied on section 40(2) of the FOIA to withhold information relevant to the complainant's request.
16. Section 40(2) provides an exemption from disclosure for information which is the personal data of any third party and where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 ("the DPA").

17. In order to rely on the exemption provided by section 40, the information being sought must constitute personal data as defined by the DPA. The DPA defines personal data as:

*"...data which relate to a living individual who can be identified*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller..."*

18. The information in question here relates to building work carried out by the complainant's neighbour. It is possible that information relating to a property might not be the personal data of an occupier of that property where, for example, there are multiple occupants of a property and it could not be said that information about the property relates to an *individual*.
19. In this case, however, the Commissioner notes that the information does relate specifically to alterations to a property made by an individual. That individual is the tenant of the property, the Council being the landlord. Although the tenant is not named in the request, the Council holds information about his identity as part of the tenancy agreement. The requester also clearly knows his identity.
20. The Commissioner considers that this information relates not only to the property, but also more specifically to the alterations made to the property by the tenant. When viewing this information as a whole in the context of the complainant's information request, the Commissioner's view is that this information does relate to an individual and that this individual is identifiable from the information and other information in both the Council's possession and the requester's possession. The information in question, therefore, constitutes the personal data of an individual other than the requester.
21. The Commissioner has gone on to consider whether disclosure of the requested information would breach any of the data protection principles contained in schedule 1 of the DPA. He considers that the first data protection principle is the one most relevant in this case.

*The first data protection principle*

22. The first data protection principle deals with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. It states that:

*"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..."*

23. In the case of an FOI request, 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 meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
24. In forming a conclusion on this issue, the Commissioner has considered the consequences of disclosure upon the data subject, their reasonable expectations as to whether the information would be disclosed, and the legitimate interests of the public in having access to the information.

*Consequences of disclosure on the data subject*

25. Although generally the identity of a requester is irrelevant when considering a request, in this case the requester is the data subject's neighbour. The Commissioner has therefore considered the repercussions for the data subject of the information becoming known in his local area, when assessing the consequences of disclosure.
26. In considering the consequences of disclosure on the data subject, the Commissioner has also paid particular attention to the wording of the request. Central to the request was the assertion that the Council had visited the property because the work breached building regulations. In responding to the request by disclosing the requested information (the dates of visits) the Council might be seen to be publicly confirming the requestor's assertion.
27. The Commissioner considers that the data subject might reasonably find such a disclosure to be distressing and embarrassing and, particularly because it might become known locally, that it would have the potential to have a detrimental impact on him, irrespective of whether or not the work actually had breached building regulations.

*Reasonable expectations of data subject*

28. The Council asserts that the data subject would have a reasonable expectation that the conduct of his tenancy and the nature of any alterations he might make to the interior of the property which did not require planning permission and which were carried out to the Council's satisfaction, would remain between him and the Council, and would not be made publicly available.

29. The Commissioner considers that most people would hold some expectation of privacy about the details of changes they make to the interior of their homes. The Commissioner's view is therefore that, for the reasons set out above, the data subject would have a reasonable expectation of privacy in relation to the information.

*Public interest in disclosure*

30. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. 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.
31. The complainant has stated that his interest in the information stems from concerns about how the work carried out by his neighbour impacts on his property. The Commissioner accepts that the complainant has a legitimate personal interest in accessing the information.
32. However, the Commissioner's published view<sup>1</sup> is that the private interests of the requester, or even of a small group of people, are not relevant in the context of assessing the public interest in disclosure of personal data. Section 40(3) refers to "*the disclosure of the information to a member of the public*", not disclosure to the requester specifically. Furthermore, as disclosure under the FOIA is considered to be disclosure to the public at large and not to the individual requester, it is the legitimate interests of the public in disclosure that must be balanced against the interests of the data subject; in other words, whether disclosure would tend to be of benefit to all.
33. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf)

understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.

34. In this particular case, while it has refused the request, the Council has responded to the complainant's wider concerns by informing him that it is aware of the work at the adjoining property, and that it is satisfied that it poses no risk to the complainant's property or to the safety of other people living there. Given that the Council owns the property, and therefore has a vested interest in its upkeep and liability for the safety of the tenant, the Commissioner considers the assurances to have credibility.
35. Furthermore, the Council has explained to the Commissioner that in cases where building regulations have been contravened, it attempts, where possible, to get things put right through informal means, before resorting to formal enforcement action. It is at the point of formal enforcement that information about the problems with a particular build, such as those alleged by the complainant, would normally be made public.
36. Disclosure in this case, under FOIA, would therefore place into the public domain information which would not otherwise be publicly available. This would be unfair to the data subject, whose treatment would have deviated from the Council's established procedure. It could also undermine confidence in and cooperation with the Council's informal resolution process in future cases, and this would not be in the public interest.

### *Conclusion*

37. Having considered all the above factors, the Commissioner's conclusion is that disclosure of the requested information would not be fair to the data subject. In reaching this decision the Commissioner has placed particular weight on the fact that the information relates to the data subject's private life and the assurances that the Council has given about the work carried out by the data subject.
38. Since one of the requirements of the first data protection principle is that processing must be fair to the data subject, disclosure would therefore breach the first principle. Consequently, the Commissioner finds that the Council was entitled to apply section 40(2) to withhold the requested information.

## **Other matters**

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### **Section 45 – internal review**

39. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one the section 45 code of practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
40. The complainant asked for an internal review of the outcome of his request on 12 March 2014 and on 17 March 2014 the Council confirmed that one was being conducted. However, it did not subsequently provide the complainant with the outcome of the internal review, and it has not explained why.
41. The Commissioner considers that in offering but failing to conduct an internal review, the Council has not conformed with the section 45 code.



## Right of appeal

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42. 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)

43. 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.
44. 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 .....**

**Jon Manners**  
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