

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 January 2014

**Public Authority:** London Borough of Redbridge  
**Address:** Redbridge Town Hall  
128-142 High Road  
Ilford  
Essex  
IG1 1DD

### Decision (including any steps ordered)

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1. The complainant requested a copy of a Redbridge Homes report concerning the affairs of a then company employee. London Borough of Redbridge (the Council) refused to provide the requested information, citing section 40 (personal information).
2. The Commissioner's decision is that the Council was entitled to withhold the information on the basis of section 40(1) and 40(2) of FOIA. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### Request and response

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3. Following earlier correspondence, on 14 June 2013 the complainant requested information of the following description:

*"As you are aware, I have previously asked for a copy of the Kiani Report.*

*This request was denied on the grounds that there was an employment tribunal due to take place.....*

*I again ask for a copy of the Kiani Report, which I hope this time will be forthcoming. Can you please now provide me with a copy of the Kiani Report?"*

4. The Council responded on 24 July 2013. It told the complainant:

*"I would refer to the RHL [Redbridge Homes Ltd] decision, notified by [name redacted]'s letter of the 8th of August 2012, on your FOIA review request. I must advise you that the company stands by its refusal of your request for disclosure of the Kiani report, on the grounds originally specified.*

*I note that the Information Commissioner, when considering your reference of the matter to his office, suggested that circumstances might change in relation to the application of the relevant exemption, were the report to be aired in public at an ET hearing of the [name redacted] proceedings. As you will know, however, the [name redacted] case was settled without the need for a hearing, and on terms that remain confidential between the company and [name redacted].*

*In these circumstances, the company's position is that the exemption applies equally now as when you made your original request for disclosure of the report".*

5. By way of background, in its letter of 8 August 2012 – the letter referred to in its correspondence of 24 July 2013 - the Council had refused to provide the requested information, citing section 40(2) (personal information) of the FOIA as its basis for doing so.
6. The complainant requested an internal review on 25 July 2013. He told the Council:
- "As you can understand, this is not the response I was hoping for, especially as the possible employment tribunal proceedings have ceased".*
7. The Council sent him the outcome of its internal review later the same day - 25 July 2013 - upholding its original position.

### **Scope of the case**

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8. Further to his previous, related correspondence, the complainant contacted the Commissioner on 26 July 2013 to complain about the way his request for information had been handled.
9. By way of background, he told the Commissioner:

*"Redbridge Homes Ltd was set up by the London Borough of Redbridge in 2007 as a not for profit ALMO (Arms Length*

*Management Organisation) to manage the council's housing stock..... since the 1st August 2012, the management of the housing service has transferred back to LBR".*

10. Referring to his earlier request for the same information, he told the Commissioner:

*"The employment tribunal case has now been concluded. I again requested the Kiani Report, only for the London Borough of Redbridge to again refuse this request".*

11. During the course of the Commissioner's investigation, the Council wrote to the complainant advising him of his separate right, under the Data Protection Act 1998 (DPA), to make a Subject Access Request (SAR) in relation to his own personal data. The Commissioner understands that, rather than make such a request, the complainant chose to defer making a SAR pending the outcome of this complaint into his request for information under FOIA.
12. In light of the above, the Commissioner considers the scope of his investigation to be whether the Council was entitled to withhold information within the scope of the request on the basis of section 40(2). However, the Commissioner will consider exemptions not cited by a public authority where he considers it appropriate to do so and will have particular regard to his dual role as regulator for the DPA as well as the FOIA when considering taking this approach. To the extent that the withheld information contains the complainant's personal information, the Commissioner has also pro-actively considered section 40(1).

## **Reasons for decision**

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### *Section 40 Personal information*

13. Section 40 of FOIA provides an exemption from the right to know where the information requested is personal data protected by the DPA.
14. Section 40(1) of FOIA provides an exemption for information that constitutes the personal data of the requester:
- "Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."*
15. Section 40(2) of the FOIA provides that information is exempt if it is the personal data of an individual other than the requester and where the

disclosure of that personal data would be in breach of any of the data protection principles.

*Is the requested information personal data?*

16. The definition of personal data is set out in section 1 of the 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.
17. 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.
18. The withheld information in this case comprises a report into a disciplinary investigation relating to the former Chief Executive of Redbridge Homes. Having considered the withheld information, the Commissioner is satisfied that, in the context of the request, the withheld information constitutes information that falls within the definition of 'personal data' as set out in section 1(1) of the Data Protection Act 1998.
19. He has reached this conclusion on the basis that the information comprises personal data relating to the third party who is the focus of the report as well as, to a limited extent, the personal data of other individuals also referred to in the report, including the complainant.

*The complainant's personal information*

20. Section 40(1) provides that information that is the personal data of the individual making the information request is absolutely exempt from the FOIA. No consideration of the data protection principles is necessary when considering this subsection: if the information is the personal data of the person making the request it is exempt.
21. The Commissioner is satisfied that the requested report contains information from which the requester can be identified. The Commissioner considers that it is appropriate that any decision as to whether or not a data subject is entitled to be provided with their personal data should be made in accordance with the DPA.
22. In this respect, he is satisfied that the Council has written to the complainant explaining about his right to proceed with a subject access request.

*Third party personal information*

*Would disclosure breach one of the Data Protection principles?*

23. The Commissioner has next considered the Council's citing of the exemption provided by section 40(2) of the FOIA. This provides that information is exempt if it is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
24. Having accepted that the information within the scope of his investigation includes the personal data of third parties, the Commissioner must consider whether disclosure of that information would breach one of the data protection principles. He considers the most relevant principle in this case is the first principle.

*The first principle*

25. The first principle deals particularly with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data.
26. 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 meet one of the DPA Schedule 2 conditions (and Schedule 3 conditions if relevant). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
27. The Commissioner's considerations in this case have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

*Reasonable expectations of the data subjects*

28. In considering the expectations of the data subjects at the time of the request, the Commissioner will have regard to the extent to which the information is, or remains, in the public domain, factors he considers would shape a data subject's reasonable expectations.
29. The Commissioner also recognises that it is reasonable to expect that a responsible public authority will not disclose certain information, and that it will respect confidentiality

*Reasonable expectations of the data subject – the former Chief Executive*

30. The Commissioner is of the opinion that disclosing personal data is generally less likely to be considered unfair in cases where the personal data relates to an individual's public or professional life rather than their private life. The threshold for releasing professional information will generally be lower than that in releasing information relating to an individual's private or home life. However, even for senior posts, there may be a reasonable expectation that information, for example information relating to some personnel matters, would not be disclosed.
31. The Commissioner acknowledges that there will be circumstances where, for example due to the nature of the information and/or the consequences of it being released, the individual will have a strong expectation that information will not be disclosed.
32. In that respect, the Commissioner acknowledges that information relating to an internal investigation or disciplinary hearing will carry a strong general expectation of privacy.
33. This is in line with the Tribunal's finding in the case of *Waugh v Information Commissioner and Doncaster College* (EA/2008/0038) when it said:

*"...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters."*
34. The Commissioner has also taken into consideration that, in the context of the request in this case, the matter under investigation - which was to have been the subject of an Employment Tribunal - was settled without the need for a public hearing.
35. In the Commissioner's view, the fact that the information at issue was not disclosed at that time is likely to contribute to the data subject's expectations that the information would not be made public in the future.

*Reasonable expectations of the data subjects – other individuals*

36. The Commissioner considers the nature of the information itself and the consequences of it being released are factors which will help shape the expectations of the data subject as to whether their personal data would be disclosed to the public.
37. In this case, the Commissioner is satisfied that it is plausible for those who have some knowledge of the report to recognise individuals either

directly or indirectly as a result of the content and context of the withheld information.

38. The Commissioner considers that the expectations of those parties referred to in the report would be that the related information about them would not be disclosed to the world at large.

*Consequences of disclosure*

39. When considering the consequences of disclosure on the data subjects, the Commissioner has taken into account the nature of the withheld information. He has also considered the fact that disclosure under freedom of information legislation is disclosure to the public at large and not just to the complainant.

*Consequences of disclosure – the former Chief Executive*

40. In the Commissioner's view, the data subject would be likely to regard the information in question as private and would reasonably expect their former employer to respect this. In general an employee would expect that certain types of information relating to them that is held by their employer, or former employer, would be kept confidential. Such information would include personnel and disciplinary matters.
41. In reaching a decision in this case, the Commissioner has also taken into account the fact that, rather than being heard in public, the anticipated employment tribunal proceedings were concluded without a hearing. In other words, the disputed information was not made public as a result of tribunal proceedings.
42. As a result, his conclusion on this point is that disclosure into the public domain of the information in question would be likely to cause distress to the data subject.

*Consequences of disclosure – other individuals*

43. In light of the nature of the information and the reasonable expectations of the individuals concerned, as noted above, the Commissioner is satisfied that release of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the individuals in this case.

*Balancing the rights and freedoms of the data subject with legitimate interests*

44. 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.

45. The Commissioner notes that the complainant has personal reasons for requesting the information. However, 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. In considering 'legitimate interests', such interests can include the general public interest in transparency and any public interest in disclosing the specific information.
46. The Commissioner accepts that there is a wider public interest in transparency of public sector organisations. However, in the circumstances of this case, he does not consider that the legitimate interest in the public accessing the withheld information would outweigh the potential damage and distress which could be caused to the data subjects by disclosure of that information. Therefore the Commissioner is unable to conclude that disclosure of the withheld information is necessary to meet a legitimate public, rather than personal, interest.
47. In view of the above, the Commissioner is satisfied that the withheld information is personal data and that disclosure of any of it would breach the first data protection principle as it would be unfair to the individuals concerned. As the Commissioner has determined that it would be unfair to disclose the requested information, it has not been necessary to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA is met. The Commissioner therefore upholds the Council's application of the exemption provided at section 40(2) of the FOIA.
48. As section 40 is an absolute exemption there is no need to consider the public interest in disclosure separately.



## Right of appeal

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49. 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: 0116 249 4253

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)

50. 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.
51. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**SK9 5AF**