

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2018

Public Authority: Regulator of Social Housing
Address: Fry Building
Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant's request concerns the information that the Regulator of Social Housing ('RSH') used when coming to a conclusion on a complaint he submitted to it about Selwood Housing. RSH released some information and withheld some under section 31 (law enforcement), section 40(2) (third person personal data) and section 42 (legal professional privilege).
2. The Commissioner's decision is that the information RSH has withheld engages the exemptions under sections 31(1)(g), 40(1) and 40(2) and, with regard to section 31(1)(g), the public interest favours maintaining the exemption.
3. The Commissioner does not require RSH to take any steps to ensure compliance with the legislation.

Request and response

4. On 13 November 2017 the complainant wrote to RSH and requested information in the following terms:

"Your organisation reviewed a complaint about my RSL [Registered Social Landlord] Selwood Housing. I wish to make a Freedom of Information Request and would be grateful of copies of all the information the regulator used when making its conclusions."

5. RSH responded on 5 January 2018. It released some information falling within the scope of the request; namely incoming complaint referrals, papers RSH generated when considering the complaints and two documents created for research purposes. RSH had redacted information from this material under section 31, section 40(2) and section 42. RSH observed that the complainant would know what some of the redacted information is but noted that release under the FOIA is effectively release to the wider world and its decisions had been made in that context, rather than considering the complainant's identity.
6. RSH provided a review on 2 March 2018. It maintained its position with regard to its reliance on sections 31(1)(g) and 31(2)(c), 40(2) and 42. RSH advised that some of the personal data that had been redacted under section 40(2) is the complainant's own personal data. It advised him to submit a subject access request under the Data Protection Act 1998 for his own personal data.
7. In addition, RSH told the complainant that some information had been redacted because it did not fall within the scope of his request; it acknowledged that its response had not been clear on that point. Finally, RSH acknowledged that a very small amount of information had been incorrectly redacted and it released this to him.

Scope of the case

8. The complainant first contacted the Commissioner on 19 January 2018 to complain about the way his request for information had been handled.
9. The Commissioner is aware that this is a request for information concerning a complaint that the complainant himself submitted to RSH – it concerns information held in his own complaint file. For reasons discussed in the Commissioner's published guidance on 'Information

Held in Complaint files¹, the Commissioner is nonetheless satisfied that RSH was correct to handle the request under the FOIA.

10. RSH has advised that it has withheld some information because it considers that it does not fall within the scope of the complainant's request. The Commissioner has reviewed this information. It comprises points that the relevant RSH team should include in its response to the complainant; the complaint having been considered and the decision made. The Commissioner is prepared to accept that this particular information is not covered by the complainant's request, which concerns information on how RSH made its decision. This information therefore falls outside the scope of the Commissioner's investigation.
11. The Commissioner's investigation has focussed on whether RSH can rely on sections 31(1)(g)/31(2)(c), 40(1) and 40(2) to withhold information within the scope of the complainant's request. She has gone on to consider the public interest test with regard to section 31(1)(g).

Reasons for decision

12. RSH has explained its role to the Commissioner. It says that the regulation of social housing is the responsibility of the Regulation Committee. This is a statutory committee of the Homes and Communities Agency (HCA) as specified at section 92B of the Housing and Regeneration Act 2008 (HRA). The HCA refers to itself as the RSH when it is undertaking the functions of the Regulation Committee.
13. Parliament has tasked the RSH with two fundamental objectives: the economic regulation objective and the consumer regulation objective. These RSH objectives are set out at section 92K of the HRA. The regulatory powers given to the RSH at chapter 6 of part 2 of the HRA permit the RSH to set regulatory standards and to consider whether registered providers of social housing are complying with these standards. Where there is evidence of non-compliance the RSH may use its enforcement powers which are set out at chapter 7 in part 2 of the HRA.
14. The RSH has internal procedures which it operates to determine whether a registered provider of social housing is meeting the standards. Where

¹ https://ico.org.uk/media/for-organisations/documents/1179/access_to_information_held_in_complaint_files.pdf

the RSH receives information or a complaint that a registered provider is failing to meet one or more of the standards the RSH will consider the information or a complaint using these internal procedures in order to determine whether a registered provider has breached a standard.

15. In the consideration of consumer matters the RSH will focus on whether there is material evidence of systemic failure on the part of the provider. The review process adopted by the RSH is to set up a Consumer Regulation Panel (CRP). The CRP is made up of representatives from different teams within the RSH. The membership of the CRP will vary each time it is convened. The objective of the CRP is to reach a corporately-owned decision about whether there may be a breach of the consumer standard and serious detriment (a statutory requirement under section 198A of the HRA prior to certain action on the part of the RSH in relation to consumer standards) and to determine whether or not the issue warrants further investigation. All decisions are to be recorded in the CRP notes to give a complete audit trail of the decisions taken by the CRP.
16. The RSH will also undertake reactive engagement work which falls outside of its planned programme of engagement with registered providers if there is reason to believe that a particular registered provider may be failing to meet an economic standard.
17. Details of the decisions taken by the RSH in the course of any reactive engagement are recorded in the Reactive Engagement Decision log (RED). The key decisions covered by this process are:
 - Compliant grade changes
 - Placing a provider on the Gradings Under Review list (this list is published on the internet)
 - Non-compliant grade changes
 - Significant points in a case (such as agreeing the strategy or considering a voluntary undertaking)
 - Undertaking or concluding investigations or responses to allegations
18. RSH says that releasing information concerning its deliberations about a registered provider of social housing can have consequences for the provider concerned, even if the regulator determines that it is not necessary to take regulatory action.

Section 31 – law enforcement

19. The Commissioner has reviewed the information RSH has withheld under section 31(1)(g)/31(2)(c). It comprises some information within:
 - a CRP note dated 3 August 2017
 - a CRP note 4 September 2017; and
 - a RED log
20. It also included an email from an in-house solicitor dated 10 August 2017. In its correspondence to the complainant, RSH had indicated that it was relying on section 42(1) with regard to this email (legal professional privilege) but RSH has confirmed in its submission to the Commissioner that it is now relying on section 31(1)(g) with regard to this particular information. The email broadly concerns a chronology of various housing organisations' registrations/de-registrations with the Housing Corporation, and name changes.
21. Section 31(1)(g) of the FOIA says that information is exempt information if disclosing it under the Act would, or would be likely to, prejudice the exercise by any public authority of its functions for any for the purposes specified in subsection (2).
22. The purpose that RSH has cited is under section 31(2)(c) of the FOIA. This is the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. In order for section 31(1)(g) of FOIA to be engaged, the RSH must be able to demonstrate that the potential prejudice being argued relates to the interest contained in section 31(2)(c).
23. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice 'would' occur, the second that prejudice 'would be likely' to occur. In its submission, the RSH has stated that disclosure *would* cause real and significant prejudice to the exercise of its regulatory functions. However, the reasons it has then given concern individuals or providers being *likely to be* dissuaded from making complaints, or to cooperate with regulatory investigations, or to manipulate future investigations. On balance, the Commissioner considers that the RSH's position is that the likelihood of prejudice arising through disclosure is one that would be likely to occur, rather than one that would occur. Although this limb places a weaker evidential burden on the RSH to discharge, it still requires the RSH to be able to demonstrate that there is a real and significant risk of the prejudice occurring.
24. Since the Commissioner is considering the application of section 31(1)(g) with subsection (2)(c) she has first considered whether the

RSH is formally tasked with ascertaining whether circumstances would justify regulatory action. From its description of its role, provided above, the Commissioner is satisfied that the RSH is formally tasked with ascertaining whether circumstances would justify regulatory action.

25. The Commissioner has therefore next gone on to consider the RSH's arguments as to why it considers disclosing the withheld information would be likely to prejudice its ability to ascertain whether circumstances would justify regulatory action.
26. In its submission to the Commissioner, RSH has confirmed that it considers that, other than personal data withheld under section 40(2), the information withheld under section 31(1)(g) reveals RSH's internal procedures and decision-making processes and strategies in relation to the exercise of its regulatory and enforcement powers.
27. RSH says that, as a statutory body, it must pursue its objectives as set out in the HRA. When pursuing those functions it is constrained by the scope of its powers and the HRA specifically requires RSH to exercise its functions in a way that minimises interference and is proportionate. The RSH must demonstrate an efficient and effective approach to its stakeholders and the fee-paying providers it regulates. Accordingly, the RSH has established a co-regulatory settlement, as is explained in the publication: *Regulating the Standards*.
28. In line with this co-regulatory approach, RSH says that it endeavours where possible to carry out its functions using its influence within the social housing sector, and relying on co-operation from providers and interested parties. This means that although the RSH has formal powers (including information gathering powers) they are generally used by exception and the RSH relies on the co-operation and transparency of the providers it regulates, and co-operation from interested third parties. In particular, RSH says it encourages:
 - providers to voluntarily co-operate in investigations concerning potential non-compliance with standards; and
 - tenants and other interested parties to report any serious concerns they may have about providers.
29. Self-referrals from providers, and complaints and referrals from third parties, form a significant proportion of the intelligence the RSH relies on in order to perform its statutory functions.
30. The RSH has told the Commissioner that if providers and/or third parties became concerned that referrals and considerations about non-compliance will be made public in their entirety, that will have a 'cooling effect' on the provision of information to the RSH. Any such cooling

effect will make it more difficult for it to perform its statutory functions in a timely, efficient and proportionate fashion.

31. *Safe space for regulatory deliberations*: According to RSH, it is vital to maintain a 'safe space' in which to consider and record the information it holds about providers, from whatever source, about performance against standards. Seeing matters in the round and considering intelligence from across the organisation is likely to result in better, and more proportionate and consistent, regulation.
32. RSH says it is also vital that in the course of its deliberations about compliance with regulatory standards, it should be able to test arguments for and against regulatory actions and to do so free from scrutiny. RSH says its staff must feel at liberty to engage in a candid exchange of information and to record the arguments considered in minutes and decision-making logs. Again, this helps ensure that the RSH is able to perform its statutory functions appropriately, achieving consistency, proportionality, parity and fairness in decision-making and regulatory engagement.
33. *Prejudice*: In light of the factors set out below, the RSH has confirmed that it continues to take the view that disclosing the withheld information would cause real and significant prejudice to the exercise of its statutory functions, for the following reasons:
 - I. Other individuals are likely to be dissuaded from raising complaints with the RSH for fear that those complaints will be released to the public in their entirety. The RSH is accordingly likely to be prejudiced in achieving its statutory functions, in particular in relation to regulating in a proportionate, consistent way which minimises interference.
 - II. Providers are likely to be dissuaded from co-operating with regulatory investigations, for fear that information about them will be released in the same way. The RSH is accordingly likely to be prejudiced in achieving its statutory functions, in particular in relation to regulating in a proportionate, consistent way which minimises interference.
 - III. Providers will see in detail how RSH reached its conclusions in this case, and may use that information to manipulate future investigations into their own performance and compliance. This will make it more difficult for the RSH to achieve its statutory regulatory functions.
 - IV. All of the above will potentially result in an overall lowering of the standards of performance of registered providers and an

undermining of the public confidence in regulation of registered providers. This will increase the cost and difficulty associated with the RSH achieving its statutory regulatory functions.

34. Given the nature of the withheld information, including the email from the in-house solicitor, and based on the RSH's arguments, the Commissioner is satisfied that the RSH is tasked with ascertaining whether circumstances would justify regulatory action. Its ability to fulfil this function effectively is dependent upon it being able to gather information and correspond with public authorities efficiently whilst it looks into performance. Releasing the information in question would allow other providers to see how RSH reaches its conclusions in complaint cases that are brought to it- for example what intelligence it considers. It might also deter organisations from cooperating with RSH in the future. The Commissioner therefore accepts that disclosure would be likely to result in the prejudicial effects to the RSH's purposes described at section 31(2)(c) of FOIA. The Commissioner finds that RSH correctly applied section 31(1)(g) with subsection (2)(c) to the withheld information, in this case.

Public interest test

35. Section 31 is subject to the public interest test. This means that even if the exemption is engaged, it may still be released if there is sufficient public interest in doing so.

Arguments in favour of disclosing the withheld information

36. The RSH has identified that there is public interest in understanding how the RSH collects information, investigates the complaints it receives and reaches its decisions.
37. The RSH has also identified that there is public interest in transparency, so that the RSH can be called to account, and that releasing the withheld information would provide an opportunity to challenge and make comment on the actions and decisions of the RSH.
38. Finally, the RSH considered that there may sometimes be a valid interest in releasing information about historical cases.
39. In correspondence to the Commissioner, the complainant has indicated that there is public interest in an individual being able to reflect on the merits of a case; to see and understand the way conclusions were reached and what was considered.
40. The complainant has also told the Commissioner that it was reported in the press at the end of 2013 that RSH had received 269 complaints about social housing providers and had not investigated a single one.

However, the complainant has acknowledged that the current regulatory process is new, having been introduced in 2017. The complainant then says that at April 2018, RSH had received eight complaints and rejected all of them. The complainant disputes that the process is fair and argues that RSH should be open and transparent.

Arguments against disclosing the withheld information

41. RSH has argued that there is public interest in it achieving its statutory objectives in a proportionate, consistent, efficient way that minimises interference. As set out above, the RSH has identified that releasing the withheld information would be likely to harm RSH's ability to exercise its statutory functions in the way mandated by the HRA.
42. There is also a public interest in ensuring that social housing providers perform to the standards set by the RSH, and in the public having confidence in the regulations of such providers. As set out above, the RSH has identified that releasing the withheld information would be likely to damage both the performance of registered providers, and confidence in regulation.
43. In particular, as the Commissioner has recognised in her own published guidance on section 31, there is a public interest in not discouraging co-operation between regulated bodies and/or third parties with public authorities such as the RSH. For example by supplying them with the information they need on a voluntary basis. As set out above, the RSH has identified that releasing the withheld information would be likely to discourage such co-operation.
44. The RSH says it acknowledges the public interest in understanding how it functions and makes its decisions. However:
 - i. The RSH already provides reasons for its regulatory decisions in specific cases, including by providing information directly to the complainant (as happened in this case).
 - ii. The RSH considers that while the complainant might have a personal interest in additional information being disclosed to him, beyond what has been supplied as part of the investigation of his case, that is not the same as there being a wider public interest in the release of the information. In fact, the RSH considers that releasing the withheld information in this case does not serve a wider public interest.
 - iii. In relation to the potential public interest in historical cases, which is recognised by the RSH, steps are already taken to publish lessons learned reports, and an annual review of

consumer regulation is made publically available on the RSH's website.

- iv. In relation to the general public interest in understanding how the RSH operates, sufficient to enable public comment and challenge, the RSH considers that it already provides a wide range of general information about how it conducts its regulatory activity. The RSH has provided the Commissioner with a range of links on its website.

Balance of the public interest

45. The Commissioner appreciates that the complainant has concerns about Selwood Housing and about RSH's performance. However, RSH considered the complainant's complaint and did not uphold it. While Selwood Housing may be of interest to the complainant, the Commissioner is not aware of any, more widespread, concerns about this provider or, indeed, about RSH. Such concerns *might* have tipped the balance in favour of RSH's decision making process being disclosed on this occasion. RSH considered the complainant's complaint and has disclosed to him some information associated with his complaint. The Commissioner considers this step, and the other measures RSH has outlined, satisfactorily meet RSH's duty to be transparent.
46. On balance, and in the absence of any broader concerns about Selwood Housing, the Commissioner considers that, on this occasion, the public interest in favour of disclosure, such as it is, is outweighed by the public interest in favour of maintaining the exemption in order to ensure that RSH's regulatory functions are not prejudiced.

Section 40 – personal data

47. The Commissioner has reviewed the information RSH has withheld under section 40. It comprises some information within:
 - correspondence from the complainant
 - the CRP note 3 August 2017
 - the CRP note 4 September 2017; and
 - the RED log.

Section 40(1) – applicant's own personal data

48. Section 40(1) of the FOIA says that information is exempt information if it is the applicant's own personal data and releasing it would breach the

first data protection principle (that personal data should be processed fairly and lawfully).

49. In its submission to the Commissioner, RSH has confirmed that it has withheld the complainant's name, signature, address and details of his work under section 40(1). (RSH appeared to have relied on section 40(2) in its correspondence with the complainant). The withheld information is included in letters that RSH received from the complainant in which he makes complaints and raises allegations about another person. The Commissioner is satisfied that the complainant could be identified from this information and that this information is therefore his own personal data. The Commissioner considers that the complainant would have the reasonable expectation that his personal data would not be released to the wider world under the FOIA. To do so would not be fair and would breach the first data protection principle. As such, the Commissioner is satisfied that RSH has correctly withheld this particular information under section 40(1).

Section 40(2) – third person personal data

50. Within the complainant's correspondence, RSH has withheld under section 40(2) the name of an employee of Selwood Housing about whom the complainant raises particular allegations.
51. With regard to the CRP notes and RED log, RSH has also withheld under section 40(2) the names of its own employees who were engaged in internal deliberations about the performance of a registered provider, and the names of employees of Selwood Housing.
52. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and the conditions under either section 40(3) or 40(4) are also satisfied. At the time of the RSH's internal review response the Data Protection Act 1998 (DPA) was still in force; it has subsequently been superseded by the General Data Protection Regulation and the DPA 2018.

Is the information the personal data of a third party/third parties?

53. The DPA says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable.
54. The Commissioner is satisfied that individuals can be identified from their names and that this information therefore constitutes their personal data. She has gone on to consider whether any of the conditions under section 40(3) or 40(4) of the FOIA have been satisfied.

Is a condition under section 40(3) or 40(4) satisfied?

55. Under section 40(3)(a) disclosing the personal data would contravene (i) any of the data protection principles or (ii) section 10 of the DPA (right to prevent processing likely to cause damage or distress).
56. RSH's position is that disclosing the information in question would not be fair or lawful and would therefore contravene the first data protection principle.
57. In assessing fairness, the Commissioner considers whether the information relates to the public or private life of the individuals; whether the individuals have consented to their personal data being released, their reasonable expectations about what will happen to their personal data and the consequence of disclosure on the individuals concerned.
58. With regard to the individual about whom the complainant raised allegations, RSH argues that this person has the reasonable expectation that any allegations about them should be properly considered in an appropriate forum. Releasing that person's name puts him or her at the heart of the allegations made by the complainant.
59. With regards to its own members of staff and those of Selwood Housing, RSH has told the Commissioner that the conduct of deliberations undertaken by RSH employees is not public facing. Although the members of staff named in the CRP notes and RED log would expect their attendance at the meeting to be reflected in the meeting record, they would not expect that their personal information would be released. RSH has confirmed that disclosing the names of Selwood Housing's employees would also not be fair and would breach the first data protection principle.
60. The Commissioner agrees that the individuals concerned would have the reasonable expectation that their personal data would not be released to the wider world under the FOIA. However despite this, the withheld information may still be disclosed if there is a compelling public interest in doing so that outweighs the legitimate interests of those individuals.
61. The Commissioner understands that the complainant has particular concerns about Selwood Housing, with RSH considering his resulting complaint. The outcome of the complainant's complaint was that RSH concluded that there was no breach of consumer, tenant involvement or home standards on the part of Selwood Housing.
62. RSH has both considered the complainant's complaint and released to him the majority of the information he requested through the FOIA. The Commissioner has considered the complainant's correspondence to her about Selwood Housing but, having taken account of RSH's

considerations and findings above, she has not been persuaded that there is a wider public interest in the withheld information that would outweigh the rights and freedoms of the individuals concerned.

63. Disclosing the information would contravene the first data protection principle and therefore a condition under section 40(3) has been met. RSH can withhold the third person personal data under section 40(2) of the FOIA. Since a condition under section 40(3) has been met it has not been necessary to consider the condition under section 40(4).

Right of appeal

64. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

65. 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.
66. 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

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