



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2018/0250

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50721457
Dated: 4th October 2018**

Appellant: Elisha Manasseh

Respondent: The Information Commissioner

Date of hearing: 13 March at Field House, London

Date of decision: 2 May 2019

Before

**Anisa Dhanji
Judge**

and

**Suzanne Cosgrave
Pieter de Waal**

Panel Members

Subject matter

FOIA section 31(1)(g) - whether disclosure would or would be likely to prejudice the effective conduct of public affairs; section 2(2)(b) whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

DECISION

The appeal is allowed.

We direct that the Regulator of Social Housing must provide the disputed information (as defined in our decision), to the Appellant within 35 working days of this decision being promulgated.

Except as set out above, the Commissioner's Decision Notice is upheld.

Signed

Anisa Dhanji

Judge

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REASONS FOR DECISION

Introduction

1. This is an appeal by Mr Elishah Manasseh (the “Appellant”), against a Decision Notice (“DN”), issued by the Information Commissioner (the “Commissioner”), on 4 October 2018.
2. It concerns a request (the “Request”), made by the Appellant for disclosure of information under the Freedom of Information Act 2000 (“FOIA”). The Appellant wanted to know what information the Regulator of Social Housing (“RSH”) used, when deciding his complaint about his regulated social landlord, Selwood Housing (“Selwood”).
3. The RSH disclosed some information to the Appellant, but refused other information, citing various exemptions in FOIA.

RSH’s Role

4. It may be helpful to begin by explaining what RSH does. The following summary is based on the Commissioner’s Response, which in turn, is drawn from explanations provided by RSH. It is not in dispute.
5. RSH is a statutory committee responsible for the regulation of social housing under section 92B of the Housing and Regeneration Act 2008 (“HRA 2008”). It was formerly part of the Homes and Communities Agency (“HCA”), but became a separate entity from the HCA (now Homes England), on 1 October 2018.
6. RSH has two key statutory objectives, namely economic regulation, and consumer regulation. It has powers to set regulatory standards, and to monitor compliance with those standards. It also has enforcement powers, and a statutory duty to exercise its functions in a way that minimises interference, and is proportionate, consistent, transparent and accountable.
7. RSH has internal procedures which it operates to determine whether a registered provider of social housing has breached the relevant standards. Consumer matters are considered by a Consumer Regulation Panel (“CRP”), made up of representatives from different teams within the RSH. CRP is mandated to reach decisions about whether there may be a breach of the consumer standard and a serious detriment, as a precondition to certain actions on the part of the RSH in relation to consumer standards, and to determine whether or not a matter warrants further investigation. All decisions are recorded in the CRP notes to create an audit trail of its decisions.
8. RSH also undertakes reactive engagement work which falls outside its planned programme of engagement if there is reason to believe that a particular registered provider may be failing to meet an economic standard.

Details of the decisions taken by the RSH in the course of any reactive engagement are recorded in the Reactive Engagement Decision (“RED”) log.

Background to the Request

9. On 17 July 2017 and 21 August 2017, the Appellant complained to RSH about Selwood. The RSH investigated the complaints and produced documents to assist in its investigation. These included CRP notes dated 3 August 2017 and 4 September 2017, a RED log dated 23 August 2017, and an email from an in-house solicitor dated 10 August 2010.
10. Amongst other things, the Appellant complained about the way Selwood’s accounts were presented, that a subsidiary had been set up in 2007 with only two directors, and without proper approval, and that Selwood had failed to provide information he had requested, including lists of company members, and details about certain processes. The specific complaints are more fully set out in the CRP notes dated 3 August 2017.
11. RSH considered the complaints. It concluded, however, that the relevant regulatory standards had not been breached. RSH communicated this to the Appellant on 20 September 2017. It also provided an explanation of the assessment it had carried out in relation to the relevant standards.
12. HCA carried out an internal review of the handling of the Appellant’s complaints by RSH. On 19 December 2017, it concluded that overall, the Appellant’s concerns had been properly considered by the regulator. The Appellant was informed that if he was not satisfied with this outcome, he could refer the matter to the Centre for Effective Dispute Resolution.

The Request

13. The Request, was made on 13 November 2017, on 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 is [sic] conclusions.

14. RSH replied 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 redacted certain information from this material in reliance on the exemptions in sections 31(1)(g), 40 and 42 of FOIA. It explained that some of the information redacted was the Appellant’s own personal data, which would be known to him, but had to be redacted because disclosure under FOIA was to the world at large.
15. RSH also withheld some information comprised within correspondence from the Appellant, the CRP notes dated 3 August 2017 and 4 September 2017, and the RED log. In so doing, RSH relied, in particular, on:

- section 40(1) in respect of the Appellant's own personal data, and section 40(2) in respect of third party personal data.
 - section 31(1)(g), read with section 31(2)(c) (the law enforcement exemption) in respect of some information within the two CRP notes and RED log.
16. RSH also relied on section 42 (legal professional privilege), in respect of an email from an in-house solicitor dated 10 August 2017. However, RSH now relies on section 31(1)(g) in respect of this information.
 17. At the Appellant's request, RSH carried out an internal review of its response, but maintained its position.
 18. Following the internal review, RSH explained, however, that some information which had been redacted was because that information did not fall within the scope of the Request. In addition, it explained that a small amount of information had been incorrectly redacted, and it released this to the Appellant.

Complaint to the Commissioner

19. On 19 January 2018, the Appellant complained to the Commissioner. The Commissioner accepted the complaint on 10 April 2018, after RSH's internal review had been completed.
20. The Commissioner then investigated the complaint. On 4 October 2018, she issued a DN, upholding RSH's decision to withhold the disputed information. She found, *inter alia*, that RSH had correctly relied on the exemptions in section 40(1) and 40(2), as well as section 31(1)(g).
21. She also found that some information (comprising points for RSH to include in its response to the complaint), was not within the scope of the Request, which concerned information on how RSH made its decision.

Appeal to the Tribunal

22. The Appellant has appealed against the DN under section 50 of FOIA.
23. His appeal is limited to the Commissioner's findings in relation to section 31. He has not appealed against her findings in relation to section 40, and accordingly those findings are not in issue in this appeal.
24. The scope of the Tribunal's jurisdiction in dealing with an appeal from a DN is set out in section 58(1) of FOIA. If the Tribunal considers that the DN is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, she ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
25. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the

Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

26. The parties have lodged an agreed open bundle comprising some 455 pages and some further 40 pages lodged separately. In addition, we have been supplied with a closed bundle which includes the disputed information.
27. RSH has not been joined as a party, although we have considered its responses to the Commissioner's investigations.
28. The parties have requested that this appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, we are satisfied that the appeal can properly be determined without an oral hearing.

Disputed Information

29. We will refer to the information still withheld by RSH under section 31(1)(g) as the "disputed information".
30. A number of the redactions have been made in respect of personal data of the Appellant or of third parties. Those redactions are not in dispute, and do not form part of the disputed information.
31. The information that has been identified as falling outside the scope of the Request (which the Appellant has not disputed), also does not form part of the disputed information.
32. The disputed information is relatively limited, in quantity, and in our view, also in significance. As already noted, it comprises some information within a CRP note dated 3rd August 2017, a CRP note dated 4th September 2017, and a RED log.
33. It also includes e mail correspondence in respect of which RSH had previously indicated that it was relying on section 42(1) (legal professional privilege), but which it has since said it is now relying on section 31(1)(g). The emails concern a chronology of various housing organisations' registrations/de-registrations with the Housing Corporation, and relevant name changes. In particular, they concern the registration history of Selwood and its subsidiary Silcoa, with Companies House.
34. The closed bundle comprises some 29 pages. Pages 1 to 26 are unredacted versions of documents already provided to the Appellant. Pages 27 to 29 are the internal e mail correspondence referred to above.

Statutory Framework

35. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with it.
36. The duty on a public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA.

37. The exemptions are either “absolute”, meaning that there is no obligation to disclose the information, or “qualified” meaning that there is an obligation to disclose the requested information, unless “*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*” (section 2(2)(b)). This balancing exercise must be undertaken as at the date of the refusal.
38. As already noted, this appeal only concerns the exemption in section 31(1)(g). This is a “qualified” exemption. It is part of a series of exemptions under the broad heading of “*law enforcement*”. So far as relevant, it provides:
- (1) *Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*
- ...
 (g) *the exercise by any public authority of its functions for any of the purposes specified in subsection (2)*
- ...
 (2) *The purposes referred to in subsection (1)(g) to (i) are—*
- ...
 (c) *the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise...*
39. This is a prejudice-based exemption. The public authority must show that in the event of disclosure, the prejudice specified in the exemption *would, or would be likely to arise*. These indicate different levels of likelihood. RSH has relied on the first limb, namely, *would be likely to*.

The Parties’ Position

The Commissioner

40. The Commissioner’s position is set out primarily in the DN, and in her Response to the Appellant’s grounds of appeal.
41. The Commissioner noted that RSH is formally tasked with ascertaining whether circumstances would justify regulatory action. The Commissioner considered that information held for that purpose falls within the scope of section 31(1)(g).
42. She accepted that disclosure of the disputed information would be likely to cause real and significant prejudice to RSH’s regulatory functions. In particular, the Commissioner found that RSH’s ability effectively to ascertain whether circumstances would justify regulatory action is dependent upon it being able to gather information, and correspond with providers and interested parties efficiently, whilst it looks into performance. Releasing the disputed information would allow other providers to see how RSH reaches its conclusions in complaint cases that are brought to it, for example, as to what intelligence it considers. It might also deter organisations from cooperating with RSH in the future. On this basis, the Commissioner accepted that disclosure would be likely to result in the prejudicial effect to RSH’s purposes

described in section 31(2)(c) of FOIA. She concluded, accordingly, that RSH had correctly applied the exemption.

43. The Commissioner then went on to consider the arguments put forward by RSH and the Appellant as to the public interest balance. The public interest in favour of disclosure is the need for transparency and accountability regarding how RSH carries out its functions. The public interest against disclosure is in ensuring that RSH's regulatory functions are not prejudiced, in particular, that social housing providers perform to the standards set by the RSH, that the public have confidence in regulation, and that co-operation with RSH is not discouraged. The Commissioner also noted RSH's position that a safe space was needed to consider and record its processes.
44. The Commissioner considered the Appellant's concerns about Selwood Housing and RSH's performance. However, she was not aware of any more widespread concerns about Selwood Housing or RSH. Such concerns might have tipped the balance in favour of disclosure. She noted that RSH had considered the complaint and disclosed some information to the Appellant associated with his complaint. She considered that this step, and other steps RSH takes (such as publishing reasons for its regulatory decisions in specific cases, as happened in this case, publishing reports on lessons learned, annual reviews, and a range of information about how it conducts its regulatory activity), satisfies RSH's duty to be transparent.
45. On balance, and in the absence of any broader concerns about Selwood Housing, the Commissioner concluded that the public interest in favour of disclosure was outweighed by the public interest in favour of maintaining the exemption.

The Appellant's Position

46. In his grounds of appeal, the Appellant says that disclosure of the disputed information would not prejudice RSH in carrying out its regulatory functions within the meaning of section 31(2)(c), because RSH does not need co-operation from providers, given that it has powers to call for information from them.
47. He also says that there is no evidence to support the assertion that RSH needs a safe space to carry out its duties. He argues that other regulators, such as Ombudsmen and the Grenfell Tower Inquiry, do not require a safe space in which to operate.
48. He further says that the public interest test favours disclosure of the information because it is in the public interest to show how RSH's regulatory process is carried out. Disclosure is necessary for public confidence in the system. Withholding the information does not allow confidence in the system, nor in its fairness.
49. He says that in this case, by refusing to disclose the information, RSH is covering up its incompetence. He further says that RSH has received other complaints and has dismissed every complaint.

50. He also says that without disclosure, he cannot address his concerns regarding RSH's handling of his complaint, for example in any arbitration process. He says that the Commissioner did not address this point in the DN.

Findings

51. As already noted, the Appellant has not appealed against the Commissioner's findings in relation to section 40, and RSH is no longer relying on section 42. The Appellant has also not taken issue with the Commissioner's finding that certain information falls outside the scope of the Request.
52. In his grounds of appeal, the Appellant takes issue with the way in which RSH handled his original complaint about Selwood Housing. However, the matters he raises in that regard fall outside the Tribunal's jurisdiction, and we make no findings about them.
53. The only issue properly before us concerns section 31(2)(c). Is the exemption engaged in relation to the disputed information? If so, does the public interest in maintaining the exemption outweigh the public interest in disclosure? We will consider these questions in turn.

Is the exemption engaged?

54. The first question is whether section 31(2)(c), is engaged. Would disclosure be likely to prejudice the exercise, by RSH, of its functions for the purpose of ascertaining whether circumstances which would justify regulatory action by it, exist or may arise?
55. As the Commissioner points out in her Guidance Note on section 31, the exemption in 31(2)(c) is one of the more frequently claimed exemptions in section 31, reflecting the fact that many activities and sectors of the economy are subject to statutory regulation. Determining that a statutory requirement has been breached, compelling a breach to be remedied, or imposing fines or other sanctions, are all measures constituting "regulatory action". There is no suggestion here that RSH is not empowered to take regulatory action; clearly it is.
56. Is the claimed prejudice made out? For the exemption to be engaged, disclosure of the disputed information must be likely to cause prejudice to the interest that the exemption protects. In the present case, this means prejudice to the ability of the regulator to determine whether any regulatory action should be taken. There must be a causal link between the disclosure and the prejudice.
57. It is not necessary to show that the prejudice would be significant (although the extent of the prejudice is relevant to the public interest balance). However, disclosing the information must have "a very significant and weighty chance" of causing prejudice that is "real, actual or of substance": **Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and EA/2005/0030)**; **Department for Work and Pensions v the Information Commissioner and FZ [2014] UKUT 0334 (AAC)**; and

R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin).

58. The likelihood of prejudice must be based on the particular information in issue. It is not an exercise based simply on a generic factors. Those may be relevant, but the likelihood of prejudice must be borne out by the particular information in issue.
59. It has been argued that the disputed information would allow other providers to know how RSH reaches its conclusions in complaint cases that are brought to it. As already noted, the disputed information is relatively limited, in quantity and significance. We find it difficult to see how releasing the disputed information would be likely give rise to the claimed prejudice. In our view there is nothing unique about RSH's processes in this regard, nor indeed has it been suggested that there is. RSH's response to complaints, as indicated by its response to the Appellant's complaint, suggests that it already discloses information about how it assesses a complaint.
60. It has also been argued that the disputed information would also allow other providers to know what intelligence RSH considers in dealing with complaints. However, the evidence before us indicates that such investigations as RSH carried out in this case were entirely desk based. There is no indication that RSH contacted Selwood; rather, it made its findings on the basis of whether the Appellant's evidence supported his complaint. In finding that it did not, RSH gave the Appellant a detailed response. In our view, the disputed information does not add much to that that could be said to substantiate the claimed prejudice.
61. As to the claimed prejudice in terms of reducing cooperation from the providers RSH regulates or third parties, the Commissioner says, and we accept, that if RSH had to rely on formal investigatory powers in all cases, it would be inconsistent with its statutory duty to exercise its functions in a way that minimises interference and is proportionate. However, this is not a case in which RSH relied on cooperation. Also, while we recognise that cooperation is preferable, we consider that the fact that RSH has statutory powers it is able to exercise in the event of non-cooperation, would itself encourage cooperation. In short, we are not persuaded that disclosure would have a material or adverse effect on cooperation.
62. We are also not persuaded that disclosure would have the chilling effect claimed on information from providers and third parties because of fear on their part that any information provided would be released to the public. There is no evidence to indicate that either Selwood, or any other regulated social landlord, was asked for any information in relation to the Appellant's complaint. That being the case, we cannot see how disclosure of the disputed information supports the chilling effect argument that RSH has made.
63. As to the argument that RSH needs a safe space in which to consider and record the information it holds about providers' performance, and to be able to test arguments for and against regulatory action, free from scrutiny, those are not considerations that arise in the present case where the finding was that the Appellant's complaint did not evidence any breach. That was a

decision that appears to have been reached entirely or largely on the basis of the complaint itself.

64. In short, we find there is a disconnect between the arguments made by RSH and the Commissioner, and the content of the disputed information. We do not consider that the evidence supports a finding that disclosure of the disputed information would be likely to result in the prejudice asserted.

The Public Interest Balance

65. Having reached the finding that the likelihood of prejudice has not been made out, it is not necessary to go on to consider the public interest balance. Nevertheless, we will do so, albeit relatively briefly, for completeness and in case we are wrong about the exemption not being engaged.
66. In all the circumstances of the case, would the public interest in maintaining the exemption claimed by RSH outweigh the public interest in disclosure of the disputed information?
67. Under FOIA, there is, of course, no presumption in favor of disclosure. The burden lies on the public authority to establish that the harm that would likely be caused by disclosure of the information is such that it outweighs the considerations in favour of disclosure.
68. The correct approach to the application of the public interest balancing exercise, is set out in the Upper Tribunal's decisions in **APPGER v ICO and FCO [2013] UKUT 0560**; **Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC)**; and **Home Office v IC and Bingham Centre for the Rule of Law [2015] UKUT 0308 (AAC)**. The public interest balance must be undertaken by reference to specific public interest factors relating to the content of the information. This does not mean that generic factors are not relevant, but they need to be borne out by the particular information in issue.
69. As to the public interest in maintaining the exemption, the Commissioner considered that there was a very strong public interest in protecting the ability of the public authority to enforce the law. In our view, however, as already indicated, we do not consider that the nature of the disputed information in this case would compromise that ability in any material way. Indeed, there has been no evidence in the form of a witness statement from RSH or otherwise as to how disclosure of the disputed information would have that effect.
70. As to the public interest in disclosure, we agree with the Commissioner that the Appellant's argument that disclosure would allow him to address his concerns about RSH's handling of his complaint through a dispute resolution process, is primarily a private interest. In any event, we are not satisfied that the Appellant would be constrained in addressing his concerns about RSH's handling of his complaint. RSH has provided the Appellant with a detailed explanation for finding that his complaint was not made out. If the Appellant submitted the dispute to the Centre for Effective Dispute Resolution, or any other relevant body, it would be for RSH to respond to any allegations the

Appellant were to make. If it chose to do so without disclosing the relevant information, it would be for that body to take a view about that.

71. We also agree with the Commissioner that the comparison between the way RSH deals with complaints, and the Grenfell inquiry, for example, is misconceived. By its very nature, that inquiry is public, and is in no way comparable to RSH's investigation of an individual complaint.
72. Nevertheless, we consider that there is clearly a public interest in disclosure. We agree with the public interest considerations set out by the Commissioner at para 58 of her Response. In brief, there is a public interest in decisions taken by the RSH on complaints being transparent to promote greater understanding of its decision making, and for the public to know whether such decisions are being properly made. This is particularly so, if as the Appellant claims (which has not been disputed), that there has been a trend of complaints made to RSH being dismissed.
73. If there was a greater public interest in maintaining the exemption, then the balance may well have been in favour of doing so. However, we consider that public interest to be limited, and although we do not regard the public interest in disclosure as being particularly strong, we find that it outweighs the public interest in maintaining the exemption in this case.

Decision

74. For all these reasons, we allow this appeal.
75. Our decision is unanimous.

Signed
Anisa Dhanji
Judge

Date: 2 May 2019