

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 4 February 2022

**Public Authority:** Bristol City Council  
**Address:** The Council House  
College Green  
Bristol  
BS1 5TR

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to work that had been carried out by the council on properties in relation to the right to buy those properties. The council provided some information however it withheld other information on the basis that section 40(2) (personal information) of the FOI Act applied. The complainant disputed this. He also felt that other information should be held by the council.
2. The Commissioner's decision is that the council was correct to apply section 40(2) to withhold the information. He has, however decided that the council did not comply with the requirements of section 10(1) of the FOI Act as its response to the complainant's request was not issued within 20 working days.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 16 January 2021 the complainant wrote to council and requested information in the following terms:

*"The information required is for the 5 requested information below and only relates to SOLTHERM BOLIX (EWI) system, External Wall insulation installed on the 780 Bristol City Council properties.*

*1) Please supply information to all address's street names & postcodes of these properties*

*2) Please supply information to all address's street names & postcodes of these properties which had vented soffits fitted*

*3) Please supply information to all address's street names & postcodes of these properties which had a replacement roof*

*4) Please supply information addresses street names & postcodes in relation to the 15 properties sold under the RTB*

*5) Please supply information addresses street names & postcodes in relation to the 2 properties sold under the RTB which had the SOLTHERM BOLIX warranty cancelled."*

5. The council advised the Commissioner that it responded to the request on 26 February 2021. The complainant confirmed to the Commissioner that he had received the council's response on 1 April 2021. The council disclosed some information in relation to some parts of the request. However, it withheld house numbers and part of the postcodes on the basis that section 40(2) of the FOI Act applied (personal data of third parties). In relation to part 5 of the request, it clarified that the warranty had not been cancelled on any of the properties concerned.
6. The complainant requested that the council carry out a review of its decision on 21 April 2021. He asked the council to reconsider its response to parts 2-5 of his request for information.
7. Following an internal review, the council wrote to the complainant on 4 May 2021. It accepted that its initial response had been out of time, however it upheld its position that the redacted information was correctly withheld under section 40(2). It also confirmed that its position that no properties had had their warranties cancelled was factually correct.

## Scope of the case

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8. The complainant contacted the Commissioner on 16 February 2021 to complain about the way his request for information had been handled.
9. Initially his complaint related to the failure of the council to respond to his request for information.
10. Following the council providing its response, the complainant remained unhappy that the council was withholding information from him.
11. The following analysis relates to the council's delay in providing its response to the complainant, its refusal to provide a full response to the request due the application of the exemption in section 40(2) of the FOIA, and whether the council identified all the information it held falling within the scope of the complainant's request.

## Reasons for decision

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### Section 40 personal information

#### Section 40(2) -personal data of third parties

12. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
13. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

***Is the information personal data?***

16. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects.
21. Specific addresses and postcodes of properties owned or rented by the individuals provides a degree of biographical information about the individuals owning or occupying those properties. Those individuals are identifiable from the specific address and postcode together with other information which is already within the public domain, such as the electoral roll. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

***Would disclosure contravene principle (a)?***

24. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

25. In the case of an 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 lawful, fair, and transparent.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

**Lawful processing: Article 6(1)(f) of the GDPR**

27. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>2</sup>.*

28. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
  - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
29. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

*Legitimate interests*

30. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
31. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
32. The complainant has outlined that he has a personal interest in the information being disclosed. He has made a claim against the council regarding its actions in relation to him buying his home, and the warranties and actions which he believes the council should have taken in regard to this.
33. The council recognised that there is a legitimate interest in ensuring transparency and accountability with regards to how the council manages its stock of housing, including regarding maintenance and improvement works carried out on the buildings and the status of the Right to Buy scheme and associated actions.
34. Insofar as the wider public is concerned, the public always has a general legitimate interest in there being greater transparency and accountability in regard to the actions and decisions of public authorities, and it is no different in this case. Many individuals will consider taking advantage of the right to buy, and if the council's actions have failed to meet appropriate standards in this case the public has a legitimate interest in knowing more about this.

*Is disclosure necessary?*

35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. The council has already disclosed the numbers of properties affected by maintenance and improvement works, the dates when various events related to Right to Buy activities were carried out or completed, and partial address data including road names and sector level postcode data. It argues that this information provides sufficient transparency and

accountability without the need for the disclosure of personal data. The complainant disagrees.

37. The Commissioner is satisfied that there are no less intrusive means of achieving the legitimate aims of the complainant which have been identified.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

38. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
39. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
40. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
41. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
42. The individuals concerned are property owners. members of the public, who have taken advantage of the right to buy, or who have had dealings with the council as regards improvements to their properties. They would have absolutely no expectation that their details might subsequently be disclosed to the whole world in response to an FOI request.



43. Whilst none of the individuals have been identified by the council as expressing concerns about the disclosure, it is not surprising given that they may not be aware of the potential for their information to be disclosed.
44. Although the council has not identified any specific damage or distress which would be caused by a disclosure of the information, the Commissioner considers that a disclosure of the withheld information would involve a breach of privacy for those individuals, and many may find it annoying or distressing that information which was provided to the council for one reason has been disclosed to the whole world in response to an information request.
45. The Commissioner recognises that names and addresses can be gathered from information which is already within the public domain. They will be able to be obtained via the electoral roll in many instances. However, the details which the complainant has requested would not be in the public domain. They would only become public if disclosed by the council.
46. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
47. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
48. Having found that the information is the personal data of a third party and that its disclosure would contravene principle (a), the conclusion of the Commissioner is that the exemption provided by section 40(2) of the FOIA was engaged and the council was not obliged to disclose the information in question.

## **Section 1 – General right of access to information**

49. Section 1(1) of the FOIA states that:

*Any person making a request for information to a public authority is entitled—*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*



50. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.
51. The council argued that no properties have had their warranty cancelled, but accepts that it has not been able to find the relevant warranty for one property. The complainant disputes the council's response.
52. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
53. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

#### The complainant's position

54. The complainant argues that the council's response is incorrect, and that it will hold information in respect of this part of the request.

#### The council's position

55. The council argues that one warranty is not held out of all of the properties which the complainant has requested information about.
56. It said that it recognised that it was possible that the council could have held this data either as a hard copy paper record and/or as an electronic record following the original document being scanned.
57. Searches for any hard copies were made in the filing areas of the relevant site office. The filing system used in the site office is organised by address, and searches were made in each file of the 11 properties in scope for the request – all except one of the requested warranties was located in this filing system at the time of the original request and subsequent internal review.
58. Searches of electronic files held on networked drives were also carried out – this involved accessing the specific subfolders under the main folder name of EWI and then Warmer Homes EWI, where all such documents are stored.

59. Searches were also carried out of the council's electronic asset management database. Copies of the 10 warranties were held electronically, but it remained the case that one warranty could not be located.

60. It said that:

- The record type is a guarantee of product and workmanship which states that for a pre-determined length of time, any defect in materials or workmanship in connection with the installation shall be rectified without charge subject to terms and conditions. These types of records are provided to the council by the third-party professionals who carry out the works.
- There is no record of the council ever receiving the document.
- There is no record of the council having deleted the document, either prior to or subsequent to the date of the request.
- The record type is not listed in the council's document retention schedule; however, warranties are retained indefinitely.
- There is no known statutory requirement to retain this record type.

61. The council concluded that after carrying out appropriate searches for relevant information, there is no indication the record was ever held or ever deleted by the council, and therefore that the record is not held.

#### The Commissioner's conclusion

62. The Commissioner has considered the council's position, in conjunction with the request.

63. The Commissioner recognises that it is anomalous that, of all the properties, only one warranty is not held for one particular property.

64. Nevertheless, the question for the Commissioner is whether information is held, not whether it *should* be held. The council has confirmed that no properties had their warranty cancelled, and in its review it confirmed that that position is factually correct. This specifically responds to the complainant's request as it was written – no addresses are disclosable as no properties had their warranties cancelled.

65. Further to this, the council has described carrying out appropriate searches of the appropriate records to establish, on a balance of probabilities, whether the missing warranty is held, and it has concluded that it is not. The wider implications of this are not a matter for the Commissioner.

66. There is no contradictory evidence available to the Commissioner that indicates the Council's position is wrong.

67. On this basis the Commissioner has concluded that, on the balance of probabilities, the requested information is not held by the council.

**Section 10(1)**

68. Section 10(1) of FOIA states that

*"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

69. The complainant sent his request for information to the council on 16 January 2021.

70. The council issued its response to the complainant on 26 February 2021.

71. This falls outside of the period of 20 working days required by section 10(1).

72. The Commissioner's decision is therefore that the council did not comply with the requirements of section 10(1) of the FOI Act.

## Right of appeal

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73. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

74. 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.
75. 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 .....**

**Ian Walley**  
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