

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 October 2017

Public Authority: Cambridge City Council
Address: The Guildhall
Cambridge
CB2 3QJ

Decision (including any steps ordered)

1. The complainant has requested information which was supplied to Cambridge City Council's Legal Team and which concerns the property where the complainant lives. The information relates to attempts made by the Council to resolve matters in respect of compliance with Building Regulations and possible proceedings under Section 36(6) of the Building Act 1984. The Council has confirmed that it holds 6 documents which fall within the scope of the complainant's request. It has withheld 5 of these documents in reliance on section 31(1)(g) of the FOIA and 1 document in reliance on section 21.
2. The Commissioner's decision is that Cambridge City Council has correctly applied the exemptions provided by sections 31(1)(g) and 21 of the FOIA. It is therefore entitled to continue to withhold the documents which the complainant seeks.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 31 March 2017, the complainant wrote to Cambridge City Council and requested information related to her own address. The terms of the complainant's request are:

"I have been advised, by [a named person], to seek permission to view the evidence that he has supplied to the Legal Team. [A named person] is uncertain whether or not the information is privileged, therefore I'm making a formal request in accordance with the Freedom of Information Act. I believe that another member of Building Control, [another named

person], *has compiled a statement following his visit to my property in February. I wish to view this and any other documentation relating to my case, please*".

5. The Council responded to the complainant's request on 13 April 2017 and advised her that; "This evidence concerns possible proceedings under Section 36(6) of the Building Act 1984", and "this information is subject to a qualified exemption under Section 30(2)(a)(iii) Freedom of Information Act 2000 (Investigations and proceedings conducted by public authorities)".
6. Having first contacted the Information Commissioner's Office, the complainant wrote to the Council on 24 April 2017 to ask it to conduct an internal review.
7. The Council immediately acknowledged the complainant's internal review request and confirmed that the Council's Information Governance Manager would be conducting its review.
8. On 11 May 2017, the Council wrote to the complainant to advise her of its internal review decision. The Council's reviewer stated:

"I understand that further actions are being considered by the local authority in this case, potentially involving legal action brought under the Building Act 1984. The information in question is contained within a live investigation file, and is being used to determine action to be taken in a dispute involving two main parties. It seems clear that disclosure of this information at this stage to one of the involved parties would prejudice the ability of the authority to come to a reasoned course of action, and would be likely to prejudice any subsequent ability to prosecute such action.

I find that in this case the more appropriate exemption is therefore at s31(1)(g) with reference to 31(2)(a) – the disclosure of this information would or would be likely to, prejudice the exercise by any public authority of its functions for the purpose of ascertaining whether any person has failed to comply with the law."

9. On 4 August 2017, The Council wrote to the complainant about her on-going concerns. Attached to the Council's letter at Appendix 'A', it provided the complainant with a "copy of the original note prepared by [a named person] following his site visit dated 20 January".
10. On 14 August 2017, following a meeting between the complainant, her daughter and the Council's Chief Executive, the Council confirmed its internal review decision that the information you have asked for is exempt by virtue of Section 31(1)(g).

Scope of the case

11. The complainant contacted the Commissioner to complain about the way her request for information had been handled and in particular the decision of the Council to refuse to disclose the information she seeks.
12. The focus of the Commissioner's investigation has been to determine whether the Council is entitled to withhold information relevant to the complainant's request in reliance of the exemption provided by section 31(1)(g) of the FOIA.

Background information

13. The complainant has a long-term leasehold on a ground floor flat, in what was once a single house.
14. The freeholder of the property occupies the upper floor flat.
15. The complainant's flat is subject to extreme damp and cold, and it is alleged that this is due to inadequate insulation which should have been installed when the property was converted.
16. It is also alleged that the Council's Building Control Department has been negligent in signing off the conversion and in issuing a certificate of completion on the works.
17. A local authority has a general duty to enforce the building regulations in its area. Where it is unable to resolve compliance with Building Regulations by informal means, the local authority may employ formal enforcement powers which are provided by the Section 36 of the Building Act 1984¹ which it may use.
18. If a person carrying out building work contravenes the Building Regulations, the local authority may prosecute them in the Magistrates' Court where an unlimited fine may be imposed. This is provided by sections 35 and 35A of the Building Act 1984. Prosecution is possible up to two years after the completion of the offending work and any action will usually be taken against the person carrying out the work.
19. Under section 36 of the Building Act, the local authority may serve an enforcement notice on the owner of the building which requires

¹ <http://www.legislation.gov.uk/ukpga/1984/55>

alteration or removal of work which contravenes the regulations. If the owner does not comply with this notice the local authority has the power to undertake the work and recover its costs from the owner.

Reasons for decision

20. The Council has supplied the Commissioner with copies of the documents it is withholding from the complainant. These documents are listed under the Council's file names as:

Item 1: [the complainant's address] Discussion and Options, December 2016

Item 2: [the complainant's address] Summary, 24 January 2017

Item 3: [a named person 1] Witness Statement

Item 4: [a named person 2] Witness Statement

Item 5: [the complainant's address] Issues noted on Site Inspection, January 2017

Item 6: Briefing note for Executive Member [the complainant's address], 23 February 2017

21. The Council has confirmed to the Commissioner that it has relied on section 31(1)(g) of the FOIA to withhold items 1, 2, 3, 4 and 6 from the complainant, on the grounds that disclosure would prejudice its function of ascertaining whether a person has failed to comply with the law.

22. In respect of item 5, the Council asserts that this document has already been supplied to the complainant in its email of 2 February 2017 and therefore it is entitled to refuse to disclose the document again in reliance on section 21 of the FOIA – where the requested information is reasonably accessible to the applicant by other means.

Section 31(1)(g)

23. Under section 31(1)(g) of the FOIA, a public authority is entitled to refuse to disclose information where disclosure would, or would likely, prejudice the exercise of any of its functions provided by subsection (2).

24. The Council has advised the Commissioner that its relevant function concerns subsection (2)(a) – “ascertaining whether any person has failed to comply with the law”. The Council considers that it is entitled to rely on section 31(1)(g) as it is the building control authority for Cambridge City.

The Council's representations

25. The Council has informed the Commissioner that the complainant has raised complaints under the Council's complainant's process. These have been dealt with by an independent complaint investigator.
26. The complainant has now submitted a complaint to the Local Government Ombudsman ("the LGO").
27. It is the Council's policy for Building Regulation enforcement to pursue a negotiated or informal resolution and to bring a prosecution under the Building Act only as a final option.
28. At the present time the Council is considering the available enforcement options to resolve the complainant's issue. Since March 2017, the Council has drawn up an offer to work with the freeholder in order to bring the property into compliance with the Building Regulations. The Council considers its offer would remedy the cold and damp issues experienced by the complainant.
29. The Council has consulted with the complainant on this preferred course of action and has asked the complainant to make her response to the Council's plan by 11 September 2017. Subsequently this deadline was extended at the complainant's request pending the decision of the LGO.
30. At this point in time the Council remains committed to seeking an informal resolution of the complainant's matter. Nonetheless, the option to pursue formal action against the freeholder remains open to the Council once it has exhausted other avenues for resolution.
31. The Council has drawn the Commissioner's attention to the following page of its website where its position on building regulation enforcement is outlined:

<https://www.cambridge.gov.uk/building-regulation-enforcement>
32. As stated above, the Council's preference is to seek an informal resolution to building enforcement matters. It will only consider formal enforcement action where other avenues for resolution have been exhausted or are unavailable.
33. Here, the requested information which concerns an on-going matter where the Council is still seeking a negotiated resolution with the freeholder of the property. To this end, the Council has drawn up an offer which includes support and financial contribution to the freeholder and it seeks the agreement of the complainant to this preferred course of action.

34. The Council argues that disclosure of the requested information would be prejudicial to achieving a negotiated outcome and also to any future enforcement action if that was to become necessary. The result would be failure to secure satisfactory living conditions in the affected property and this would significantly be to the complainant's detriment.
35. The Council asserts that it would be unlikely to secure any injunctions necessary for formal enforcement action until it has exhausted all of the options for gaining an informal resolution.
36. The information requested by the complainant is comprised of the statements of opinion given by appropriate professionals. The documents set out opinions on the current situation of the property and its likely causes. They also set out the position of the Council in respect of gaining a resolution of this matter.
37. The Council is claiming that section 31(1)(g) is engaged by virtue of subsection 31(2)(a) where it has a responsibility to ascertain whether the freeholder has failed to comply with the law. Here, the Council is the regulatory authority responsible for the enforcement of Building Regulation in its area. This responsibility is derived from the Building Act 1984.
38. At the time the complainant made her request, the Council was pursuing an injunction to resolve this situation. Having then taken legal advice, the Council moved to seek a resolution outside of the injunctive process and it is this course of action which is ongoing. If this action is successful it should bring a resolution to the complainant's matter.
39. The Council's enforcement powers under the Building Act 1984 remain an option until the negotiated and informal process has been exhausted. These powers are reliant on the Council successfully seeking an injunction. This is not guaranteed and could be jeopardised if the case has been prejudiced through the disclosure of the Council's position.
40. It is the Council's position that the disclosure of the withheld information would prejudice the informal resolution of this complainant's matter and would also be prejudicial to it bringing formal enforcement action if this was to become necessary – that is injunction and prosecution.
41. Having considered the Council's representations in support of its application of section 31(1)(g), the Commissioner readily accepts that this exemption is engaged. It therefore remains for the Commissioner to consider the public interest test which this particular exemption is subject to.

Public interest favouring disclosure

42. The Commissioner will always give necessary weight to the public interest where disclosure of information provides accountability and transparency for decisions taken by public authorities.
43. In this case, disclosure of the withheld information would allow the public to judge whether the Council is pursuing appropriate regulatory/enforcement action in respect of compliance with Building Regulations.
44. The information, should it be disclosed, would substantiate the Council's claims that it has considered all of the options available for resolving the complainant's matter and it would assure the public that the Council is satisfying its duties under the Building Act 1984.

Public interest favouring withholding the requested information

45. Having examined the withheld information, the Commissioner is satisfied that its release into the public domain would prejudice the ability of the Council to resolve the complainant's matter. She is reassured that the Council is actively trying to secure satisfactory living conditions for the complainant by seeking an informal resolution with the freeholder of the property.
46. Likewise, the Commissioner is satisfied that disclosure of the requested information at this point in time would be prejudicial to the Council's ability to bring formal enforcement action against the freeholder, should this become necessary.

The Commissioner conclusions

47. The Commissioner must give substantial weight to the fact that the Council is currently seeking a resolution of the complainant's matter and she must accept the Council's assertion that it is making progress with the freeholder of the property to achieve that end.
48. The Commissioner considers that the public interest would not be served by disclosing the withheld information at this juncture. Disclosure would potentially jeopardise the future use of the Council's enforcement powers which, should this be necessary, would likely prove to be a more costly option and greater drain on the public purse.
49. In the Commissioner's opinion, disclosure of the withheld information at this time would likely hinder the on-going negotiations between the Council and the freeholder.
50. Whilst recognizing that the withheld information is of particular interest to the complainant, the Commissioner has decided that balance of the public interest falls heavily in favour of its continued withholding.

51. In the Commissioner's opinion, the general public interest in transparency is outweighed by the need to avoid prejudicing the Council's on-going efforts to resolve this matter.
52. The Commissioner's decision is that Cambridge City Council has correctly applied the exemption provided by section 31(1)(g) of the FOIA and it is therefore entitled to withhold the information listed as items 1, 2, 3, 4 and 6 at paragraph 21 above.

Section 21

53. The Council is relying on section 21 of the FOIA to withhold the document identified as item 5.
54. Section 21 allows public authorities to refuse to disclose information which is "accessible to the applicant by other means". In this case, the Council asserts that it can rely on this exemption because the item 5 document was sent to the complainant in its email of 2 February 2017.
55. Given that the item 5 document is already in the complainant's possession, the Commissioner's decision is that the Council is entitled to rely on section 21 of the FOIA.

Right of appeal

56. 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

57. 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.
58. 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

Andrew White
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