

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 March 2020

Public Authority: Cornwall Council
Address: County Hall
Treyew Road
Truro
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested from Cornwall Council (the Council) information in relation to Council property tenants who have been investigated for unauthorised short-term/holiday lets. The Council provided parts of the information requested and withheld the remainder because it considered that disclosing it would breach data protection principles.
2. The Commissioner's decision is that the Council was entitled to rely on section 40(2) (personal information) of the FOIA to withhold part of the requested information.
3. The Commissioner does not require any step to be taken as a result of this decision notice.

Request and response

4. On 30 July 2019 the complainant contacted the Council requesting information of the following description:

"Under the Freedom of Information Act, please provide:

- the number of council property tenants who have been investigated for unauthorised short-term/holiday lets (e.g. Airbnb)*
- the number of council property tenants that have received warnings about unauthorised short-term/holiday lets (e.g. Airbnb)*
- the number of council property tenants that have received any other penalty for unauthorised short-term/holiday lets (e.g. Airbnb) (please provide information about any such penalties)*

Please provide this information broken down by financial year for the past three years (i.e. 2016/17, 2017/18, and 2018/19).

Please could you provide this information as a spreadsheet or CSV file."

5. The Council provided the complainant with a response on 16 August 2019. The response consisted of an excel spreadsheet¹, which indicated that:
 - the number in all three categories for financial year 2016/17 was 0;
 - the number in category 1 and 3 for financial year 2017/18 was less than 5; whilst for category 2 for the same financial year it was 0; and
 - the number in all three categories for financial year 2018/19 was 0.
6. The Council stated that it was withholding the exact number of Council property tenants who have been investigated for unauthorised short-term/holiday lets and the exact number of Council property tenants that have received any other penalty for unauthorised short-term/holiday lets during financial year 2017/18, citing section 40(2) of the FOIA as its basis for refusal to disclose the information requested.
7. Remaining dissatisfied with the Council's response, on the same day the complainant wrote to the Council to express her dissatisfaction and submitted reasoning as to why she believed the Council had incorrectly applied section 40(2) of the FOIA.
8. The Council provided her with the outcome of its internal review on 3 September 2019. The Council upheld its original position.

¹ The extracted data has been reproduced as an annex to this decision notice in the form of a table.

Scope of the case

9. The complainant contacted the Commissioner on 11 September 2019 to complain about the way her request for information had been handled. The complainant argued that the withheld information does not constitute personal data and that the Council, therefore, incorrectly applied section 40(2) of the FOIA.
10. The following analysis covers whether the exemption provided by section 40(2) is engaged in relation to:
 - the exact number of Council property tenants in the financial year 2017/18 who were investigated for unauthorised short-term/holiday lets and
 - the exact number who received any other penalty for unauthorised short-term/holiday lets during 2017/18.

Reasons for decision

Section 40 - personal information

11. 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.
12. In this case the relevant condition is contained in section 40(3A)(a)². 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").
13. 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.

² As amended by Schedule 19 Paragraph 58(3) DPA.

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

Is the information personal data?

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. The Commissioner's guidance on what is personal data³ states that if information "relates to" an "identifiable individual" it is "personal data" regulated by the DPA.
17. 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.
18. 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.
19. The Commissioner's guidance on FOIA section 40⁴ states:
"The DPA defines personal data as any information relating to an identified or identifiable living individual. If an individual cannot be directly identified from the information, it may still be possible to identify them. You need to consider all the means reasonably likely to be used to identify an individual"
20. In the present case, as explained above in the scope of the case, the withheld information is the exact number of Council property tenants who have been investigated for unauthorised short-term/holiday lets

³ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

https://ico.org.uk/media/fororganisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

⁴ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

and the exact number of them that have received any other penalty for unauthorised short-term/holiday lets during the financial year 2017/18.

21. The Council asserted that the withheld information is personal data. It stated that *"the actual data was suppressed due to possible identification of private data under section 40(2) as personal data as it would be available through investigation."*
22. The Council stated that in order to mitigate the risk of identification of individuals, the *"less than five"* approach was applied. The Council did so, because it considered that *"the risk for identification was reasonably (extremely) likely."*
23. The complainant argued that the Council did not correctly apply the necessary test to conclude that disclosing the exact number would make possible the identification of individuals. She cited a recent decision of the Upper Tribunal⁵ where it is stated that:

"even though the data controller holds the key to identification of individuals to which the data relates, whether it is personal information when disclosed depends on 'whether any living individuals can be identified by the public following disclosure of the information'"
24. The complainant also quoted the Commissioner's guidance to GDPR⁶, which provides, among others:

"the fact that there is a very slight hypothetical possibility that someone might be able to reconstruct the data in such a way that the individual is identified is not necessarily sufficient to make the individual identifiable."
25. The complainant maintained that *"the Council has not explained clearly why the small numbers are personal data nor made clear what the route to identification is. It presents no evidence to this end and has failed to show the steps a motivated intruder could take to identify individuals from the suppressed numbers if disclosed."*
26. The Commissioner is aware of the Upper Tribunal decision cited by the complainant in paragraph 23 of this decision notice. However, she considers that the subject matter in the present case is slightly different

⁵ <https://www.bailii.org/uk/cases/UKUT/AAC/2018/229.pdf>

⁶ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/can-we-identify-an-individual-indirectly/#pd5>

from what was considered in that case in front of the Upper Tribunal. One key difference between that case and the present one is that the applicable law on data protection has been updated in the meantime. In the Upper Tribunal case the Data Protection 1998 was in force whilst in the present one the new DPA and GDPR are applicable. The other difference is that the information requested in the present case is related to criminal records. The new legislative framework on personal data protection provides additional safeguards for this category of information.

27. In relation to the complainant's argument which reproduced a paragraph from the Commissioner's guidance on GDPR, that paragraph must be read with the preceding paragraph, which states:

"In these cases, Recital 26 of the GDPR states that, to determine whether or not the individual is identifiable you should take into account 'all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly'."

28. Having examined the withheld information and having considered the Council's arguments as to why the disclosure would lead to identification of certain individuals, the Commissioner is satisfied that the exact number of Council property tenants who have been investigated for unauthorised short-term/holiday lets and the exact number of them that have received any other penalty for unauthorised short-term/holiday lets during financial year 2017/18, constitutes personal data of third parties.
29. The Commissioner considers that any further detailed explanation by the Council in relation to the possible routes of identifying individuals upon a potential disclosure of the information request, would actually risk identifying individuals other than the complainant.
30. In the circumstances of this case, the Commissioner is satisfied that the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information, the low number of individuals involved and other information which is likely to be in, or come into, the possession of others.
31. She has reached this conclusion on the basis that the focus of the present request is the number of individuals who have been investigated or convicted for fraudulently subletting a Council property. Although, the request as formulated does not seek personal information of the individuals concerned, the very low number of them in combination with other information already in public domain, disclosed through news

reports and on social media, means that there is a strong likelihood of the withheld information being linked to identifiable individuals.

32. 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.
33. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

34. 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".

35. 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.
36. In order for disclosure 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.
37. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.

Is the information criminal offence data?

38. Information relating to criminal convictions and offences is given special status in the GDPR.
39. Article 10 of the GDPR defines "criminal offence data" as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
 - a) the alleged commission of offences by the data subject; or
 - b) proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.
40. Having considered the wording of the request, and viewed the withheld information, the Commissioner is satisfied that the requested information does include criminal offence data.

41. She has reached this conclusion based on the wording of the complainant's request for information, which seeks specifically information in relation to acts which can result in criminal conviction. Prevention of Social Housing Fraud Act 2013⁷ (PSHFA 2013) provides that:

"(2) A tenant of a dwelling-house let under a secure tenancy commits an offence if –

(a) dishonestly and in breach of an express or implied term of the tenancy, the tenant sub-lets or parts with possession of –

i. the whole of the dwelling, or

ii. part of the dwelling-house without the landlord's written consent, and

(b) the tenant ceases to occupy the dwelling-house as the tenant's only or principal home."

42. PSHFA 2013 provides that a person convicted under this provision is liable to a fine or imprisonment (or both).

43. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.

44. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).

45. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.

46. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a).

⁷ <http://www.legislation.gov.uk/ukpga/2013/3/section/1/enacted>

47. As the Commissioner has found that the withheld information is personal data and that disclosure of it would breach principle (a), the exemption provided by section 40(2) is engaged. The Council was not, therefore, obliged to disclose this information.

Right of appeal

48. 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@justice.gov.uk

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

49. 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.
50. 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

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex 1

51.

Year	the number of council property tenants who have been investigated for unauthorised short-term/holiday lets (e.g. Airbnb)	the number of council property tenants that have received warnings about unauthorised short-term/holiday lets (e.g. Airbnb)	the number of council property tenants that have received any other penalty for unauthorised short-term/holiday lets (e.g. Airbnb) (please provide information about any such penalties)
2016/2017	0	0	0
2017/2018	less than 5	0	less than 5
2018/2019	0	0	0