

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2023

Public Authority: Newport City Council

Address: Civic Centre
Newport
South Wales
NP20 4UR

Decision (including any steps ordered)

1. The complainant requested information in the form of a series of questions about the use of a specific property by Newport City Council ("the Council"). The Council cited section 40(2) (personal information) of FOIA to withhold some of the requested information.
2. The Commissioner's decision is that the withheld information comprises of special category personal data and the Council is entitled to rely on section 40(2) of FOIA to withhold the information for parts three and four of the request and has complied with section 1(1) of FOIA.
3. The Commissioner does not require any steps to be taken as a result of this decision.

Request and response

4. On 21 and 24 March 2023, the complainant wrote to the Council and requested information in the following terms:

"Please can you answer the following:

- 1) On what date did the first child or children first go in the home?
- 2) What is the ratio of adults to children in the home?
- 3) Will the home house children who have been remanded after police charges?
- 4) Will the home house children being kept prior to sentencing?
- 5) Will all children in the home be from the Newport authority?
- 6) Will any children be from outside Newport on behalf of other authorities?."

5. The Council responded on 19 April 2023 citing section 40(2) of FOIA to withhold the information requested and explained its reliance on the exemption cited.
6. On 5 June 2023 at internal review, the Council disclosed information to parts one and two of the request but upheld its reliance on section 40(2) of FOIA to withhold information to parts three, four, five and six of the request and explained that identification of individuals would be likely given the particular circumstances of the request.
7. During the course of the Commissioner's investigation, the Council concluded that parts five and six of the request could be answered. Therefore this decision notice has focused on the information relating specifically to parts three and four of the request.

Reasons for decision

Section 40(2) – personal information

8. 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.

9. In this case the relevant condition is contained in section 40(3A)(a)¹. 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 UK General Data Protection Regulation ('UK GDPR').
10. 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 FOIA cannot apply.
11. 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?

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

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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.
15. 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.
16. In this case the withheld information comprises of special category personal data (information relating to a child or children and whether they may or may not be the subject of criminal procedures), having considered the Council's submissions, the Commissioner is satisfied that data subjects could be directly identified by the complainant and wider

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

public if this information were to be disclosed. The subject matter of the information is, clearly, extremely sensitive.

17. Having considered the information available to him, the Commissioner is satisfied that this information falls within the definition of 'personal data' in section 3(2) of the DPA.
18. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
19. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

21. 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.
22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

23. 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.²"

² Article 6(1) goes on to state that:-

24. In addition, if the requested data is “special category” data, in order for disclosure to be lawful and compliant with principle (a), it also requires one of the ten conditions for processing set out in Article 9 of the UK GDPR, to be met.

Is the information special category data?

25. Information relating to special category data is given special status in the UK GDPR.

26. Article 9 of the UK GDPR defines “special category” as being personal data which reveals racial, political, religious, or philosophical beliefs, or trade union membership; and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health, or data concerning a natural person’s sex life or sexual orientation.

27. Having considered the wording and specific nature of the request, the Commissioner finds that the information described in paragraph 16 of this notice does include special category data. He has reached this conclusion on the basis that the information relates to children, and whether they may or may not have been involved with criminal procedure.

28. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the ten stringent conditions of Article 9 can be met.

29. The Commissioner considers that the only Article 9 conditions that could be relevant to a disclosure under the FOIA are condition (a) (explicit

“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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”

consent from the data subject) or condition (e) (data made manifestly public by the data subject) in Article 9.

30. The Commissioner has seen no evidence or indication that 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.
31. As none of the conditions required for processing special category data is satisfied, there is no legal basis for its disclosure. Processing this special category data would be unlawful, and therefore would breach principle (a). Consequently it is not necessary for the Commissioner to consider the balance between the legitimate interests and the rights and freedoms of the individuals concerned.

The Commissioner's decision

32. The Commissioner has therefore decided that the Council was entitled to withhold the information for parts three and four, described in paragraph 16 of this notice under section 40(2), by way of section 40(3A)(a).

Right of appeal

33. 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

34. 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.
35. 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

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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