

FOI POLICY REVIEW – FTT/UT/CA decision

Tribunal / Court:
Upper Tribunal

FOI or EIR :	Section / Regulation:	Date of decision:	Reference:
FOI	S40(2)	12/07/2018	[2018] UKUT229 (AAC) GIA/2444/2017

Parties :

Appellant: Information Commissioner

Respondent: Claire Miller

Earlier judgement/decision summaries:

ICO decision –

- Date 11 October 2016
- Reference [FS50631570](#)
- Link to DN & summarise main points if appropriate.

The complainant has requested local authority data on homelessness for the financial years 2009-2010, 2010-2011 and 2011-2012. The Department for Communities and Local Government (DCLG) withheld the information under section 22 as it stated that there was an intention to publish it. The Commissioner's decision is that DCLG has correctly applied section 22 to the requested information.

FTT –

- Date 20 April 2017
- Reference [EA/2016/0265](#)
- Link to policy summary & summarise main points if appropriate.

See summary of the UT decision

Summary of Decision :

Appeal dismissed – section 40(2) – personal data

The Upper Tribunal has issued its decision on the above matter. It has dismissed the appeal brought by the Commissioner. As this matter relates to personal data, and it is binding, it would benefit from a policy review.

Information requested:

Ms Miller requested from the Department for Communities and Local Government (Ministry of Housing, Communities and Local Government at the time of the decision and now the Department for Levelling Up, Housing and Communities) statistical information which had been provided to it by local authorities relating to homelessness in the years between 2009 and 2012. The information related in some cases to very

small geographical areas and fell under a large number of categories (e.g. ethnicity, gender, number of dependants, reasons for homelessness etc).

Commissioner's decision:

The Commissioner's decision notice FS50631570 found that all the information requested had been correctly withheld under section 22 FOIA. The Commissioner also noted that the public authority intended to redact 'small number data' (i.e. numbers about fewer than five individuals) in any event as it considered such to be personal data, but did not herself make a determination about whether or not the information did or did not constitute personal data.

FTT decision:

The First-tier Tribunal (the FTT) decided that section 22 did not apply. It went on to consider whether section 40(2) applied. The FTT found that the requested information, including 'small number data', did not constitute personal data because disclosure of the requested information would not permit individuals to be identified, and so s.40(2) did not apply. The public authority did not seek to be joined, and was not joined by the Tribunal, to the proceedings. The FTT ordered disclosure of all the information requested.

UT decision:

The Commissioner sought permission to appeal on various grounds, including arguing that the FTT had erred in its decision by applying the wrong legal test meaning it was wrong to find that the 'small numbers data' was not personal data.

The public authority again decided not to be joined to proceedings.

The Upper Tribunal (the UT) set out the various considerations for deciding whether information is personal data (see paras 6-16 UT decision), including citing from the Commissioner's Anonymisation Code of Practice.

The UT considered that, reading the decision as a whole, the FTT did turn its mind to the correct test and there was no reason to disturb the FTT's findings. The UT noted at paragraph 31 that '[n]either the DCLG nor the Information Commissioner had advanced any possible basis on which the individuals could be identified from the data. The DCLG simply asserted it to be the case....'.

Analysis:

(An analysis of the decision, highlighting any differences or similarities in approach, whether or not it aligns with our published guidance)

Although a policy review of this decision was originally carried out in 2019, it has been decided to look at the decision in more detail. This is because there has now been a number of other decisions relating to the issue of small numbers within statistics and whether they constitute personal data. The opportunity has therefore been taken to look at them afresh to see what lessons could be learnt. The original policy review is on the FOI Knowledge base and is also set out in full below.

Original policy review 04.02.2019 ([Here](#))

The UT considered the FFT's application to considering whether the requested information was truly anonymous, or whether it was personal data. In particular it referred to the approach set out in the ICO's Code of Practice 'Anonymisation: managing data protection risk'.

Whilst the UT upheld the FFT's decision to dismiss the ICO's findings in the decision notice that the information was personal data*, it did not highlight any failings in the ICO's guidance on this matter. Instead the FFT's findings referred to the generic arguments advanced by the public authority in this matter; and were critical of the ICO's acceptance of these and the 'somewhat vague' finding on the issue of personal data. As such, no changes to our internal or external policy guidance are needed as a result of this UT decision.

*Note added December 2021 - The DN actually focussed on whether the information could be withheld under s22. When accepting that the Department did intend to publish the statistics, we simply acknowledged that it would need to redact any personal data , but we did not make an actual finding as to what information within the statistics was personal data.

Policy review December 2021

Headline

The decision does not alter our position on anonymisation and low numbers. But it should be remembered that the disclosure of low numbers will not necessarily risk identifying individuals. Therefore it is important that public authorities properly explain how identification could be achieved and we should be prepared to challenge their arguments.

The legislation

The case was determined by reference to the data protection legislation applicable at the time of the request ie DPA 1998. However the tests applied are equally relevant to the DPA 2018 and UK GDPR.

The correct approach to anonymisation of data

The decision follows established precedents on the correct approach to the disclosure of anonymised data first set out in House of Lords in [Common Services Agency v Scottish Information Commissioner \[2008\] 1 WLR 1550](#), and later built on and clarified by other courts including [R \(Department of Health\) v Information Commissioner \[2011\] EWHC 1430 \(Admin\)](#). As such the case provides a useful summary of the case law (paragraphs 10 – 16). Essentially, the question is whether any living individuals can be identified by the public following disclosure of the information; the fact that the data controller would still hold the key to the identification of individuals is irrelevant.

Account should be taken not only of the disclosed information itself, but also any other information which is, or is likely to come, into the possession of others. This includes an

assessment of whether there is likely to be a motivated intruder and, if so, the information they would be able to access. All of this is in line with our established approach, see page 22 of our [anonymisation code](#) (note - the anonymisation code is currently being reviewed).

Considering whether someone could be identified from the information

In this case, statistics on homelessness were collected from every local authority in England on a quarterly basis. The data provides a wide range of evidence about homelessness including the numbers of homeless households, reasons for homelessness, types of accommodation, the makeup of the households by reference to ethnicity, gender, disability and dependents, the outcomes of applications for temporary accommodation and the accommodation provided.

The request, made in December 2015, asked for the statistics for 2009 – 2012. During our investigation the DCLG had simply asserted that individuals could be identified through data matching or similar techniques. The UT disagreed. It considered that each set of data represented a snap shot in time. To identify an individual from that data, one would need to know very specific information about the circumstances of that individual at that precise point in time, for example that the individual had applied for temporary accommodation during that period and what the outcome of the application had been. Given the age of the information at the time of the request, the UT considered the possibility that someone being able to recollect such details was extremely remote.

The UT also considered that, it was "... quite fantastical to suppose that, several years later, there would be anyone sufficiently motivated to try to identify an individual to which the data related. The information in the spreadsheets is not such as is likely to attract those with investigative skills ..." (para 52)

Approach to take

Public authorities should be able to explain by reference to the actual information how any low numbers could be used to identify an individual and what other information would be required to make that identification.

We should also take account of the nature of the requested information and the likelihood that it would attract the interest of a motivated intruder. Where a motivated intruder would be active, account should be taken of the information they would be able to access.

Where a public authority claims identification could be achieved with the aid of non-recorded information, for example, the personal knowledge of acquaintances, we should take account of how reliable such non recorded information would be, particularly if the requested information relates to situations some time ago.

<p>Significance of Decision :</p> <ul style="list-style-type: none"> • Of significance 	<p>Status of Decision :</p> <ul style="list-style-type: none"> • Binding (UT decision) 	
<p>External guidance:</p> <p>(An indication as to whether the decision will feed into, reinforce or result in changes to any existing or new guidance. Following any changes to guidance, or identification that a decision could reinforce guidance, this section will be updated to provide links to any relevant guidance.)</p> <p>The decision does not change our position on anonymisation, nor is likely to feed into external guidance.</p>		
<p>Date: 9 December 2021</p>	<p>Appeal status: Not appealed</p>	<p>Author: RM</p>