

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 September 2024

Public Authority: London Borough of Southwark

Address: Town Hall
Peckham Road
London
SE5 8UB

Decision

1. The complainant has asked London Borough of Southwark (“the Council”) for information about data breaches. The Commissioner’s decision is that the Council is entitled to withhold some of the information it holds under section 40(2) of FOIA as it is personal data of third persons and disclosure would be unlawful.
2. The Commissioner does not require any further action to be taken.

Request and response

3. The complainant requested the following information from the Council:-
 1. “Please confirm how many data breaches in total, occurred concerning Southwark residents and employees of Southwark Council between 1st September 2023 and 29th February 2024. This includes all data breaches including but not limited to a family receiving another family's SAR, a Southwark employee CC other families into emails instead of BCC, staff without explicit consent, and appropriate reason accessing records not related to their job role.
 2. Please confirm the total percentage of the data breaches between 1st September 2023 and 29th February 2024 that included children’s data.

3. Please confirm the total percentage of the data breaches between 1st September 2023 and 29th February 2024 that were reported to the Information Commissioners Office.”
4. The Council responded to the complainant stating that its previous responses to questions 1 and 2 had not changed, and providing a response to question 3. In response to a previous request by the complainant, the Council had provided information in response to question 1, however it had not disclosed information in response to question 2 as it applied section 40 of FOIA as a basis for non-disclosure.
5. The complainant sought an internal review of the Council’s handling of their request on 2 April 2024 specifically in relation to the Council’s response to question 2. An internal review response was provided on 29 April 2024 and the reviewer upheld the original decision regarding question 2.

Reasons for decision

Section 40 – personal information

6. 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.
7. In this case, the relevant condition is contained in section 40(3A)(a). 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’).
8. 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’).¹ If it is not personal data then section 40 of FOIA cannot apply.
9. 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 DP principles.

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

Is the information personal data?

10. Section 3(2) of the DPA defines personal data as: “any information relating to an identified or identifiable living individual”.
11. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
12. 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.
13. 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.
14. It is the Council’s position that the withheld information is the personal data of the children whose information was impacted by data breaches. The Council considers that the number/percentages of data breaches relating to children is information that ‘relates to’ them, on the basis that a personal data breach involves an incident which has a direct impact on an individual’s personal data. Information held within a personal data breach report directly identifies an individual and therefore it follows that the nature of the information requested may indirectly identify an individual and could constitute personal data.
16. Having particular regard to the definition above, the Commissioner is satisfied that information about data breaches affecting children’s data is undoubtedly information which relates to those children.
15. The complainant has disputed that the withheld information is capable of identifying anyone. In examining this point, the Commissioner has had regard to the Upper Tribunal decision in *The Information Commissioner v Miller* [2018] UKUT 229 (AAC).
16. In that case, the Upper Tribunal found the likelihood of individuals being identified from a particular set of statistics involving low numbers to be “so remote as to be negligible”, and the complainant believes that similar considerations apply in this case.
17. The Commissioner notes that the request in that case was for UK-wide statistics on homeless households and that the Upper Tribunal commented that the absence of anyone with an identifiable motive for attempting re-identification was relevant to determining whether the withheld information was personal data.

18. Referring to its previous decisions, the Upper Tribunal said that, when considering disclosure under the FOIA, the proper approach to determining whether anonymised information is personal data is to consider whether an individual or individuals could be identified from it and other information which is in the possession of, or likely to come into the possession of, a person other than the data controller after disclosure. The assessment of the likelihood of identification included:

“...assessing a range of every day factors, such as the likelihood that particular groups, such as campaigners, and the press, will seek out information of identity and the types of other information, already in the public domain, which could inform the search.”
19. The Upper Tribunal also quoted the Court of Session (Inner House) in *Craigdale Housing Association v The Scottish Information Commissioner* [2010] CSIH 43 at paragraph 24:

“...it is not just the means reasonably likely to be used by the ordinary man on the street to identify a person, but also the means which are likely to be used by a determined person with a particular reason to want to identify the individual...”
20. The Commissioner’s guidance on access to personal information 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”.
21. On the face of it, the withheld information does not directly identify any individual. However, because the percentages and therefore the numbers are low (numbers equate to five or less), the Commissioner has considered whether this information, when combined with other information either already in the public domain, or known to particular individuals, may nevertheless make identification possible. The Commissioner is mindful that disclosure under FOIA is considered as being made to the world at large, rather than to the requester only, and this includes to those individuals who may have a particular interest in the information (and additional knowledge of the specific circumstances of relevant children) which is not shared by the wider public.
22. In considering this point, the Commissioner recognises that different members of the public will have different degrees of access to the ‘other information’ which would be needed for re-identification of apparently anonymous information to take place. In his Code of Practice on Anonymisation he acknowledges that “...there is no doubt that non-

recorded personal knowledge, in combination with anonymised data, can lead to identification”.

23. The Code of Practice goes on to state:

“Re-identification problems can arise where one individual or group of individuals already knows a great deal about another individual, for example a family member... These individuals may be able to determine that anonymised data relates to a particular individual, even though an ‘ordinary’ member of the public or an organisation would not be able to do this. ... The risk of re-identification posed by making anonymised data available to those with particular personal knowledge cannot be ruled out, particularly where someone might learn something ‘sensitive’ about another individual – if only by having an existing suspicion confirmed. However, the privacy risk posed could, in reality, be low where one individual would already require access to so much information about the other individual for re-identification to take place. Therefore a relevant factor is whether the other individual will learn anything new”.

24. The Code states that it is also necessary to consider the likelihood of individuals having and using the prior knowledge necessary to facilitate re-identification and whether any new information would be learned from re-identification. The Code notes that:

“The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA”.

25. In the particular decision cited in paragraph 15 above, the Upper Tribunal concluded that there was no evidence that anyone would be sufficiently motivated to attempt re-identification, and that this rendered the risk of re-identification taking place “negligible”. The Commissioner has considered whether the same can be said in this case.

26. The Council states that:-

“The children’s data is a small number of a small total number which presents a very specific and potentially identifiable dataset.”

27. The Council also cites the Commissioner’s guidance on what is personal data, in particular:-

“When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals.”

28. The Council takes seriously the actions of a 'determined person with a particular reason' and with that in mind the Council has advised the Commissioner that the complainant has frequent and ongoing correspondence with the Council, including on data protection matters relating to children. The Council takes the view that this request arises from a personal interest of the complainant rather than a request being made in the interests of the general public. In isolation the small numbers may appear insignificant but the Council considers that the frequent contact of the complainant with the Council causes them to be an interested and sufficiently determined person and gives weight to the possibility that they may be able to piece together information from other sources and therefore identification of individual children cannot be ruled out.

29. The Commissioner considers that the Council's submissions to him demonstrate that the withheld information is capable of identifying an individual child or children. The numbers are low and so there is a reasonable risk that a determined person may be able to identify children from the data, especially if it is in conjunction with other, personalised knowledge about the child's or children's particular circumstances. The Council states that:

"The children's data is a small number of a small total number which presents a very specific and potentially identifiable dataset."

30. Having reached this conclusion, and because he has determined that the information relates to the individuals in question, it follows that the Commissioner is satisfied that the withheld information falls within the definition of 'personal data' in section 3(2) of the DPA.

31. 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.

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

Would disclosure contravene principle (a)?

33. 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".

34. In the case of a 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.

Lawful processing:

38. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.

39. The Commissioner considers that the lawful basis most applicable is basis (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”.

40. In considering the application of Article 6(1)(f)² of the GDPR in the context of a request for information under 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.

41. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

42. In considering any legitimate interest in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

² Article 6(1) goes on to state:- “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”.

43. 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.
44. The complainant has not explained their reasons for requesting the information or the interests that would be served by its disclosure. However, the Commissioner notes the Council's comments that the complainant is frequently in contact with them regarding matters such as children's data, which suggests they have an ongoing interest in these matters. The Commissioner also accepts that there is a legitimate public interest in the Council being open and transparent with regard to data breaches and the security of children's data.

Is disclosure necessary?

45. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
46. The Commissioner recognises that the Council has disclosed some of the requested information in this case and has stated that the withheld information constitutes low numbers. The Commissioner considers that this goes some way towards satisfying the legitimate public interest and the interest of the complainant that has been identified. However, the Commissioner considers that, due to the precise nature of the information requested, the disclosure of the remaining withheld information is the only means by which the legitimate interest identified above can be fully met.

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

47. 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 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.
48. 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 data subject expressed concern to the disclosure; and
 - the reasonable expectations of the data subject.
49. The Commissioner is also mindful in this particular case that Article 6(1)(f) of the GDPR identifies the need to give particular weight to protecting children's data.
50. The Commissioner has borne in mind the best interests of the children in question. The concept of the best interests of the child comes from Article 3 of the United Nations Convention on the Rights of the Child. Although it is not specifically referenced in the UK GDPR, the Commissioner has stated in his guidance on children and the UK GDPR that it is something that he will take into account when considering issues to do with the processing of children's personal data. It states that:
- "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
51. In the Commissioner's view, a key issue is whether data subjects have a reasonable expectation that their information will not be disclosed. This expectation can be shaped by factors such as:-
- a data subject's age
 - their general expectation of privacy
 - whether the information relates to them in their professional role or to them as individuals
 - the purpose for which they provided their personal data.
52. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that data subject.
53. The Council states that it treats children's data with extra care and considers that it should be afforded extra protection due to the children's inability to control their own data. The Commissioner agrees with this and considers that the reasonable expectation of children whose personal data is held by the Council would be that the Council

would keep this confidential, for reasons of privacy and safety. It is important that their rights and freedoms are uppermost in any consideration of whether or not to disclose the withheld information.

54. The Commissioner has not seen any information which suggests that the withheld information is already in the public domain and it does not appear that any of the data subjects have been asked whether they are willing to consent to the disclosure of their personal data (depending on the ages and particular circumstances of the children involved, it is by no means clear that meaningful consent could, in any case, be obtained).
55. Based on the above factors, the Commissioner is satisfied that the potential negative consequences for individual data subjects, i.e. unwarranted damage or distress, outweigh any interests of the public in accessing the information. It follows that he has determined that there is insufficient legitimate interest in disclosure to outweigh the data subjects' fundamental rights and freedoms, and that the disclosure of the information would not be lawful.
56. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
57. His decision is that the Council was entitled to rely on section 40(2) of FOIA to withhold the information.

Right of appeal

58. 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

59. 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.
60. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF