

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 August 2020

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Education ("the DfE") concerning figures of children of different ethnicities who were born into care at both a national level and a local level.
2. The DfE provided suppressed data and redacted some figures lower than 10 at a national level, citing section 40 of the FOIA as its basis for doing so.
3. The Commissioner's decision is that the DfE has correctly withheld the information under section 40 of the FOIA but as it responded after 20 working days, it has breached section 10 of the FOIA.
4. The Commissioner requires no further steps to be taken by the DfE.

Request and response

5. On 26 June 2019, the complainant wrote to the public authority and requested information in the following terms:

"I am inquiring about children who were "born into care" to discover the ethnic group and legal status on entry to care.

1. At a national level for children who started to be looked after within 1 week of birth for each of the years ending 31 March 2008 to 2018 please supply ethnicity and legal status on entry to care

2. For children who started to be looked after within 1 week of birth for the 2 periods between:

a) 1 April 2014 and 31 March 2018 and

b) 1 April 2007 and 31 March 2011 please provide:

a. Ethnicity by legal status on entry to care at national level

b. At a local authority and regional level please provide breakdowns of ethnicity and legal status on entry to care The attached spreadsheet gives more details of the format for each of the questions.

Please do not round data to the nearest 10. In order to make accurate calculations using the small numbers contained in this data for the research I am doing it would be helpful to have exact numbers and include small numbers.

As the data has been processed statistically and there is no way to connect this data with individuals, this is not personal data and I would ask that you please provide the exact numbers in line with the ruling in R (on the application of the Department of Health) v Information Commissioner [2011] EWHC 1430 (Admin) the implications of which are summarised on pages 14 and 15 of the Information Commissioner's publication 'Anonymisation: managing data protection risk code of practice' which is available on the commissioner's web site at <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>.

Please use the following categories and give numbers for categories and subtotals for the sub-categories that fall into each category. Care Orders Placement Order granted Voluntary agreements under S20 CA 1989 (single placements) Detained for child protection

*Police protection Emergency protection Child assessment orders
Ethnic origin White White British White Irish?"*

6. The public authority responded on 6 September 2019. It provided some information within the scope of the request but redacted any figures fewer than 10, rounded the available figures to the nearest 10, and cited section 40 of the FOIA as its reason for doing so.
7. Following an internal review the public authority wrote to the complainant on 4 October 2019. It maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 18 October 2019 to complain about the way his request for information had been handled.
9. Within the complainant's contact to the Commissioner, he included the basis of his complaint to the DfE being that the data at a national level is suppressed to the nearest 10 and the local level table is less suppressed. His complaint to the DfE is as follows:

The reason you give for suppressing these numbers is not a valid reason within the terms of the data protection act, a case which has been tested in the ruling in R (on the application of the Department of Health) v Information Commissioner [2011] EWHC 1430 (Admin) the implications of which are summarised on pages 14 and 15 of the Information Commissioner's publication "Anonymisation: managing data protection risk code of practice" which is available on the commissioner's web site at <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>. Not only is this not a valid reason but the fact that you have provided numbers not rounded to the nearest 10 in the local authority tables 3 and 4 shows that this is not required.

10. The Commissioner considers the scope of her investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA.

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)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 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.
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 DP 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.
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. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

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

20. As outlined earlier in determining the scope of the Commissioner's investigation, the complainant argued that because the data requested is statistical, it is anonymised. He referred to the Commissioner's Code of Practice on Anonymisation² to show that, *"the principles of protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable"*.
21. On the face of it, the withheld information does not *directly* identify any individual. However, because the withheld numbers are low (five or fewer), 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.
22. The Commissioner is aware that disclosure under the 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 the child) which is not shared by the wider public.
23. 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 her Code of Practice on Anonymisation, she acknowledges that *"...there is no doubt that non-recorded personal knowledge, in combination with anonymised data, can lead to identification"*.
24. In this case, as the DfE has released numbers at both a national level and a local level, if both were figures were rounded to the same level, any motivated individual could cross reference the two figures in order to narrow down and therefore re-identify any particular children.
25. The Commissioner has previously issued decisions³ considering similar circumstances and has taken the line to say that if re-identification is achieved, she would consider the consequences for the data subject(s).
26. Aside from questions of intrusion and privacy, in a child protection context this is sensitive information and it may, in combination with a

² <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2616920/fs50825882.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2616923/fs50839647.pdf>

mosaic of other information, ultimately lead to any particular child who was “born into care” being located. This, clearly, could have very serious consequences for the child, ranging from distress to physical harm.

27. 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.
28. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

29. 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”.

30. 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.
31. In order 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.

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

32. 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”⁴.

⁴ Article 6(1) goes on to state that:-

“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

33. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.
34. 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

35. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
36. In this particular case, the complainant is conducting academic research.
37. 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.

Is disclosure necessary?

38. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

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".

39. The Commissioner found during her investigation that there is another way to access specific information from the DfE⁵ where the data would not be disclosed to the world at large.
40. Included in the complainant's supporting evidence to the Commissioner was some correspondence between the DfE and the complainant that was exchanged after the DfE's initial response but before its internal review. The correspondence offered the complainant another way to gain the information, ensuring that there were safeguards in place and that the information was not released to the world at large. The Commissioner notes that this offer was not accepted. The complainant provides this in the following:

... "the process for registration is onerous, expensive and time consuming and access to data is problematic because of distance to approved centres for access. I would therefore ask you to continue the review."

41. The Commissioner is satisfied in this case that there are less intrusive means of achieving the legitimate aims identified.
42. Therefore, the Commissioner finds that disclosure of the requested information is not necessary. Due to this, as mentioned in point 23, she does not need to go on to consider the balancing test.
43. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
44. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Section 10 – time for compliance

45. Section 10 of the FOIA states that responses to requests made under the Act must be provided *"promptly and in any event not later than the twentieth working day following the date of receipt."*
46. The request was made on 26 June 2019 and was responded to on 6 September 2019, 52 working days after the DfE received the request.

⁵ <https://www.gov.uk/guidance/how-to-access-department-for-education-dfe-data-extracts>

47. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, the DfE has breached section 10 of the FOIA.

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

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