

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 3 October 2019

**Public Authority:** West Sussex County Council  
**Address:** County Hall  
Chichester  
PO19 1RQ

#### Decision (including any steps ordered)

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1. The complainant has requested information about money paid by West Sussex County Council ("the Council") to place children into secure care accommodation facilities in Scotland, broken down by care facility. The Council refused the request under section 40(2) of the FOIA, as it considered that the information it held comprised third party personal data.
2. The Commissioner's decision is that the Council correctly withheld the requested information under section 40(2) of the FOIA, and she does not require the Council to take any steps.

#### Request and response

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##### Initial request

3. On 13 February 2019, the complainant wrote to the Council to request information of the following description (numbers added for ease of reference):
  - 1) *"How many secure care accommodation facilities do you operate or have access to in your area?"*
  - 2) *How many places are available in these facilities for young people?"*

- 3) *In the past 10 years (January 2009 - January 2019) how many children and young people have you placed in secure care placements in Scotland, per year? What ages have these children been?*
- 4) *For all of these placements, how much has been paid to the provider of the Scottish secure care accommodation per placement?*
- 5) *Which providers have you used in Scotland to provide secure care accommodation?*

*Please note - If the time frame of the past 10 years is going to be too large to fit within the FOI guidelines, please reduce this to five years (January 2014 - 2019)."*

4. On 12 March, the Council responded. It stated (point 1) that no secure accommodation facilities were operated in the relevant area and therefore the response to point 2 was "n/a". With regard to points 3 – 5, it stated that the information requested was exempt from disclosure under section 40(2) of the FOIA – third party personal data.
5. The complainant requested an internal review on 12 March 2019. The Council sent her the outcome of its internal review on 12 March 2019. It upheld its original position.

### **Revised request**

6. On 12 March 2019 the complainant revised her request to limit it to the "financial information", as follows:  
  
*"I want to know how much has been paid to each Scottish facility you have used in that time frame, in total for all the placements. It needs to be per facility though. You do not need to tell me how many placements that is for".*
7. On 26 March 2019 the Council stated that this information was exempt from disclosure under section 40(2).

### **Scope of the case**

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8. The complainant contacted the Commissioner on 28 March 2019 to complain about the way her request for information had been handled.
9. During the course of the investigation, the complainant clarified that she wished her complaint to the ICO to focus on the revised request of 12

March 2019. She also clarified that she would expect the Council to provide the name of each facility in the response.

10. It was agreed that the information being requested could be summarised as *the total amount of money paid by the Council to each secure care accommodation facility in Scotland into which children/young people have been placed between January 2009 and January 2019 – the information to be broken down by facility and the facilities to be identified by name.*
11. The following decision considers whether the Council correctly withheld the information under section 40(2) of the FOIA.

## Reasons for decision

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### Section 40(2) – third party personal data

12. 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.
13. 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”).
14. 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.
15. 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?**

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

*“any information relating to an identified or identifiable living individual”.*

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

18. 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.
19. 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.
20. In this case, the Council has explained that the requested information relates to a very small number of individuals. It explained to the complainant: *"although the specific answers to your questions do not involve disclosure of a name, they could still amount to personal data. I consider that because of the specificity about the placement, name, type and geographical location and because of the very limited number of placements involved it would be likely that an individual could be identified"*.
21. The Council has provided the information it holds to the Commissioner, for consideration. A key factor in this case has been to determine whether or not individuals are identifiable from the withheld information.
22. The Commissioner notes that the complainant requested the amount of money paid by the Council to secure care facilities, broken down by name of facility, for the relevant 10-year period.
23. The Commissioner also notes that no further identifying information has been requested, such as the names of the individuals being placed in care, nor the specific number of individuals per facility. The complainant evidently considered that the information would be sufficiently anonymous not to comprise personal data.
24. However, the Council has argued that the disclosure of the information it holds may lead to the identification of the individuals that have been placed in secure care, due to the very small number of cases.
25. As is explored in her guidance on determining what is personal data<sup>1</sup>, the Commissioner considers that it is necessary to consider whether individuals would be identifiable *"by a determined person with a particular reason to want to identify individuals"*. This is because a

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

disclosure which is ordered under the FOIA is a disclosure to the world at large, and not only to the person making the request.

26. In this case, the Council has argued that, because of the very small number of relevant placements, members of the public with related knowledge may be able to link that knowledge with the information being requested, and be able to identify specific individuals as well as, potentially, their address.
27. In her guidance on anonymisation<sup>2</sup>, from page 31 onwards, the Commissioner explains that "*removing numbers relating to five or 10 individuals or fewer may be a reasonable rule of thumb for minimising the risk of identification*". This is particularly the case with regard to a known geographical location.
28. The Commissioner has examined the withheld information in this case and is satisfied that the Council holds information relating to a small number of individual placements: fewer than five. She also notes that while the complainant requested financial information, she specifically requested that it be broken down by specific location.
29. The Commissioner considers that the individuals placed in secure care could potentially be identified by "a determined person" from the requested information, owing to the very small numbers involved.
30. She is satisfied that the risk of identification is sufficient that the 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 identifiable living individuals 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. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

32. 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"*.

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

33. 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.
34. 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) of the GDPR

35. 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.
36. 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".*

37. 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.
38. 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*

39. 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.
40. 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.

41. The Commissioner considers that there is some legitimate interest in the amount of money a local authority has spent in funding places in care for young people, particularly perhaps in this case, where the request relates to individuals being placed at a considerable distance away from the relevant local authority.
42. The Commissioner is aware that the complainant has made the same request of other councils and evidently has some interest in this area of local authority provision. While the Commissioner is not aware of any particular interest of the requester in the information requested in this case, this is not usually a bar to there being a legitimate interest in any case, since the FOIA is, in most cases, deemed to be motive-blind.
43. The Commissioner is satisfied that a legitimate interest is being pursued.

*Is disclosure necessary?*

44. "Necessary" means more than desirable but less than indispensable or of 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.
45. The Commissioner is not aware that the information requested by the complainant has otherwise been published or can otherwise be accessed by the requester. She is therefore satisfied that disclosure under the FOIA would be necessary to meet the legitimate interests of the requester.
46. As the Commissioner has decided in this case that disclosure is necessary to meet the legitimate interest in disclosure, she has gone on to conduct the balancing test.

*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 subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the 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 individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
49. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
50. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
51. In this case, the Council has explained that it took into account the nature of the information being requested. It explained that "*a secure care placement connotes a requirement for a very high level of intensive support*" and for this reason it was especially mindful of the need for confidentiality.
52. The Council has also explained that it considers that the issue of Council expenditure on a small number of individuals and their particular circumstances could attract attention from the public, which may "*result in anxiety or impact on their relationships or employment prospects*".
53. The Commissioner agrees that the relevant individuals would have no expectation that their personal circumstances would be published. She considers that the disclosure of the information is likely to result in unwarranted damage and distress.
54. Moreover, she is mindful that the request relates to information about "*young people*". Under the provisions of Article 6(1)(f) of the GDPR, as previously stated, the individuals' rights and freedoms which require protection are more likely to override the legitimate interests in disclosure where the individual is a child.
55. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore



considers that there is no Article 6 basis for processing, and so the disclosure of the information would not be lawful.

56. Given the above conclusion that disclosure would be unlawful, the Commissioner does not need to go on to consider, separately, whether disclosure would be fair or transparent.

**The Commissioner's view**

57. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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