

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2019

Public Authority: Housing Ombudsman Service
Address: PO Box 152
Liverpool
L33 7WQ

Decision (including any steps ordered)

1. The complainant has requested information about complaints submitted to the Housing Ombudsman Service (HOS) about a specific housing organisation. HOS is relying on section 40(2) of the FOIA (third person personal data) to withhold the information the complainant has requested.
2. The Commissioner's decision is as follows:
 - HOS is entitled to rely on section 40(2) of the FOIA to withhold the requested information. It is the personal data of third persons and disclosure would contravene a data protection principle.
3. The Commissioner does not require HOS to take any remedial steps.

Request and response

4. Following HOS' response of 6 March 2019 to an earlier request the complainant had submitted for information about Curo Group (Albion Limited), on 6 March 2019 the complainant submitted the following request:

"Thank you for this. How can I now see the detailed reports of these 26 complaints?"

Do I apply to you? OR Do I apply to Curo? If I did they would be sure to refuse me access.

Are these 26 complaints private or public?

If they are public knowledge or have become public knowledge after these complaints were upheld did the Housing Ombudsman also order the details of the outcomes to be published anywhere and if so where?"

5. On 11 March 2019 HOS responded to this request. It refused to release the information the complainant has requested, referring to its data protection duties. HOS did not refer to a specific FOIA exemption.
6. Following an internal review HOS wrote to the complainant on 2 April 2019. It maintained its position and refused to release the information the complainant has requested. HOS appeared to be relying on section 40(2) of the FOIA (third person personal data) to withhold the information but its position was not quite clear.

Scope of the case

7. The complainant contacted the Commissioner on 3 April 2019 to complain about the way his request for information had been handled.
8. Once HOS had confirmed its position, the Commissioner's investigation focussed on whether the withheld information is exempt information under section 40(2) of the FOIA.

Reasons for decision

Section 40 - personal information

9. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and a condition under either section 40(3A), 40(3B) or 40(4A) is also satisfied.
10. The first step for the Commissioner is therefore to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA18).

Is the information personal data?

11. Section 3(2) of the DPA18 defines personal data as: 'any information relating to an identified or identifiable living individual'.
12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. 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.
13. HOS has told the Commissioner that some of the withheld information is personal data as defined under section 11(2) of DPA18 as it concerns allegations about the committing of offences and, in one case, the conviction of a third party. The Commissioner also notes that some of the information concerns individuals' mental or physical health, which is a special category of personal data. Data about criminal offences and special category personal data is more sensitive and needs more protection.
14. The requested information in this case concerns 26 complaints that HOS has received about one particular housing organisation based in Bath, over a specific period. HOS has provided this information to the Commissioner; it comprises determination/review letters HOS has sent to people who have submitted complaints to it, and investigation reports that HOS prepared.
15. HOS considers that this material in its entirety is the personal data of third persons. It has confirmed that the withheld information relates to living individuals who it considers could be identified. They could be identified from names and addresses included in the information, case identification numbers and location data in the information. In addition HOS says that the information also contains substantial detail and contextual information that could be used to identify individuals.
16. HOS says that the information is also the personal data of parties other than those who submitted the complaint to it, for example parties to anti-social behaviour complaints, referred to as neighbours living in proximity to the complainants. Although not specifically mentioned by name, HOS considers that associated location information and the name of the member landlord is likely to allow "a requester" to search for and to identify those individuals.
17. Release under the FOIA is, in effect, release to the wider world. And the information requested in this case concerns an organisation operating in one specific area: Bath and north east Somerset. Even if specific names and addresses were redacted from it, given the detail in the letters and

reports in question the Commissioner is satisfied that this information falls within the definition of 'personal data' and 'special category personal data'. This is because it is possible that someone, with sufficient motivation to do so, could piece together the withheld information with other information in the public domain, or known to other tenants of the housing organisation or other local residents, and identify one or more individuals. The Commissioner has gone on to consider the first of the conditions under section 40(3).

Is a condition under section 40(3A) satisfied?

18. The condition under section 40(3A)(a) of the FOIA is that disclosure would contravene any of the data protection principles. The principle under Article 5(1)(a) of the General Data Protection Regulation (GDPR) states that: "*Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject*".
19. In the case of a FOIA request, 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. In order to be lawful, one of the lawful bases listed in GDPR Article 6(1) must apply to the processing. It must also be generally lawful.
20. GDPR Article 10 gives separate safeguards for personal data relating to criminal convictions and offences or related security measures. In order for an authority to disclose criminal offence data lawfully under FOIA, in addition to an Article 6 basis for processing, under GDPR Article 10 the disclosure must meet a specific condition in Schedule 1 of DPA18. Due to its sensitivity, these conditions are very restrictive and generally concern specific, stated purposes. Consequently, only two are relevant to allow authorities to lawfully disclose criminal offence data under FOIA. These are: consent from the data subject; or the processing relates to personal data which has clearly been made public by the individual concerned.
21. Special category personal data about people's health is also safeguarded by conditions under GDPR. As with data about criminal offences, due to its sensitivity, these conditions are very restrictive and generally concern specific, stated purposes. Consequently, only two are relevant to allow authorities to lawfully disclose under FOIA. These are under GDPR Article 9(2) and are similar to those identified above for data about criminal offences: explicit consent; or the processing relates to personal data which has clearly been made public by the individual concerned.

22. In its submission, HOS has told the Commissioner that it has first considered whether any of the conditions under GDPR Article 6(1)(f) provides a lawful basis for disclosing the requested information.

23. Article 6(1)(f) states that processing shall be lawful only if:

"...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".

24. In considering the application of Article 6(1)(f) in the context of a request for information under the FOIA it is necessary to consider the following three-part test:

Legitimate interest test: Whether a legitimate interest is being pursued in the request for information

Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question

Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subjects – those submitting complaints to HOS in this case.

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

(i) Is a legitimate interest being pursued?

26. In considering any legitimate interest(s) in disclosing 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.

27. 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.

28. The complainant has concerns about his landlord – Curo Group - and, at the time of his complaint to the Commissioner, was considering submitting a complaint about that organisation to HOS. The Commissioner considers that this is a case-specific interest but is satisfied that it is nonetheless a legitimate interest for the complainant.

(ii) Is disclosure necessary to meet the legitimate interests?

29. '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.
30. As above, the complainant has a specific interest and concern about his landlord and has requested the details of other complaints submitted to HOS about this landlord. The complainant considers that this information could possibly support and strengthen his position with regard to his landlord.
31. In its submission HOS has confirmed that it has provided the complainant with the number of complaints it has received about the landlord in question – between particular dates - and the number of orders or recommendations for compensation, between those dates. It appears to be indicating that it considers that disclosing the requested information is not therefore necessary to meet the complainant's legitimate interest. However, the numbers that HOS has released do not provide information on the nature of each of the complaints – the requested information could indicate a pattern to the concerns raised about the landlord. As such, the Commissioner finds that disclosure would be necessary to meet the complainant's legitimate interests and she has gone on to consider the third test; the balancing test.

(iii) Do the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subjects?

32. Through this test the Commissioner will 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.
33. 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 individuals expressed concern to the disclosure; and

- the reasonable expectations of the individuals.
34. In the Commissioner's view, a key issue is whether the individuals concerned would have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as the individuals' general expectation of privacy, whether the information relates to employees in their professional role or to them as individuals, and the purpose for which they provided their personal data.
 35. It is clear that the information relates to individuals in their personal capacity. HOS says in its submission that those people have not consented to the release of their personal data under FOIA and would have the reasonable expectation that their personal data would not be disclosed to the world at large as the result of such a request. The Commissioner agrees. The Commissioner also agrees with HOS that the individuals in question would be likely to be distressed if the requested information was to be released.
 36. The Commissioner considers that such wider public interest as there is in complaints against this particular landlord is met through the information HOS has released. It may also be possible to submit a request for information on the types of complaints submitted about the landlord that would not necessitate the release of third person personal data.
 37. Having considered all the circumstances 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 disclosing the information would be unlawful as it would contravene GDPR Article 5. In addition, and as has been noted, GDPR Article 10 provides a further safeguard for personal data about criminal offences. Neither of the conditions under DPA18, Schedule 1 are satisfied with regard to such information in this case. The Commissioner remains satisfied that disclosing that information would contravene GDPR Article 5.
 38. And as has been noted, GDPR Article 9 provides conditions that remove restrictions on processing special category data such as the data about people's health in this case. HOS has reviewed these conditions, as has the Commissioner, and neither are met in this case. The Commissioner is therefore satisfied that disclosing that information would contravene GDPR Article 5.

Conclusion

39. The Commissioner has decided that HOS is entitled to withhold the information requested under section 40(2), by way of section 40(3A)(a). Since a condition under section 40(3A) has been satisfied it has not been necessary to consider the conditions under section 40(3B) or 40(4A).

Right of appeal

40. 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

41. 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.
42. 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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