

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 February 2021

Public Authority: London Borough of Sutton
Address: Civic Offices
St. Nicholas Way
Sutton
SM1 1EA

Decision (including any steps ordered)

1. The complainant has requested from the London Borough of Sutton ("the Council") information in two parts regarding criminal records relating to individuals residing at particular properties. The Council withheld the information as it considered to be the personal data of the individuals concerned and exempt under section 40(2) of the FOIA.
2. The Commissioner's decision is that the information requested at part one of the request does not fall within the definition of personal data. The Council was therefore not entitled to withhold this information under section 40(2).
3. The Commissioner's decision is also that the Council should have sought clarification of the second part of the request as it had no single objective reading. The Council has therefore breached section 16 of the FOIA (advice and assistance).
4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information requested at part one.
 - Respond to the complainant to seek clarification of part two of the request.

5. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 18 September 2020 the complainant wrote to the Council and requested information in the following terms:

"1) There are 3 properties 20 and 22 Park Road, Wallington, SM6 8AH and 3 Park Road, Wallington, SM6. In the last 36 months how many people with criminal records and/or people released from prison had been housed in these 3 properties.

2) Does Sutton Council have any information regarding any crime committed by people living in 20 and 22 Park Road, Wallington, SM6 8AH and 3 Park Road, Wallington, SM6 during the time they were living in these properties. If so without going into detail of all this information, can you please give me a summary."

7. The Council responded on 6 October 2020. It refused to provide the requested information citing section 40(2) of the FOIA (personal data).
8. Following an internal review the Council wrote to the complainant on 9 October 2020. It maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 10 October 2020 to complain about the way his request for information had been handled, and specifically that the Council was incorrect to apply section 40(2) of the FOIA.
10. The scope of this notice is to determine whether the Council has correctly applied section 40(2) in relation to part one of the request.
11. It will also consider whether the Council has complied with its obligations under section 16 of the FOIA in relation to part two of the request.

Reasons for decision

Section 40 - Personal information

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)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").
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.

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

20. As part of her investigation, the Commissioner asked the Council to identify whose personal data it considered the requested information to be. The Council said that it considered this information to be the personal information of the tenants residing at the addresses identified in the request during the time parameters of the request. The Council explained:

"If the information being requested were to be disclosed, the information could be linked to an individual thereby compromising that individual's personal data. In addition, given the nature of the information being requested, any individual residing at these properties could potentially be the subject of victimization/stigma, thereby putting them at risk of harm."

21. The Council also stated that it considered the withheld information to be criminal offence data, as defined in Article 10 of the GDPR, because it concerns criminal convictions pertaining to individual tenants.
22. The Commissioner asked the Council further questions as to how the requested information could be linked to an individual, in view of the request being for numerical information rather than for information that could more obviously be linked to an individual.
23. The Council informed the Commissioner that it did not know if the complainant is a neighbour of the specific properties and would therefore be able to link the information to tenants residing at the address. The Council also stated that it did not know if the requester has personal knowledge of the tenants, either past or present. If so, it argued that the numerical data could be linked to individuals.
24. The Commissioner is not convinced that the information requested at part one could be linked to individuals. She notes that sometimes information may indirectly identify an individual, particularly when information is combined with other information that allows for the identification of an individual. However, in this case, the Council's arguments about any pre-existing knowledge the complainant may have are speculative. The fact that there is a very slight hypothetical possibility that someone might be able to reconstruct the data in such a way that an individual is identified is not necessarily sufficient to meet the DPA definition of personal data.
25. In the circumstances of this case, the Commissioner is not satisfied that any individual could be identified from the information falling within the scope of part one of the request. The Council has not given a convincing explanation as to how the numerical information requested could be linked to any identifiable individual. Ultimately, the Commissioner is of the view that this numerical information would not identify individuals

and it therefore does not fall within the definition of personal data in section 3(2) of the DPA.

26. As the Commissioner does not consider the information requested to be personal data, her finding is that the exemption provided by section 40(2) of the FOIA is not engaged. The Council is now required to take the step as at paragraph 4 above.

Section 16 – Advice and assistance

27. Section 16(1) of the FOIA states that:

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."

28. Section 1(3) of the FOIA states:

"Where a public authority-

(a) Reasonably requires further information in order to identify and locate the information requested, and

(b) Has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

29. When a public authority receives an unclear or ambiguous request, its section 16 duty to provide advice and assistance will be triggered and it must go back to the requester under section 1(3) of the FOIA to ask for clarification.
30. Under section 1(3) of the FOIA, once the public authority has informed the requester that it requires further clarification, it will not be under any further obligation to respond until that clarification has been provided.
31. As covered in the Commissioner's guidance on interpreting and clarifying requests², where a request does not have a single objective reading a

² <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

public authority is obliged to seek clarification from the requester. It should not proceed with responding to the request until that clarification has been received.

The Commissioner's conclusion

32. The question for the Commissioner here is whether part two of the complainant's request had a single objective reading. If it did not, then the Council should have responded to the complainant to seek clarification about the scope of the request.
33. Having considered the phrasing of part two of the request, the Commissioner's view is that it is not sufficiently specific on the information sought for it to have a single objective reading. Her finding is, therefore, that the Council was obliged to seek clarification from the complainant on the scope of part two of the request, and in not doing so it breached section 16(1) of the FOIA.
34. At paragraph 4 above the Council is now required to respond to the complainant seeking clarification on the scope of part two of the request, with the aim of reaching a single objective reading of this request.

Right of appeal

35. 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

36. 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.
37. 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

**Ben Tomes
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