

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 3 November 2022

**Public Authority:** Department for Work and Pensions  
**Address:** Caxton House  
Tothill Street  
London  
SW1H 9NA

#### **Decision (including any steps ordered)**

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1. The complainant has requested confirmation of the number of people claiming benefits at a specified address.
2. The Department for Work and Pensions (DWP) refused to confirm or deny whether it held the information as it constituted the personal data of a third party and was exempt under section 40(5).
3. The Commissioner's decision is that DWP is entitled to rely on section 40(5) to refuse to confirm or deny whether the requested information is held.
4. The Commissioner does not require DWP to take any steps.

#### **Request and response**

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5. On 4 May 2021, the complainant contacted DWP via its online benefit fraud reporting tool and made a request in the following terms:  
  
"I am making a Freedom of Information Act request, I am not asking for personal details, how many people claimed benefits at [specified address]".
6. This request included the complainant's correspondence address but not their name. It also confirmed the identity of the individuals that the complainant knew were living at the address provided.

7. On 14 May 2021, the complainant wrote again to DWP via the 'National Benefit Fraud Hotline' at its Wolverhampton address. The complainant made a request in the following terms:  
  
"I wish to know how many people were claiming benefits at [specified address] in the year 2020. I am not seeking personal details just a number, was it 1 person or 2".
8. The complainant provided their name in this request. They also confirmed again that they knew the individuals living at the address cited and provided a detailed background regarding why they were seeking the information.
9. On 24 May 2021, DWP responded to the original request dated 4 May 2021 and explained that it required the complainant's name before it could progress the request. DWP confirmed that without the complainant's name, the request did not comply with section 8(1)(b) of FOIA. DWP explained that the Commissioner had provided guidance for public authorities on recognising a request. DWP provided a link to this guidance, however, this link was in a short form format which only shows the title of the webpage and not the link itself. As the response was sent in hard copy, the link could not be accessed.
10. DWP advised the complainant to submit their request again using their real name.
11. On 28 May 2021, the complainant wrote to DWP and provided their full name and proof of identity. They confirmed that they were unable to access the link included in the letter and did not understand why there were concerns regarding their name.
12. On 7 June 2021, DWP provided its substantive response. DWP explained that personal information about a third party is treated as exempt information under FOIA. DWP confirmed that access to personal information is handled under the provisions of the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA) and can only be disclosed where doing so would not breach that person's right to privacy.
13. DWP confirmed that it considered the request was for the personal information of a third party and therefore it was refusing to confirm or deny whether it held the requested information. DWP also confirmed that, even if it was held, the requested information would not be disclosed and would be exempt under section 40.
14. On 18 June 2021, the complainant wrote to DWP and requested an internal review of the handling of their request. The complainant considered that DWP had not provided adequate advice and assistance

but did not set out what advice and assistance they expected to receive.

15. The complainant also disputed DWP's refusal to confirm or deny whether it held the requested information. The complainant provided details of why they were seeking the requested information. The complainant considered that he had a right of access to the information under the Human Rights Act 1998 and the Fraud Act 2006.
16. On 1 July 2021, DWP provided the first of two internal review outcomes. DWP confirmed that it had reviewed the handling of the original request dated 4 May 2021 and response of 24 May 2021, and it considered that the original request was handled correctly.
17. DWP confirmed that on 4 May 2021, it received a benefit fraud allegation and accompanying FOI request. DWP confirmed that this report did not include the name of the person making the claim and the only identifying information provided was the complainant's address and their relationship to the individuals against whom the allegation of benefit fraud was made.
18. DWP explained that section 8(1)(b) of FOIA sets out that for an FOI request to be valid the requester must supply their real name. DWP considered that as the complainant had not provided their name in the original request, it was correct to refuse the request for information.
19. With regards to the duty to provide advice and assistance under section 16, DWP considered that help was provided as they were advised that a real name was required, a link was provided and the complainant was invited to submit the request again using their real name.
20. On 5 July 2021, DWP provided the second response to the request for an internal review of the handling of the request. DWP upheld its reliance on section 40(5) to neither confirm nor deny whether it held the requested information.
21. DWP explained that by confirming or denying whether anyone living at the address cited was in receipt of benefits, it could have enabled the complainant to identify whether specific individuals were in receipt of Welfare Benefits administered by DWP. DWP confirmed that this information would constitute the personal information of a third party and its disclosure would breach that person's right to privacy. DWP set out that this would be contrary to the provisions of the GDPR and DPA.

## **Scope of the case**

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22. The complainant contacted the Commissioner in a letter dated 13 September 2021, received on 20 September 2021, to complain about the handling of their request for information.
23. The complainant provided a detailed background and arguments in favour of disclosure. These will not be reproduced in this decision notice as they constitute the complainant's own personal data, however, they can be summarised as follows:
  - i. Disclosure is necessary to ascertain whether fraud has occurred against the complainant;
  - ii. the public interest lies in preventing fraud; and
  - iii. DWP's refusal is incompatible with their rights under the Human Rights Act 1998.
24. The Commissioner considers that the scope of this case is to determine whether DWP is entitled to rely on section 40(5) to refuse to confirm or deny whether it holds the requested information.

## **Reasons for decision**

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### **Section 40 – personal data of third parties**

25. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if doing so would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).
26. Therefore, for DWP to be entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request, the following two criteria must be met:
  - i. confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
  - ii. providing this confirmation or denial would contravene one of the data protection principles.
27. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual"

28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. In this case, the complainant has requested the number of people living at a specified address who are claiming benefits. In both of their requests to DWP and in their complaint to the Commissioner, the complainant confirmed that they knew who lived at this address during the specified time period. The Commissioner is satisfied that, if DWP confirmed whether or not it held the requested information, this would result in the disclosure of third party personal data as this would confirm whether or not any individual at this address was claiming benefits. As the complainant has confirmed that they knew the resident(s) of this address, the data subject(s) are clearly identifiable.
30. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether confirming or denying whether DWP held the requested information would contravene any of the data protection principles.
31. The most relevant data protection principle in this case is principle (a).

**Would confirming or denying whether DWP held the requested information contravene principle (a)?**

32. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.
33. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. In this case, disclosure by way of confirmation or denial as to whether or not the information was held can only be made 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 UK GDPR must apply to the processing of the personal data.
35. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:

“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”<sup>1</sup>.

36. In considering the application of Article 6(1)(f) UK 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 confirmation as to whether the requested information is held (or not) 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.

37. 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**

38. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests. However, if the requester is pursuing a purely private concern unrelated to any

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<sup>1</sup> 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 2018) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

39. In the circumstances of this case, the complainant has confirmed to the Commissioner that they are seeking the information as it would aid their understanding of whether they have been a victim of fraud by the data subject(s). The complainant also considers that there is a wider public interest in preventing fraud.
40. The Commissioner accepts that the complainant has a legitimate interest in pursuing the information.

**Is confirming whether or not the requested information is held necessary?**

41. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
42. The question of necessity has been considered by the High Court, which found that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate<sup>2</sup>.
43. Therefore where considering the question of necessity, the Commissioner must consider whether there is a pressing social need for DWP to confirm or deny whether it holds the requested information (ie what the legitimate interests are).
44. The fact that there is a right of access to information under FOIA does not in itself constitute a pressing social need to confirm or deny whether the information is held.
45. The Commissioner must then consider whether confirmation or denial under FOIA is necessary to achieve these needs or interests, or

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<sup>2</sup> Corporate Officer of the House of Commons v Information Commissioner and Brooke, Leapman and Ungood-Thomas [2008] EWHC 1984 (Admin), para 43

whether there is another way to address them that would interfere less with the privacy of individuals.

46. The necessity test therefore involves judging whether there are alternative methods of meeting the identified legitimate interest.
47. The Commissioner has carefully considered whether confirming or denying that the information is held is necessary to meet the legitimate interest identified above.
48. The Commissioner has taken into account that the legitimate interest identified relates only to the complainant as part of their attempt to ascertain whether they were a victim of fraud. The Commissioner does not consider there to be a wider societal benefit or public interest as the information relates to the individual benefit status of the resident(s) of the named address. The Commissioner is not persuaded that confirming or denying whether information is held would add to the wider prevention of fraud. He is not persuaded that there is any social pressing need to disregard the rights and privacy of the data subject(s) by disclosing the personal data of private individual(s) to the world at large.
49. The Commissioner is sympathetic to the complainant's unfortunate circumstances, however, he has not seen sufficient evidence to persuade him that confirming or denying whether the information is held is necessary in this case.
50. The Commissioner considers that there are less intrusive means than via FOIA for the complainant to pursue their attempt to rectify the alleged fraud. The police can be contacted where an individual considers themselves a victim of crime and the Commissioner notes that the complainant has already exhausted this avenue, albeit unsuccessfully. DWP has routes by which potential fraud can be reported and, as set out above, the complainant has provided DWP with their concerns.
51. In light of the above, the Commissioner finds that the necessity test is not met, therefore DWP would not be able to rely on Article 6(1)(f) as a lawful basis for processing the personal data in question. It follows that confirming or denying whether the requested information is held would not be lawful, and would contravene principle (a). For this reason, the Commissioner finds that DWP was entitled to rely on section 40(5) to refuse to confirm or deny whether it held the requested information.

## **Other matters**

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52. The Commissioner notes that the complainant has disputed that DWP needed evidence of their identity before proceeding with their request. Having reviewed the correspondence provided by the complainant and DWP, the complainant originally submitted a request which did not include their name and was therefore not valid under FOIA.
53. The confusion appears to have arisen as the complainant resubmitted their request with their name ten days following the original request. DWP's confirmation that the original request was not valid was received after the second request was submitted and appears to have been interpreted as a response to the second request rather than the original request.
54. The Commissioner raised with DWP that it had provided a link to the Commissioner's guidance on requests in its short form format (ie [ICO Recognising a request](#)) in a hard copy response and therefore the complainant could not follow this link.
55. DWP acknowledged this error and apologised that the hard copy status of the response was not taken into account.
56. The Commissioner notes, however, that the complainant does not appear to have been disadvantaged and was able to provide the requested confirmation of their name following DWP's explanation. He also notes that the complainant received a substantive response within 20 working days of submitting a valid request which included their name.

## Right of appeal

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57. 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: 0203 936 8963

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)

58. 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.
59. 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

**Victoria Parkinson**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**