

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 September 2022

Public Authority: The Charity Commission for Northern Ireland
Address: Marlborough House
Central Way
Craigavon
BT64 1AD

Decision (including any steps ordered)

1. The complainant made a request for a summary of the Charity Commission for Northern Ireland (the Charity Commission) report of the charity Growth for Adolescents and Providing Support Northern Ireland (GAPS NI) and its findings.
2. The Commissioner's decision is that the Charity Commission is entitled withhold the requested information under section 40(2) of FOIA.

Request and response

3. On 23 March 2020, the complainant wrote to the Charity Commission and requested information in the following terms:
"The information I am specifically seeking is:
 1. A copy of the commission's report into GAPS, if there is a public version available.
 2. Whether there are ongoing legal proceedings in respect of the findings of the report."

4. The Charity Commission stated that when the request was initially received its enquiry team responded to the complainant stating that the report in question was not public and no legal proceedings were ongoing.
5. On 28 September 2020 the complainant responded to the Charity Commission's enquiries team stating the following:

".. I remain unclear as to the outcomes relating to the findings of the commission's report on the GAPS charity. Are you in a position to summarise the findings and relates outcomes?"
6. The Charity Commission stated that it treated the complainant's correspondence of 28 September as a request under FOIA. It responded stating that it was considering section 36(2)(c) of FOIA to withhold the information but needed to carry out the public interest test and would respond in full on 2 November 2020.
7. The Charity Commission responded to the request fully on 2 November 2020 stating that it was applying section 36(2)(c) of FOIA to withhold the requested information.
8. The complainant requested an internal review and on 1 December 2020 the Charity Commission responded stating that it was maintaining its original decision.

Background

9. The Charity Commission explained that it opened a statutory inquiry into the charity GAPS NI following the receipt of serious concerns including allegations of misconduct and mismanagement, and criminal activity, which it reported to the Police Service Northern Ireland.
10. The Commission confirmed that it does not hold an available public version of the statutory report into GAPS NI and did not hold such at the time of the query as the report had previously been made public but had been removed from the Commission's website as a result of the Court of Appeal judgment of February 2020¹ which found the decision was void. The report has not been made public since that point.

¹ [\[2020\] NICA 13 | Judiciary NI](#)

Scope of the case

11. The complainant contacted the Commissioner on 6 July 2021 to complain about the way his request for information had been handled.
12. Although the Charity Commission's submission was primarily concerned with the application of section 36(2)(c), it stated that it considered section 40(2) also applied to the withheld information, it however provided no arguments to support this position.
13. Given the Commissioner's dual role as the regulator of data protection legislation, he has a responsibility to prevent personal data being inadvertently disclosed under FOIA, he asked the Charity Commission to provide its submission in regards to the application of section 40(2).
14. This reasoning covers whether the requested information is exempt under section 40(2).

Reasons for decision

Section 40(2) – personal information

15. Section 40(2) of 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 (4A) is satisfied.
16. In this case, the relevant condition is contained in section 40(3A)(a)². 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 UK General Data Protection Regulation ("UK GDPR").
17. 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 cannot apply.

² As amended by Schedule 19 Paragraph 58(3) DPA.

18. Secondly, if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

20. The two main elements of personal data are that the data must relate to a living person and that the person must be identifiable.
21. An individual is “identifiable” if they 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.
22. 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.
23. The Commissioner has been provided with a copy of the withheld information. The information consists of a report containing a summary about the Charity Commission’s inquiry into the charity GAPS NI.
24. The summary provides that the Charity Commission opened a statutory inquiry into the charity and includes detail of the Charity Commission’s findings following its investigation.
25. The Commissioner notes that if the Charity Commission was to consider providing the summary , this would consist of information relating to the alleged misconduct and mismanagement of named individuals involved with the charity; any decisions that may have been taken as a result and any outcome of the investigation.
26. The Commissioner is satisfied that this information falls within the definition of “personal data” in section 3(2) of the DPA.

Would disclosure of the information contravene any of the DP principles?

27. 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 disclosure would contravene any of the DP principles.
28. The most relevant DP principle in this case is the one contained within Article 5(1)(a) of the UK GDPR, which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
29. In the case of an FOI 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.
30. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
31. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the UK.

Is the information criminal offence data?

32. Information relating to criminal convictions and offences is given special status in the UK GDPR.
33. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
 - (a) The alleged commission of offences by the data subject; or
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.
34. Having viewed the withheld information, the Commissioner finds that the requested information would contain criminal offence data. He has reached this conclusion on the basis that allegations of criminal activity of named individuals are referenced in the withheld information.

35. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
36. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
37. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this information being disclosed to the world in response to an FOIA request, nor that they have deliberately made this data public.
38. As none of the conditions required for processing criminal offence data are satisfied, there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) of Article 5 of the UK GDPR, and so this information is exempt under section 40(2) of FOIA.
39. As the disclosure of the information would be unlawful (and therefore already in breach of principle (a) of Article 5 of the UK GDPR), the Commissioner has not gone on to consider whether the disclosure would be fair and transparent.

The Commissioner's view

40. The Commissioner has therefore decided that the Charity Commission is entitled to withhold the requested information under section 40(2), by way of section 40(3A)(a).
41. In light of this decision, the Commissioner has not considered the Charity Commission's application of section 36 to the same information.

Right of appeal

42. 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

43. 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.
44. 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

Laura Tomkinson
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