

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

### **Decision notice**

**Date:** 10 January 2023

**Public Authority:** Isle of Wight Council  
**Address:** County Hall  
Newport  
Isle of Wight  
PO30 1UD

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

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1. The complainant has requested information regarding criminal convictions held by taxi drivers in Isle of Wight.
2. The Commissioner's decision is that Isle of Wight Council (the Council) has correctly withheld the information under section 40(2) of FOIA.
3. The Commissioner does not require the public authority to take any further steps.

#### **Request and response**

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4. On 9 February 2022, the complainant wrote to the Council and requested information in the following terms:  
  
"Please tell me, for a 50% sample of current IOW taxi drivers, i.e. c.150 taxi drivers, how many of them have a criminal record (spent / unspent) listing both their convictions and the sentences they received and relevant dates.  
  
Given your previous email this should be well within the 18 hours guidance provided by the FOI Act.  
  
In order for this to be an unbiased sample, please either go alphabetically A-Z or Z-A. I leave that to your choice but once chosen, should be committed to."

5. The Council responded on 4 March 2022. It stated that it held the request information, however the information is exempt under section 40(2) FOIA. The Council did give a total amount of criminal convictions the taxi drivers had.
6. Following an internal review the Council wrote to the complainant on 21 April 2022. It stated that it was upholding its original decision, but gave a brief summary of some criminal convictions.

## **Reasons for decision**

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### **Section 40(2) – personal information**

7. 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 40(4A) is satisfied.
8. 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 UK General Data Protection Regulation ('UK GDPR').
9. 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 FOIA cannot apply.
10. Secondly, and only 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?**

11. Section 3(2) of the DPA 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.
13. 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.

14. 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.
15. The Commissioner acknowledges that the withheld information in this case comprises of a number of individual(s) charged with an offence, the type of offence committed, their convictions and the sentences they received and relevant dates.
16. The Commissioner accepts that there are circumstances where, while an individual cannot be directly identified from the information, it may still be possible to identify them.
17. The Commissioner is satisfied that information relating to an individual charged with a criminal offence undoubtedly relates to them.
18. The second part of the test is whether the withheld information identifies any individual.
19. In this case, the Council told the complainant:

“Whilst you have referred to the information being anonymized, we believe that if the names of individuals were not disclosed, there would still be a risk of individuals being identified, due to the specific details of the convictions/sentences and dates...

It is the [Council's] belief that the release if this information would be likely to breach the Data Protection Act 2018... it further believe that the release of the same information would therefore be unfair to the data subjects.”

20. The Commissioner is mindful that the issue to be considered in a case such as this is whether disclosure to a member of the public would breach the data protection principles, because an individual is capable of being identified from apparently anonymised information.
21. He accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.
22. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any

prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.

23. In summary, the test is whether the withheld information can identify an individual with a degree of certainty when it is combined with any additional information which is reasonably likely to be accessed and used to aid identification.
24. The withheld information in this case comprises the number of individuals with a criminal record, the details of the crime they committed, the sentence they received and finally relevant dates of this sentence/crime.
25. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the individual(s) concerned.
26. He has reached that conclusion on the basis that the focus of the information is the individual(s) who were charged with an offence and details regarding their offence would clearly linked to them.
27. The Commissioner is further satisfied that the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information and other information which is likely to be in, or come into, the possession of others.
28. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
29. The fact that information constitutes the personal data of an identifiable living individual 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.
30. The most relevant DP principle in this case is principle (a)

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

31. 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".
32. In the case of a 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.

33. 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.
34. 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 GDPR.

**Is the information criminal offence data?**

35. Information relating to criminal convictions and offences is given special status in the UK GDPR.
36. 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; and
  - b. proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings, including sentencing.
37. Having considered the wording of the request, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis that the requested information relates to the individual(s) criminal records, details of their offences and sentences.
38. 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.
39. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under 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).
40. The Commissioner has seen no evidence or indication that the individual(s) concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
41. 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) and so this information is exempt under section 40(2) of FOIA.



## Right of appeal

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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: 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)

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 .....**

**Catherine Fletcher**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**