

## Freedom of Information Act 2000 (FOIA)

### Decision Notice

**Date:** 11 October 2019

**Public Authority:** London Borough of Lambeth  
**Address:** Town Hall  
Brixton Hill  
London  
SW2 1RL

#### Decision (including any steps ordered)

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1. The complainant has made a request for information relating to applicant households accommodated by the London Borough of Lambeth (the Council). The Council provided some information but relied on the exemption at section 40(2) of the FOIA to withhold other information.
2. The Commissioner's decision is that section 40(2) is not engaged in respect of the withheld information, since it is not personal data as defined by the Data Protection Act 2018 (the DPA 2018).
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
  - Disclose the information which was withheld under section 40(2) to the complainant.
4. The public authority 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 FOIA and may be dealt with as a contempt of court.

#### Request and response

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5. On 1 March 2019 the complainant requested the following information from the Council:

*"A- For applicant households accommodated by your authority in bed and breakfast hotels (e.g. privately managed, meal(s) provided, shared*

*facilities) or other nightly paid, privately managed accommodation with shared facilities, as of December 31, 2018*

- the total number of households in such accommodation*
- the total number of households in such accommodation for more than 6 weeks but less than 13 weeks*
- the total number of households in such accommodation for more than 13 weeks but less than 26 weeks*
- the total number of households in such accommodation for more than 26 weeks but less than 52 weeks*
- the total number in such accommodation for more than 52 weeks*

*B- For applicant households accommodated by your authority in bed and breakfast hotels (e.g. privately managed, meal(s) provided, shared facilities) or other nightly paid, privately managed accommodation with shared facilities, as of December 31, 2018*

- the total number of households with dependent children and / or pregnant woman with no other dependants in such accommodation*
- the total number of households with dependent children and / or pregnant woman with no other dependants in such accommodation for more than 6 weeks but less than 13 weeks*
- the total number in such accommodation with dependent children and / or pregnant woman with no other dependants for more than 13 weeks but less than 26 weeks*
- the total number in such accommodation with dependent children and / or pregnant woman with no other dependants for more than 26 weeks but less than 52 weeks*
- the total number in such accommodation with dependent children and / or pregnant woman with no other dependants for more than 52 weeks*

*C- For applicant households accommodated by your authority in bed and breakfast hotels (e.g. privately managed, meal(s) provided, shared facilities) or other nightly paid, privately managed accommodation with shared facilities, as of December 31, 2018*

- the total number of children in such accommodation*
- the total number of children in such accommodation for more than 6 weeks but less than 13 weeks*
- the total number of children in such accommodation for more than 13 weeks but less than 26 weeks*
- the total number of children in such accommodation for more than 26 weeks but less than 52 weeks*
- the total number of children in such accommodation for more than 52 weeks*

6. The Council responded on 20 March 2019. It stated that with regard to categories B and C, the answer was "none". With regard to most parts of category A the Council stated that the figure was "five or fewer", except for one part, to which the answer was "none". The refusal notice did not cite any exemptions.
7. The complainant requested an internal review on 25 April 2019. She interpreted the refusal notice to indicate that the Council was relying on section 40(2) of the FOIA, but argued that this exemption could not apply since in her opinion the requested information did not identify any individuals. The Council communicated the outcome of its internal review to the complainant on 9 May 2019. It maintained its position that individuals could be identified from the withheld information and clarified that it did seek to rely on section 40(2).

### **Scope of the case**

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8. The complainant contacted the Commissioner on 10 May 2019 to complain about the way her request for information had been handled. The complainant was of the view that the Council was not entitled to rely on section 40(2) in respect of the withheld information.

### **Reasons for decision**

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#### **Section 40(2): third party personal data**

9. 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 applicant (ie third party personal data), and where one of the conditions listed in section 40(3A)(3B) or 40(4A) of the FOIA is satisfied.
10. In this case, the relevant condition is contained in section 40(3A)(a).<sup>1</sup> This applies where the disclosure of the third party personal data 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 (the GDPR).

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA 2018. If it is not personal data then section 40 of the FOIA cannot apply.
12. If the Commissioner is satisfied that the requested information is personal data, she will go on to consider whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

14. 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.
15. 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.
16. In this case the Council sought to rely on section 40(2) in order to withhold the number of households accommodated in certain facilities at a certain point in time, and a breakdown of the time they had spent in such accommodation.
17. The Commissioner asked the Council to explain how it considered the withheld information to comprise personal data within the meaning of section 3(2) of the DPA 2018.
18. The Commissioner acknowledged that a household (and therefore the individuals within that family unit) may be identifiable by those with pre-existing knowledge of that household's circumstances. However it was not clear how any individual could be identified without such knowledge. The Commissioner therefore asked the Council to describe how in practical terms an individual could be identified, in terms of the steps that would need to be taken and any additional information or knowledge required.
19. The Commissioner also asked the Council to consider the Upper Tribunal's findings in the case of *IC v Miller* (appeal no [2018] UKUT 229 (AAC), issued 12 July 2018). In this case the Upper Tribunal upheld a previous First-Tier Tribunal finding that certain small-number information was not personal data since its disclosure into the public domain would not itself identify any individual.

20. By way of context, the Council explained that individuals placed in managed accommodation as described in the request nature are usually vulnerable, for example leaving a violent relationship or otherwise needing a place of safety. The Council accepted that the figures themselves without any other information would not identify anyone.
21. However, the Council considered that when combined with other information which could be held by individuals known to the family(s), then a mosaic picture could be produced in order to attempt to identify the individuals involved. In cases where the individuals are placed in accommodation to protect them from other individuals then the Council said that it would want to ensure that no information providing any indication of their identity was disclosed.
22. The Council also pointed out that the request asked about households in managed accommodation on a specific date, making it more likely that other individuals with knowledge of the family(s) involved would be able to identify them. The snapshot picture of families makes the information more specific than, for example, the number of families assisted in a year.
23. The Commissioner has considered the withheld information, which comprises figures of five or fewer. She has considered whether the nature of the information is, in fact, sufficiently anonymised not to be the personal data of any specific individuals.
24. The Commissioner acknowledges the Council's argument that individuals placed in such accommodation are likely to be vulnerable. She also accepts that other individuals may already hold information relating to these individuals.
25. However, the Commissioner is not persuaded that the possibility of identifying an individual, or individuals, from the withheld information, is more than remote.
26. The Commissioner's guidance on anonymisation<sup>2</sup> (page 25) sets out that it is good practice to try to assess the likelihood of motivated individuals having and using the prior knowledge necessary to facilitate re-identification of statistical data. However, the guidance also states:

*"Small numbers in small geographical areas present increased risk, but this does not mean that small numbers should always be removed automatically... always removing numbers relating to five or 10*

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<sup>2</sup> <https://ico.org.uk/media/1061/anonymisation-code.pdf>

*individuals or fewer may be a reasonable rule of thumb for minimising the risk of identification... but in the context of a specific freedom of information request a different approach may be possible”.*

27. The Commissioner understands the Council’s concern that a motivated requester and/or person with knowledge of the relevant household could discover the specific identities of attendees by obtaining further related information. However, the Council has not provided any explanation to indicate a causal link between the withheld information and identification of any individual.

28. The Commissioner is also mindful of the Upper Tribunal’s comments in *Miller*, which dealt with a request for information that is very similar to the request which is the subject of this decision notice:

*“In my judgment, the chance of a member of the public being able to identify the household and its members from the data is so remote as to be negligible... In particular, the data does not state where a household is accommodated nor where they had previously been accommodated. An authority will not necessarily provide accommodation within its own geographical area... I do not see how a person could be identified by a third party from the information in the spreadsheet. They could, at best, make no more than an educated guess and even that seems highly unlikely.”*

29. The Commissioner is mindful that *Miller* fell to be considered under the Data Protection Act 1998 rather than the DPA 2018. Nevertheless she is assisted by the Upper Tribunal’s assessment of the possibility of identification. The Commissioner considers that in this case the possibility of identifying any individual attendee from the withheld information is extremely unlikely, even by a motivated individual.

30. Since the Commissioner is not satisfied that the withheld information relates to identifiable individuals, she cannot be satisfied that it is personal data within the meaning of section 3(2) of the DPA 2018. Accordingly the Commissioner finds that section 40(2) is not engaged. She is not required to consider whether disclosure would contravene any of the DP principles.

31. The Commissioner would strongly recommend that public authorities consider her published guidance, decision notices and Tribunal decisions when considering how to respond to a request. The Commissioner would again remind authorities that it is for them to demonstrate that any exemptions relied on are properly applied. Failure to do so is more likely to result in an adverse decision notice.

## Right of appeal

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32. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.
34. 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 .....**

**Sarah O’Cathain  
Senior Case Officer  
Information Commissioner’s Office  
Wycliffe House  
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SK9 5AF**