



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0244V

Heard via the CVP platform on 21 January 2021.

**Before
Judge Stephen Cragg Q.C.**

Between

Ivan Murray-Smith

Appellant

And

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is allowed.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.
4. The Tribunal considered an agreed open bundle of evidence comprising 258 pages, an additional bundle and a closed bundle.

INTRODUCTION

5. On 19 August 2019, the Appellant wrote to the London Borough of Lewisham (the Council) and requested information in the following terms: -

“I hereby request a copy of all records held by the council in relation to PCN LX20249368 issued on 4 Dec 2014 to HJ12 KXB, subject of course to any personal data being redacted.”

6. For context, this request related to a vehicle driven by a Council employee. The Council responded on 10 September 2019 with a refusal notice relying on section 21 FOIA and providing a link to information at the parking tribunal’s website. This provided details of the alleged driving contravention by the van (essentially driving in a pedestrian area), and also provided the van driver’s name. The Council also relied on section 40(2) FOIA to withhold personal information within the scope of the request.

7. Following an internal review the Council wrote to the Appellant on 18 October 2019 upholding its previous refusal response. The Appellant contacted the Commissioner on 18 October 2019 to complain about the way his request for information had been handled. He advised the Commissioner that records:

“... lists the London Borough of Lewisham as both the enforcement authority and the appellant for this Penalty Charge Notice.

The London Borough of Lewisham is not an individual and it does not benefit from any data protection rights whatsoever. If the vehicle was leased, the lease company as an incorporated entity would also not have any rights of its own under GDPR because a company is not an individual.

The driver of the vehicle undoubtedly has data rights under GDPR, but the driver was never issued a PCN in his own name and he was never a party to the tribunal proceedings, nor was he ever liable to pay the PCN: Had the appeal failed, the London Borough of Lewisham would have needed to enforce the penalty charge against itself.

It follows that the driver was only ever at most a witness, rather than a member of the public to whom the penalty charge had been issued. The council says “When any PCN is issued to a member of the public” but in this case no PCN has been issued to a member of the public, rather two PCNs were issued:

- 1) The original PCN issued to the lease company
- 2) The second PCN which the council issued to itself.

There is no doubt that some personal data belonging to the driver is likely to be included in the information held by the council, but that does not entitle the council to withhold information that is not personal data.”

THE STATUTORY FRAMEWORK

8. During the course of the Commissioner’s investigation the Council provided information within the scope of the request previously redacted under section 40(2) FOIA.

9. Section 40 (2) FOIA reads as follows:-

(2) Any information to which a request for information relates is also exempt information if –

- (a) it constitutes personal data which does not fall within subsection (1) [personal information of the applicant], and
- (b) the first, second or third condition below is satisfied.

10. Section 3(2) of the DPA 2018 defines personal data as “any information relating to an identified or identifiable living individual”.

11. The relevant condition (as referred to in s40(2)(b) FOIA) in this case is found in s40(3A)(a):-

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –

- (a) would contravene any of the data protection principles.

12. Under s40(7) FOIA the relevant data protection principles in this case are to be found, first, in Article 5(1) of the GDPR. Materially, Article 5(1)(a) reads:-

Personal data shall be:

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’).

13. Further, by Article 6(1) GDPR:-

Processing shall be lawful only if and to the extent that at least one of the following applies:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

...

- (f) 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...

THE DECISION NOTICE

14. The Commissioner issued a decision notice dated 4 August 2020. By that time the Commissioner stated that she considered the scope of this case to be the Council's reliance on section 40(2) FOIA to withhold the remaining information in the scope of the request, which she said comprised the CCTV footage of the incident. All other information had been disclosed including stills from the CCTV footage.
15. The Commissioner stated that she had viewed the CCTV footage and that the van driver's face can be seen. The Commissioner records the Appellant's view as follows:-

"For example, if the video evidence of the contravention shows the face of the driver, the driver's face can easily be redacted from the video. It is also relevant that the driver of the vehicle was acting in an official capacity and was in the employment of the council, the publicly available record of the tribunal appeal (from <https://londontribunals.org.uk/>) states:

'The Appellant denies the contravention and states that he drove through the pedestrian zone because it was an operational vehicle and is used to distribute essential equipment to inspect the public highway.'

The fact that an individual employed by a public authority was engaged in official duties at the time of the alleged contravention is unlikely to amount to personal data if the individual concerned cannot actually be identified."

16. The Commissioner's response was as follows:-

18.... She agrees that the footage could be anonymised, however, as the driver's identity is already in the public domain on the Tribunal website referenced by the complainant, the information allows for identification of the driver. The Commissioner is therefore satisfied that the withheld CCTV comprises the personal data of the driver of the vehicle.

17. Having found that the anonymised CCTV footage would amount to personal data of the driver, the Commissioner went on to consider whether there was a legitimate interest in disclosure, as follows:-

28. The Council advised that it is satisfied that there is the legitimate interest of the general public in seeing how the Council's appeal and decision-making processes operate in the circumstances of the issuing of a PCN in this case.

29. The Commissioner accepts that there is a legitimate interest in the accountability of public authorities as a general principle. There is also the legitimate interest of the requester, the complainant. The complainant has not provided any specific legitimate interest in the disclosure of the CCTV and the Commissioner therefore concludes that his is a general interest.

30. The Commissioner notes that it is important to acknowledge that section 40 is different from other exemptions in that its consideration does not begin with an expectation of disclosure. As section 40 is the point at which the FOIA and DPA interact, the expectation is that personal data will not be disclosed unless it can be demonstrated that disclosure is in accordance with the DPA.

31. The Commissioner notes that the CCTV in question is the only element within the scope of the request which remains withheld. She accepts the Council's view that the information already disclosed and in the public domain is sufficient to satisfy the legitimate interest in accountability and transparency of the Council in the process of issuing PCNs in respect of all the PCNs it issues, including in regard to its own vehicles and any ensuing appeals. The Commissioner considers that there is limited legitimate interest in disclosure of the specific CCTV footage in respect to the interests of third parties.

18. Having reached those findings the Commissioner decided that disclosure was not necessary to meet those legitimate interests. She concluded that:-

34. In the Commissioner's view it is not sustainable to argue that disclosure of the CCTV is necessary. Disclosure of this information would not add further to the public's understanding of the Council's actions in regard to the specific PCN or PCNs generally. In the

circumstances of this case, the Commissioner has identified that whilst there is a legitimate interest in ensuring accountability and transparency on the part of the Council, she is not convinced of the necessity in the disclosure of the CCTV.

THE APPEAL AND RESPONSE

19. The Appellant's appeal is dated 6 August 2020. The Appellant agrees with the Commissioner that the name of the driver of the vehicle in the CCTV footage is in the public domain, and that 'the driver's identity will remain in the public domain forever, as any member of the public could look up the case on <https://londontribunals.org.uk/>'

20. The Appellant explains his legitimate interest in why he requested the information, and why he believes there is a legitimate interest in obtaining a copy of the CCTV footage. In summary, the Appellant states that when local authorities issue PCNs against itself, it is 'not a zero sum game.' The PCN has to be paid by the council itself, out of taxpayer's funds. He adds:

'There is therefore a much greater public interest in transparency in a case where a council is issuing a penalty to itself, than there is in a generic PCN case. This is because enforcement will cause an expenditure of public funds and it will not, in itself, achieve any traffic management objectives (as the penalty cannot be enforced against the driver). It is arguable that where a public authority squanders public resources litigating against itself, this is exactly the sort of waste that the Freedom of Information Act 2000 is designed to uncover and bring to light (and hopefully put a stop to).'

21. The Appellant also comments as follows:-

Four reasonably high quality still images, which have obviously been taken from the CCTV footage, have been disclosed in response to this FOI request.

These images are anonymised because the driver's face cannot be seen, however applying the motivated intruder test, it is obvious that anyone

minded to do so could, with a bare minimum of IT literacy, identify who the driver of the vehicle was. The video and images can be said to “relate to” the data subject only to the extent that they identify that the data subject drove down a particular road at a particular time on a particular date in the course of their employment. ...Neither the public authority nor the Commissioner could have exercised any discretion to disclose the data, disclosure of the still images is either compatible with the data protection principles (and therefore mandatory unless some other FOI exemption applies) or it is not (and that would make the disclosures made to date unlawful and a breach of the GDPR). I am therefore assuming that the Commissioner is satisfied that disclosure of the still images is lawful under section 40(2), notwithstanding that they relate to the data subject.

Given the considerations included in the Decision Notice, it appears the Commissioner is satisfied that the still images could be lawfully disclosed under Article 6(1)(f) of GDPR.

22. The Appellant also makes some points about whether disclosure is necessary to meet his legitimate interests (and he expands on the latter in the process).

The Commissioner did not seek the appellant's views as to why disclosure might be necessary before issuing her Decision Notice. She has not explained why the test of necessity is met for the still images, but not for the CCTV video. ...

However, the Decision Notice leaves me with no understanding of why disclosure of the still images meets the necessity test, while disclosure of a suitably redacted copy of the video does not.

...

Providing the face of the driver is suitably redacted, it is not apparent how the moving images would differ in intrusiveness from the still frames. On the other hand, disclosure of the video would help illustrate how a public authority has spent a considerable amount of time and resources litigating a case against itself for what amounts, at its worst, to a minor technical traffic infraction.

If ...the video shows nothing more than a vehicle driving through a road in a manner which, but for the technical contravention of the pedestrian zone restrictions, was entirely unremarkable, this would highlight the unreasonableness of the authority in pursuing this penalty to the extent that it did. All other evidence suggests that the video is in fact unremarkable and if this is the case, disclosure of the video (with the driver's face redacted) is necessary to fully illustrate the unreasonableness of the council in pursuing the matter as far as it did.

If I wanted to create a video illustrating a series of similar cases (and noting that in at least one other similar case the videos have been disclosed without issue), whether for the purposes of raising public awareness (whether online or via formal press channels), or to be submitted as evidence to a Parliamentary Select committee, the video from this case would clearly be necessary to fully illustrate the degree of unreasonableness of the council's conduct...

The latter purpose is not remote or fanciful: Parliament has enacted primary legislation on PCNs on average 3 or 4 times per decade over the past 30 years so the prospects of primary legislation on the topic being considered by a parliamentary select committee at some point within the next two or three years is not at all fanciful, indeed there are currently plans for civil enforcement powers to be given to local authorities to enforce the widely disobeyed restriction created by section 72 of the Highways Act 1835, which the police seldom if ever enforce.

Parliament may well wish to hear about examples of local authorities acting in an arguably wasteful and unreasonable way when this legislation is considered at committee level, and Parliament may well decide that additional safeguards are needed to prevent such conduct. I therefore have a legitimate interest that is clearly stronger than the generic interest identified by the Commissioner.

23. In relation to the balancing test the Appellant says as follows:-

...if it is met for the still images, and if the necessity test is met for the video as well, it is hard to see how the balancing test would not be satisfied. If the video does not show anything other than an unremarkable piece of driving, this will not disclose anything about the data subject that is not already in the public domain and it is hard to see how any harm could come to the interests of the data subject.

If disclosure of the fact that the data subject drove a particular vehicle down a particular road on the date and at the time in question could cause any such harm, that harm would already have been suffered by disclosure of the information that is:

- A) Published by the tribunal, and
- B) Has been disclosed under this FOIA request by the council.

If no harm (or no additional harm) could be made by disclosure of the video, it is hard to see what interests of the data subject could tip the balance against disclosure.

In summary, the fact that the data subject drove down that particular road at the date and time shown in the video is already in the public domain, so it is hard to see what interests of the data subject could possibly be harmed by disclosure of a redacted copy of the video.

24. In her Response, The Commissioner recognised the legitimate interest put forward by the Appellant that he wants to see the CCTV footage because he is concerned that the Council may have issued a PCN when it was not warranted (i.e. when a traffic violation did not occur). It is noted that he would like to see how the vehicle was driven and so releasing of the CCTV footage would be necessary. However, the Commissioner has not really addressed the other points made by the Appellant. In particular, the Commissioner does not explain why stills from the CCTV footage can be disclosed whereas a redacted version of the CCTV footage cannot be disclosed. The Commissioner does not gainsay the Appellant's assumption in his appeal that the Council and the Commissioner have concluded that disclosure of the stills is a lawful disclosure.

25. The Commissioner states that she:-

'...fails to see how releasing the footage would meet the Appellant's legitimate interest in seeking whether the PCN was issued correctly..'

THE HEARING

26. At the hearing the Appellant represented himself and neither the Commissioner nor the Council was represented. The Appellant explained that he is interested in the information relating to an apparent traffic violation by someone driving a van on the Council's behalf. The Appellant notes that a PCN issued in relation to the van leads to situation where the Council is pursuing the PCN effectively against itself. The Appellant told the Tribunal during the oral hearing that he is interested in obtaining information about scenarios such as this to illustrate the need for reform of local authorities'

parking enforcement functions. He accepts that he has been provided with a lot of information in this case, including the tribunal appeal records which actually include the name of the driver, and stills from the video referred to which show the van in question (including the number plate) from the front and the back, although it is not possible to identify the driver.

27. However, he explains that having a video of the incident, with the image of the driver pixelated so that he is not identifiable from the video, is a lot more powerful way of demonstrating the pointlessness of the Council issuing a PCN in a case such as this, especially if the driver is not driving carelessly, for the purposes of advocating for changes to the Council's powers.

DISCUSSION

28. As the Commissioner says in the decision notice the driver can be seen in the van in the CCTV footage, albeit fleetingly for a period of about two seconds. Otherwise it is not possible to see the driver at all in the footage and the CCTV footage is simply of a van driving through a pedestrian area (as can also be seen from the stills from the footage provided to the Appellant).

29. In relation to this issue the Commissioner said in her decision notice (as already set out above):-

18. ...She has viewed the withheld CCTV and notes that the driver's face can be seen. She agrees that the footage could be anonymised, however, as the driver's identity is already in the public domain on the Tribunal website referenced by the complainant, the information allows for identification of the driver. The Commissioner is therefore satisfied that the withheld CCTV comprises the personal data of the driver of the vehicle.

30. It is thus accepted that the image of the driver could be anonymised so that the driver cannot be seen. In that case, the personal data of the driver that the Commissioner appears to be concerned about in paragraph 18 of the decision

notice is that it will be possible to glean the name of the driver of the van seen in the footage because his name appears in the parking tribunal material available online.

31. However, as the Appellant states in his appeal, exactly the same can be said about the stills from the footage which have been disclosed to the Appellant already. What is the difference, asks the Appellant, between disclosure of the stills and disclosure of the redacted/anonymised CCTV footage?
32. Unfortunately, the Commissioner does not address this issue at all in the decision notice or the Response, but it is an important question in this case.
33. It is useful to start by exploring on what basis the stills have been disclosed. It seems to me that there are two ways in which disclosure of the stills can be justified. It could be argued that stills of the van driving on a road do not amount to personal data at all even though the driver can be identified (although not seen). Or it could be accepted that the information is personal data but, pursuant to the statutory framework set out above, disclosure has been made because it has been accepted that the Appellant has a legitimate interest for which disclosure is necessary, and this outweighs the fundamental rights and freedoms of the data subject.
34. I am prepared to accept that both the stills and redacted CCTV footage amount to the personal data of the driver in this situation even if he cannot be seen. From seeing the footage or the stills and having access to the tribunal records it is possible to identify by name who is driving the van.
35. However, it also seems to me that it is necessary for the Appellant's (accepted) legitimate interest for there to be disclosure of the redacted CCTV footage. I accept his submissions to me about the advantages that a video can have over still photographs when endeavouring to make a point about the Council actions that he is concerned about.

36. In relation to the balancing test, I must consider the fundamental rights and freedoms of the driver which require the protection of personal data. But in the context of this case, it is already public knowledge that the driver was driving the van at the particular time and place because that is in the tribunal documentation. Four pictures of the van, in the form, of stills from the CCTV containing the time and date when they are taken, show the passage of the van over a period of a minute or so through a pedestrianised area, have been disclosed and already in the public domain.
37. In these circumstances what are the 'interests or fundamental rights and freedoms of the data subject' which require protection'?
38. In my view it is too late to protect the driver from images of the van of which he was the driver from being disclosed, because the Appellant has these already. On that basis the driver can now have no reasonable expectation that the information will not be in the public domain.
39. Neither the Commissioner nor the Council have addressed this issue, and in my view there is no palpable difference between the disclosure of stills and the disclosure of redacted CCTV footage. Both reveal the same personal data about the driver, but that is, in fact, personal data already in the public domain. The driver's fundamental rights and freedoms which require protection of personal data in such circumstances, in my view, do not outweigh the Appellant's legitimate interests for which disclosure is necessary.

CONCLUSION

40. For all these reasons the appeal is allowed, and a decision notice substituted which provides for disclosure of an anonymised copy of the CCTV footage.
41. A copy of this decision is to be sent to the Council.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 12 February 2021

Date promulgated: 17 February 2021