



Neutral citation: [2024] UKFTT 164 (GRC)

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Number: EA/2023/0104

Considered on the papers
On 20 February 2024

Decision given on: 26 February 2024
Promulgated on: 29 February 2024

Before

JUDGE OF THE FIRST-TIER TRIBUNAL SWANEY
TRIBUNAL MEMBER SHAW
TRIBUNAL MEMBER SIVERS

Between

PAUL MACKINTOSH

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

1. The appeal is dismissed.
2. The decision to withhold information pursuant to sections 24(1) and 40(2) of the Freedom of Information Act 2000 (FOIA) is confirmed.

REASONS

Background

3. The appellant made a request to the first respondent, Nottinghamshire County Council (the Council) seeking information about reports made under the 'Lorry Watch' Scheme. Lorry Watch is a scheme operated by the Council using local people to identify the misuse of weight restricted routes by heavy goods vehicles in Nottinghamshire.

4. The appellant made a detailed request for information to the Council on 18 May 2022. The Council responded on 14 June 2022 and provided information it considered within the scope of the request. A copy of the detailed request together with the Council's response is set out as an annex to the Commissioner's decision and is not repeated here.
5. On 23 June 2022 the appellant contacted the Council to query parts of the response and to seek clarification on other aspects. For the purposes of
6. this appeal the following request for clarification is material:

why were x23 of the x51 identified at a) not contacted - in other words, why were another x23 letters or emails, or some combination of both, not issued?
7. The Council responded on 21 July 2022 and stated that the data was not held. The appellant then contacted the Council on 25 July 2022 seeking the following clarification:

In my request of 23/6/22 I asked, among other things, for an explanation as to why were another x23 letters or emails, or some combination of both, not issued?'...And this is the part of the request giving rise to your 'Data not held by NCC' response. So, I'll ask again for information as regards the x23 cases.
8. In a response dated 27 July 2022 the Council stated that:

Whilst NCC have logged 23 vehicles we did not hold specific data relating to these vehicles due to lack of resources available to the authority at the time, which enabled us to follow up with letters or emails.
9. The appellant contacted the Council on 1 August 2022 asking the following:

why/for what reason(s) exactly...' [there was a] lack of resources available to the authority at the time fully to process the x23 [and probably more County-wide] cases
10. The Council's response is dated 24 August 2022 and states:

I can confirm that there were 2 periods which affected the full processing of Lorry Watch. Period 1, was from 21 June 2021 to 8 August 2021, and as you are aware this was due to lack of resources. Unfortunately, I cannot provide any further detailed information about this as it falls under personal information and is exempt under Section 40 of FOIA which provides an exemption from the right to information if its is personal data as defined in the DPA.

Period 2 was from 6 December 2021 to 12 April 2022 and this information is exempt from disclosure under Section 24(1) for the purposes of safeguarding national security.

This exemption is subject to the public interest test. The public interest test provides you with an opportunity to explain the severity of the damage that would be caused, so it can be weighed against the public interest in disclosure. Even though the ICO gives significant weight to safeguarding our national security, it is important to give proper consideration to the public interest in disclosing information. I can confirm that the Council has considered the PIT and the decision to withhold this information applies.

11. This last response prompted the appellant to complain to the second respondent, the Information Commissioner (the Commissioner) on 31 August 2022 about the Council's decision to withhold information pursuant to sections 24(1) and 40(2) of FOIA.

The Commissioner's decision

12. In his letter dated 9 February 2023 the Commissioner gave the following reasons for upholding the Council's decision:
 - (i) The withheld information relating to 'period 2' engages section 24(1) having regard to the principles identified by the House of Lords in SSHD v Rehman [2001] UKHL 47 and applied in Norman Baker v the Information Commissioner and the Cabinet Office (EA/2006/0045, 4 April 2007).
 - (ii) It is not accepted that disclosure would be likely to meet all of the generic public interests identified by the Council; however, it is accepted that disclosure of the withheld information would aid transparency around the Council's processing of Lorry Watch reports.
 - (iii) Public interest in disclosure is significantly outweighed by the public interest in ensuring that the national security of the United Kingdom is not harmed.
 - (iv) Section 40(3A)(a) of FOIA is relevant and applies where disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data as set out in article 5 of the UK General Data Protection Regulation (UK GDPR).
 - (v) The withheld information relating to 'period 1' relates to an individual, which a motivated person could use to identify that individual and therefore falls within the definition of personal data in section 3(2) of the Data Protection Act 2018 (the DPA).
 - (vi) The relevant data protection principle is principle (a) contained in article 5(1)(a) of the UK GDPR.

- (vii) The most applicable basis for lawful processing of personal data is contained in article 6(1)(f) of the UK GDPR. The application of article 6(1)(f) requires a three part test.
- (viii) There is a legitimate interest in disclosure of the withheld information which would aid transparency in respect of why certain reports under the Lorry Watch scheme were not fully processed.
- (ix) Disclosure is necessary to meet the legitimate interest.
- (x) The individual whose personal data is included in the withheld information would have no expectation that this would be released to the public and such disclosure is likely to cause that individual some distress. These factors outweigh the public interest in disclosure.
- (xi) It is not possible to give full reasons for the outcome of the balancing exercise in relation to the information withheld under section 24(1) without referring to the content of that information.

The appellant's case

13. The appellant lodged his appeal on 24 February 2023 and essentially argues that the Commissioner has failed to properly conduct the balancing exercise required in relation to the exemption in section 24(1).
14. In respect of the section 40 exemption, the appellant denies that he is seeking information that would fall within the definition of personal information and would be satisfied with a more generic response to the reasons for the non-processing of the 23 cases. He asks the tribunal to direct the Council to disclose such generic information.
15. In respect of the section 24(1) exemption, the appellant also denies that he requires information that has a bearing on national security and indicates that he would be satisfied with a more generic response. He asks the tribunal to direct the disclosure of such generic information.

The Commissioner's response

16. Following receipt of the appellant's notice of appeal, the Commissioner wrote to the appellant to provide him with a copy of redacted correspondence from the Council and asked whether the additional information contained within the correspondence was sufficient to satisfy the appellant's request. This was set out in the following terms:

[1] The council responded and confirmed that there were 2 periods which affected the full processing of Lorry Watch. Period 1 was from 21 June 2021 to 8 August 2021, was due to lack of resource. No further detailed information about this was provided as the council considers the information to fall under personal information and is exempt under Section 40(2) of FOIA which provides an exemption from the right to information if it is personal data as defined under the DPA.

[2] To assist the ICO's consideration of the application of section 40(2) the council considers disclosure would contravene UK GDP principle. The personal data relates to an employee as an individual's employees information due to the staff member who is responsible for processing this element of the work, was [Redacted] and the council had no additional staff available to monitor or follow up the work of this individual.

[3] Period 2 was from 6 December 2021 to 12 April 2022 this information is exempt from disclosure under Section 24(1) for the purposes of safeguarding national security.

[4] To assist the ICO's consideration of the application of this exemption, I can confirm that the data was not recorded at this time due to the Council having no access to the PNC police vehicle recognition system. [Redacted]. The Council had no access during tis period which halted any actions. This exemption is subject to the public interest test...

17. The second and fourth paragraphs of this extract are relevant for the purposes of this appeal. The numbering is ours for ease of reference and all references to [2] and [4] below refer to this extract. Paragraph [2] contains information that is said to be exempt from disclosure pursuant to section 40(2) of FOIA and paragraph [4] contains information that is said to be exempt pursuant to section 24(1) of FOIA.
18. The appellant did not accept that this was sufficient to satisfy his request and in his correspondence dated 31 May 2023 he speculated that the withheld information in paragraph [2] related to health data and contended that there was no need to apply section 40(2) of FOIA because even if the information were not withheld, neither he nor anyone else could identify the individual concerned. In respect of the information provided in paragraph [4], the appellant stated that it brought him no closer to understanding why the withheld information related to national security.

The law

19. There are two exemptions relied on in this appeal. The first is contained in section 40 of FOIA which provides where relevant:
 40. – Personal information.
 - (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
 - (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), and

(b) the first, second or third condition below is satisfied.

(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, or...

(7) In this section—

‘the data protection principles’ means the principles set out in—

(a) Article 5(1) of the UK GDPR, and

(b) section 34(1) of the Data Protection Act 2018;

‘data subject’ has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

‘personal data’ and ‘processing’ have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);

‘the UK GDPR’ has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act).

20. Pursuant to section 2 of FOIA, the exemption in section 40(1) is absolute, as is that in section 40(2) where the first condition referred to in that subsection is satisfied.

21. The second exemption relied on is contained in section 24 of FOIA which provides where relevant:

24. — National security

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

Findings and reasons

22. The issues for determination in this appeal are as follows:

Section 40(2)

- (i) Is the withheld information personal data?
- (ii) Does disclosure breach the first data protection principle, i.e. would disclosure be lawful pursuant to article 6(1)(f) of the UK GDPR?
 - (a) Is there a legitimate interest in disclosure?
 - (b) Is disclosure necessary?
 - (c) Are the legitimate interests outweighed by the interests of the data subject?
 - (d) If it is lawful, is disclosure fair and transparent?

Section 24(1)

- (i) Does the withheld information relate to national security?
- (ii) Is there public interest in disclosure?
- (iii) Is the public interest in disclosure outweighed such that exemption is required for the purpose of safeguarding national security?

Section 40(2)

- 23. We have seen the withheld information and are satisfied that it is personal information within the meaning of section 3(2) of the Data Protection Act (the DPA) because it is any information relating to an identified or identifiable living individual. Paragraph [2] of the additional information disclosed makes it clear that the redacted information relates to a single individual, i.e. '*the staff member* who is responsible for processing this element of the work'. We are satisfied that the withheld information, together with other available information, which could include that obtained by making enquiries of other people who may have additional information about the data subject, is capable of identifying them with a degree of certainty.
- 24. We find that there was a legitimate interest in disclosure of the information set out at paragraph 16 above. This was not disputed by the Commissioner. We agree that there is a legitimate interest in knowing the reasons as to why certain reports made under the Lorry Watch scheme were not processed because it aids transparency of the scheme.
- 25. Having had regard to the closed evidence we do not accept that the appellant has any legitimate interest in disclosure of the withheld information. It adds nothing material to the information that has already been provided and does not assist in aiding transparency of the scheme over and above the information that has already been disclosed.
- 26. It was not disputed that disclosure was necessary in order to meet the legitimate interest. We find that this concession relates to the information that was disclosed before the decision under appeal was made. As we have found that there is no legitimate interest in disclosure of the withheld information, the question of whether it is necessary does not arise. In other words, disclosure is not necessary to meet a legitimate interest because there is no legitimate interest to meet.
- 27. Our findings mean that disclosure of the withheld information would not be lawful. Accordingly, there is no need for us to go on and conduct a balancing exercise or consider whether disclosure would be fair and transparent.

Section 24(1)

- 28. The information to which this exemption has been applied is contained in paragraph [4].

29. In disputing that the withheld information relates to national security, the appellant acknowledges that it is hard for him to assess for himself whether that is the case given he has not seen that withheld information. The appellant indicates in his email dated 31 May 2023 that he would be content to know which aspect of national security is relevant with reference to paragraph 14 of the respondent's decision.
30. We are satisfied having had regard to the closed evidence, that the withheld information does relate to national security in that it relates to the security of the United Kingdom and its people. The appellant's indication that he would be satisfied if it were explained to him why the withheld information falls within one of the bullet points listed in paragraph 14 of the Commissioner's decision is to misunderstand that paragraph. While bullet points two, three, four, and five contain examples of what the interests of national security might include, the second bullet point makes it clear that these are not exhaustive.
31. It is clear from the additional information provided to the appellant on 26 May 2023 that the reason for the lack of processing of reports in period two was due to the fact that the Council did not have access to the PNC (Police National Computer) police vehicle recognition system. We are satisfied that a lack of access to the PNC vehicle recognition system and the reasons for that lack of access are relevant to the security of the United Kingdom and its people.
32. The Commissioner accepted that disclosure of the withheld information would aid transparency around the Council's processing of the Lorry Watch reports. We agree and find that there is public interest in disclosure.
33. We have carefully balanced the public interest in disclosure and the public interest in maintaining the exemption. The public interest in disclosure carries weight. We have had regard to the information in paragraph [4]. This had not been disclosed to the appellant at the time of the Commissioner's decision. Having considered this, together with the closed evidence, we consider that the additional information in paragraph [4] disclosed to the appellant is sufficient to provide him with the reason for the lack of processing of some reports made in period 2. This reduces the weight to be given to the public interest in disclosure of the withheld information.
34. We bear in mind that although the views of the public authority carry weight, they are not a trump card. We are satisfied that we should accord weight to the concerns identified by the Commissioner in his closed submissions. Even if we accept that the risk of harm as a result of disclosure is relatively low, the nature of the risk means that there is strong public interest in avoiding that risk.
35. Having balanced these factors, we find that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Summary

36. In summary we find the following:

- (i) The withheld information at paragraph [2] is personal information.
- (ii) There no legitimate interest in the disclosure of that information.
- (iii) Because there is no legitimate interest in the disclosure of the withheld information in paragraph [2], the question of necessity does not arise.
- (iv) The disclosure of the withheld information would not be lawful pursuant to article 6(1)(f) of UK GDPR.
- (v) The withheld information at paragraph [4] does relate to national security.
- (vi) There is public interest in disclosure of that information.
- (vii) The public interest in disclosure is outweighed by the public interest in maintaining the exemption

37. Our findings mean that we find that the exemptions in sections 40(2) and 24(1) of FOIA apply and the appeal therefore falls to be dismissed on both grounds.

Signed *J K Swaney*

Date 26 February 2024

Judge J K Swaney
Judge of the First-tier Tribunal