

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 June 2013

Public Authority: The Chief Constable of Essex Police
Address: Essex Police Headquarters
PO Box 2
Springfield
Chelmsford
Essex
CM2 6DA

Decision (including any steps ordered)

1. The complainant requested details of automatic number plate recognition (ANPR) activations from Essex Police (the Police) for a particular vehicle on a particular date. The Police refused to confirm or deny whether it held information falling within the scope of this request on the basis of section 40(5) of FOIA, the personal data exemption. The Commissioner is satisfied that the Police are entitled to rely on this exemption to refuse to confirm or deny whether it holds the requested information.

Request and response

2. On 11 April 2012 the complainant wrote to Essex Police (the Police) and requested information in the following terms:

'1. According to the National ANPR Data Centre, all ANPR data which is generated by automatic number-plate readers in Essex, belongs to and is owned by the Chief Constable to Essex Police. The NADC are merely the "controllers" of the data.

2. On that basis, please can you provide me with the archive national ANPR details for all activations in relation to Vauxhall Vectra, [index number redacted], in Essex on 28th February 2008, in which it was confirmed by Essex Police that I was a passenger on that particular day.

3. Should it be the case that this ANPR data has been deleted from the NADC database, please can you inform me, on whose authority was the data deleted and the precise data of the deletion.

4. Just to there is no ambiguity or confusion as to the correct registration of the vehicle and the precise date of the information required. It is Vauxhall Vectra [index number redacted] on the Twenty-eighth of February Two-thousand-and-eight.'

3. The Police responded on 9 May 2012 and explained that it was seeking to rely on section 40 of FOIA as a basis to refuse to confirm or deny whether it held information falling within the scope of the request.
4. The complainant contacted the Police on 26 June 2012 in order to ask for an internal review of this decision.
5. The Police responded on 19 July 2012 and upheld the decision to refuse to confirm or deny whether it held information falling within the scope of the request. It confirmed that the exemption contained within FOIA it was relying on to adopt this approach was contained at section 40(5).

Scope of the case

6. The complainant contacted the Commissioner on 31 July 2012 to complain about the way his request for information had been handled.
7. The complainant asked the Commissioner to consider two broad issues. Firstly his opinion that the requested information constituted his own personal data and thus the Police should have considered this request under the Data Protection Act (DPA) rather than under FOIA. Secondly, that if it was determined that the information was not his personal data and thus the request was in fact considered under FOIA, the complainant argued that in the particular circumstances of this case it would not be unfair to the third party in question (i.e. the owner of the vehicle referenced in the request) to disclose the requested information (if held).
8. With regard to the first issue, the Commissioner is of the opinion that the requested information does not constitute the complainant's personal data and he has already informed the complainant of this finding, and his reasons for it, in a letter dated 17 May 2013.
9. Therefore, this notice simply focuses on the second point of the complaint. In terms of this issue, it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested.

Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held of course. Both rights are subject to the application of exemptions.

10. In this case the Police have relied upon section 40(5)(b)(i) of FOIA to refuse to confirm or deny whether they hold the requested information, i.e. they have relied on this exemption in order not to fulfil the duty contained at section 1(1)(a) of FOIA. Therefore this notice simply considers whether the Police are entitled, on the basis of this exemption, to refuse to confirm or deny whether it holds the requested information. The notice does not consider whether the requested information – if held – should be disclosed.

Reasons for decision

Section 40 – personal data

11. Section 40 of the FOIA provides a number of exemptions relating to the withholding of 'personal data' with personal data being defined by the Data Protection Act 1998 (DPA).
12. Section 40(5) specifically states that:
 - 'The duty to confirm or deny-
 - (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).'

13. Therefore, for the Police to be correct in relying on section 40(5)(b)(i) to neither confirm or deny whether it holds information falling within the scope of the complainant's request the following conditions must be met:

- Confirming or denying whether information is held would reveal personal data of a third party; and
That to confirm or deny whether information is held would contravene one of the data protection principles.

Would the confirmation or denial that information was held reveal the personal data of a third party?

14. Section 1(1) of the DPA defines personal data as:

'data which relate to a living individual who can be identified –

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'

15. The Police argued that it had previously been accepted by the Commissioner that vehicle registration marks (VRMs) were the personal data of the registered keeper of the vehicle. Therefore the requested information (if held) was the personal data of the register keeper of the vehicle identified in the request.

16. As the Police suggested, the Commissioner accepts that VRMs are the personal data of the vehicle's registered keeper. Furthermore, in the circumstances of this case the Commissioner accepts that confirmation as to whether the requested information was held would reveal biographical information about the registered keeper. That is to say it would reveal whether the registered keeper had been driving his car in Essex on 28 February 2008. The Commissioner is therefore satisfied that the confirmation or denial as to whether the Police hold information falling within the scope of the request would constitute the disclosure of personal data of the registered keeper.

Would confirming or denying whether such information was held contravene any of the data protection principles?

17. In support of its application of section 40(5)(b)(i), the Police argued that to confirm or deny whether it held information falling within the scope of this request would contravene the first data protection principle.

18. The first data protection principle states that:

1. Personal data must be processed fairly and lawfully; and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

19. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself (if held);
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information or the consequences of confirming whether information is held, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

20. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information (or confirm whether or not the information is held) if it can be argued that there is a more compelling public interest in disclosure. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of

accountability and transparency for their own sakes as well as case specific interests.

The Police's position

21. In support of its position that confirming whether or not it held the requested information would breach the first data protection principle, the Police explained that it is very rare that information that relates closely to an individual would be released under FOIA. It suggested that examples of where this might happen are where an individual is a highly placed employee, or where a good deal of information about the individual has already been placed in the public domain and release - or in this case even confirmation as to whether or not information is held - could not cause them harm in any significant way. Consequently the Police explained that when it receives a request from a person asking for information which is the personal data of a third party under FOIA, it will usually refuse to confirm whether or not information is held on the basis of section 40(5). The Police emphasised the importance of it adopting a consistent approach to adopting a neither confirm nor deny response. That is to say, responding to one request by confirming that information was not held may undermine the Police's decision to adopt a neither confirm nor deny response to a similar requests it may receive in the future

The complainant's position

22. The complainant argued that in applying section 40(5)(b)(i) the Police had failed to give sufficient regard to the particular circumstances of this request. The complainant explained that he and the driver of the vehicle in question had been following a particular cash-in-transit van as part of lawful research on the date referred to in the request for the purposes of a book the complainant was writing. The complainant explained that unbeknown to them both, they were being observed by police surveillance teams. Many months later, the complainant explained that both he and the driver of the vehicle had been arrested and subsequently convicted of conspiracy to rob. The complainant explained that these convictions were the result of a high profile trial which was covered extensively in local newspapers and on regional television. Consequently, in light of the high profile trial and coverage that it attracted, the complainant argued that there was no basis for the Police to argue that disclosure of the requested information (if held) would cause significant harm to the third party in question when very similar amounts of personal data had been placed into the public domain via the court case which led to the conviction of the complainant and the driver. Moreover, the complainant argued that he had been unfairly convicted and the requested information could assist him challenging his conviction and imprisonment.

The Commissioner's position

23. Central to the Commissioner's view of the application of section 40(5)(b)(i) in this case is his position with regard to whether information disclosed in open court is considered to be in the public domain for the purposes of FOIA. In the Commissioner's opinion, for information to be considered to be in the public domain, it must be in the public domain at the time of the request. Even if information has entered the public domain some time before the date of the request, this does not mean that it remains there indefinitely. For example, information disclosed in court may briefly enter the public domain in theory, but its availability in practice is likely to be short-lived unless it passes into more permanently available sources (e.g. online newspaper reports).

24. The Information Tribunal has confirmed this approach:

*'We also consider that even if the disputed information had entered the public domain by virtue of having been referred to during the Siddiqui trial in 2001, it does not necessarily follow that it remains in the public domain. We agree with the observation of the Commissioner in the Decision Notice that knowledge obtained in the course of criminal trials is likely to be restricted to a limited number of people and such knowledge is relatively short-lived.'*¹

25. Therefore, in line with his guidance, the Commissioner does not accept the complainant's line of argument that information that was disclosed and discussed in court during the case he has referred to can be considered to be in the public domain for the purposes of this request. Nevertheless, the Commissioner acknowledges that there a number of newspaper articles online which report details of the court case, including the names of the defendants, details of the offences they were charged with and the outcome of the case. However, the Commissioner believes that it is vital to note that these newspaper articles do *not* include any detailed information which is similar to the requested information in this case. In other words, whilst the broad details of the case are discussed in the newspaper articles, the specifics of particular pieces of evidence are not. The Commissioner is therefore satisfied that despite the court case and media coverage, for the purposes of this request neither the requested information, nor information very similar to it (e.g. other ANPR data relating to the vehicle in question which may,

¹ *Armstrong v Information Commissioner and HMRC (EA/2008/0026, 14 October 2008)*

as the complainant infers, have been discussed in court) can be said to have been in the public domain at the time of the request.

26. With regard to the reasonable expectations of the third party, the Commissioner accepts that custom and practice dictates that the Police would be exceptionally unlikely – under FOIA – to confirm whether or not they hold specific information, such as that requested here, about particular individuals. The Commissioner does not believe that the Police's approach would differ even if the third party had been convicted of an offence and the court case had received some press coverage. The Commissioner recognises that if asked, the third party in question may not necessarily refuse to consent to confirmation being given as to whether the requested information is held. However, in cases where a public authority has adopted a neither confirm nor deny exemption, the Commissioner believes that consideration has to be given to the importance of maintaining a consistent approach. Therefore, when taking this need for consistency into account, along with the established custom and practice, the Commissioner is satisfied that under FOIA, the third party would have a reasonable expectation that the Police would not confirm whether they held specific information related directly to him such as the information which is the focus of this request.
27. In terms of the consequences of disclosure, the Commissioner notes the complainant's argument that in light of the trial and media coverage it is implausible for the Police to argue that significant harm would occur if the information (if held) was disclosed. However, as explained above, whilst the Commissioner accepts that general details of the court case were in the public domain at the time of the request, such information did not extend to the information of the specific nature falling within the scope of this information request. Consequently, the Commissioner accepts the Police's position that confirming whether or not the requested information is held potentially risks invading the privacy of the third party, albeit the Commissioner believes that such an invasion of privacy would arguably be relatively minor given that the information that *is* in the public domain already reveals key details of the third party's conviction. In the Commissioner's view it is difficult to envisage how confirmation as to whether the requested information is held would invade the privacy of the third party to any significant degree in the particular circumstances of this case in light of the information that is already in the public domain surrounding his conviction.
28. In terms of the legitimate interests in confirming whether or not the information is held, the Commissioner recognises that the complainant has a clear personal interest in accessing the requested information as he believes that this may help him in challenging his conviction and imprisonment. However, in the Commissioner's view beyond this particular and specific interest it is difficult to envisage how confirmation as to whether or not the Police hold the information would add

materially to any broader public interests associated with accountability and transparency.

29. In conclusion, although the Commissioner accepts that confirmation by the Police as to whether the recorded information is held would be unlikely to cause any significant harm to the third party, the Commissioner is satisfied that such a confirmation or denial would still be unfair given the reasonable expectations of the third party. Furthermore, the Commissioner believes that the complainant's argument that fulfilling this request would assist him in challenging his conviction can only attract limited weight given that FOIA is concerned with disclosing information to the world at large, and the benefits associated with such disclosures, rather than any private interests. Moreover, the Commissioner believes that consideration has to be given to the broader consequences of the Police complying with the duty contained at section 1(1)(a) in relation to this request. If the Police did comply with this duty in relation to this request this would undermine its ability to adopt a consistent neither or deny response to future requests which sought specific pieces of evidence potentially held by the Police as part their investigations.

Right of appeal

30. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. 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

Alexander Ganotis
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