

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 February 2020

Public Authority: Nottinghamshire County Council

Address: County Hall
Loughborough Road
West Bridgford
Nottingham
NG2 7QP

Decision (including any steps ordered)

1. The complainant has requested information regarding the monitoring and enforcement of Environmental Weight Restrictions for vehicles.
2. The Commissioner's decision is that Nottinghamshire County Council has correctly engaged the exemptions at 40(2) – personal information and section 30(1)(b) - investigations and proceedings to withhold some information. However, it failed to provide a response to part of the information request and therefore breached section 10 – time for compliance.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Issue a response to request item [i] in accordance with the Freedom of Information Act (2000).
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 Act and may be dealt with as a contempt of court.

Request and response

5. On 15 May 2019, the complainant wrote to Nottinghamshire County Council ('the council') and requested information in the following terms:

"The information requested is as follows (bearing in mind the connection with NCC - 037225 - 19) -

a) an explanation about the way in which the owners/operators of the 71 vehicles, the weights of which each exceeded the EWR [Environmental Weight Restriction] limit, were approached ie if by 'phone, in person or in writing. Please supply an example copy of any written communication used (redacted if/as necessary) or tell me where/how I might view a copy,

b) the registration of the vehicle which did not exceed the weight restriction limit,

c) the VRMs (number plate registrations) of the 14 vehicles '.....[where] there was no trace on the VRM (number plate) supplied...',

d) what is meant by the expression 'No Further Action' eg does this relate to a decision following contact with the owner/operator? In this connection, please also list the reason(s) to support 'No Further Action',

e) what is meant by the expression 'No Response' eg what is your protocol/procedure to be followed before being able to apply this 'outcome'? Eg are owners/operators 'phoned/written to - once, twice - and how is it, apparently, that owners/operators of vehicles who potentially have broken the law can avoid possible consequences simply by not responding to your communication(s)?,

f) the dates, durations (hours/mins) and locations (eg roadside verge at junction of x road with y street) of the 7 (seven) enforcement exercises carried out by Notts CC in and around Southwell in the period 1/4/18 to 1/4/19 inclusive, and

g) how many -

i) warnings, and

ii) prosecutions

in the 12 month period 1/4/18 to 1/4/19 inclusive has Notts CC issued/taken forward concerning offence(s) committed relating to

Environmental Weight Restriction provisions on any road anywhere in the Nottinghamshire, whether as a result of Notts CC's own enforcement activities or as consequence of 'Lorry Watch' reporting. Please supply an example copy of a formal written warning communication as issued (which I realise may need to be redacted) or tell me where/how I might view a copy."

6. The council responded on 31 May 2019. In relation to each element of the request it:

[a],[e] ,[f] refused to provide the requested information on the basis of the exemption at section 30(1)(b) – investigations conducted by public authorities;

[b], [c] refused to provide the requested information on the basis of the exemption at section 40(2) – personal information;

[d] provided some information;

[g] provided some information but refused to provide "*an example copy of a formal written warning communication*" on the basis of the exemption at section 30(1)(b) – investigations conducted by public authorities.

7. Following an internal review, the council wrote to the complainant on 9 July 2019. In relation to each request item it:

[a] provided some information;

[b], [c] – upheld its position regarding the exemption at section 40(2);

[e] provided some information;

[f] upheld its position regarding section 30(1)(b), stating:

"We are intelligence led and as the results from last year show and the outcomes from Community Lorry Watch reports also indicate there is a high level of compliance at this EWR (over 90%) as most lorries have a legitimate reason to be there. We have a number of EWRs to enforce in the county so decide which ones to carry out operations at based on intelligence";

[g] provided further information, being a copy of the warning letter.

8. On 11 July 2019 the complainant requested a further review of the council's response. This included a request for the originating document for the 90% statement that the council made in the review response of [f]. This additional request is annotated [i] for ease of reference in this decision notice:

[i] *"as regards your points about compliance (made as part of response to f) and g)), please let me have a copy of the document (or the relevant extract) in which "...the results from last year [dates required, please] show and the outcomes from Community Lorry Watch also indicate there is a high level of compliance at this EWR (over 90%) [calculations required, please]....."*

9. Following a further review, the council wrote to the complainant on 30 July 2019. It upheld its position regarding [c] and [f]; it did not provide any information in respect of [i].

Scope of the case

10. The complainant contacted the Commissioner on 1 August 2019 to complain about the way his request for information had been handled. Specifically with regard to the council's refusal to provide information in relation to [c] on the basis of section 40(2) – personal information; its refusal regarding [f] on the basis of 30(1)(b) – investigations and proceedings; and its failure to respond to [i].
11. The Commissioner considers the scope of this case is to establish whether the council has correctly engaged the exemption at section 40(2) and section 30(1)(b) and to determine whether it has provided a response and complied with section 10 in relation to [i].

Background

12. The request is linked to a previous information request regarding "Lorry Watch" reports made by the public to the council. The scope of the disclosure included the number of reports and details of action taken by the council.
13. The council's website provides a description of the Lorry Watch scheme which states it *"is a scheme operated using local people to identify the misuse of weight restricted routes by heavy goods vehicles in Nottinghamshire. Heavy vehicles are not allowed to travel along certain routes which are considered to be unsuitable. Large vehicles using these routes can create serious safety hazards for other road users and pedestrians, in particular children."*
14. To report a vehicle, the following is requested:
- vehicle registration number;
 - date of the sighting;
 - time of the sighting;
 - name or number of the road.

Reasons for decision

Section 40 - personal information

15. 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 requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
16. 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 General Data Protection Regulation ('GDPR').
17. 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 the FOIA cannot apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. 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.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

23. In item [c], the complainant requests the number plate details provided for 14 vehicles where the council states "*there was no trace on the VRM (number plate) supplied.*" It is the complainant's position that if vehicle registrations are untraceable, and therefore do not exist, then there is "*no third party data argument.*"
24. In previous decision notices, the Commissioner has considered that vehicle registration marks (VRMs) are personal data (especially when combined with other information such as geographical, manufacturer, model and colour information) and relate to the relevant vehicle keeper's private life.
25. A Vehicle Registration Mark (VRM) is a unique mark linked to a specific vehicle. In this case they are being collected as part of a system where the ultimate purpose is to identify and, if necessary, take some action against a living individual. The VRM therefore will be personal data at the point of collection.
26. The council advised "*in considering this request the Council deemed vehicle registration numbers to be third party personal data. The data requested is a list of 14 VRMs the Council does not know who the current registered keeper of the vehicles are, but recognised that they could be owned by individuals, sole traders or that of a limited company.*"
27. The council further advised "*the requester had narrowed down his request to focus on a small geographical location of this Lorry Watch scheme. The Council believed that these 14 VRMs could act as a common identifier, when used in conjunction with other information may allow the identification of the registered owner, sole trader or place a driver/employee of a limited company to a date seen, time and location.*"
28. The Commissioner asked the council what it meant by untraceable VRMs and how these would constitute personal data. It explained that the recorded information contains the VRMs that were checked through the DVLA system for the purpose of the Lorry Watch Operation only. If the number did not correspond to an HGV vehicle then it was recorded as invalid for the purposes of Lorry Watch only.
29. Non-traceable registrations, in the context of the recorded information, only identify that the registrations do not correspond to an HGV vehicle. The council advises, therefore, that from the information held by the council "*we could not confirm or deny if the 'invalid' registrations we held were personal data, or if the community lorry watch observer reported the VRM incorrectly.*"

30. Having reviewed the withheld information the Commissioner agrees that it is not possible to discern whether or not the VRMs relate to a valid vehicle. Furthermore, the council is not required to carry out investigation of the VRMs in the recorded information in order to assess this point.
31. The Commissioner is therefore satisfied that the information withheld under section 40(2) is information from which living data subjects could be identifiable.
32. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to vehicle registrations. This information, when combined with other information, could allow the identification of registered owners or drivers of vehicles reported in the area. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
33. 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.
34. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

35. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

36. In the case of an 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.
37. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

38. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
39. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"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, in particular where the data subject is a child"².

40. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
41. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

42. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

43. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
44. The complainant has stated "*Either the registrations are traceable (exist), in which case NCC should have pursued the EWR process and the data argument is valid, or the registrations are not valid (do not exist), EWR process couldn't be pursued, there is no data argument and I should be supplied with the (no trace) VRMs.*"
45. The council states that there is a "*legitimate interest of effective enforcement by the County Council as a deterrent against future offending.*"
46. The Commissioner therefore concludes that the complainant's legitimate interest is in ensuring that the council are taking appropriate actions for VRMs reported by the public as part of the Lorry Watch scheme.

Is disclosure necessary?

47. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
48. The purpose of the requested information is to allay any concerns that the complainant may have in relation to the community Lorry Watch scheme in the given area.
49. Disclosure would enable the requester to validate whether the VRMs corresponded with an HGV vehicle; and therefore, whether the council had taken appropriate action.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

50. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

51. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
52. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
53. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
54. The council stated that it had considered the disclosure of the 14 VRMs in the context of other information it had released relating to the Lorry Watch scheme. The Commissioner accepts the council's viewpoint that this could infer some connection with vehicles reported under that scheme.
55. The council also stated that the information may mislead the public or be out of date. It considers the 14 VRMs may relate to *"owners of vehicles that couldn't be identified by the Council and were caught by community road watch scheme. These are random entities who can't be identified and who may be successors in title by now to the registered VRM if found."*
56. The Commissioner considers that individual owners of vehicles which may be identifiable from the VRMs, would not have an expectation that their information would be disclosed. Furthermore, it would be unreasonable for their vehicles to be linked in any respect to information relating to the scheme.
57. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
58. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

59. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 30 - Investigations and proceedings

60. Section 30(1)(b) of the FOIA states that:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose of –

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has the power to conduct, ..."

61. Section 30(1)(b) is a class-based exemption; if information falls within its scope there is no need for it to demonstrate harm or prejudice in order for the exemption to be engaged. However, the public authority must have the power to conduct the investigation and the power to institute and conduct any criminal proceedings that result from its investigation. In order for the exemption to be applicable, any information must be held for a specific or particular investigation and not for investigations in general. The exemption can cover investigations which commence with specific criminal proceedings identified even if ultimately they do not result in a prosecution. It can also cover information concerning initial investigations, or vetting processes, to determine whether a full investigation is warranted, as long as the public authority can explain why any full investigation may, in the circumstances, lead to criminal proceedings.

62. The Commissioner considers that the phrase "at any time" means that information can be exempt under section 30(1) of the FOIA whether it relates to a specific ongoing, closed or abandoned investigation.

Is the exemption engaged?

63. The first step to address is whether the requested information falls within the class specified in section 30(1)(b) of the FOIA.

64. The complainant requested in item [f] the details of dates, durations and locations, of HGV monitoring exercises carried out by the council in a given area, within a given time period.

65. The council advised that as a "Trading Standards Authority" it has powers to regulate or restrict traffic on UK roads through routine

inspections by virtue of section 121A of the Road Traffic Regulations Act 1984³.

66. It confirmed that *"the exercises were carried out to find out if the offence of overloading was taking place. That is a criminal offence pursuant to section 20 (5) of the Road Traffic Regulation Act 1984."*
67. The council further explained that *"Trading Standards adopt an intelligence led approach to target regular enforcement exercises to monitor compliance with Environmental Weight Restriction orders (EWR) around the County. Officers also respond to reports of sightings of HGVs in EWRs by the public under the Community Lorry Watch scheme... if information about the locations and timings of our officer enforcement exercises were disclosed to the public this would jeopardise the effectiveness of future enforcement exercises. Records are kept of checks conducted to determine whether HGV vehicles spotted in an EWR are in breach of the EWR. These records are retained for a period to identify repeat offenders and also to inform future enforcement work. If for example successive enforcement exercises identify a high level of legitimate access into a particular EWR, enforcement resources will be then be re-directed towards other EWRs in the County. So investigations are continually ongoing."*
68. The Commissioner is satisfied that the council has the power to conduct these investigations and that the requested information falls under Section 30(1)(b) of the FOIA and is therefore exempt from disclosure on that basis.
69. Having established that Section 30(1)(b) of the FOIA, a qualified exemption, is applicable in this case, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.

Public interest arguments in favour of disclosing the information

70. In reaching its decision the council confirmed it had considered that *"Disclosure of the information is in the public interest to know that effective enforcement of the Traffic Regulation Order is taking place by a public authority."*
71. The complainant's case is that *"... this (denial of information) is quite the opposite to the approach taken by Notts Police as regards their (ad*

³ <http://www.legislation.gov.uk/ukpga/1984/27/section/121A>

hoc) speed limit enforcement exercises, and, therefore, needs to be clarified/reconciled."

72. Furthermore, the complainant put to the council: *"... would not the impact of your EWR enforcement activities actually be enhanced if it became clear - in the public domain - that such activities were taking place, randomly, and that follow-up actions were being taken. After all, you cannot be bound always to use the same locations, and presumably are able to park and monitor highways from unmarked vehicles ie retain that degree of 'covertness'."*

Public interest arguments in favour of maintaining the exemption

73. The council provided that:

- *"Disclosure of the information would prejudice enforcement activities of Nottinghamshire County Council.*
- *The efficient administration of testing would be compromised by public knowledge of the methods used.*
- *There is the legitimate interest of effective enforcement. This is only effected by keeping these details from the public owing to the sensitivity of the locations and timings of enforcement. This information would effectively become information in the unrestricted public domain and it wouldn't be in the wider public interest of effective law enforcement to publicise these details."*

74. Regarding the comparison made with police speeding checks, the council stated in the internal review:

"I understand the police speeding checks are widely publicised in advance and are very different - deliberately overt, whereas our checks aren't and the police have the added H&S protections as outlined.

- *speed checks are very overt; our checks are better if covert. So we do not wish to share this tactical information.*
- *H&S: police have back up and power of arrest; our officers don't.*

We are intelligence led and as the results from last year show and the outcomes from Community Lorry Watch reports also indicate there is a high level of compliance at this EWR (over 90%) as most lorries have a legitimate reason to be there. We have a number of EWRs to enforce in the county so decide which ones to carry out operations based on intelligence."

The Commissioner's view

75. The Commissioner has taken into account the general public interest in promoting openness and transparency of the council's activities relating to its responsibility for monitoring and enforcement of compliance with Environmental Weight Restriction orders (EWR). Disclosure of the requested information would enable further public scrutiny of the council's actions in this respect.
76. The Commissioner has considered the complainants comparison with the approach taken by the police for speed limit enforcement exercises. In effect, the complainant is stating that it is in the public interest to release the requested information because this may enhance the impact of the council's enforcement activities.
77. The council provides an opposite view, that covert operations are more effective and additionally that the health and safety of council officers would be a concern.
78. The Commissioner considers that it is not within her remit to discern whether overt operations should be taken by the council in favour of its current mode of operation. Nor can she consider whether this change of approach would be beneficial, and therefore be in the public interest.
79. The Commissioner therefore accepts the arguments offered by the council that there is a public interest in withholding the details from the public to enable it to continue with its covert operations for the purpose of effective enforcement of the EWR.
80. The Commissioner has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information. Accordingly, she finds the Council was entitled to withhold the requested information under Section 30(1)(b) of the FOIA.

Procedural matters

81. Section 1 of the FOIA states that:

"(1) Any person making a request for information to a public authority is entitled-

- (a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) If that is the case, to have that information communicated to him."*

82. Section 10 of the FOIA states that responses to requests made under the Act must be provided *"promptly and in any event not later than the twentieth working day following the date of receipt."*

83. Request item [i] was a follow-up question to the review response of item [f]. The complainant asked for a copy of the document or the relevant extract in which *"....the results from last year [dates required, please] show and the outcomes from Community Lorry Watch also indicate there is a high level of compliance at this EWR (over 90%) [calculations required, please]....."*
84. The complainant raises that the council has not provided a response to this question. They state: *"as regards the request for a copy of the doc, or extract, substantiating the contended high level of compliance at this EWR (over 90%) - ie setting out the dates for the 'last year' and actual calculations - this has been ignored through reference back to earlier correspondence (and I do not see that I should/could somehow try to use that info to test/substantiate or otherwise the 'over 90%' claim)."*
85. The Commissioner wrote to the council and reiterating the request and asking for details of its response and internal review. The council provided a copy of its response to "NCC - 037225 - 19" which is the earlier information request that pre-empted the subsequent requests which are the subject of this decision notice.
86. The Commissioner has reviewed NCC-037225-19 and finds that it does not provide an answer to the request.
87. Furthermore, in answering the Commissioner's questions regarding request item [I] the council provided her with some information that is relevant to the request.
88. The Commissioner concludes that the council holds information, of the description specified in the request, which it has neither disclosed nor provided a refusal notice to the complainant.
89. The Commissioner considers that the council has not responded to the complainant in accordance with section 1(1) of the FOIA. In failing to issue a response to the request within 20 working days, the council has breached section 10 of the FOIA.
90. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation: issue a response in accordance with the Freedom of Information Act (2000).

Right of appeal

91. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

92. 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.
93. 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

Andrew White
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