

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 January 2021

**Public Authority:** London Borough of Waltham Forest

**Address:** Waltham Forest Town Hall  
Forest Road  
Walthamstow  
E17 4JF

#### Decision (including any steps ordered)

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1. The complainant asked the public authority for a copy of any correspondence relating to an information technology company called AnyVision. The public authority withheld all of the information held relying on the exemption at section 43(2) FOIA (prejudice to commercial interests) and some of the information relying on the exemption at section 40(2) FOIA (personal data).
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 43(2) FOIA as the basis for withholding some of the disputed information which is set out in Annex A.
3. The Commissioner has also concluded that the names and contact details of private individuals and Council officers should have been withheld by the public authority on the basis of the exemption at section 40(2) FOIA.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Disclose the disputed information save the information set out in Annex A
  - The names and contact details of private individuals and Council officers should be redacted from the information the Commissioner has ordered the public authority to disclose.

5. 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 FOIA and may be dealt with as a contempt of court.

## Background

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6. The complainant says she discovered the public authority had piloted a facial recognition technology supplied by an information technology company called AnyVision<sup>1</sup> following a freedom of information request she submitted to the public authority. Her complaint relates to the handling of a request that she subsequently submitted to the public authority seeking a copy of any correspondence relating to AnyVision.

## Request and response

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7. On 3 October 2019 the complainant submitted the following request for information to the public authority:
8. "Please can you send me a copy of any correspondence between council officials and a company called AnyVision since January 2017.

Please include any emails, documents or meeting minutes.

Please can you also send me any correspondence including emails, documents or meeting minutes that mentions the company AnyVision since January 2017."

9. The public authority provided the following response on 1 November 2019: "...the information you requested is being withheld under the Freedom of Information Act 2000. The information is prejudicial to their [AnyVision] commercial interests."
10. On 2 November 2019 the complainant requested an internal review of this decision arguing that the information should be disclosed in the public interest. She noted that the public authority did not say that disclosing the information would harm the public authority's own

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<sup>1</sup> <https://www.anyvision.co/>

commercial interests only that it would harm AnyVision's commercial interests.

11. The public authority wrote back to the complainant on 18 November 2019 with details of the outcome of the internal review. The review concluded that the public authority was entitled to rely on section 43(2) FOIA because the information held was commercially sensitive. The review did not address the complainant's submission that the information should be disclosed in the public interest. Neither did the review address her view that the information should be disclosed since it appeared the public authority was concerned about protecting AnyVision's commercial interests alone.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 5 February 2020 to complain about the public authority's handling of her request specifically challenging the public authority's refusal to disclose the information held within the scope of her request.
13. During the course of the Commissioner's investigation, the public authority additionally relied on the exemption at section 40(2) FOIA to withhold part of the information held within the scope of the complainant's request.
14. The Commissioner has considered whether the public authority was entitled to rely on the exemption at section 43(2) FOIA to withhold the information held by the public authority within the scope of the complainant's request of 3 October 2019 above (the disputed information).
15. The Commissioner has also considered whether part of the disputed information should also be withheld on the basis of the exemption at section 40(2) FOIA.

## Reasons for decision

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### Section 43(2)

16. Section 43(2) states:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”<sup>2</sup>

### Complainant's submissions

17. The complainant's submissions are reproduced below.

18. “...the council does not say the release of the information would harm its own commercial interests, just AnyVision's. I would argue that this adds to the credibility of the public interest test in this instance. It is not for publicly funded bodies like local authorities to be protecting the interests of a private company that is providing controversial software that has proven to be in the public interest.”

19. “The public interest test outweighs any commercial interest that has the potential to be harmed through the release of the information. It is very much in the public interest to understand how the council came to the decision to trial facial recognition software provided by AnyVision. It is the first council in the United Kingdom to have been identified as using facial recognition software and the use of such software has been a matter of intense public debate.”

### Public authority's submissions

20. The public authority's submissions are set out below.

21. The public authority considers that disclosing the disputed information would prejudice the commercial interests of AnyVision.

22. The disputed information can be divided into 3 categories namely; procurement, policy development and policy implementation. Information which falls under procurement relates to “the details of the contract with AnyVision, future procurement plans and performance information about the contract.” Information which falls under policy development is “information pertaining to the details of policy

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<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2000/36/section/43>

development." Information which falls under policy implementation is "information pertaining to the details of policy implementation."

23. The prejudice envisaged by the disclosure of the disputed information is real, of substance, and would be capable of harming the commercial interests of AnyVision. There is a causal link between disclosing the disputed information and the prejudice claimed. "The request was made by The Telegraph which would indicate that it would be disseminated to a wide audience."
24. With regards to the likelihood of prejudice, disclosing the disputed information would prejudice the commercial interests of AnyVision. There is a real possibility that the circumstances giving rise to the prejudice would occur. The likelihood of prejudice is not so limited that the chance of prejudice is in fact remote. The public authority's submission on the likelihood of prejudice with reference to the nature of the disputed information itself is summarised in the Commissioner's analysis below.
25. The exemption at section 43(2) is designed to protect the commercial interests of any person including private companies. AnyVision has made its position clear to the public authority in a confidential agreement (Non-Disclosure Agreement) between the parties that its commercial information should only be used in relation to piloting the use of the facial recognition technology and should not be published.
26. With regards to the assessment of the balance of the public interest, the public authority considers that "there is public interest in the issue of facial recognition technology in the prevention and detection of crime." However, the trial of the technology was limited by time, geographical area and undertaken with consenting individuals and as such it did not have a widespread or significant impact on the public<sup>3</sup>. Therefore, "there is no specific public interest in disclosing [the disputed information]."
27. The public authority has not specified the factors it considered in favour of maintaining the exemption. It however claims that the disputed information would not further the public interest "on the topic of the use of facial recognition technology or enhance the public's understanding of

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<sup>3</sup> As far as the Commissioner understands it, there was at least one live demonstration of the facial recognition technology in a limited geographical area by AnyVision to senior officers of the Council which was undertaken with consenting individuals. She has not seen evidence that the technology was trialled more widely in the borough on individuals without their consent.

the topic." Furthermore, in the public authority's view, the fact that facial recognition is discussed in the media does not necessarily mean that there would be a public interest in disclosing the disputed information. "...such media coverage and public debate of a topic may indicate that there is a public interest at stake, but it is not proof of the fact."

## **Commissioner's considerations**

### The disputed information

28. The disputed information primarily consists of email correspondence including attachments (a very small number of which appear to post-date the request) between the public authority and AnyVision, a small number between the public authority and third parties in relation to piloting the facial recognition technology, and internal emails between Council officers. The Non-Disclosure Agreement (NDA) is also part of the disputed information. The emails, some of which are part of a chain of emails, are numbered 1 – 66 and were provided to the Commissioner electronically in 14 separate batches. The emails set out in the annex to this notice are identified by reference to their batch and document number. For example, batch 1 document 1, document 2 and so on. Where the Commissioner is only referring to a specific email in a chain, she has identified the email by the date and time it was sent. Where the Commissioner is only referring to a document attached to an email or multiple emails, she has identified the document by reference to its title alone.

### Is the exemption engaged?

29. In order for a prejudice based exemption, such as section 43(2) to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. The resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied on by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a

hypothetical possibility; there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not, ie a more than 50% chance of the disclosure causing the prejudice.

30. The Commissioner is satisfied that the harm the public authority considers would occur relates to the commercial interests of AnyVision, an applicable interest in section 43(2).
31. With respect to the second criterion of the test, given the disputed information relates to the public authority procuring facial recognition technology developed by AnyVision, an information technology company operating in a competitive market, the Commissioner considers that a causal relationship exists between disclosing the disputed information and prejudice to the commercial interests of AnyVision. The Commissioner next considers the likelihood of that prejudice occurring.
32. The public authority's submission in support of the likelihood of prejudice with reference to the disputed information can be summarised as follows:

The emails refer to the tender and procurement process.

The emails detail costings relating to the procurement of the facial recognition technology.

The emails refer to the proof of concept trial/demonstration of the technology.

The emails detail the technical requirements for the proof of concept trial/ demonstration of the technology.

The emails contain technical details about the facial recognition technology.

The emails refer to the details of the NDA.

The emails have the NDA attached.

33. The Commissioner has carefully considered the public authority's submission on the nature of the disputed information in her assessment of whether there is more than a 50% chance that disclosing the information would prejudice AnyVision's commercial interests. As always however, it is the nature of the disputed information itself that would ultimately determine whether there is a likelihood of prejudice to the commercial interests of AnyVision.

34. The Commissioner has therefore concluded that it is more probable than not (ie more than a 50% chance) that disclosing the information she has set out in Annex A would prejudice AnyVision's commercial interests. The information is commercially sensitive because it relates to the capabilities of the facial recognition technology, pricing and methodology. Competitors would find the information useful. Disclosing the information is also likely to weaken AnyVision's bargaining position in a similar procurement process. In the Commissioner's view, this information also falls under the category of information that the NDA considers confidential.
35. The Commissioner is not persuaded that the rest of the disputed information (ie any information not listed in Annex A) engages the exemption at section 43(2). Some of these emails merely reference the procurement process and the proof of concept trial. The rest of the emails consist primarily of internal discussions relating to the procurement process and to setting up the proof of concept trial. Some of the emails are arguably sensitive to the Council and include information relating to legal advice. However, in the Commissioner's view, they are not commercially sensitive to AnyVision and the majority do not appear to fall under the category of information that the NDA considers confidential. More pertinently, the Commissioner is not persuaded that there is more than a 50% chance that disclosing these emails would prejudice AnyVision's commercial interests.
36. Alternatively, the Commissioner also considered whether disclosing the disputed information would be likely to prejudice (the lower threshold) AnyVision's commercial interests. For the same reasons mentioned above, the Commissioner does not consider that disclosing the majority of the emails would pose a real and significant risk of prejudice to AnyVision's commercial interests.
37. The Commissioner understands the point that has been made about the likelihood of wider dissemination of the disputed information given the request was submitted by a journalist. However, it is important to reiterate that the FOIA is largely applicant and purpose blind. Therefore, the Commissioner has not given additional weight to the fact that the complainant is a journalist
38. The Commissioner finds that the exemption at section 43(2) was correctly engaged in respect of the information in Annex A.
39. The Commissioner however finds that the exemption at section 43(2) was not correctly engaged in respect of the rest of the disputed information not listed in Annex A.



### The Public interest test

40. The exemption at section 43(2) is subject to the public interest test set out in section 2(2)(b) FOIA which is whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing withheld information.
41. The Commissioner has considered whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information in Annex A
42. There is ongoing debate regarding the use of facial recognition technology particularly for law enforcement purposes and the impact it has on an individual's right to privacy. The strong public interest in how to balance the intrusive nature of facial recognition technology in the prevention and detection of crime against an individual's right to privacy should not be underestimated. The Commissioner considers that the disputed information will contribute to the debate on how to balance these competing interests.
43. There is a strong public interest in not disclosing the commercially sensitive information in Annex A. Disclosing the information is likely to undermine AnyVision's ability to successfully tender for the provision of facial recognition technology because competitors now aware of their product capabilities, pricing and methodology would be able to adjust their own products and prices in order to outbid them. Based on the information gained from the disclosure, AnyVision's competitors could also make adjustments to their products and prices in order to make them more competitive in the market which could reduce AnyVision's reach in the market.
44. There is a strong public interest in not prejudicing AnyVision's commercial interests by disclosing its commercially sensitive information. Although not prejudicial to AnyVision's commercial interests in the strictest sense, disclosing the information in Annex A is also likely to undermine confidence in the public authority's ability to protect commercially sensitive information obtained as part of a procurement process. The likely consequence is the public authority procuring products and services at a higher rate to the detriment of the taxpayer.
45. The fact that there may be strong views regarding the use of facial recognition technology does not automatically mean that there is a strong public interest in disclosing AnyVision's commercially sensitive information. As with any other company providing a product or service, AnyVision's commercially sensitive information is entitled to protection from its competitors.

46. The Commissioner accepts that there is a public interest in understanding how the public authority came to the decision to pilot the facial recognition technology provided by AnyVision. The disputed information does generally shed some light on the process leading up to a live demonstration of the technology and rationale for deploying facial recognition technology long term in the borough. However, as the public authority has clarified, the pilot of the technology was limited by time, geographical area and undertaken with consenting individuals.
47. Given this was a limited pilot of the technology with consenting individuals, the Commissioner considers that it did not have a significant intrusive impact on residents of the borough and the wider public. Therefore, the public interest in disclosing the information in Annex A specifically in order to understand the impact of the pilot on the right to privacy of the residents of the borough in particular is not significant in the Commissioner's view. From all indications, this was a controlled pilot with adequate measures to protect individuals' right to privacy. Therefore, the public interest in disclosing the information in Annex A does not outweigh the strong public interest in protecting AnyVision's commercial interests.
48. In light of the above, the Commissioner finds that on balance, the public interest in maintaining the exemption outweighs the public interest in disclosing the information in Annex A.

#### **Section 40(2)**

49. The disputed information includes the names and contact details of private individuals (mostly AnyVision employees) and Council officers. The public authority relied on the exemption at section 40(2) in order to withhold the "email addresses of Council employees and Anyvision employees/contractors" alone.
50. In support of its decision to withhold the email addresses, the public authority submitted that the email addresses constitute personal data within the meaning of the Data Protection Act 2018 and that disclosing this information would be in contravention of GDPR Principle (a) – Lawfulness of processing. The email addresses of Council officers not in the public domain by virtue of their role within the Council and the email addresses of Anyvision employees/contractors should not be disclosed. Otherwise, it "may impede the individual staff members ability to conduct working duties."
51. The Commissioner considers the above submission in support of the public authority's reliance on the exemption at section 40(2) less than satisfactory. The Commissioner has commented on this and other

aspects of the public authority's submissions in the 'Other Matters' section below.

52. However, given the Commissioner has a duty to ensure that personal data is not processed in contravention of Data Protection legislation, she has gone on to consider whether the names and contact details of private individuals and Council officers in the rest of the disputed information not listed in Annex A (names and contact details) should be withheld on the basis of the exemption at section 40(2) FOIA. The Commissioner has already found that the public authority was entitled to withhold the information in Annex A on the basis of section 43(2) FOIA.
53. Section 40(2) 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.
54. In this case the relevant condition is contained in section 40(3A)(a). 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').
55. The first step for the Commissioner is to determine whether the names and contact details constitute personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
56. 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.
57. Section 3(2) of the DPA defines personal data as: 'any information relating to an identified or identifiable living individual'.
58. In the circumstances of this case, the Commissioner is satisfied that the names and contact details relate to and identify the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
59. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

60. 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'.
61. 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.
62. 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*

63. 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<sup>4</sup>

64. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under 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.

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<sup>4</sup> 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".

65. 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*

66. In considering any legitimate interest(s) in the disclosure of the names and contact details under 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.
67. 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.
68. The Commissioner considers that there is a legitimate interest in full transparency regarding the public authority's trial of facial recognition technology supplied by AnyVision. Facial recognition technology is a contentious subject. There is therefore a legitimate interest in disclosing any information that may shed light on the trial of the technology by the public authority.

*Is disclosure necessary?*

69. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
70. In the Commissioner's view, disclosing the names and contact details would not significantly inform the debate regarding facial recognition technology generally. In addition, disclosure would not significantly inform the public about the process relating to the pilot of the technology by the public authority and the rationale for long term deployment of the technology in the borough. It is not necessary to disclose the names and contact details in order to obtain substantive information relating to the trial of the technology and therefore meet the legitimate aim of full transparency regarding the trial. Whilst the names and contact details would have some value in meeting this legitimate interest, this would be comparatively limited yet intrusive. It is not the least restrictive means of meeting the legitimate aim in question which the Commissioner considers can be met by the substantive information in the withheld emails.

71. The Commissioner has therefore concluded that disclosing the names and contact details would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the names and contact details would therefore breach the first data protection principle and thus is exempt from disclosure on the basis of section 40(2) of FOIA.

## **Other Matters**

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72. The Commissioner would like to place on record her dissatisfaction with the quality of the public authority's response to the request and submission in support of the application of the exemptions.
73. In the Commissioner's view, both the refusal notice and the outcome of the internal review that were issued to the complainant were not particularly helpful in better understanding why the requested information had been withheld. The refusal notice merely stated that the disputed information had been withheld on the basis of the exemption at section 43(2). As a matter of good practice and in the spirit of the Act, the public authority should have provided additional explanation with reference to the nature of the withheld information. It had another opportunity to do so in response to the request for an internal review. However, not only did the public authority fail to provide an explanation justifying the application of section 43(2), it did not even directly address any of the complainant's submissions.
74. In relation to the application of the exemption at section 43(2) FOIA, the Commissioner considers that the submissions in support of engaging the exemption are largely generic. In the majority of cases, the explanation provided along with a description of the content of individual emails also does not clearly reflect the rationale for engaging the exemption. The public interest assessment in support of disclosing the disputed information is at best inadequate and at worst dismissive.
75. In relation to the application of the exemption at section 40(2) FOIA, it is unclear why the public authority has not withheld the names of employees along with their email addresses since the whole point of relying on the exemption is to protect personal data. In addition, the Council simply asserts that disclosing the email addresses would be unlawful in contravention of Article 6(1)(f) of the GDPR without any evidence that it reached this conclusion following consideration of the three part test (legitimate interest, necessity and balancing tests).
76. The Commissioner expects the public authority to take her comments here on board and ensure that in future it undertakes a more thorough consideration of all relevant factors pursuant to engaging an exemption and assessing the balance of the public interest.

## **ANNEX A**

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### **Information exempt on the basis of section 43(2) FOIA**

- i. Batch 2 document 9
- ii. Batch 2 document 10
- iii. Batch 3 document 11
- iv. Batch 3 document 12
- v. Batch 3 document 15
- vi. Batch 5 document 22
- vii. "POC report and Facial recognition – Ops centre plan" including any draft copies
- viii. The Non-Disclosure Agreement including any draft copies.
- ix. Email of 13 November 2018 at 10:03.
- x. Email of 13 November 2018 at 10:54.
- xi. Email of 15 October 2019 at 15:54 – post-date's request.

## Right of appeal

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77. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

78. 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.
79. 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.....

**Terna Waya**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**