

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 8 September 2009**

**Public Authority:** Chief Constable of Essex Police  
**Address:** Essex Police Headquarters  
Springfield  
Chelmsford  
Essex  
CM2 6DA

#### Summary

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The complainant requested the number of Fixed Penalty Notices issued annually as a result of a specified speed camera on the M11. The public authority refused to disclose this information on the basis of the enforcement pattern of this camera that it believed would be revealed through this information and cited the exemptions provided by sections 31(1)(a) (prejudice to the prevention or detection of crime) and 38(1) (endangerment to health and safety). As the request was for annual totals rather than a more detailed breakdown, the Commissioner finds that the prejudice and endangerment predicted by the public authority would not be likely to occur as a result of disclosure and concludes that these exemptions are not engaged. The Commissioner also finds that the public authority has stated accurately and in compliance with section 1(1)(a) that information relating to the earliest period of the operation of this camera is no longer held and that the public authority failed to comply with the procedural requirements of sections 17(1)(b) and (c) through its handling of the request. The public authority is required to disclose the information requested.

#### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

#### The Request

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2. The complainant made the following information request on 1 May 2008:

*"...in relation to [speed camera M11 shortly before Junction 4 on the London bound carriageway] immediately as it narrows from three to two lanes.*

*I would like to know the number of Penalty Charge Notices that have been issued since its installation on a yearly basis."*

3. This request was initially made to Transport for London, which transferred it to the Metropolitan Police Service as the public authority it believed would hold the requested information. The Metropolitan Police Service in turn referred the request to Essex Police as the force with jurisdiction over the area within which the camera identified in the request is located.
4. The public authority responded to the request on 29 July 2008. Although the public authority did not confirm this specifically, the wording of the refusal notice suggests that information falling within the scope of the request is held. The public authority refused to disclose the information requested, citing the exemptions provided by sections 31 (law enforcement) and 38 (health and safety). No subsections of these exemptions were cited and the public authority provided little explanation as to why these exemptions were believed to be engaged or for why the public interest in the maintenance of the exemptions outweighed the public interest in disclosure.
5. The complainant responded on 5 August 2008 and requested that the public authority carry out an internal review of the handling of the request. The public authority responded with the outcome to the review on 15 October 2008. This upheld the refusal of the request, but provided no further explanation of the reasoning for this. The public authority cited the decision made by the Information Tribunal in the case *Hemsley v Information Commissioner* (EA/2005/0026) and stated that this supported its refusal in this case.

## The Investigation

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### Scope of the case

6. The complainant contacted the Commissioner initially on 3 November 2008 and raised the issue of the refusal by the public authority to disclose the information requested. The complainant believed that the camera specified in the request was in a dangerous location and that statistics disclosed to him in response to a request made to the Department for Transport indicated that the number of accidents at that location had risen since the installation of this speed camera. The complainant also referred to a newspaper article that was based on the disclosure by Hertfordshire Constabulary of similar information to that requested by the complainant.
7. As noted below at paragraph 12, the public authority provided the Commissioner with the information it held falling within the scope of the complainant's request. In the form in which it was provided to the Commissioner, this information was

broken down by the periods 8 October 2002 (the earliest date for which the public authority held the information requested) to 31 December 2002, annual totals for each year 2003 to 2007 and 1 January 2008 to 1 May 2008 (the date of the request).

8. The Commissioner considers the totals for the full years 2003 to 2007 to fall within the scope of the request. The information for the periods October to December 2002 and January to May 2008 also falls within the scope of the request. Even though they are not full yearly totals, they are totals for those years (albeit incomplete) that the public authority held at the time the request was made. The public authority would be able to explain this if required to disclose the information. The Commissioner notes the decision of the Information Tribunal in the case of *Home Office v Information Commissioner* (EA/2008/027): “the right under the Act is to information which is held, not information which is accurate...” (para 15).
9. As noted above, the request was transferred between three public authorities. The Commissioner is not aware of the date on which the request was referred to Essex Police and so finds no breach of section 10(1) in connection with the timing of the response.

## Chronology

10. The Commissioner contacted the public authority on 26 March 2009. The background to this case was set out and the public authority was asked to respond with any further representations that it wished to make about its reasoning for the refusal of the request. The public authority was referred to the Information Tribunal decision *Bucks Free Press v The Information Commissioner* (EA/2006/0071), in which the Information Tribunal had concluded that the exemptions provided by sections 31 and 38 were not engaged in respect of certain statistical speed camera information, and asked to consider what relevance this decision may have in this case.
11. The public authority responded to this on 6 April 2009 and stated that it had no further representations to make beyond those in the refusal notice or internal review response. The public authority did not believe that the Information Tribunal decision it had been referred to was relevant in this case as that related to information about multiple cameras, whereas in this case information had been requested relating to a single camera.
12. The Commissioner contacted the public authority again on 8 April 2009 and asked it to provide to his office a copy of the information withheld from the complainant. The public authority responded to this on 23 April 2009 and provided this information.
13. The Commissioner responded to the public authority on 13 May 2009 and asked that it confirm when the speed camera was installed and to describe the searches that were carried out for information covering the period from the installation of the camera to the date of the request. The public authority responded to this on the same day and confirmed that the speed camera was installed in May 2001.

The public authority stated that from October 2002 the information requested had been held in an electronic form, but that prior to this it had been held in a manual form. The information held in manual form, covering the period May 2001 to October 2002, had since been destroyed.

## Analysis

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### Procedural matters

#### Section 1

14. As noted above, the public authority has stated that it no longer holds the information requested for the period from the installation of the camera in May 2001 to October 2002. The complainant specified in his request the period since the installation of the camera. It is, therefore, necessary for the Commissioner to consider and reach a conclusion on whether the public authority has stated accurately that it does not hold some of the information requested.
15. The test that the Commissioner applies when considering whether a public authority has stated accurately that information is not held is the civil standard of the balance of probabilities. In reaching his conclusion the Commissioner will consider the scope, quality and thoroughness of the searches conducted by the public authority, as well as any other reasons given by the public authority as to why the information requested is not held.
16. In this case the stance of the public authority is that the information in question is not held as this was recorded in hard copy form prior to the current electronic system for recording this information being in place. The public authority has stated that the paper records covering the period May 2001 to October 2002 have since been shredded.
17. The Commissioner accepts that the balance of probabilities indicates that this information is no longer retained. In coming to this conclusion the Commissioner has taken into account that the public authority has changed the way that this information is recorded, from manual to electronic form, and that this suggests that it is reasonable to expect that aged paper records of information now held electronically would have been disposed of. The Commissioner also notes the age of this information and that, given this, it is reasonable to conclude that this information is no longer retained.
18. The conclusion of the Commissioner is that the public authority has complied with section 1(1)(a) in stating accurately that the information requested for the period between May 2001 and October 2002 is not held. Section 1(1)(a) is set out in full in the attached legal annex, as are all other sections of the Act referred to in this notice.

## Section 17

19. At neither the refusal notice nor internal review stage did the public authority cite the subsections of sections 31 and 38 upon which it was relying or provide an adequate explanation as to why these exemptions were engaged. In so doing the public authority failed to comply with the requirements of sections 17(1)(b) and (c).

## Exemption

### Section 31

20. The public authority has not at any stage specified which subsection from 31(1) it believes to be engaged. In the absence of this confirmation, the Commissioner has considered whether the exemption provided by section 31(1)(a) is engaged. This provides an exemption where disclosure *would, or would be likely to,* prejudice the prevention or detection of crime. This exemption is also qualified by the public interest. This means that the information should be disclosed if the public interest favours this despite the prejudice to the prevention or detection of crime that would, or would be likely to, result through disclosure.
21. The public authority has not specified whether its stance is that prejudice would result, or that prejudice would be likely to result. Where the public authority does not specify the level of prejudice, the Commissioner will consider whether the prejudice would be likely to result. When considering whether prejudice would be likely to result, the test that the Commissioner applies is that there must be a real and significant likelihood of prejudice, and that this likelihood must certainly be more than hypothetical or remote. This is in line with the approach taken by the Information Tribunal in the case *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* in which it stated:
- “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.”* (paragraph 15)
22. The argument of the public authority is based on the notion that disclosure would reveal details of the enforcement pattern of this camera. A speed camera will not generally be active all of the time. The concern of the public authority is that disclosure could lead to a situation where drivers perceive a reduced likelihood of the speed camera being activated. For example, if the information revealed a far lower number of fixed penalty notices than may reasonably be expected to have been issued through a camera on a motorway, this may lead a driver to conclude that the speed camera is rarely operated. This perception may mean that the driver is more likely to exceed the speed limit, and in so doing contravene the law.
23. The Commissioner would accept that creating a situation where drivers are more likely to break the law through driving in excess of the speed limit would constitute prejudice to the prevention of crime. This argument is, therefore, relevant to the exemption. The task for the Commissioner is to consider first whether this outcome is a likely result of disclosure.

24. The complainant requested the number of penalty charge notices issued as a result of this camera. Without further investigation on this point, the Commissioner accepts that, whilst it may well be the case that the number of notices issued varies from the actual number of drivers caught speeding due to, for example, the degree to which the speed limit was exceeded, the figure relating to penalty charge notices would provide an insight into the numbers of drivers registered by this camera as exceeding the speed limit.

25. In reaching a conclusion here, the Commissioner has been guided by the following observations made by the Information Tribunal in the case *Bucks Free Press v The Information Commissioner* (EA/2006/0071):

*"It is already public knowledge that speed camera equipment is generally operated intermittently."* (paragraph 16)

*"...the number of NIPs issued over a reasonably lengthy period does not, in our view, provide additional information that is likely to influence drivers' behaviour. A high number of NIPs over a period of, say 12 months, may result from the camera site having been operative for very long periods. But it may equally be the result of very substantial offending by motorists during a relatively short period of operation. Conversely, a low number may be the result of drivers being conscious of the dangers of a particular accident blackspot, and therefore observing the applicable speed limit, even though the camera site was operative for long periods of time."* (paragraph 16)

*"It seems to us that driver behaviour is only likely to be affected when further information is provided, such as the dates and times when offences were detected (as in Hemsley), the date or time when a particular site was operative, or the number of offences detected per hour of camera operation."* (paragraph 17)

*"That total, covering the period since the sites were first created in 2003, will not in our view be capable of having any effect on drivers' behaviour. We believe that the same result would follow if the figures were broken down into annual totals."* (paragraph 17)

26. In that case the Tribunal effectively indicated that it did not believe that speed camera statistical information could conceivably influence drivers' behaviour if that information did not include some of the following information:

- the dates and / or times of speeding offences
- the date and / or times when a specific camera is operative
- the number of offences detected per hour
- any further breakdown of information beyond annual totals; quarterly or monthly totals for example.

27. None of the detail specified by the Tribunal has been requested in this case. Instead, the complainant has requested annual totals, a level of detail which the

Tribunal concluded specifically would not be capable of influencing drivers' behaviour.

28. Whilst the information requested in *Bucks Free Press* was the number of Notices of Intended Prosecution and so differed from the information requested in this case, the Commissioner believes that the points made and examples given by the Information Tribunal in that case are applicable here. The public authority may argue that these cases are not comparable as the Tribunal decision relates to a request for combined totals from two speed cameras. However, the observations of the Tribunal that are referred to above are not based on the information relating to multiple cameras, rather they relate to the level of detail requested.
29. The Commissioner has also considered whether the public authority has provided any arguments that suggest that this exemption is engaged, even taking into account this Tribunal decision, and whether the information in question would be likely to influence driver behaviour, even given that it consists of annual totals. Covering the arguments provided by the public authority first, these do not go beyond the suggestion that any statistical information relating to a single camera would be likely to influence driver behaviour. The public authority has provided no argument as to how the specific information in this case would be likely to influence driver behaviour, or how this would in general be likely to result through the disclosure of annual totals.
30. Turning secondly to the statistical information in question, whilst the figures for four of the five years are consistent, the figure for one year is considerably lower. The disparity between this figure and the remainder of the information appears to reflect some change in the circumstances surrounding this speed camera. However, as the Tribunal noted in *Bucks Free Press*, a disparity in the figures does not necessarily indicate a change in the enforcement pattern of this camera, rather than, for example, that the rate of compliance with the speed limit at this location had increased during this period.
31. In any event, even if this disparity did reflect that the camera had been activated for less time during one of the years the information covers, without further explanation on this point the Commissioner would not accept that this information would be likely to influence drivers to act in a manner prejudicial to the prevention of crime. Rather than acting on the basis of information relating to one of the five years covered in the information, it appears more likely that any interpretation of this information would be based on the figures relating to four of these five years. The only reasonable conclusion drawn from this interpretation would be that the number of penalty charge notices issued through this camera has been comparatively high four times as often as it has been comparatively low. It does not appear likely, therefore, that this disparity in the figures could create a perception that the likelihood of this camera being active on any given date would be low.
32. The conclusion of the Commissioner is that the likelihood of prejudice to the prevention or detection of crime through disclosure of the information in question is not real and significant. The exemption provided by section 31(1)(a) is not, therefore, engaged. This conclusion is based on the observations of the Tribunal

in *Bucks Free Press*, the lack of convincing argument from the public authority that the line taken by the Tribunal in that case should not be followed here, or any suggestion based on the content of the information in question that this would reveal an enforcement pattern likely to influence drivers' behaviour in a manner prejudicial to the prevention of crime. As this conclusion has been reached, it has not been necessary to go on to consider the balance of the public interest.

33. The public authority may argue that the decision in this case appears contradictory to that made in *Hemsley*. In response to this point, the Commissioner would note that the request in that case was for considerably more detail than has been requested in this case, including the date and time of each speeding offence. Had a similar level of detail been requested in this case, the Commissioner may have reached a different conclusion.

### Section 38

34. Section 38(1)(a) provides that information is exempt if its disclosure would, or would be likely to, endanger the health of any individual. Section 38(1)(b) provides the same in relation to information that would, or would be likely to, endanger safety. The public authority has not specified which subsection it believes to be relevant here. As the argument of the public authority essentially relates to a reduction in road safety, the Commissioner will take the stance of the public authority as being that both of these subsections are engaged.
35. Neither has the public authority specified whether it believes that endangerment *would occur*, or *would be likely* to occur. In the absence of this clarification the Commissioner has considered whether endangerment would be likely to occur. The test for this is the same as set out above at paragraphs 20 and 21; that is that the likelihood of endangerment must be real and significant and certainly more than hypothetical or remote.
36. This exemption is qualified by the public interest. This means that the information should be disclosed if the public interest favours this over avoidance of the endangerment to health and safety likely to result through this disclosure.
37. The argument of the public authority here is the same as that made in connection with section 31(1)(a); that disclosure would lead to the perception amongst drivers that it is possible to estimate at any given time whether the speed camera is active and that this would be likely to lead to drivers exceeding the speed limit. In connection with section 31(1)(a), the public authority argued that this would prejudice the prevention of crime. In relation to this exemption the argument of the public authority is that driving in excess of the speed limit would be likely to endanger health and safety.
38. Without going into detail about the connection between driving at high speed and road safety, the Commissioner is aware that it has been suggested in various forums that there is no indelible link between the two. However, the Commissioner accepts that drivers exceeding the speed limit at the location of the speed camera in question would be likely to lead to endangerment to health and safety. The Commissioner accepts, therefore, both that the argument advanced



by the public authority is relevant to the endangerment described in this exemption and that the basic premise of this argument is sound.

39. The next step is to consider whether there is a real and significant likelihood of drivers increasing, or failing to reduce, their speed at the location specified in the request as a result of disclosure of the information requested by the complainant. On this point the analysis and conclusion of the Commissioner are the same as set out above in connection with section 31(1)(a); as the Commissioner does not accept that the information in question reveals any pattern of enforcement that would be likely to influence drivers to believe the camera was not active on any given date, neither does the Commissioner believe that the likelihood of endangerment to health and safety resulting through disclosure is real and significant. The exemption provided by section 38(1)(a) and (b) is not, therefore, engaged. As this conclusion has been reached it has not been necessary to go on to consider the balance of the public interest.

## The Decision

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40. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act. In failing to disclose the requested information on the basis of the exemptions provided by sections 31(1)(a) and 38(1)(a) and (b), which the Commissioner now finds are not engaged, it did not comply with the requirements of sections 1(1)(b) and 10(1). The Commissioner also finds that the public authority failed to comply with the requirements of sections 17(1)(b) and (c) in its handling of the request.
41. The Commissioner further finds that the public authority has stated correctly and in compliance with section 1(1)(a) that information relating to the period May 2001 to October 2002 is not held.

## Steps Required

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42. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose to the complainant the annual totals of penalty charge notices issued for the years 2003, 2004, 2005, 2006 and 2007 and the totals for the periods October to December 2002 and January to May 2008.
43. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Other matters

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44. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

45. When giving the outcome to the internal review, the public authority gave little explanation for concluding that the refusal of the request should be upheld. Paragraph 39 of the section 45 Code of Practice states the following:

*“The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue.”*

46. The internal review response from the public authority did not reflect that a reconsideration of the request conforming to the description above took place. The Commissioner would advise the public authority that a response giving the outcome to an internal review should state the reasoning for why the initial refusal was upheld and should reflect that there has been a genuine reconsideration of the request.

47. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to provide the outcome to the review within 20 working days. Neither was this outcome provided within 40 working days. The Commissioner would advise the public authority to ensure that comprehensive internal reviews are conducted promptly in future.

## Failure to comply

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48. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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49. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 8<sup>th</sup> day of September 2009**

**Signed .....**

**Steve Wood**  
**Assistant Commissioner**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## **Legal Annex**

### **Section 1**

Section 1(1) provides that -

“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.”

### **Section 10**

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

### **Section 17**

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

### **Section 31**

Section 31(1)(a) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime”

### **Section 38**

Section 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.”