

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2021

Public Authority: Chief Constable of North Yorkshire
Address: Alverton Court
Crosby Road
Northallerton
North Yorkshire
DL6 1BF

Decision (including any steps ordered)

1. The complainant requested information about drone pilots at a specified race meeting in York. Ultimately, North Yorkshire Police ('NYP') provided some of the requested information but withheld the remainder under section 40(2), the exemption for personal information, of FOIA. The complainant disputed NYP's reliance on section 40(2) and considered that parts of his request were not responded to in full. During the course of the Commissioner's investigation, NYP confirmed it was relying on section 40(2) for the remaining parts of the request disputed by the complainant.
2. The Commissioner's decision is that NYP is not entitled to rely on section 40(2) of FOIA for the remaining withheld information on the basis of its submissions submitted to him.
3. The Commissioner requires NYP to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
4. NYP must take this step 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 24 August 2020, the complainant wrote to NYP and requested information in the following terms:

"It was publicised that North Yorkshire Police were in attendance at the Ebor race meeting at York from the 19th to the 22nd August 2020 to monitor drone activity.

- 1. Can you please tell me how many drone pilots were spoken to?*
 - 2. How many drone pilots had the applicable CAA [Civil Aviation Authority] commercial operations permission and were considered to be flying within the scope of that permission?*
 - 3. How many drone pilots were considered as committing offences and were charged with violations of the Air Navigation Order rules?*
 - 4. How many of the drone pilots/operators were not registered under the CAA registration scheme or had not completed the necessary CAA online training scheme, and how many of these were charged?"*
6. NYP responded on 3 September 2020. It provided some information within the scope of the request (for part 1 where it said three drone pilots had been spoken to) but refused to provide the remainder (for parts 2, 3 and 4), citing section 40(2) (personal information) of FOIA.
7. The complainant requested an internal review on 10 September 2020. NYP provided its internal review, late, on 5 January 2021 and partly revised its position. It now confirmed that no drone pilots were charged at the race meeting (parts 3 and 4 of the request) but maintained that section 40(2) applied to part 2 of the request.

Scope of the case

8. The complainant contacted the Commissioner on 21 March 2021 to complain about the way his request for information had been handled. His grounds of complaint included the following:

"...Following the [internal] review they decided to answer Q 3 and 4, but upheld their refusal to answer Q 2.(See N. Yorks 2) My questions concerned a police operation at York racecourse. They refuse to answer Q2 saying it would breach a data subject's DP

[Data Protection] rights and may breach their obligations under the European Convention. In their response (N. Yorks 2) they say that due to the small number of drone pilots spoken to they could be identified by someone in attendance at the race meeting and therefore releasing the data could disclose personal data. In my review request I pointed out that details of those with CAA commercial operations permissions are publically available. Assuming the three pilots did not have commercial permissions from the CAA, can it really be true that by N. Yorks Police disclosing whether they had such permission or not would breach their data protection rights? I find it questionable that someone attending might recognise them and releasing the data would be a breach. N. Yorks Police answered Q1, that they spoke to three people. Why is that not a data breach, but Q2 would be? N. Yorks Police's reasoning is even more questionable based upon this online report¹. Specific details are provided here, and if the reason given for not providing me with all of the information is correct, then the information in this report must also potentially breach DP rules. Neither question 3 or 4 was fully answered after the review either."

9. During the course of the Commissioner's investigation, NYP confirmed that it was relying on section 40(2) for the remainder of parts 3 and 4 of the request, namely *how many drone pilots were considered as committing offences (part 3) and how many of the drone pilots/operators were not registered under the CAA registration scheme or had not completed the necessary CAA online training scheme (part 4)*.
10. The Commissioner has considered whether NYP was entitled to rely on section 40(2) for part 2, and the remainder of parts 3 and 4 of the request.

Reasons for decision

Section 40 personal information

11. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the

¹ <https://www.ifsecglobal.com/security/drone-detection-firm-helps-protect-york-racecourses/>

requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

12. In this case the relevant condition is contained in section 40(3A)(a)². 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').
13. 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 FOIA cannot apply.
14. 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?

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. NYP has confirmed in its response to part 1 of the request that three drone pilots were spoken to. It told the Commissioner that due to the small number of pilots involved, the provision of any further requested information could lead to identification of one or more of those pilots. Specifically, NYP said:

² As amended by Schedule 19 Paragraph 58(3) DPA.

"Due to the small number of pilots spoken to, they could be identified by someone in attendance at the Ebor race meeting and therefore releasing the data could disclose personal data about those three drone pilots."

20. The Commissioner notes that the race meeting took place over four consecutive days and was not convinced that the three drone pilots could be identified, given the duration of the event and the numbers of people in attendance. He therefore asked NYP again to explain definitively how the three drone pilots could be identified. He also asked NYP how many drone pilots were in operation in each of the four days and on what dates the three individuals were spoken to.
21. In reply, NYP said that no data was available as to how many drone pilots operated in each day of the Ebor event, nor for the dates the three drone pilots were spoken to. It explained that one Police Constable ('PC') designated as the Racecourse Liaison Officer was in attendance for the entire four days. It said that if this PC had spoken to a drone pilot in the presence of others, then that drone pilot could be identified.
22. However, the Commissioner notes that NYP has not definitively stated whether any or all of the drone pilots were spoken to in the "*presence of others*"; it has only suggested that this might have occurred by using the word "*if*".
23. It is also noted that there is a small possibility that identification might be possible by the drone pilots themselves; however the arguments have not been made and it is not known how many drone pilots operated at the Ebor event on each of the four days.
24. In the circumstances of this case, having considered the explanations put forward by NYP, the Commissioner is not persuaded that the remaining withheld information could be used to identify any specific individual/s. Knowing whether or not any of the three drone pilots mentioned, who are not named and who could be three any of any number of such pilots who were at the event over the four day period, would not allow for them to be identified. The fact that someone may have seen the PC talking to a drone pilot does not mean that this was in respect of their authority to operate a drone and it does not mean that the member/s of the public would know who that party was. If it was in relation to an alleged offence, then the Commissioner considers it highly unlikely that they would be approached in a 'public' space and NYP has not definitively made this argument.
25. This information therefore does not fall within the definition of 'personal data' in section 3(2) of the DPA and so it cannot engage the exemption under section 40(2) of FOIA. It is therefore not necessary to go on to

consider whether disclosure would contravene any of the data protection principles.

Other matters

26. In this case, the complainant requested an internal review on 10 September 2020. NYP did not provide its internal review until 5 January 2021.
27. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
28. Part 5 of the section 45 Code of Practice³ (the 'Code') states that it is best practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Code states that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
29. In this case, NYP told the Commissioner:

"The reasons for delay were that during that period there was a staffing and resourcing issue which we apologise for and are doing our best to resolve. It is always our aim to respond and comply with the internal review request in accordance with the FOIA."
30. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "*Openness by Design strategy*"⁴ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

⁴ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

Reference: IC-95798-W7T5



through targeting of systemic non-compliance, consistent with the approaches set out in her "*Regulatory Action Policy*"⁵.

⁵ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

31. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

32. 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.
33. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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