

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 September 2022

Public Authority: Chief Constable for British Transport Police
Address: 3 Callaghan Square
Cardiff
CF10 5BT

Decision (including any steps ordered)

1. The complainant requested from British Transport Police (BTP) information relating to body worn video footage by officers showing PC [name redacted] turning off body worn video of a fellow officer. BTP refused the request under section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that BTP was entitled to rely on section 40(2) of FOIA to withhold the requested information. Therefore, the Commissioner does not require BTP to take any steps as a result of this decision.

Request and response

3. In October 2021 the complainant wrote to BTP and requested information in the following terms:

"Under the Freedom of Information Act 2000, please can you provide me with the following: All body worn video recorded by officers showing PC Tim Anderson turning off body worn video of a fellow officer as recorded here:

<https://www.mylondon.news/news/north-london-news/london-police-officer-dismissed-filling-19966126>"

4. On 15 October 2021 BTP responded and refused the request under section 40(2) (personal information) of FOIA. BTP explained to the complainant the footage captured, constitutes personal data of which he is not the subject and that the information falls within the definition of 'personal data' under the Data Protection Act (DPA).
5. On 5 November 2021 the complainant asked BTP for an internal review and said that he would be "happy for the face of the officer to not be shown..." However, he disputed its application of the exemption.
6. On 2 December 2021 BTP provided its response. It upheld its original position to withhold the information under section 40(2) and reiterated the personal data constitutes that of individuals shown in the footage, which the complainant is not the subject of.

Scope of the case

7. The complainant contacted the Commissioner on 14 December 2021 to complain about the way his request for information had been handled. Specifically, he disagreed that the information (camera footage) he is seeking is personal data.
8. The following analysis focuses on whether the exemption at section 40(2) of the FOIA was cited correctly.

Reasons for decision

Section 40 – Personal information

9. BTP explained to the Commissioner why this information is the individual's personal data. It said the purpose to police operation of body worn video systems, is the capture of personal data relating to individuals being dealt with by police officers. "Cameras are mounted on the shoulders of officers and therefore capture video footage of whatever the officer is facing and audio of people speaking in the vicinity."
10. BTP further explained that the cameras will also capture data relating to persons being dealt with by the police. This may include criminal offence data and special category personal data about persons that have committed or are suspected of committing criminal offences, victims of crime, vulnerable persons or individuals suffering episodes of physical or mental illness. BTP said that the cameras will also capture other people involved in incidents, or bystanders or people walking past the camera.

The footage will capture communications that may be overheard on officer radios.

11. BTP confirmed that some of the individuals captured in the video footage are police officers acting in the course of their duties. It said that in one of the incidents, the footage captures significant details about an individual and their identity and circumstances.
12. 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.
13. 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 UK General Data Protection Regulation ("UK GDPR").
14. 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.
15. 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?

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.

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

19. 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.
20. The withheld information in this case is body worn video footage of specific incidents which occurred in 2020. This includes details of some police officers and other individuals. BTP confirmed that all of the withheld information is personal data.
21. In the circumstances of this case, having considered the withheld information and the arguments presented by both parties, the Commissioner is satisfied that the information relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. 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.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. 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".

25. 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.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

27. Article 6(1) of the UK 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.
28. 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

29. In considering the application of Article 6(1)(f) of the UK 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.
30. 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

31. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These 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".

32. BTP identified a legitimate interest in transparency around police officer misconduct, especially when it results in officers being dismissed. BTP said this is also a subject of most recent significant public interest, and the conduct of police officers, which it said is something that is highly scrutinised. BTP stated there is a provision in the Police Conduct Regulations for this transparency and explained, "the fact that the details of this case are in the public domain is because BTP has published the facts and circumstances of the dismissal."
33. In this case, the Commissioner accepts that there is a legitimate interest in police officer misconduct, specifically when resulting in police officers being dismissed from the force. Promoting transparency, accountability and openness with regard to details of a dismissal case is also an important aspect for the Commissioner to consider.

Is disclosure necessary?

34. "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.
35. The Commissioner is satisfied that disclosure of the requested information would be necessary to achieve the legitimate aims identified and that there are no less intrusive means of achieving these aims.

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

36. 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.
37. 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.
38. 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.
39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
40. BTP set out its conclusions as to the balance between the rights and freedoms of the data subject(s) in this case, and the legitimate interest of the public in accessing this information. BTP is of the view "the legitimate interests of the public in accessing information are fully satisfied by the public disclosures that BTP has already made which name the dismissed officer (in line with the police conduct regulations)". It reiterated "the disclosure of the footage does not add anything to that in terms of information or transparency, other than potentially allowing identification of data subjects." BTP therefore considers that balance is in favour of withholding the information.
41. BTP explained to the Commissioner that "body worn video is an overt surveillance system. The cameras are deliberately obvious and the policy states that an officer should make a verbal announcement (if practical) when they activate the camera (which also has a light on it that indicates it is in operation. BTP publish a force privacy notice which is published on our website. An employee-specific version of the privacy notice is published on the Force intranet."
42. With regard to reasonable expectations the individual(s) have about what will happen to their personal data, BTP said there are a number of data subjects captured including the officer filming the footage, and that they would not have an expectation of privacy in respect of the footage. BTP explained that one of the purposes of police body worn video is to enhance accountability and transparency. Also, to ensure the actions of officers can be reviewed and challenged if necessary. It said, officers are aware that the footage may be reviewed post-incident, may be disclosed to a court if required for a prosecution or other legal process, or disclosed in response to an information rights request. However, BPT added, "in cases where the footage is disclosed or proactively released into the public domain, there would be an expectation that this would be done with an appropriate lawful basis..."

43. BTP said there were members of the public captured on the video footage. It considered "these subjects would be aware of the fact that they are being filmed with an overt surveillance system, but would not have an expectation of that footage subsequently being released into the public domain."
44. BTP did not consider it possible to gain consent to the disclosure of the data subjects' personal data. It said that the data subjects are either employees or are members of the public being dealt with by police officers. BTP added that it would not be appropriate to contact the members of the public in these circumstances (if it was possible), and that one of the police officers has been dismissed from the Force, therefore it would also not be appropriate in this instance.
45. The consequences of disclosure would be, BTP said, completely unjustified to publish data relating to the members of public that can be identified in this video footage. It considered that this would be likely to cause distress to the individuals. Also, due to the number of police officers identified in the footage, outside of the named officer, including the officer filming, BTP considers that the consequences of disclosure would cause them further distress. This is, BTP stated, in addition to any involvement they may have had in the misconduct investigation.
46. The Commissioner considers that the individuals captured on the video footage have a strong and reasonable expectation that the content would not be released into the public domain.
47. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the individuals who provided statements. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

The Commissioner's view

48. The Commissioner's decision is that BTP was entitled to rely on section 40(2) of FOIA to refuse to provide the withheld information. Therefore, BTP was not obliged to disclose this information and the Commissioner does not require any further action to be taken in relation to this request.

Right of appeal

49. 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

50. 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.
51. 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

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