

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 June 2024

**Public Authority:** Chief Constable of West Midlands Police

**Address:** Lloyd House  
Colmore Circus  
Birmingham  
B4 6NQ

#### Decision (including any steps ordered)

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1. The complainant has requested information from West Midlands Police (the Police) regarding a road traffic offence. The Police relied on section 40(2) of FOIA (third party personal information) to withhold the information.
2. The Commissioner's decision is that the Police has not correctly relied on section 40(2) of FOIA to withhold the information.
3. The Commissioner requires Police to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information, with appropriate redactions made to the footage to obscure the driver's face and the vehicle registration number wherever they appear. If the footage captures the driver's voice, this should also be appropriately disguised.
4. The Police must take these steps within 30 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

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5. On 31 December 2023, the complainant wrote to the public authority and requested information in the following terms:

- "1. At about 2:00 minutes into the video [website link redacted] there is a mini overtaking a ford fiesta. Please could you
- a. Tell me what specific offence was the driver prosecuted for?
  - b. Tell the location?
  - c. Was the initial offence listed for prosecution different from end result? If this is the case could you give both offence names? For example, a driver is sent letter for prosecution of speeding offence but gets prosecuted for failing to name driver after not responding?
  - c. Was there a court appearance or other procedure involving court such as SJPN?
  - d. Could you release the full footage of the initial submission or the submission used for prosecution of the driver?"
6. The Police responded on 22 January 2024. It stated that it did hold some of the requested information, but the information was exempt under section 40(2). A position which the Police upheld at the internal review stage.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 23 February 2024 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to establish whether the public authority is entitled to withhold the requested information under section 40(2) of FOIA.

## **Reasons for decision**

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### **Section 40 - personal information**

9. Section 40(2) of 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.
10. 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 UK General Data Protection Regulation ('UK GDPR').

11. 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.
12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

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

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that some of the information does relate to an individual. This is because the information relates to a specific individual who has been accused of committing a driving offence.
18. Turning to the part of the request which asks for video footage used for prosecution of the driver, the Commissioner accepts that the Vehicle Registration Number and any footage which shows the driver's face or records the driver's voice will identify the driver. If the driver can be identified, the remainder of the withheld information will be their criminal offence personal data and hence exempt from disclosure under FOIA – as they have neither consented to this information being published, nor published it themselves.

19. However, if the registration number, the driver's face and the driver's voice are all obscured, the Commissioner is not persuaded that the remaining information still identifies the driver.
20. Although the request does not ask for the individual's identity, the Commissioner must consider whether a motivated individual could combine information already in the public domain with seemingly anonymised information and reveal the identity of the data subject which the information relates to.
21. This is referred to as the motivated intruder test, the motivated intruder test was defined by the Upper Tribunal<sup>1</sup> as:

"a person who starts without any prior knowledge but who wishes to identify the individual or individuals referred to in the purportedly anonymised information and will take all reasonable steps to do so."
22. The Police advised the Commissioner that as the complainant is already aware of the make, model and colour of the vehicle, if it were then to disclose the location the incident took place, the offence the individual was accused of, the full footage of the incident (which would likely be time and date stamped) and the outcome of the prosecution, this information could be combined and used to identify the data subject in question.
23. Rule 5.8 of the Criminal Procedure Rules allows a person to ask a court for the name of a defendant in any particular case along with the alleged offence, the plea entered and the outcome. This information can be sought without having to provide an explanation as to why it is wanted or how it will be used. More detailed information can also be sought, but only by providing a satisfactory explanation to the court.
24. The Commissioner requested that the Police explain what information a motivated intruder would be required to possess in order to make an application to the court for more detailed records. The Police advised it was unable to confirm the level of detail required for a court to disclose such information.
25. Anyone wishing to match the driver to a court record would face a number of issues:

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<sup>1</sup> <https://www.bailii.org/uk/cases/UKUT/AAC/2012/263.html>

- There is nothing in the public domain that indicates whether the offence **was actually dealt with by a court**. Traffic offences are often dealt with by way of Fixed Penalty Notice, as opposed to a court hearing.
  - Even if the matter did go to court, it would not be obvious **which court** dealt with the matter- even assuming the location of the offence could be identified.
  - Even if the matter did go to court and even if the court that dealt with the matter could be identified, it would not be obvious (even from the withheld information) **when the court** dealt with the matter. Cases can take days, weeks or even months to proceed – so knowing the date of the offence would give, at best, a window of time in which the matter would have come to court.
26. Even if the issues above could be surmounted, a person wishing to identify the driver would, at best, be able to narrow the driver down to one of a group of individuals prosecuted for a specific offence or specific combination of offences. Even if that group is quite small, that is not the same as identifying the individual (see for example the Upper Tribunal ruling in *Spivack v ICO* [2021] UKUT 192 (AAC)).
27. In order to work out which of that group was the driver, the motivated intruder would need more detail about each case than they are entitled to seek, without explanation, from the court. The Commissioner is not persuaded that a motivated intruder would have an explanation for wanting this information that a court would be likely to accept. He must assume that such a person would not be willing to perjure themselves by providing a false explanation to the court in order to obtain the information.
28. Based on the above, the Commissioner is satisfied that the majority of the requested information is not information which could identify an individual, either on its own or in combination with other information in the public domain. With the exception of the driver's face and voice and the vehicle registration number, this information is not therefore personal information and so section 40(2) cannot apply.

## Right of appeal

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29. 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](mailto:grc@justice.gov.uk)

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

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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