

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 4 August 2020

**Public Authority:** London Borough of Lewisham  
**Address:** Lewisham Town Hall  
1 Catford Road  
Catford  
London  
SE6 4RU

#### **Decision (including any steps ordered)**

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1. The complainant has requested information on a particular penalty charge notice ("PCN").
2. The Commissioner's decision is that the London Borough of Lewisham ("the Council") appropriately applied the exemption at section 40(2) - Personal information – to withhold one element of the requested information.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

#### **Request and response**

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4. On 19 August 2019, the complainant wrote to the Council and requested information in the following terms:  
  
"I hereby request a copy of all records held by the council in relation to PCN LX20249368 issued on 4 Dec 2014 to HJ12 KXB, subject of course to any personal data being redacted."
5. The Council responded on 10 September 2019 with a refusal notice in reliance of section 21 FOIA and providing a link to information at the Tribunals website. The Council also relied on section 40(2) to withhold personal information within the scope of the request.

6. Following an internal review the Council wrote to the complainant on 18 October 2019 upholding its previous refusal response.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 18 October 2019 to complain about the way his request for information had been handled. He advised the Commissioner:

"... lists the London Borough of Lewisham as both the enforcement authority and the appellant for this Penalty Charge Notice.

The London Borough of Lewisham is not an individual and it does not benefit from any data protection rights whatsoever. If the vehicle was leased, the lease company as an incorporated entity would also not have any rights of its own under GDPR because a company is not an individual.

The driver of the vehicle undoubtedly has data rights under GDPR, but the driver was never issued a PCN in his own name and he was never a party to the tribunal proceedings, nor was he ever liable to pay the PCN: Had the appeal failed, the London Borough of Lewisham would have needed to enforce the penalty charge against itself.

It follows that the driver was only ever at most a witness, rather than a member of the public to whom the penalty charge had been issued. The council says "*When any PCN is issued to a member of the public*" but in this case no PCN has been issued to a member of the public, rather two PCNs were issued:

- 1) The original PCN issued to the lease company
- 2) The second PCN which the council issued to itself.

There is no doubt that some personal data belonging to the driver is likely to be included in the information held by the council, but that does not entitle the council to withhold information that is not personal data."

8. During the course of the Commissioner's investigation the Council provided information within the scope of the request previously redacted under section 40(2).
9. The Commissioner considers the scope of this case to be the Council's reliance on section 40(2) to withhold the remaining information in the scope of the request which comprises the CCTV footage of the incident.

### **Reasons for decision**

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## Section 40 – Personal information

10. 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.
11. 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').
12. 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.
13. 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?

14. Section 3(2) of the DPA defines personal data as:  
"any information relating to an identified or identifiable living individual"
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. The complainant has made clear his view as follows:  
"For example, if the video evidence of the contravention shows the face of the driver, the driver's face can easily be redacted from the video. It is also relevant that the driver of the vehicle was acting in an official capacity and was in the employment of the council, the publicly available record of the tribunal appeal (from <https://londontribunals.org.uk/>) states:

'The Appellant denies the contravention and states that he drove through the pedestrian zone because it was an operational vehicle and is used to distribute essential equipment to inspect the public highway.'

The fact that an individual employed by a public authority was engaged in official duties at the time of the alleged contravention is unlikely to amount to personal data if the individual concerned cannot actually be identified.”

18. The Commissioner does not agree with the complainant’s analysis. She has viewed the withheld CCTV and notes that the driver’s face can be seen. She agrees that the footage could be anonymised, however, as the driver’s identity is already in the public domain on the Tribunal website referenced by the complainant, the information allows for identification of the driver. The Commissioner is therefore satisfied that the withheld CCTV comprises the personal data of the driver of the vehicle.
19. Notwithstanding this, 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.
20. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

21. 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”

22. 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.
23. 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**

24. 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>1</sup>

23. In considering the application of Article 6(1)(f) of the 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.
25. 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*

26. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.
27. 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.

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<sup>1</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’.*

28. The Council advised that it is satisfied that there is the legitimate interest of the general public in seeing how the Council's appeal and decision-making processes operate in the circumstances of the issuing of a PCN in this case.
29. The Commissioner accepts that there is a legitimate interest in the accountability of public authorities as a general principle. There is also the legitimate interest of the requester, the complainant. The complainant has not provided any specific legitimate interest in the disclosure of the CCTV and the Commissioner therefore concludes that his is a general interest
30. The Commissioner notes that it is important to acknowledge that section 40 is different from other exemptions in that its consideration does not begin with an expectation of disclosure. As section 40 is the point at which the FOIA and DPA interact, the expectation is that personal data will not be disclosed unless it can be demonstrated that disclosure is in accordance with the DPA.
31. The Commissioner notes that the CCTV in question is the only element within the scope of the request which remains withheld. She accepts the Council's view that the information already disclosed and in the public domain is sufficient to satisfy the legitimate interest in accountability and transparency of the Council in the process of issuing PCNs in respect of all the PCNs it issues, including in regard to its own vehicles and any ensuing appeals. The Commissioner considers that there is limited legitimate interest in disclosure of the specific CCTV footage in respect to the interests of third parties.

*Is disclosure necessary?*

32. "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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The Commissioner is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requestor. It is the equivalent of the Council publishing the information on its website.
34. In the Commissioner's view it is not sustainable to argue that disclosure of the CCTV is necessary. Disclosure of this information would not add further to the public's understanding of the Council's actions in regard to the specific PCN or PCNs generally. In the circumstances of this case, the Commissioner has identified that whilst there is a legitimate interest in ensuring accountability and transparency on the part of the Council, she is not convinced of the necessity in the disclosure of the CCTV.

35. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is thus unlawful, so does not meet the requirements of principle (a).
36. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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37. 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)

38. 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.
39. 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 .....**

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