

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

### **Decision notice**

**Date:** 9 February 2023

**Public Authority:** Nottinghamshire County Council

**Address:** County Hall  
Loughborough Road  
West Bridgford  
Nottinghamshire  
NG2 7QP

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

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1. The complainant submitted a multipart request to Nottinghamshire County Council (the Council) seeking information about reports made under the 'Lorry Watch' scheme. The Council provided information falling within the scope of the request but explained that it was seeking to withhold some information on the basis of sections 24(1) (national security) and 40(2) (personal data) of FOIA. The information in question explained why reports made under the scheme were not fully processed for certain periods of time.
2. The Commissioner's decision is that the Council is entitled to apply these exemptions in the manner in which it has.
3. No steps are required.

## Request and response

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4. The complainant submitted a multipart request to the Council on 18 May 2022 seeking information about reports made under the 'Lorry Watch' scheme.<sup>1</sup>
5. The Council responded on 14 June 2022. It provided information falling within the scope of the request. The full text of the request, along with Council's response to each point are included in an annex at the end of this notice.
6. The complainant contacted the Council on 23 June 2022 querying parts of the response and seeking clarification on others. For the purposes of this notice it is relevant only to note that the complainant's communication sought answers to the following points:

"why were x23 of the x51 identified at a) not contacted - in other words, why were another x23 letters or emails, or some combination of both, not issued?"
7. The Council responded on 21 July 2022 by stating that "Data not held by NCC".
8. The complainant contacted the Council again on 25 July 2022 and sought clarification as follows:

"In my request of 23/6/22 I asked, among other things, for an explanation as to why were another x23 letters or emails, or some combination of both, not issued?'...And this is the part of the request giving rise to your 'Data not held by NCC' response. So, I'll ask again for information as regards the x23 cases."
9. The Council responded on 27 July 2022 as follows:

"Whilst NCC have logged 23 vehicles we did not hold specific data relating to these vehicles due to lack of resources available to the authority at the time, which enabled us to follow up with letters or emails."
10. The complainant contacted the Council again on 1 August 2022 and in relation to this point asked 'why/for what reason(s) exactly...' [there was

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<sup>1</sup> <https://www.nottinghamshire.gov.uk/transport/lorries/report-misuse>

a] lack of resources available to the authority at the time fully to process the x23 [and probably more County-wide] cases'

11. The Council responded on 24 August 2022. It stated that:

"I can confirm that there were 2 periods which affected the full processing of Lorry Watch. Period 1, was from 21 June 2021 to 8 August 2021, and as you are aware this was due to lack of resources. Unfortunately, I cannot provide any further detailed information about this as it falls under personal information and is exempt under Section 40 of FOIA which provides an exemption from the right to information if its is personal data as defined in the DPA.

Period 2 was from 6 December 2021 to 12 April 2022 and this information is exempt from disclosure under Section 24(1) for the purposes of safeguarding national security.

This exemption is subject to the public interest test. The public interest test provides you with an opportunity to explain the severity of the damage that would be caused, so it can be weighed against the public interest in disclosure. Even though the ICO gives significant weight to safeguarding our national security, it is important to give proper consideration to the public interest in disclosing information. I can confirm that the Council has considered the PIT and the decision to withhold this information applies".

## **Scope of the case**

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12. The complainant contacted the Commissioner on 31 August 2022 to complain about the Council's decision to withhold information on the basis of sections 24(1) and 40(2) of FOIA falling within the scope of his request.

## **Reasons for decision**

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### **Section 24(1) – national security**

13. Section 24(1) states that:

"Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security".

14. FOIA does not define the term 'national security'. However in *Norman Baker v the Information Commissioner and the Cabinet Office*

(EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:

- 'national security' means the security of the United Kingdom and its people;
  - the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
  - the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
  - action against a foreign state may be capable indirectly of affecting the security of the UK; and,
  - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
15. Furthermore, in this context the Commissioner interprets 'required for the purpose of' to mean 'reasonably necessary'. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.
16. The complainant explained that he could not see how withholding the type of information sought by this part of his request was necessary to protect national security.
17. The Council provided the Commissioner with submissions to explain why in its view it was necessary to withhold information covering 'period 2' in order to protect national security. As these submissions refer directly to the content of the withheld information itself the Commissioner cannot include these submissions in this notice. The Commissioner acknowledges that this is likely to prove frustrating for the complainant. However, the Commissioner notes that such a scenario is anticipated in FOIA by the provision contained at section 17(4) which provides that when issuing a refusal notice a public authority does not have to explain why that exemption applies if to do so would reveal information that is itself exempt.
18. Having considered the withheld information, alongside the Council's submissions, the Commissioner accepts that section 24(1) applies to this information.

Public interest test

19. Section 24 is a qualified exemption. Therefore, the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing that information.
20. The Council suggested that disclosure of the information would improve confidence in public bodies, improve transparency in public affairs and decision making and demonstrate effective spending of public finances. However, the Council argued that there was a more compelling public interest in protecting national security.
21. In the Commissioner's view it is difficult to see how disclosure of the specific information that has been withheld would be likely to meet all of the generic interests in disclosure identified by the Council. However, he does accept that disclosure of the information would aid transparency around the Council's processing of Lorry Watch reports. Nevertheless, the Commissioner considers such an interest to be significantly outweighed by the public interest in ensuring that the national security of the UK is not harmed. The Commissioner is satisfied that the Council was therefore entitled to withhold the information relating to the second period on the basis of section 24(1) of FOIA.

**Section 40 – personal information**

22. The Council withheld the information which explained in more detail why the reports were not fully processed for the 'period 1' on the basis of section 40(2) of FOIA.
23. 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.
24. In this case the relevant condition is contained in section 40(3A)(a)<sup>2</sup>. 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').

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

25. 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.
26. 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?**

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

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

28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. 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.
30. 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.
31. The Commissioner is satisfied that the withheld information in question relates to an individual, and that a motivated individual could identify the person in question and/or use information that they may be privy to or already have knowledge of to do so. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
32. 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.
33. The most relevant DP principle in this case is principle (a).

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

34. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

35. 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.
36. 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.
37. 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>3</sup>.
38. 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.
39. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.
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<sup>3</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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

### Legitimate interests

40. 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. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
41. The Commissioner accepts that there is a legitimate interest in disclosure of information which would aid transparency in respect of why certain reports under the Lorry Watch scheme were not fully processed.

### Is disclosure necessary?

42. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
43. The Commissioner accepts that disclosure is necessary to meet the legitimate interest identified above as there is no obvious or alternative way in which this interest could be met other than disclosure of the information.

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

44. 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 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.
45. 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.
46. 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.
47. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
48. In the Commissioner's opinion the individual's whose personal data the information constitutes would have no expectation that this would be released into the public. Furthermore, in the Commissioner's view disclosure of this information would be likely to cause the individual in question some distress. Taking these factors into account, the Commissioner considers that these outweigh the legitimate interests in disclosure of the information. As with the information withheld on the basis of section 24(1), the Commissioner cannot elaborate on why he has reached this conclusion without referring to the content of the withheld information.

## Right of appeal

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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: 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)

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 .....**

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

## Annex

Below is a copy of the request submitted by the complainant to the Council on 18 May 2022. The Council's responses to the various parts of the request was issued on 14 June 2022 and are shown in blue text.

"This is a request for information under the provisions of the Freedom of Information Act as regards the Council's "Lorry Watch" scheme and Environmental Weight Limit enforcement.

I should be happy to receive the information requested in electronic format - ie as a response to this e mail address - within 20 working days following the date you receive this request (which, given format, will be today, Wednesday 18/5/21, and so, given two intervening Bank Holidays (2 & 3/6), I should hear back from you by Friday 17/6/21, latest, please) .

So long as the Council and/or its Agent(s) operate and maintain good record systems, I should not expect the effort needed to search for and collate the requested information to exceed the "standard" two and a half days/£450 "limit".

The information requested is as follows, please -

a) how many "Lorry Watch" reports (ie about suspected Heavy Goods Vehicle (HGV) abuse of highways with Environmental Weight Limit restrictions), in electronic, postal or telephone call format, did Nottinghamshire County Council (NCC) receive relating to weight restricted roads in and around the Town of Southwell in the 12 month period 1/4/21 to 31/3/22 inclusive **51**

b) of the number at a), a breakdown showing how many cases were taken up with the established Owners/Operators of the vehicles via -

- (i) letter(s) sent by NCC (or Agent) by post to Owners/Operators, **28**

- (ii) through email(s) sent by NCC (or Agent) to Owners/Operators, **0**

(I understand from previous correspondence that NCC Officials do not visit the premises of Owners/Operators for the purpose of such checking, though please say in the response if this policy has changed and give the number visited if now appropriate), **No change to policy**

c) a breakdown explaining -

- (i) any difference between the total number reported (ie response to a)) and the number contacted (ie total produced via responses b (i) and (ii), plus visits if effected), **23**

- (ii) in (possible) connection with i) above, for each vehicle registration mark (vrm) searched but found to be invalid -

- the date of sighting cited in the relevant report to NCC,

[13/04/2021](#)

[28/05/2021](#)

[01/06/2021](#)

[26/10/2021](#)

[17/11/2021](#)

[20/01/2022](#)

- each note included in NCC records to explain/substantiate each "invalid vrm", eg "vehicle sold/not re-registered", "incorrect vehicle registration mark", "Operator moved from premises"

[1 no VRM](#)

[1 vehicle sold](#)

[3 vehicles not found](#)

[1 VRM administrative error](#)

- (iii) how many of those found to be without valid reason for using the restricted route were formally issued with warning letters, [0](#)

- (iv) how many of those found to be without valid reason for using the restricted route were prosecuted or are in the process of being prosecuted, [0](#)

d) (i) on how many occasions during this period (1/4/21 - 31/3/22 inc) NCC Officials and/or authorised Agent(s) carried out HGV monitoring exercises in and around the Town of Southwell (say within a five mile radius centred on Southwell Minster), [0](#)

- (ii) the date, duration(s) (in hours and minutes) and highways patrolled (by classification and/or name eg "C Unnumbered Upton Road", "Oxton Road") of each such occasion. For the avoidance of doubt, I request date and duration information to be linked, please, whilst a separate "random" list of highways patrolled will suffice (thereby safeguarding the Council's previously-claimed need to be able to operate "covertly" and which, following a previous similar FOI request/response and referral to ICO, I chose not to Appeal), [See answer to d\)\(i\)](#)

- (iii) the results of any such exercise(s) ie total cases of HGVs spotted per occasion, total cases of HGVs overall (ie totalling numbers for each occasion) and the overall total broken down in the terms of b)(i) and (ii) and c(i) - (iv) inc above, and [See answer to d\)\(i\)](#)

e) (i) the total number of cases for the County of Nottinghamshire during the period 1/4/21 - 31/3/22 inc ie generated through reporting via the Lorry Watch system plus those identified via NCC and/or Agent monitoring exercises, [583 Lorry Watch submissions plus 232 NCC observations](#)

- (ii) how many of these County-wide cases without valid reason for using the restricted route were formally issued with warning letters, and [120 Lorry Watch submissions and 22 NCC observations](#)

- (iii) how many of these County-wide cases without valid reason for using the restricted route were prosecuted or are in the process of being prosecuted. [0 prosecutions"](#)