

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2024

- Public Authority:**
- **Richard Turfitt Senior Traffic Commissioner, Traffic Commissioner for the east of England (IC-289107-W6T7).**
 - **Tim Blackmore OBE Traffic Commissioner for the north east of England (IC-288817-B4W1).**
 - **Post currently vacant (Traffic Commissioner functions temporarily exercised by the Senior Traffic Commissioner – Richard Turfitt) Traffic Commissioner for the north west of England (IC-289104-Q8F9).**
 - **Sarah Bell Traffic Commissioner for London and the south east (IC-288816-H3D7).**
 - **Miles Dorrington Traffic Commissioner for the West Midlands (IC-289103-D6T8).**
 - **Kevin Rooney Traffic Commissioner for the west of England (IC-288815-C8H1).**
 - **Claire Gilmore Traffic Commissioner for Scotland (IC-294829-S4D7)**
 - **Victoria Davies Traffic Commissioner for Wales (IC0288818-K0R1)**

Address: C/O Office of the Traffic Commissioner.
Jubilee House, Croydon Street, Bristol, BS5
0GB

Decision (including any steps ordered)

1. The complainant made an information request to each of the eight Traffic Commissioners for their email address. The Office of the Traffic Commissioner (OTC) has handled the requests on behalf of the Traffic Commissioners and it refused to disclose the information in accordance with section 36(2)(c) of FOIA.
2. During the Commissioner's investigation the OTC withdrew its application of section 36(2)(c) of FOIA and claimed a late reliance on section 40(2).
3. The Commissioner's decision is that the OTC is entitled to rely on section 40(2) of FOIA. He therefore does not require any further action to be taken.

Request and response

4. On 8 December 2023, the complainant sent eight information requests to the OTC for the email address of each of the eight Traffic Commissioners.
5. The OTC responded on 11 January 2024. It refused to disclose the information citing section 36(2)(c) of FOIA.
6. The complainant requested an internal review on 12 January 2024.
7. The OTC wrote to the complainant on 14 February 2024. It confirmed that it had conducted a partial review and remained of the view that section 36(2)(c) of FOIA applies. It was however requesting some legal advice and would respond more fully in due course. It provided the complainant with their rights to contact the Commissioner.

Scope of the case

8. The complainant contacted the Commissioner on 15 February 2024 to complain about the way their request for information had been handled.
9. During the Commissioner's investigation, the OTC withdrew its application of section 36(2)(c) of FOIA and claimed a late reliance on section 40(2) of FOIA. It provided a revised response to the complainant on 21 March 2024. The complainant provided their comments to that revised response the same day.

10. The scope of the Commissioner's investigation is therefore to establish whether or not the OTC is entitled to rely on section 40(2) of FOIA.

Reasons for decision

Section 40 personal information

11. 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.
12. 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').
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 the FOIA cannot apply.
14. 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?

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

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

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. The email address of each Traffic Commissioner is information relating to them and information from which they can be identified. It therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. 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.
21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. 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”.

23. 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.
24. 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 UK GDPR

25. 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.

² Article 6(1) goes on to state that:-

26. 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.
27. 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

28. 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.

"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".

29. The complainant stated that the details of each Traffic Commissioner (name and photograph) is published online. Additionally, the Secretary of State for Transport issues a new release whenever a new Traffic Commissioner is appointed or someone leaves post (appointments of Deputy Traffic Commissioner are also announced). They said that a full biography for each Traffic Commissioner is also published on gov.uk including previous employment history, membership of professional bodies and so on.
30. The complainant commented how Traffic Commissioners are both senior and key appointments and it obvious that personal information relating to the Traffic Commissioners is already available on line and has been proactively published on the UK government website. It is their view that members of the public should be able to make direct contact with public bodies by email, even when the public body is also "an identified or identifiable living individual".
31. They believe there are legitimate interests in the disclosure of the requested information. Each Traffic Commissioner is a public authority in their own right and therefore they should be able to contact each of those public authorities individually and directly, rather than use the email address already provided for the Office of the OTC.
32. The OTC confirmed that it recognised there are legitimate interests in members of the public being in a position to communicate with each Traffic Commissioner. It also recognised that each Traffic Commissioner is a separate public authority in their own right and there is a legitimate interest in being able to contact each and every one when relevant. It also noted the more general legitimate interests in openness, transparency and accountability.

Is disclosure necessary?

33. '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.
34. The complainant believes that disclosure is necessary to meet the legitimate interests identified above and the current arrangements in place for contacting the Traffic Commissioners is not satisfactory. They believe it is necessary for themselves and other members of the public to contact each of the eight Traffic Commissioners direct rather than direct correspondence via the OTC.

35. The OTC confirmed that it does not consider disclosure is necessary to meet the legitimate interests outlined above. It believes those legitimate interests are already met by the arrangements that are currently in place. The names of the individual Traffic Commissioners are already published and there is an email address to use, via the OTC, to direct any emails and correspondence to them. It stated that there is no obstacle to contacting any of the eight Traffic Commissioners. Members of the public and relevant stakeholders can direct any communication or correspondence to any of them via the email address for the OTC and where necessary these are directed to the relevant Traffic Commissioner on receipt.
36. The OTC said that as it already has an adequate and effective administrative structure in place for dealing with emails from the public and this structure does not prevent anyone from sending correspondence for the attention of a Traffic Commissioner(s), there is no real benefit in releasing the individual email addresses for each of the Traffic Commissioners to the public. Instead the OTC can see how such action would disrupt the business.
37. The Commissioner acknowledges that there are legitimate interests in the disclosure of the requested information. However, he considers any such interests are fairly limited considering the administrative structure already in place for directing emails and correspondence for the attention of the Traffic Commissioners. He accepts that each Traffic Commissioner is a separate public authority in their own right and there should be a clear, easy and effective way to contact them. However, it is the Commissioner's view that there is already a way of doing that, which works appropriately and effectively via the email address provided for the OTC.
38. He considers the disclosure of each of the eight Traffic Commissioner's email address is not necessary to meet the legitimate interests identified, as these are already met effectively via the administrative arrangements already in place. Instead he can see how such disclosure would disrupt the current working arrangements and potentially result in a less effective and efficient way of coordinating, directing and responding where necessary, to communications from the public and relevant stakeholders.
39. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he 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 unlawful. It therefore does not meet the requirements of principle (a).

40. The Commissioner has therefore decided that the OTC is entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

41. 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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Samantha Coward
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