

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 2019

Public Authority: Chief Constable of Surrey Police
Address: Surrey Police Headquarters
PO Box 101
Guildford
GU1 9PE

Decision (including any steps ordered)

1. The complainant requested the total number of speeding offences on the M23 since the introduction of a 50 miles per hour speed limit. Surrey Police refused to provide the requested information, citing section 38 (health and safety) of FOIA.
2. The Commissioner's decision is that Surrey Police was incorrect to cite sections 38(1)(a) and (b) to withhold the requested information.
3. The Commissioner requires Surrey Police to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information as set out in paragraph 7 of this notice.
4. Surrey Police must take these steps within 35 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.

Background

5. Surrey Police has explained that the roadworks are situated between the M25 London Orbital Motorway and the first junction on the M23 which is the busiest access route to Gatwick Airport. The restrictions are well signposted. It said that thousands of vehicle road users use this stretch of road every day.
6. Average speed cameras are in place to reduce speeds throughout the roadworks and to reduce the risk to road workers and other road users within the scheme.

Request and response

7. On 19 December 2018, the complainant wrote to Surrey Police and requested information in the following terms:

"I would like to access the total number of speeding offences since the 50mph limit was introduced on the M23."

8. Surrey Police responded on 22 January 2019. It refused to provide the requested information citing both limbs of section 38, the health and safety exemption under FOIA. It said that the public interest favoured withholding the information but indicated that its position might change once the roadworks were completed.
9. The complainant requested an internal review on 24 January 2019. He highlighted that other police forces had provided him with the requested information whilst roadworks were ongoing. Surrey Police acknowledged receipt but failed to provide its internal review outcome.

Scope of the case

10. The complainant initially contacted the Commissioner on 19 March 2019 to complain about the way his request for information had been handled, including the lack of an internal review (see 'Other Matters' section at the end of this notice).
11. On 12 April 2019, the Commissioner wrote to Surrey Police to ask it to carry out its internal review, which it completed on 3 May 2019 maintaining its original position. With regard to the complainant's point about other police forces releasing the requested information whilst

roadworks were underway, Surrey Police advised him that this does not set a precedent.

12. Surrey Police has provided the Commissioner with the total number of "*first notices of intended prosecution*" in relation to offences detected within the M23 roadworks scheme from the commencement of enforcement activity being used on the scheme to 19 December 2018 (the date the request was received by Surrey Police).
13. The Commissioner has considered whether Surrey Police was entitled to rely on section 38 in relation to this request.

Reasons for decision

Section 38 – health and safety

14. Surrey Police told the Commissioner it was relying on both sections 38(1)(a) and (b) in relation to this request which state:

"Information is exempt information if its disclosure under this Act would, or would be likely to –

- (a) endanger the physical or mental health of any individual, or*
- (b) endanger the safety of any individual."*

15. For the exemption to be engaged, it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
16. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment, and the likelihood of it occurring as a result of disclosure of the information in question, is "*real, actual and of substance*", rather than trivial or insignificant. As part of this, she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
17. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that it is envisaged would, or would be likely to occur, should relate to the applicable interest described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of

the prejudice, or more precisely the endangerment, arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure 'would be likely' to result in prejudice or that disclosure 'would' result in prejudice - 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.

18. The relevant applicable interests cited in this exemption are physical or mental health (section 38(1)(a)) or the safety of any individual (section 38(1)(b)).
19. The Commissioner's guidance¹ sets out that under section 38(1)(a), endangering physical health usually means an adverse physical impact and often involves medical matters. This can relate to individuals or groups.
20. Her guidance also states that endangering mental health implies that the disclosure of information might lead to a psychological disorder or make mental illness worse. This means that it has a greater impact than stress or worry. A public authority may find it difficult to demonstrate a danger to mental health. They might consider obtaining an expert opinion confirming that the disclosure of the information would be likely to endanger the mental health of the applicant or any other individual; however the Commissioner considers that clinical evidence of a psychiatric condition is not always necessary.
21. Endangering safety (section 38(1)(b)) is usually connected to the risk of accident and the protection of individuals. Information that could endanger an individual's safety could also endanger their mental or physical health. If so, both parts of the exemption may be relied upon.
22. The requested information relates to speeding offences along a stretch of roadworks on the M23 in which a 50mph limit is in place. Surrey Police has argued that disclosure of the requested information could impact on the general public using this road by affecting both their mental or physical health and their safety as a consequence of their exceeding the speed limit for the roadworks. The Commissioner is satisfied that there can be a link between road usage and speed and the possible adverse effects to individuals, specifically in relation to possible road traffic accidents. For example, were the figures to be either zero, or very low, then this may indicate that the cameras *in situ* are not actually being used which could encourage the public to exceed the limit set thereby increasing the likelihood of accidents. The Commissioner is

¹ <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

therefore satisfied that the information requested is relevant to this exemption and the applicable interests test is met.

23. The Commissioner has therefore gone on to consider the next stage of the prejudice test; that is, whether there is a causal link between disclosure and the harm referred to by Surrey Police. In her guidance on the prejudice test, the Commissioner acknowledges that it will not usually be possible for a public authority to provide concrete proof that the prejudice 'would' or 'would be likely' to result. This is because the test relates to something that may happen in the future. However, the Commissioner considers that the engagement of an exemption cannot be based on mere assertion or belief but must reflect a logical connection between the disclosure and the prejudice.
24. Surrey Police also said that it considers that disclosure of the requested information into the public domain "would be likely" to have a prejudicial effect.
25. The Commissioner acknowledges that the physical or mental health or safety of members of the public needs to be considered when disclosure "to the world at large" is being made under FOIA. In this case, Surrey Police has argued that disclosure of the number of speeding offences whilst the roadworks are 'live':

"...could diminish the effect on road safety by encouraging motorists to drive to their perception of the likelihood of being recorded speeding rather than to the speed limit in force. This could result in higher speeds and an increased risk for road workers and road users".

26. Surrey Police also said:

"Road works present a variety of different hazards such as narrow lanes, changes to road layout, lane drops and works traffic access points, so to reduce the risk of harm it is important that traffic speeds are reduced.

Average speed cameras work by encouraging motorists to drive at a consistent speed and to comply with the posted limit. Releasing offence information to the world, could allow motorists to deduce the likelihood of being caught speeding, which could result in a change in driver behaviour, increased speeds and therefore increased risk of harm."

27. It explained that, for various reasons, enforcement activity is not always in place or operational at speed camera sites and that such activity may not be utilised or available 100% of the time. Surrey Police argued that release of the withheld information at a time when the roadworks are

'live', particularly during times of minimal or non-existent level of enforcement:

"...results in higher speeds and a greater potential for harm. There is a clear relationship between speed and risk; as average traffic speed reduces so does the likelihood of a collision. If a collision does happen the risk of death and serious injury is higher at higher speeds."

28. It said:

"There are numerous academic studies that support the link between speed and risk – e.g., [sic]

*The Power Model, a well-recognised piece of work by Swedish researcher Goran Nilsson, looked at the relationship between changes in speed and changes in the number of accidents (or the number of victims of the accident). The model (and subsequent updates to the model) concluded that the higher the speed, the greater the number of accidents. The lower the speed, the lower the number of accidents (in terms of mean speed of traffic). The full paper can be found online."*²

29. The Commissioner accepts that there is some causal link between speed and accident risk; she must therefore next consider whether there is a real risk of endangerment to physical or mental health and/or to the safety of individuals through disclosure of the requested information.
30. Surrey Police has argued that disclosure in this case would mean that it would have to disclose "zero returns" in response to future FOIA requests where no enforcement activity has been carried out for operational or technical reasons. The Commissioner does not agree that disclosure of the information sets a binding precedent but, rather, that each case must be considered on its merits. It should also be taken into consideration that this is a specific set of roadworks for a specific length of time and it would be difficult to accurately compare it to future works.
31. The Commissioner considers that most individuals will be aware that speed limits are not always monitored 100% of the time and, therefore, it is a personal choice as to whether an individual adheres to the

²<https://www.toi.no/getfile.php/1313206/Publikasjoner/T%C3%98I%20rapporter/2009/1034-2009/1034-2009-nett.pdf>

specified speed limit. This applies to all speed limits and not just to those utilised for roadwork schemes.

32. Having viewed the withheld figures, the Commissioner is not convinced, in this particular case, that disclosure of the requested information would pose a real risk to the health and safety of individuals. The speed limit itself would deter some individuals from speeding irrespective of whether there is a risk of being caught, for others just knowing that they might be caught if they exceed the speed limit would deter them from speeding. Disclosure of the figure in this case with no other information, such as the numbers of vehicles using the specified road, does not necessarily reveal whether the area has been monitored 100% of the time. The figure is a single figure spanning a time period of four and a half months and it would not be possible to identify any patterns of camera use over that time period, such as times of the day or days of the week when it has been in operation. It would only show that there have been a number of offences detected on the M23 scheme and disclosure of the figure in itself may actually deter potential road users from speeding.
33. Given that the monitoring of roadworks for offences may not be applied continuously throughout the course of a roadworks scheme, it is feasible that at one time road users may be detected, and another, they may not. This variance means that the disclosure of the requested information, in the Commissioner's view, does not reveal anything definitive about the enforcement monitoring along this stretch of the M23.
34. The Commissioner is not satisfied that the level and nature of the prejudice identified would be likely to constitute an endangerment to the physical or mental health and / or safety of the general public on this particular occasion.
35. The Commissioner is therefore not satisfied that sections 38(1)(a) or (b) of FOIA are engaged in relation to the requested information. She therefore does not need to consider the public interest test. She requires Surrey Police to disclose the requested information as set out in paragraph 3 of this notice.

Other matters

36. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.

37. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
38. The Commissioner is concerned that it took almost four months for an internal review to be completed.
39. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"³ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

40. 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

41. 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.
42. 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

Carolyn Howes
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