

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 November 2019

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to prosecutions for nuisance caused by excessive motorcycle noise over a three year period.
2. The Ministry of Justice (the 'MOJ') confirmed it held information within the scope of the request but refused to provide it, ultimately citing both sections 32 (court records) and 40(2) (personal information) of FOIA.
3. The Commissioner first considered whether the request should have been handled under the EIR and concluded that FOIA was the correct regime. She has investigated the MOJ's application of section 32(1)(c)(ii) and section 40(2) and concluded that the MOJ was not entitled to rely on either exemption to withhold the requested information. The Commissioner, therefore, requires the MOJ to take the following steps to ensure compliance with the legislation:
 - disclose the requested information.
4. The MOJ 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. The Commissioner understands from the MOJ that the modification of exhausts falls under the Road Traffic Act, and is a criminal, rather than environmental offence. It said that such an offence is defined as:

"Use of a motor vehicle on a road with silencer / exhaust system altered to increase the noise made, contrary to regulation 54(2) of the Road Vehicles (Construction and Use) Regulations 1986, section 42 of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988."

Request and response

6. On 14 June 2019, the complainant wrote to the MOJ and requested information in the following terms:

"I am preparing an article for a local magazine about the nuisance caused by excessive motorcycle noise, usually caused by illegal alteration of exhausts. I understand that the records of Northallerton Magistrates Court will now have been transferred to Teeside and I wonder if there is any way of finding out whether any (and is fo [sic] how many) such offences have resulted in prosecution in (say) the past three years? The article is mainly concerned with the problem in North Yorkshire, which is why I wanted to access the Northallerton Court records. If you do not have them can you tell me who does?"

7. The MOJ responded on 9 July 2019. It stated that section 40(2) of FOIA, the exemption for personal information, applied.
8. Following an internal review the MOJ wrote to the complainant on 26 July 2019. It maintained that section 40(2) applied but now also cited section 32(1)(c)(ii), the exemption for court records, etc.

Scope of the case

9. The complainant contacted the Commissioner on 28 July 2019 to complain about the way his request for information had been handled. He submitted that he only required "numbers" and not any personal information, and said he had already sent his request to the court which had been passed to the MOJ to respond to (the Commissioner is aware that all FOIA requests to courts and other bodies falling within the MOJ's remit are responded to centrally by the MOJ's information access team).

10. The Commissioner has considered below whether the MOJ was correct to refuse this request on the basis of sections 32(1)(c) and section 40(2). She has also considered under which legislative regime the request should have been handled.

Reasons for decision

11. The request was handled by the MOJ under FOIA. The Commissioner asked the public authority for its view as to whether the request should have instead been handled under the EIR. In response the MOJ advised the following:

"As the request is asking for statistics on conviction we would take this to be answered as a FOI and that it does not fall within EIR."

12. The Commissioner has first considered whether the requested information constitutes environmental information.

Regulation 2 - Is any of the information environmental?

13. Information is environmental if it meets the definition set out in regulation 2 of the EIR. Briefly, subparagraph 2(1)(a) of the EIR defines environmental information as material on the state of the elements of the environment including, for example the atmosphere, air, water, land and landscape. Sub-paragraph 2(1)(b) extends this definition to include information on factors such as substances, energy, noise, emissions, radiation, waste, etcetera, affecting or likely to affect the elements of the environment referred to in (a).

14. Sub-paragraph 2(1)(c) covers measures and activities as follows:

"measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;"

15. In the Commissioner's view, excessive motorcycle noise, particularly that caused by alterations to the exhaust, could fall within the definition of 2(1)(b) and that the resulting noise and emissions could impact on the air and atmosphere as defined in 2(1)(a). The earlier part of regulation 2(1) states environmental information is 'any information ... on' the matters listed later in regulation 2(1). This means regulation 2(1)(c) covers:

- documents setting out the measures themselves;
 - any information on the way they have been developed and are applied; and
 - any information about the results of that application.
16. However, in this case the complainant has only asked for "how many" prosecutions of this specified type there have been over three years. The Commissioner has concluded that this is statistical rather than environmental information – the numbers of prosecutions themselves do not impact on the environment. She, therefore, finds that the MOJ was correct to handle the request under FOIA.

Section 40(2) – personal information

17. The MOJ refused to provide the number of prosecutions (of the specified type over the requested three year period) on the basis that it constitutes personal information. It advised the complainant as follows:

"If a request is made for information and the total figure amounts to five people or fewer, the MOJ must consider whether this could lead to the identification of individuals and whether disclosure of this information would be in breach of our statutory obligations under the General Data Protection Regulation ['GDPR'] and/or the Data Protection Act 2018 [the 'DPA']. We believe that the release of some of this information would risk identification of the individuals concerned. For this reason, MOJ has chosen not to provide an exact figure where the true number falls between one and five. However, it should not be assumed that the actual figure represented falls at any particular point within this scale; 'five or fewer' is used as a replacement value from which it would be difficult to isolate or extract any individual data."

18. 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.
19. 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

¹ As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

processing of personal data set out in Article 5 of the GDPR ('the DP principles').

20. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 FOIA cannot apply.
21. 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 data protection principles under the DPA.

Is the information personal data?

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

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

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. 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.
25. 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.
26. For the request under consideration here, the Commissioner has viewed the actual number of prosecutions of the specified type which has been withheld.
27. Whilst a prosecution will relate to a living individual given that he or she has been subject to such action, the Commissioner must here consider whether disclosure of the requested information could result in the identification of any such individual.
28. In this case, the MOJ has withheld the requested number on the basis of its 'five or fewer' explanation set out in paragraph 17 of this notice. The request spans a period of three years for prosecutions handed down in Northallerton. Despite the low number of actual prosecutions, the MOJ has not provided any evidence to support how identification would be possible. For example, were the actual figure one or five, how would the MOJ disclosing this make identification any more likely than already knowing that the figure is less than five?

29. Based on the lack of any realistic evidence to the contrary, the Commissioner is not persuaded that release of the actual number would identify any living individual. She has therefore concluded that section 40(2) is not engaged.

Section 32 - court records

30. The Commissioner has next considered the MOJ's reliance on section 32(1)(c) of FOIA.

31. Section 32(1) of FOIA states:

"Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by—

(i) a court, or

(ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter."

32. The MOJ considered that section 32(1)(c)(ii) applied to the requested information. It told the Commissioner that:

"The information requested could only be sourced via our Libra system.

The Libra system is used by our Magistrates Court's administrative staff to record details of proceedings. Libra is a court record system which is used for amongst other things listing of court proceedings, case progression, resulting and creating court lists.

This data is created by a member of the courts administrative staff. The information requested is solely recorded by the MOJ for the purposes of creating a court record to allow court proceedings to continue."

33. Section 32(1) is a class based exemption. This means that any information falling within the category described is automatically exempt from disclosure, regardless of whether or not there is a likelihood of harm or prejudice if it is disclosed. It is therefore conceivable that the exemption could apply to information which may otherwise be available to an applicant via other means, or to information which is already widely available.

34. There are two main tests in considering whether information falls within this exemption. First, is the requested information contained within a relevant document? Secondly, is this information held by the public authority only by virtue of being held in such a document?
35. In the Commissioner's view, the phrase 'only by virtue of' implies that if the public authority also holds the information elsewhere it may not rely upon the exemption.

Is the information contained in a relevant document created for the purposes of proceedings in a particular cause or matter?

36. What is important in this context is whether the information meets the criteria as set out in section 32(1)(c). As the wording of the exemption implies, it is not only the reason for holding the information which is relevant, but also the type of document it is contained in.
37. The wording of the request is crucial here; the complainant has not asked for any details other than the total number of prosecutions for excessive motorcycle noise. Whilst the Commissioner accepts that the prosecutions themselves would be contained in a relevant document created for the purposes of court proceedings, she does not accept that the *number* of prosecutions constitutes a court record.
38. She has therefore concluded that section 32(1)(c)(ii) of FOIA is not engaged.

Conclusion

39. As the Commissioner has found that neither section 40(2) nor section 32(1)(c) is engaged in relation to the requested information, she requires the MOJ to comply with the step as set out in paragraph 3 of this notice.

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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