

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 July 2022

Public Authority: Northern Trains Ltd
Address: 9 Rougier Street
York
YO1 6HZ

Decision (including any steps ordered)

1. The complainant has requested details of a complaint he submitted. Northern Trains Ltd ("Northern Trains") initially responded under SAR before later withholding some information under section 40(2) of FOIA (third party personal data).
2. The Commissioner's decision is that Northern Trains was entitled to rely on section 40(2) of FOIA to withhold the information that it has done. Apart from that information and the information which has already been disclosed, any further information Northern Trains may or may not have held would have been the complainant's own personal data and exempt from disclosure under FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 19 September 2021 the complainant requested information of the following description:

"I am requesting all the records you have regarding a complaint from myself [name], regarding an incident on 13 September 2021. The complaint was handled by [name] (Customer Complaints Manager) with reference #83680. It also involved an interview with the conductor of 1316 Barrow-in-Furness to Carlisle service. It also involved her manager.

"I am requesting all the record you hold of audio and video recordings on the 1316 Barrow-in-Furness to Carlisle service on 13 September 2021.

"I am requesting all the records you hold of communications to/from the 1316 Barrow-in-Furness to Carlisle service on 13 September 2021 between the times of 1320 and 1400."

5. On 22 September 2021, Northern Trains responded. It dealt with the request as a Subject Access Request (SAR) and disclosed some information in redacted form.
6. On 23 September 2021, the complainant asked for his request to be dealt with under FOIA. He asked to be provided with the information that had been redacted and argued that further information was held. He expanded his request to include any recordings of a conversation between the train and the control room.
7. On 20 October 2021, Northern Trains responded under FOIA. It provided a small quantity of additional information, said that it did not hold some of the information and withheld the remainder. It relied on section 38 (health and safety) and section 40 of FOIA to withhold information.
8. The complainant requested an internal review on 29 October 2021. Northern Trains sent the outcome of its internal review on 9 November 2021. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 31 October 2021 to complain about the way his request for information had been handled.
10. During the course of the investigation, Northern Trains revised its position slightly. Whilst it maintained that the information it was relying on section 38 to withhold (details of the crew roster) was current at the time of the request, changes in shift patterns since then meant that the information was now out of date and thus safe to disclose. Northern Trains disclosed this information to the complainant on 19 July 2022.
11. The Commissioner considers that the scope of this complaint is to determine whether Northern Trains was entitled to rely on section 40(2) of FOIA to withhold information. He will also explain why he has not considered whether further information is held.

Reasons for decision

Section 40(2) – third party personal data

12. 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.
13. 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 UK General Data Protection Regulation ('UK GDPR').
14. 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.
15. 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?

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. The withheld information in question is a single paragraph within the wider complaint documentation that Northern Trains has already provided to the complainant. In its original FOIA refusal notice, Northern

Trains described the information contained within this paragraph as being “purely related to the wellbeing of a member of staff” following the incident that formed the basis of the original complaint to Northern Trains. Having viewed the material in question, the Commissioner accepts that this is an accurate summary.

21. The Commissioner considers that there is sufficient information in the public domain to allow this staff member to be identified. Furthermore, he considers it likely that the complainant is already able to identify this staff member and would therefore learn something about them from the withheld information.
22. In the circumstances of this case, and having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the staff member concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
23. 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.

Lawful processing

24. Personal data can only be processed where there is a specific lawful basis for doing so. In the context of FOIA, the Commissioner considers that there are only two possible bases for disclosure to the world at large. The first would be where the individual involved had consented to disclosure. The second would be if disclosure was necessary to serve a legitimate interest.
25. The Commissioner is not aware that the staff member has given consent to this information being disclosed. Northern Trains was not obliged to seek the staff member’s consent and nor would the staff member have been obliged to give consent if it had done.
26. The Commissioner recognises that the complainant has a legitimate interest in understanding how Northern Trains has dealt with his complaint. There is also a legitimate interest in understanding, more generally, how Northern Trains deals with complaints made about it.
27. However, in this case, the Commissioner considers that those legitimate interests have already been met by the previous disclosure of information both under SAR and under FOIA. Not only would the additional disclosure of the withheld information therefore not be necessary, having viewed its contents the Commissioner does not

consider that this particular information would even serve those interests at all.

28. The Commissioner is thus satisfied that disclosure would not serve a legitimate interest and hence would be unlawful. As disclosure would be unlawful, Northern Trains is entitled to rely on section 40(2) of FOIA to withhold the information in question.

Did Northern Trains hold further information within scope?

29. In his request for an internal review, the complainant argued that Northern Trains should hold the following information:
- Records of interviews with other customers
 - Metadata showing communications between train crew members and the police or the control room
 - Recording of conversation between the train and control room
30. Northern Trains maintained that it did not hold some of this information. It held a recording of a call but argued that it was entitled to provide transcripts as it did not possess software capable of redacting the personal data from an audio file.
31. The Commissioner does not consider it necessary to resolve these matters.
32. Section 40(1) of FOIA provides an exemption for any information that is the personal data of the person requesting it. Section 40(5A) of FOIA allows a public authority to neither confirm or deny holding information that is or, if it were held, would be covered by section 40(1).
33. Sections 40(1) and 40(5A) are absolute exemptions and there is no requirement to consider the complainant's wishes.
34. In the circumstances of this particular case, if Northern Trains held any further information within the scope of any of the three categories above it would be the complainant's own personal data. This is because, in the particular circumstances, the information would only have been created because of a particular incident in which the complainant played a central role.
35. As Northern Trains would be entitled, under FOIA, to neither confirm nor deny holding this information the Commissioner sees no point in determining whether Northern Trains does or does not hold the information.

Right of appeal

36. 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

37. 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.
38. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF