Tribunals Service
Information Tribunal

Appeal under section 57 of Freedom of Information Act 2000

Information Tribunal Appeal Number: EA/2009/0061
Information Commissioner's Ref: FS50199511

Determined on papers
On 16 November 2009

Determination Promulgated
23 November 2009

BEFORE

CHAIRMAN

Murray Shanks

and

LAY MEMBERS

Malcolm Clarke and Paul Taylor

Between

BALWINDER BANGAR

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

TRANSPORT FOR LONDON

Additional Party

Subject area covered:

Law enforcement s.31

Cases referred to:

FSA v Information Commissioner (EA/2008/0061)

Determination

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 29 June 2009.

SUBSTITUTED DECISION NOTICE

Dated 23 November 2009

Public authority: **Transport for London**

Address of public authority: **6th Floor, Windsor House**
42-50 Victoria St
London SW1H 0TL

Name of complainant: **Balwinder Bangar**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the public authority was required by section 1(1) of the Act to communicate the requested information to the complainant but has failed to do so.

Action Required

Save in the event of an appeal under section 58 (in which case the matter will be decided by the appeal court), the public authority must by 4.00 pm on 23 December 2009 supply to the complainant a copy of its document entitled "Criteria for dealing with Representations and Appeals".

Dated 23 November 2009

Signed

Deputy Chairman, Information Tribunal

Reasons for Determination

Background

1. The congestion charging scheme for central London was established by Transport for London (TfL) in 2002 under section 295 of the Greater London Authority Act 1999. Under the scheme a charge of £8 is imposed for each "charging day" on which a "relevant vehicle" is used in the central zone during "charging hours"[1]. Where a charge payable under the scheme is not paid in time, regulation 12 of The Road User Charging (Enforcement and Adjudication) (London) Regulations 2001 enables TfL to serve a "penalty charge notice" on the registered keeper of the vehicle. Regulation 13 allows the registered keeper to make representations against the notice on one of six specified grounds; if TfL accept such a ground regulation 14 requires them to cancel the notice; otherwise (subject to appeal to an adjudicator) regulation 18 provides that the penalty charge becomes recoverable as if payable under a county court order.

2. In practice, as is made clear by their publicly available document "Helping you with your Congestion Charging Penalty Charge Notice", TfL receive and consider representations based on circumstances other than the six specified grounds and can, in their discretion, accept such representations and cancel the penalty charge notice in question. That document (which runs to 27 pages) gives the public a substantial amount of information about the type of representations which may be accepted under the discretion and the type of supporting evidence expected in support of all representations (whether made on one of the specified statutory grounds or otherwise).

3. By a request under the Freedom of Information Act 2000 made on 7 January 2008 the Appellant, Mr Bangar, asked for sight of any separate guidance used by TfL staff in determining whether to apply the discretion to accede to representations. TfL answered the request by informing him that there was such a document entitled "Criteria for dealing with Representations and Appeals"[2] but that they would not disclose it to him in reliance on section 31 of the 2000 Act, which exempts

[1] See art 4 of The Greater London (Central Zone) Congestion Charging Order 2004, which contains the relevant version of the scheme.
[2] We shall refer to this document as the "disputed document".

information whose disclosure would or may be prejudicial to various law enforcement functions. That decision was upheld on an internal review whose results were communicated to Mr Bangar in a letter dated 12 March 2008.

4. Mr Bangar complained to the Information Commissioner about TfL's decision but the Commissioner upheld their position in a decision notice dated 29 June 2009. He has now appealed to the Tribunal under section 57 of the 2000 Act. On the appeal the Tribunal must decide whether the Commissioner's decision is "in accordance with the law" and can review any finding of fact on which the decision notice is based.

The issues

5. The relevant parts of section 31 of the 2000 Act (ie section 31(1)(g) read with 31(2)(c)) provide as follows:

> **Information … is exempt information if its disclosure under this Act would, or would be likely to, prejudice … the exercise by any public authority of its functions for … the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise…**

This exemption is a qualified exemption so that the requirement to disclose information in section 1 of the 2000 Act is only disapplied if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It is well established that disclosure "would be likely to" cause the necessary prejudice if there is a real and significant risk of such prejudice.

6. The issues raised by Mr Bangar's appeal are therefore these:

   (1) whether TfL is carrying out functions of the type identified in section 31 when dealing with representations about penalty charge notices;

   (2) whether disclosure of the disputed document would cause (at least) a real and significant risk of prejudice to the exercise of those functions by TfL;

(3) if so, whether in all the circumstances of the case, the public interest in maintaining the section 31 exemption outweighs the public interest in disclosure of the information.

(1) Functions

7. Mr Bangar challenges the Commissioner's conclusion that the functions exercised by TfL come within section 31 and he refers to another decision of the Tribunal, *FSA v Information Commissioner* (EA/2008/0061). Having considered the legislative and factual framework which we outline in paragraphs 1 and 2 we are in no doubt that in deciding how to deal with representations made against a penalty charge notice TfL is "… ascertaining whether circumstances [exist] which would justify regulatory action in pursuance of any enactment …", the relevant regulatory action being the enforcement of a penalty charge notice under the 2001 Regulations we mention above.

8. We are not clear precisely what point Mr Bangar seeks to make based on the *FSA* case but we are quite satisfied that nothing in that case bears in any way on that conclusion.

(2) Prejudice

9. In paragraph 37 of his decision notice the Commissioner stated:

> **TfL has provided a number of examples to support its conclusion that disclosure would be likely to prejudice its enforcement functions in relation to [penalty charge notices] by reference to the material contained in [the disputed document]. However as stated above due to the nature of this information the Commissioner has not provided further details of this evidence in this Notice. The examples are particularly sensitive as they provide definitive circumstances under which an appeal representation will be accepted or rejected. It is not possible to detail these arguments without disclosing the contents of the withheld information. However upon consideration of TfL's arguments, the Commissioner is satisfied that this evidence does demonstrate that the prejudice to the function in 31(2)(c) is real and significant.**

The Commissioner went on at paragraphs 38 to 42 to refer to various websites which indicate clearly that there are individuals who seek to manipulate the representation process and who would be willing to take advantage of any information they could in order to put forward false representations that might enable them illegitimately to avoid liability for a penalty charge notice. He

concluded in effect that the disputed document may assist them in this way and that this would be prejudicial to TfL's regulatory functions.

10. We have no doubt that if indeed there was a real and significant risk that the disputed document would assist such individuals in this way the necessary prejudice would be established. The question is whether the evidence establishes the existence of such a risk. In order to help it to test that question the Tribunal gave a direction (at paragraph 4 of the directions order dated 3 September 2009) that TfL should produce the publicly available guidance document and the disputed document and should give details of the examples referred to by the Commissioner in paragraph 37 of his decision notice.

11. The closed evidence of TfL in relation to paragraph 37 of the decision notice (which is given by Paul Cowperthwaite, Head of Contracted Services within their Congestion Charging and Traffic Enforcement Directorate) simply refers to an exhibit containing screen shots from various websites with commentary. These establish clearly and unsurprisingly that there are individuals prepared to go to great (and illegitimate) lengths to avoid liability for penalty charge notices. They do not, however, indicate how those individuals would be assisted by the disputed document. The Tribunal has also seen a letter from TfL to the Commissioner dated 26 March 2009 produced as part of the Commissioner's closed material which sets out two specific areas where they say disclosure of the disputed document would prejudice their functions. We have read what is said in the letter carefully and it seems to us that, although the letter refers to some specific evidential problems faced by TfL in those specific areas, there is nothing in the relevant parts of the disputed document whose disclosure of which would make those problems worse. We have also read through the whole of the disputed document in order to see if we can identify any way in which it may help those intending to evade liability for a penalty charge notice but we have been unable to identify any (there are, for example, no cases where TfL staff are instructed to accept statements at face value without corroborating evidence); indeed our impression was that disclosure of the document to the public might positively assist (rather than prejudice) the whole process by making it clear to some would-be evaders that certain representations would have no prospect of success.

12. In the circumstances set out in paragraphs 10 and 11 above the Tribunal is forced to conclude that the necessary prejudice or risk of prejudice is simply not established on the evidence and that the Commissioner's analysis of the position was unfortunately insufficiently rigorous. It follows from that conclusion that section 31 does not apply to the disputed document and that Mr Bangar's appeal must be allowed.

(3) Public interest

13. That conclusion makes it unnecessary for us to consider the public interest test. We would only observe (without making any decision) that it would not necessarily follow that, because there was an identified risk of prejudice, the public interest would be against disclosure and that a particular factor which may have weighed strongly in favour of disclosure would have been the fact that TfL have chosen to go beyond the six statutory grounds for bringing representations and it may be said that in those circumstances the public ought to have as much information as possible about how they will respond to such representations, although we acknowledge that the publicly available guidance document is very informative.

Conclusion

14. The appeal is allowed but we will give TfL time to consider a further appeal before they need disclose the disputed document.

15. Our decision is unanimous.

Signed

Murray Shanks

Deputy Chairman

Dated 23 November 2009