

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 July 2020

Public Authority: London Borough of Lambeth
Address: Lambeth Town Hall
Brixton Hill
London
SW2 1RW

Decision (including any steps ordered)

1. The complainant has requested information relating to reconsideration of Penalty Charge Notices (PCNs).
2. The Commissioner's decision is that the London Borough of Lambeth (the Council) is not entitled to rely on section 31 to withhold the requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
4. The public authority 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.

Request and response

5. On 5 February 2019, the complainant wrote to the Council and requested information in the following terms:

Query 1: *I would like to request a copy of all policy and guidance documents that are available to council officers who are tasked with considering the question of whether a Penalty Charge Notice should be cancelled. For the avoidance of doubt, this request covers any policy*

that is published or otherwise publicly available, plus any internal council guidance or policy that is only available internally to council staff (such as any internal policy that outlines in what circumstances the council may exercise its discretionary powers to cancel a PCN).

Query 2: *Please could you also disclose the training material that is used to train the council officers who make decisions regarding the cancellation of PCNs. This should cover only training material that is directly relevant to their role in deciding whether a council PCN should be cancelled, any other training material (such as generic council training, health and safety, GDPR or training related to other roles or functions) is not within the scope of this request.*

Again for the avoidance of doubt, both queries above cover policies and training material available to council officers who deal with informal representations, formal representations and appeals to the tribunal."

6. The Council responded on 21 February 2019. It stated the following:

"I can confirm that Lambeth information requests holds the information you requested. However, we are withholding that information since we consider that the following exemptions apply to it.

Please see the information which is published via:-

https://www.whatdotheyknow.com/request/lambeths_parking_enforcement_pro "

7. The Council did not cite an exemption on which it was relying.
8. The complainant wrote to the Council on 21 February 2019 and requested an internal review. He disputed that the information previously disclosed via the What Do They Know? Website would be relevant to his request as it was published more than 8 years previously. He also noted that the internal review of the previous request stated that the Council was intending to review the training provided to staff.
9. The Council provided its internal review on 19 March 2019 and, despite not providing any information, simply stated:

"We have provided you with all of the recorded information held with regards to this request and have nothing further to add."

Scope of the case

10. The complainant contacted the Commissioner on 21 March 2019 to complain about the way his request for information had been handled.

11. The Commissioner contacted the Council and set out that despite the lack of cited exemption, it appeared that the Council was relying on section 21 as it considered the requested information to be available via the Whatdotheyknow? Website.
12. The Commissioner invited the Council to review its handling of this request and reconsider whether there is further information held to that disclosed eight years previously.
13. The Council confirmed to the Commissioner that it had located further information and that it was relying on section 31(1)(g) with the specified purpose being section 31(2)(a) to withhold the requested information.
14. The Council provided the Commissioner with its submissions regarding this exemption.
15. The Commissioner therefore considers that the scope of this investigation is to determine whether the Council is entitled to rely on section 31 to withhold the requested information.

Reasons for decision

Section 31: Law Enforcement

16. Section 31(1)(g) state:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)"

17. The Council confirmed that the specified purposes are sections 31(2)(a):

"(a) the purpose of ascertaining whether any person has failed to comply with the law"

18. In order for a prejudice based exemption, such as section 31, to be engaged the Commissioner believes that three criteria must be met:

- a. Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;

- b. Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged to be real, actual or of substance; and
 - c. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, ie disclosure 'would be likely' to result in prejudice or disclosure or 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the change of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
19. The complainant disputed that section 31(1)(g) was engaged as Local authorities are required to take *The Secretary of State's Statutory Guidance to Local Authorities on the Civil Enforcement of Parking Contraventions* into account when creating and publishing information on enforcement of parking contraventions. This guidance document sets out that the enforcement authority should have clear policies, instructions and training on how it exercises this authority. It also sets out that these policies should be published. In particular, paragraph 10.4 states "*Authorities should formulate (with advice from their legal department) and then publish their policies on the exercise of discretion*".
20. The complainant provided a list of 39 Local Authorities who published their policies on parking enforcement. The complainant acknowledged that whilst this does not bind the Council to publish the same information, he considers that this suggests that disclosure would not have the level of prejudice claimed by the Council.
21. The complainant also argued that the Council would not suffer prejudice to its ability to ascertain whether a person has complied with the law as when considering whether to use discretion to cancel a PCN, the council has already decided that the law has not been complied with and is considering whether to apply discretion in spite of this.
22. The Council explained that disclosure of this information would be likely to undermine its ability to ensure PCNs are issued fairly.
23. The Council set out that the cancellation policy should only be used by council parking staff to assist in making decisions in respect of PCN appeals and representations. It considers that disclosure of this

information may result in manipulation of the PCN representations and appeals process.

24. The Council explained that the details set out in the cancellation policy would provide unscrupulous appellants with an opportunity to manipulate their appeal or representation, in order to match its criteria for cancelling PCNs and therefore this would undermine the proper enforcement of parking and traffic offences.
25. The Council confirmed that it was relying on the lower threshold of prejudice ie "*would be likely to*". It considers that disclosure would be likely to have a prejudicial effect as it would allow individuals to attempt to avoid parking enforcement.

The Commissioner's considerations

26. The Commissioner has considered the submissions provided by the Council and the withheld information in making her decision as well as the arguments made by the complainant. The Commissioner has also taken account of the recent First Tier Tribunal decision, EA/2019/0369, regarding similar information¹.
27. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Council relates to the purpose which the exemptions contained at section 31(1)(g), with section 31(2)(a) as the specified function, is designed to protect for some of the withheld information. This is because one of the functions of the Council includes issuing PCNs in accordance with the Traffic Management Act and when receiving representations, the Council's officers are required to ascertain whether or not a PCN was issued correctly and therefore whether the recipient had complied with the law.
28. However, a significant portion of the withheld information relates to situations where the contravention is not in dispute but the motorist is requesting leniency in the form of cancellation of the PCN. For this information, it has already been ascertained that the motorist has not complied with the law by the officer issuing the PCN. The Commissioner is not, therefore, persuaded that the prejudice that the Council cites

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2655/Webber%20,%20Gabriel%20\(EA.2019.0369\)%20%20Allowed.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2655/Webber%20,%20Gabriel%20(EA.2019.0369)%20%20Allowed.pdf)

relates to the function set out in section 31(2)(a) and therefore the exemption at section 31(1)(g) is not engaged.

29. With regard to the second criterion, the Commissioner is only persuaded that there is a clear causal link between disclosure of the withheld information and the prejudice described in relation to a very small proportion of the withheld information.
30. A significant portion of the information is anodyne and relates to high level explanations of the legislation and contraventions, relevant caselaw and technical requirements of reconsidering a PCN. It is not apparent how this would prejudice the Council's ability to ascertain whether the motorist had complied with the law when receiving a PCN.
31. For the small amount of information regarding situations where the motorist has disputed that they have not complied with the law, the guidance is clear as to what evidence the officer must obtain to make this decision. In light of the requirement for evidence, it is not apparent how disclosure of this information could prejudice the Council's ability to ascertain whether the motorist had complied with the law, indeed this information may aid the Council as motorists would be aware of what constitutes evidence and may provide this proactively, reducing the amount of investigation required by the Council's officers.
32. The Commissioner therefore considers that the Council is not entitled to rely on section 31(1)(g) with the specified function being section 31(2)(a).
33. The Commissioner notes however that the Council's arguments appear to be more relevant to the function set out at section 31(2)(c) *the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise*.
34. In the specific circumstances of this case, she has exercised her discretion to consider whether the Council is entitled to rely on section 31(1)(g) with the specified function being 31(2)(c).
35. The Commissioner accepts that the first criterion of the three limb test is satisfied as the potential prejudice described by the Council clearly relates to the purpose set out in section 31(2)(c). This is because one of the functions of the Council includes issuing PCNs in accordance with the Traffic Management Act as well as ascertaining which circumstances allow discretion to cancel a PCN.
36. Consequently the Commissioner is satisfied that any infringement on the Council's function to issue, and apply discretion regarding, PCNs could interfere with its ability to ascertain whether regulatory action is required in individual circumstances.

37. With regard to the second criterion, the Commissioner is only persuaded that there is a clear causal link between disclosure of the withheld information and the prejudice described in relation to a very small proportion of the withheld information. A significant portion of the information is anodyne and relates to the procedural element of reconsidering a PCN.
38. It is not apparent how disclosure would prejudice the Council's ability to ascertain whether a request for reconsideration is based on genuine circumstances. Where the information relates to the ability to apply discretion, the majority of the situations require evidence to be provided to the Council and where this evidence is not provided, enforcement of the PCN is required.
39. In light of the requirement for a motorist to provide this evidence, it is not apparent how disclosure of the evidence-based criteria could prejudice the Council's ability to ascertain whether the reconsideration should result in a cancellation of the PCN.
40. The withheld information included a small amount of information which detailed situations in which the Council may apply discretion without an evidential burden on the motorist. The Commissioner accepts that, with regards to this information, there is a clear causal link between the disclosure of the withheld information the Council's ability to effectively apply discretion where appropriate. This is because the withheld information would provide the public with an insight into the specific circumstances in which the Council is will to exercise discretion.
41. The Commissioner accepts that disclosure of this information could assist an individual in engineering situations where, following the issue of a PCN, that could request the Council use discretion to cancel the PCN. The Commissioner also accepts that this could prejudice the Council's ability to decide whether contravention has occurred due to a genuine mistake on the motorist's part or whether the request for discretion is based on the knowledge that the Council is more likely to accept this situation as a reason for applying discretion.
42. However, with regard to the third criterion, the Commissioner is not satisfied that the threshold of would be likely has been met. *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), states at paragraph 15:

"We interpret the expression "likely to prejudice as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk".

43. The Commissioner has reviewed the withheld information and considers that the proportion and restrictive nature of the criteria that could lead to motorists deliberately parking where they know discretion may be used is significantly small enough that it is unlikely to have a significant detrimental effect on the Council's ability to enforce PCNs.
44. She also considers that it is likely that the Council would be able to take steps to confirm the veracity of the reasoning given in a reconsideration request by confirming whether the motorist's explanation matches the Council's knowledge of the area in which the offence took place or by comparing the reconsiderations with previously received appeals.
45. For the reasons set above, the Commissioner considers that the Council is not entitled to rely on section 31(1)(g) to withhold the requested information and therefore she requires the Council to disclose this information.

Section 17 – Refusal Notice requirements

46. Section 17(1) of the Act states:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

47. As set out in paragraph 6 of this notice, the Council stated that the information was exempt and provided a link to a previous request for information. However, the Council failed to confirm what exemption it was relying on and its reasons why.
48. The Commissioner therefore considers that the Council is in breach of section 17(1) of the Act.

Other matters

49. The Commissioner has concerns regarding the handling of this request for information.

50. The Council appears to have performed inadequate searches for information when receiving the request. The Council provided the complainant with the information disclosed to a previous request made eight years earlier.
 51. In his request for an internal review, the complainant raised concerns regarding the age of the information and directed the Council to its own statement that it intended to amend the previously disclosed information.
 52. The Council appears to have performed a superficial internal review, simply stating that it had provided all information to the complainant, despite the complainant's clearly stated concerns regarding the implausibility of there being no further information held following disclosure eight years previously.
 53. The Commissioner expects the Council to take steps to improve its searches when receiving requests for information. She also expects the Council to perform detailed internal reviews which address the concerns raised by the requester.
 54. The above concerns will be logged and used by the Commissioner when considering the overall compliance of the Council.
 55. We will use intelligence gathered from individual cases to inform our insight and compliance function. This will align with the goal in our draft [Openness by design strategy](#) to improve standards of accountability, openness and transparency in a digital age. We aim to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our [Regulatory Action Policy](#).
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Right of appeal

56. 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

57. 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.
58. 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

Victoria Parkinson
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Information Commissioner's Office
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