

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 July 2020

**Public Authority:** The Royal Borough of Kingston upon Thames  
**Address:** Guildhall  
High Street  
Kingston upon Thames  
KT1 1EU

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Royal Borough of Kingston upon Thames (the Council) seeking information about the circumstances in which it could cancel a Penalty Charge Notice due to medical circumstances. The Council confirmed that it held information falling within the scope of the request but considered this to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA. During the course of the Commissioner's investigation it explained that it now considered sections 31(1)(c) and 31(1)(g) (law enforcement) of FOIA to apply instead.
2. The Commissioner's decision is that the exemptions contained at sections 31(1)(c) and 31(1)(g) of FOIA do not provide a basis to withhold the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Provide the complainant with a copy of the information falling within the scope of his request which it has sought to withhold on the basis of sections 31(1)(c) and 31(1)(g) of FOIA.
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**

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5. The complainant submitted the following request to the Council on 17 October 2019:

*'What medical mitigating circumstances, do you accept for cancelling a PCN?*

*If you accept a 'Medical Emergency' only; what do you class as a medical emergency?'*

6. The Council responded on 28 October 2019. It confirmed that it held information falling within the scope of the first part of the request but it considered this to be exempt from disclosure on the basis of section 43(2) (commercial interests) of the FOIA. In relation to the second part of the request the Council clarified what it would consider to be a medical emergency.
7. The complainant contacted the Council on 29 October 2019 and asked it to conduct an internal review of the decision to withhold information on the basis of section 43(2) of FOIA.
8. The Council informed the complainant of the outcome of the internal review on 11 November 2019. It upheld the decision to withhold the information falling within the scope of the first part of the request on the basis of section 43(2) of FOIA.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 16 November 2019 in order to complain about the Council's decision to withhold the information falling within the scope of the first part of his request.
10. During the course of the Commissioner's investigation the Council explained that it was no longer seeking to rely on section 43(2) of FOIA to withhold this information. Rather, it was now seeking to rely on the following exemptions within FOIA:
- section 31(1)(c), the administration of justice, and
  - section 31(1)(g), the exercise by any public authority of its functions for any of the purposes specified in subsection 31(2).

11. The information being withheld by the Council consists of its 'Policy and processing guide' for PCNs and a shorter document detailing its position on 'Routine but sensitive' cases.<sup>1</sup>

## Reasons for decision

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### Section 31 – law enforcement

12. Section 31(1) of FOIA provides a number of different exemptions.
13. In the circumstances of this case as noted above the relevant exemptions are those contained at sections 31(1)(c) and 31(1)(g) which state that:

*'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 –*

*(c) the administration of justice...*

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

14. In relation to this latter exemption the Council explained that the function in question was that contained at section 31(2)(c) of FOIA which stated that:

*'the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise'*

### The Council's position

15. The Council explained that there are specific circumstances where an officer may exercise their discretion and cancel a Penalty Charge Notice (PCN) despite there being a parking contravention. It explained that the withheld information compromised scenarios where such discretion may be exercised and included details of what representations and evidence submitted by motorists which would be accepted and rejected.
16. The Council explained that in applying the exemptions contained at sections 31(1)(c) and 31(1)(g) it was satisfied that there would be harm

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<sup>1</sup> The document, 'Policy and processing guide' was also the subject of a decision notice issued by the Commissioner on 16 July 2020 and her analysis of application of section 31 below follows the approach taken in that decision notice, FS50847772.

to the Council's parking enforcement functions; disclosure of the withheld information would cause actual, real or substantive prejudice to the Council's parking enforcement functions; and the prejudice would be likely to occur.

17. In support of this position the Council argued that if motorists were aware of which representations and evidence influence the exercise of discretion to cancel PCNs this would lead to the adoption of methods to evade penalties for illegal parking and could be widespread. It argued that motorists would be able to tailor their representations against PCNs to 'fit' with the criteria in the policy and guidelines that would make it more likely to succeed but would not necessarily be consistent with the real circumstances. The Council suggested that it would be likely to result in 'exaggerated' claims for cancellation being made, not necessarily supported by the factual circumstances.
18. The Council argued that this would have a significant effect on its parking enforcement functions. This is because it would prejudice its ability to consider PCNs and divert resources from legitimate parking enforcement to ascertaining whether a contravention has occurred due to a genuine mistake or whether the motorist is misleading the Council based on the knowledge of its parking enforcement policy.
19. The Council emphasised that a significant number of motorists (both residents in and visitors to the Council's area) could use the information to engineer situations where the PCN could be cancelled. This would not only cause actual and real prejudice but also make such prejudice likely. Furthermore the Council explained that information similar to the withheld information is used by councils throughout the UK and disclosure of the Council's information could be used to harm other councils' parking enforcement functions.

#### The complainant's position

20. The complainant explained that he had submitted the same request to a number of other London councils and they had provided him with the information. In light of this he questioned why the information held by the Council could not be disclosed.

#### The Commissioner's position

21. In order for a prejudice based exemption such as section 31(1) to be engaged the Commissioner considers that three criteria must be met:
  - 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;

- 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 must be real, actual or of substance; and
  - 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 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there 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.
22. With regard to the first criterion, the Commissioner agrees that if the Council's ability to enforce PCNs was undermined then this in turn would undermine the interests protected by sections 31(1)(c) and 31(2)(c) of FOIA. The first criterion is therefore met.
  23. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Council clearly relates to the purpose which the exemptions contained at sections 31(2)(a) & (c) are designed to protect. 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. Consequently, the Commissioner is satisfied that any infringement on the Council's function to issue, and apply discretion to, PCNs could interfere with its ability to ascertain whether regulatory action is required in individual circumstances.
  24. With regard to the second criterion, the Commissioner is only persuaded that there is a clear causal link between disclosure of a very small proportion of the withheld information and the prejudice described. A significant proportion of the information is anodyne and relates to the procedural element of reconsidering a PCN, it is not apparent how this would prejudice the Council's ability to ascertain whether a reconsideration is genuine. The majority of the information relates to the evidence required by the Council and decisions that can be made when provided with such evidence.
  25. 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.

26. The Commissioner therefore considers that sections 31(1)(c) or 31(1)(g) are not engaged in relation to this part of the information.
27. 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 causal link between the disclosure of the withheld information and 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 situations in which the Council is willing to exercise discretion. The Commissioner accepts that disclosure of this information could assist an individual in engineering situations where, following the issue of a PCN, they 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 a 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.
28. 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'.*
29. The Commissioner has reviewed the withheld information and considers that the proportion of 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. 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.
30. Furthermore, the Commissioner is conscious that a number of other London councils have disclosed information in response to the complainant's request. The Commissioner has considered the information disclosed by the various councils. It is clear that in some cases the disclosed information is not as detailed as the withheld information in this case. However, in the Commissioner's view the

information disclosed by some councils, for example a version of Lambeth's policy<sup>2</sup> and Barking & Dagenham policy<sup>3</sup> is very similar to the withheld information. The information disclosed by both of these councils explains what evidence that will accepted by them when pleading mitigating circumstances to challenge a PCN, and as with the withheld information, the disclosed information is not limited to medical issues but covers a much broader range of potential scenarios.

31. For the above the above reasons the Commissioner has therefore concluded that the third criterion is not met. Therefore, the Council cannot rely on the exemptions contained at sections 31(1)(c) and 31(1)(g) to withhold the information.

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<sup>2</sup> [https://www.whatdotheyknow.com/request/lambeths\\_parking\\_enforcement\\_pro](https://www.whatdotheyknow.com/request/lambeths_parking_enforcement_pro)

<sup>3</sup> <https://modgov.lbbd.gov.uk/internet/documents/s57863/Parking%20Policy%20-%20Annex%201%20Cancellation%20Policy.pdf>

## Right of appeal

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32. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.
34. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**