

Freedom of Information Act 2000 (Section 50)

Decision Notice

29 June 2009

Public Authority: Transport for London
Address: 6th Floor, Windsor House
42-50 Victoria Street
London
SW1H 0TL

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to Transport for London ("TfL") for its internal guidance relating to how it considers appeal representations made against a Penalty Charge Notice (PCN). TfL confirmed that it held the requested information but stated that it was exempt from disclosure under section 31(1)(g) in conjunction with section 31(2)(c) of the Act. The Commissioner considers that this exemption is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. In a letter dated 7 January 2008 the complainant asked TfL whether it held any further guidelines (in addition to that which is publicly available) as to how it considers appeal representations made against PCNs. If held the complainant requested a copy of that information.
3. On 30 January 2008 TfL responded to the complainant's request for information. TfL confirmed that it did hold further guidelines for considering representations against a PCN. It explained that the document containing those guidelines supplemented its published guidance and is used by its service provider to help it consider and

determine representations submitted to TfL. It stated that this document is entitled "Criteria for dealing with Representations and Appeals". For the purposes of this Notice the Commissioner has referred to this document as the "Guidance". TfL also noted that the Guidance is consistent with publicly available information.

4. TfL refused to provide the complainant with the Guidance as it stated that it was exempt from disclosure under section 31(g) in conjunction with section 31(2)(c) of the Act. TfL suggested that disclosure of the Guidance would prejudice the exercise of its public functions for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. TfL listed the relevant regulatory procedures that support enforcement action being taken against those who should but do not pay the congestion charge.
5. TfL explained that the Guidance related to procedures for collecting PCNs, including decisions about whether to pursue regulatory action in order to collect money owed. It explained that it was applying the exemption in this case because disclosure would prejudice TfL's ability to ascertain whether to pursue an unpaid PCN in accordance with the legislation it had listed or whether to accept a representation. It explained that disclosure would result in significant damage to TfL's ability to collect the congestion charge and any related penalty charge by opening up the representation process to potential abuse by current and future customers.
6. TfL argued that there are websites dedicated to finding ways around paying PCNs and that this information would greatly enhance people's ability to abuse the process. It clarified that those with legitimate claims against a PCN have well established procedures to oppose their penalties and a public information leaflet that outlines the general grounds for accepting representations is made readily available to customers by TfL. It clarified that the leaflet clearly advises that customers may make a representation on any grounds and not just those listed in the leaflet.
7. TfL considered the public interest in maintaining the exemption against the public interest in disclosing the information. In favour of disclosure it conceded that publication of the Guidance would show that TfL does apply discretion in considering representations and that this is carefully managed to ensure fairness, consistency and to protect public funds from the effect of invalid representations. It also highlighted that publication of the Guidance would show openness in decision making and would increase public confidence that TfL is applying the law correctly.
8. However it argued that disclosure of the Guidance could result in a number of outlets and organisations distributing it to a wider audience, particularly those opposed to the congestion charging

scheme. This, it suggested, may encourage drivers to stop paying the congestion charge in the belief that this 'insider knowledge' would enable them to make a successful appeal representation when a penalty charge is incurred. It stated that this could lead to a higher level of congestion charge, which would not be in the public interest. Furthermore it suggested that disclosure of the Guidance would lead to an increase in the number of individuals not paying the charge and therefore an increase in the cost of enforcement. This would lead to a decrease in the level of revenue re-invested in public transport, which is not in the public interest. Finally it explained that there would also be an increase in operating costs and expenditure of public money due to increased volumes of representation processing and the need to introduce further verification of the evidence and information provided as part of the appeal process. It stated that it is not in the public interest for money to be spent in this way.

9. On balance TfL concluded that the public interest favoured the maintenance of the exemption in this case.
10. On 11 February 2008 the complainant asked TfL to conduct an internal review of its decision to withhold the requested information. In summary the complainant argued that the publicly available guidance document made it clear that TfL is able to use discretion and that the general principles in relation to this that are made available have not prevented TfL from carrying out its investigative actions. The complainant also suggested that TfL's arguments against disclosure were based too heavily on circumstances that may not arise. The complainant explained that he wanted to know that TfL were dealing with cases fairly.
11. On 12 March 2008 TfL wrote to the complainant with the result of the internal review it had carried out. It upheld its initial refusal. It explained that the review panel had discussed the possibility of redacting the Guidance however it was concluded that if it did so it would make it essentially the same as the document which is already publicly available.

The Investigation

Scope of the case

12. On 15 April 2008 the complainant made a formal complaint to the Information Commissioner's Office as he was dissatisfied with the result of the internal review. The complainant specifically asked the Commissioner to investigate whether or not section 31(1)(g) in conjunction with section 31(2)(c) had been correctly applied in this case. The Commissioner notes that some of the some of the

information contained within the requested internal Guidance is contained within the external Guidance which is publicly available. The Commissioner has therefore limited the scope of his investigation to the information contained within the internal Guidance which is not publicly available.

Chronology

13. The Commissioner contacted TfL on 14 January 2009 in order to discuss its handling of the complainant's request and to establish whether or not the application of section 31(1)(g) in conjunction with section 31(2)(c) had been correctly applied in this case.
14. The Commissioner asked for TfL's further submissions to support its use of the exemption. The Commissioner highlighted that section 31 is subject to a prejudice test. The Commissioner asked TfL to provide further arguments as to why it believed section 31(1)(g) in conjunction with 31(2)(c) is engaged, and specifically how disclosure of the Guidance would, or would be likely, to prejudice the exercise of TfL's functions for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
15. The Commissioner also highlighted that section 31 is a qualified exemption and as such is subject to the public interest test. TfL had provided arguments as to its consideration of the public interest test within the refusal notice to the complainant. The Commissioner asked if TfL wished to provide any further submissions as to the public interest test, and its considerations as to how the public interest in maintaining the exemption outweighed the public interest in disclosure.
16. On 26 March 2009 TfL responded to the Commissioner. By way of background information, TfL explained that the Congestion Charging scheme is operated by way of a civil enforcement regime, which is provided for in the Greater London Authority Act 1999. It explained that Regulations made under this legislation provide for the imposition and payment of penalty charges against drivers who fail to pay the congestion charge and for an appeals framework in respect of such penalty charges.
17. TfL stated that under the Road User Charging (Charges and Penalty Charges)(London) Regulations 2001, as amended, and the Road User Charging (Enforcement and Adjudication)(London) Regulations 2001, as amended, TfL has the power to impose and escalate penalty charges against drivers who fail to pay the congestion charge, and to register this outstanding debt to enable it to be collected under a warrant if necessary. It explained that the above Regulations also confer upon TfL the authority to clamp and remove a vehicle with three or more outstanding penalty charges as

a further enforcement measure. It further explained that the above Regulations provide for a representations and appeals procedure, through which a recipient of a penalty charge can make a representation to TfL and subsequently appeal to an independent adjudicator.

18. TfL explained that a representation may be made on one of six grounds which it clarified are defined in the above Regulations and contained within the public domain. It stated that if a recipient believes that their representation does not fall within any of the listed grounds, a recipient is able to state other reasons why they do not believe they are liable for a PCN. It explained that TfL makes individuals aware that mitigating circumstances will be considered and in reaching any decision it always considers the use of its discretion.
19. TfL explained that after considering the representation it can either issue a notice of acceptance, which means that the recipient of the PCN is no longer liable, or alternatively it can issue a notice of rejection, which means the recipient is still liable for the PCN.
20. TfL clarified that this process is explained on its website and in a document entitled "Helping you with your Congestion Charging Penalty Notice" of which it provided a copy to the Commissioner. TfL stated that this document which is available on its website and on request, explains in detail how TfL considers appeal representations and provides common examples of appeal representations which may or may not be accepted.
21. TfL clarified that the Guidance is used by its staff to help to determine whether to accept or reject an appeal representation based on the evidence provided to support that appeal, either in respect of one of the six grounds or if relating to wider mitigating circumstances. It stated that this Guidance also makes clear that representations can be made for any reason and that an appeal must be considered in accordance with the Guidance.
22. It stated that the Guidance is provided to its service provider to simplify the decision making process, to reduce processing costs and to ensure consistency in decision making for the benefits of its customers and its service providers.
23. TfL explained that it considered that the appropriate exemption in this case was that contained at section 31(1)(g) in conjunction with 31(2)(c). It stated that it had explained the legal basis for the enforcement procedures that support action being taken against those who should but do not pay the congestion charge within the background information and which is detailed at paragraphs 16-17 above. It explained that it considered that the circumstances in which the Guidance is used amounts to the exercise of a statutory

function intended to ascertain whether regulatory action is required. TfL also clarified that it believed disclosure would be likely to prejudice its functions in this regard.

24. TfL provided a number of examples to support its conclusion that disclosure would be likely to prejudice its enforcement functions in relation to PCNs. However due to the nature of this information the Commissioner is not able to set it out in detail in this Notice without revealing aspects of the withheld information.
25. In addition to this TfL has also explained that there are a number of websites and forums which are used by individuals to discuss the representation process, including ways in which individuals can avoid paying for a PCN. TfL provided examples of such websites.
26. TfL summarised that on the basis of past experience coupled with its knowledge of the websites and forums described above, it considered that were the Guidance disclosed it would lead to a number of disingenuous representations by individuals who would know exactly how TfL will deal with specific representations, particularly those criteria which do not require corroborative evidence. It concluded that this would be likely to prejudice its power to impose and enforce penalty charges against drivers who fail to pay the congestion charge.
27. TfL explained that it had considered the balance of the public interest in its refusal notice to the complainant dated 30 January 2008. It stated that it wished to continue to rely on the public interest arguments it had set out in the refusal notice and which are detailed at paragraphs 7-9 of this Notice. It also added a further public interest argument in favour of maintaining the exemption, which was that TfL might see more congestion if the public were of the belief that PCNs could be overturned using the internal criteria to make a false representation. TfL stated that it is not in the public interest for a scheme which is designed to reduce congestion for the benefit of London to be “hamstrung” by the disclosure of TfL’s internal enforcement criteria.

Analysis

Exemption

Section 31(1)(g) in conjunction with section 31(2)(c)

28. Section 31(1)(g) provides 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-

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

Section 31(2)(c) provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,”

29. The full text of section 31 can be found in the Legal Annex at the end of this Notice.
30. The Commissioner has considered whether the section 31(1)(g) with subsection 2(c) exemption has been correctly engaged in this case.

What is the relevant purpose in relation to section 31(2)(c)?

31. TfL has described the legislation which confers its powers in relation to imposition and enforcement of PCNs. This is set out in detail at paragraphs 16-17 above. It explained that it considered that the Guidance is used in order to exercise its statutory function intended to ascertain whether regulatory action is required.
32. The Commissioner has considered the powers provided to TfL under this legislation. The Commissioner notes that under this legislation TfL has the responsibility for imposing and enforcing penalty charges against drivers who fail to pay the congestion charge.
33. The Guidance is internal guidance which is used by TfL's service providers to determine whether or not to accept representations appealing a penalty charge which has been imposed in accordance with the legislation listed at paragraphs 16-17.
34. The Commissioner is therefore satisfied that TfL's functions relevant to this case are for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise and therefore section 31(2)(c) is applicable. In the case of *Reith v Information Commissioner's Office and London Borough of Hammersmith and Fulham (EA/2006/0058)* the Tribunal supported the application of section 31(2)(c) in similar circumstances however in that case the prejudice test was not met.

35. TfL has argued that disclosing the Guidance would be likely to prejudice its ability to exercise its functions for the purpose set out in section 31(2)(c).
36. In the Commissioner's view, "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. In the case of *John Connor Press Associates Ltd v Information Commissioner (EA/2005/0005)*, the Tribunal confirmed that, "*the chance of prejudice being suffered should be more than a hypothetical possibility, there must be real and significant risk.*" The Tribunal in that case indicated that the degree of risk must be such that there 'may very well' be prejudice.
37. TfL has provided a number of examples to support its conclusion that disclosure would be likely to prejudice its enforcement functions in relation to PCNs by reference to the material contained in the Guidance. 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.
38. In addition to the arguments which the Commissioner has not detailed due to the nature of those arguments, TfL has also brought to the attention of the Commissioner the fact that there are a number of websites and forums which are used by individuals to discuss the representation process, including ways in which individuals can avoid paying for a PCN. TfL provided examples of such websites including www.appealnow.com, www.beatparkingticket.co.uk and www.penaltychargesforum.co.uk. It explained that these websites and a number of discussion threads on these forums disseminate arguments that can be used against TfL when making a representation. Additionally it explained that some of these websites offer a service whereby they will actively make representations and appeals on behalf of a customer using templates for a fee considerably less than the penalty charge due. Therefore TfL suggested that those behind these websites had a commercial interest in knowing which circumstances will generate an acceptance of the representation.
39. TfL also explained that many of the forum threads are from individuals who may have a scenario that they feel is weak or offers insufficient weight to be excused from the penalty charge. TfL assert that such individuals are seeking any other or supplementary challenges to avoid the charge rather than putting forward the true

circumstances within the representation. TfL argued that this would suggest that if it were to release the Guidance, motorists would endeavour to use irrelevant and disingenuous examples to avoid the penalty charge.

40. Therefore TfL has argued that if the Guidance were disclosed, its ability to exercise its functions in relation to this would be eroded because the public may use the Guidance to make false appeal representations against a PCN.
41. Upon consideration of all of the arguments put forward by TfL the Commissioner believes that it is likely that some members of the public may endeavour to utilise the Guidance to illegitimately avoid liability of PCNs. The Commissioner considers that this is evident from the websites which he has been directed to which focus upon this aim. Upon consideration of this and the other arguments put forward by TfL, which set out above cannot be detailed in this Notice as to how the Guidance could be utilised to make false appeal representations, the Commissioner accepts that if it were released it would be likely to prejudice TfL's ability to exercise its functions in relation to the enforcing of PCN's.
42. The Commissioner considers that this case can be distinguished from the Reith case as discussed at paragraph 36 above. In the Reith case the Tribunal found that the test of prejudice was not met because the public authority had relied upon its own parking enforcement expertise in support of its belief that prejudice would occur but had not provided any evidence beyond this. Therefore the Tribunal stated that "its evidence is not independent, and being unsupported amounts to a bare assertion." In this case, TfL has provided external evidence, which does not rely on its own enforcement expertise, that the prejudice would be likely to occur. That external evidence is the websites and forums which TfL directed the Commissioner to and which are used by individuals to discuss the representation process, including ways in which individuals can avoid paying a PCN.

The public interest test

43. The Commissioner has gone on to consider whether the public interest in maintaining the section 31(1)(g) with section 31(2)(c) outweighs the public interest in disclosure.
44. In favour of maintaining the exemption TfL has argued that disclosure of the Guidance could result in a number of outlets and organisations distributing it to a wider audience, particularly those opposed to the congestion charging scheme. TfL suggested that this might encourage drivers to stop paying the congestion charge in the belief that this 'insider knowledge' would enable them to make a successful representation when they incur a penalty

charge. It stated that this could lead to a higher level of congestion charge, which is not in the public interest. The Commissioner does not consider that this is a relevant public interest argument in relation to the application of this exemption. Whilst this may have a negative impact upon the purse of private individuals against whom a PCN is imposed, it is not something that would impact upon the public at large.

45. TfL also suggested that disclosure of the Guidance would lead to an increase in the number of individuals not paying the charge and therefore an increase in the cost of enforcement. It suggested that this would lead to a decrease in the level of revenue re-invested in public transport, which it stated was not in the public interest. It explained that there would also be an increase in operating costs and expenditure of public money due to increased volumes of representation processing and the need to introduce further verification of the evidence and information provided as part of the appeal process. TfL stated that it is not in the public interest for money to be spent in this way. The Commissioner considers that if the withheld information were released this may lead to an increase in the number of illegitimate representation appeals being made to TfL to avoid liability of PCNs. If the number of appeals would be likely to increase, the costs of processing the appeals would similarly be likely to increase. The Commissioner considers that further demand on TfL's resources in this way may have a negative impact on its ability to carry out its enforcement activities effectively.
46. Finally TfL explained that we might see more congestion if the public were of the belief that PCNs could be overturned using the Guidance to make a false representation. TfL stated that it is not in the public interest for a scheme which is designed to reduce congestion for the benefit of London to be "hamstrung" by the disclosure of TfL's internal enforcement criteria. The Commissioner considers that the rationale for bestowing TfL with the powers it has to impose and enforce PCNs was to reduce congestion within the city centre. The Commissioner considers that the congestion charge may cease to be as significant a disincentive to driving within the city centre if motorists believe that they will be able to utilise the Guidance to avoid liability of paying a PCN. The Commissioner considers that this consequence would not be in the public interest.
47. The Commissioner also considers that there is a public interest in upholding compliance with the law and not assisting individuals illegitimately avoiding liability which arises as the result of the imposition of a PCN.
48. In favour of disclosure TfL conceded that publication of the Guidance would show that TfL does apply discretion in considering representations and that this is carefully managed to ensure

fairness, consistency and to protect public funds from invalid appeal representations. It also highlighted that publication of the Guidance would show openness in decision making and would increase public confidence that TfL is applying the law correctly.

49. The Commissioner considers that there is a public interest in TfL operating, in relation to its enforcement powers, in an open and transparent way. Disclosure of the Guidance would increase transparency of the PCN enforcement process as it would show exactly what circumstances TfL will accept a PCN appeal outside of one of the six strict legal grounds defined in the Regulations. It would also show whether TfL utilises its enforcement powers in a consistent and fair manner. The Commissioner considers that disclosure of the withheld information would show how the decision is made by TfL as to whether or not to accept a PCN appeal. This would increase public confidence in the congestion charging system which is in place.
50. However the Commissioner considers that the external Guidance which is publicly available is comprehensive and furthermore if an appeal representation does not fit into the criteria contained within the internal Guidance, it will be escalated to TfL's Representations and Appeals Policy and Monitoring Advisors which is able to take any circumstances into account and exercise discretion as to whether or not to accept an appeal. The Commissioner therefore considers that this information goes a considerable way to meeting the public interest in ensuring TfL is operating in a transparent, consistent and fair manner and that the information already within the public domain assists individuals to be able to make an informed decision as to whether or not to make a legitimate appeal representation against a PCN.
51. On balance the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Commissioner considers that there is a strong public interest in preserving TfL's ability to carry out its functions in respect of enforcing PCNs without prejudice to those functions. Furthermore the Commissioner considers that disclosure would be likely to have a negative impact upon the public purse due to the likelihood of an increased number of appeal representations being generated. The Commissioner considers that disclosure would undermine the rationale behind conferring the powers upon TfL to impose and enforce PCNs, that basic underlying principle being reduction of traffic congestion, which again would not be in the public interest. Finally as noted above the Commissioner is also minded of the information which is publicly available which assists individuals in making informed appeal representations.

The Decision

52. The Commissioner's decision is that TfL was correct to apply section 31(1)(g) in conjunction with section 31(2)(c) of the Act to the requested information and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Steps Required

53. The Commissioner requires no steps to be taken.

Right of Appeal

54. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 29th day of June 2009

Signed

**Nicole Duncan
Head of FOI**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Law enforcement.

Section 31(1) provides 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-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

Section 31(2) provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons)

- in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
 - (h) the purpose of recovering the property of charities,
 - (i) the purpose of securing the health, safety and welfare of persons at work, and
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.”

Section 31(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”