

Freedom of Information Act 2000 (the Act)

Decision notice

Date: 7 October 2019

Public Authority: London Borough of Barnet
Address: North London Business Park
Oakleigh Road South
London
N11 1NP

Decision (including any steps ordered)

1. The complainant has requested the template information used by London Borough of Barnet (the Council) when responding to Parking Charge Notice (PCN) challenges.
2. The Council disclosed the majority of the information held but withheld 6 paragraphs under section 31(1)(g).
3. The Commissioner's decision is that the Council is entitled to rely on section 31(1)(g) to withhold the information but has breached section 17 as it did not inform the complainant which exemption it was relying on when advising that it required further time to consider the public interest.
4. The Commissioner does not require the Council to take any steps.

Request and response

5. On 1 November 2018, the complainant wrote to the Council and requested information in the following terms:

"...please can I ask for an electronic copy of all template letters, paragraphs etc used in responding to (i) informal challenges and (ii) formal representations."¹

6. The Council wrote to the complainant on 3 December 2018 and confirmed that it required further time to consider the balance of the public interest test. It did not cite which exemption it considered the information was exempt under.
7. On 16 January 2019, the Council wrote to the complainant and provided a formal response. It disclosed information falling within the scope of the request and confirmed that it was withholding some information under section 31 of the Act as it could undermine law enforcement.
8. The Council explained that template and paragraph libraries provide a tool for officers to assist in building responses to representations. They do not constitute policy or fetter the discretion of the officers and they do not cover all situations.
9. The Council explained that the disclosed information reflects what is currently available to officers in the system and is subject to change. It also explained that officers can and do edit and add to these paragraphs to meet the situation and also draft responses without the use of standard paragraphs. The Council confirmed that it is unable to confirm whether any particular paragraph has or has not been used in response to a representation.
10. The Council confirmed that section 31 is a qualified exemption and that it had considered the balance of the public interest. It considered that arguments in favour of disclosure were: Transparency and understanding how parking is enforced. The arguments in favour of maintaining the exemption stated as: High risk and likelihood of contravention of waiting and parking restrictions (Part 6 of The Traffic Management Act 2004) and publication of the withheld information could limit the effectiveness of parking enforcement.
11. The Council confirmed that in all the circumstances of the case, it considered the public interest in maintaining the exemption outweighed that in disclosure of the withheld information.

¹ The request dated 1 November was in response to the disclosure of information about Penalty Charge Notices previously requested by the complainant.

12. On 16 January 2019, the complainant wrote to the Council and requested an internal review of the handling of his request for information. He disputed the application of section 31 and stated that the Council has not adequately explained how publicising this information could limit the effectiveness of parking enforcement or what differentiates the withheld information from the information the Council had disclosed.
13. The complainant considered that as the information requested comprises templates to be used in letters sent to members of the public, all of the withheld information must be suitable for public consumption. He argued that any of it might appear on a letter to a motorist and that motorist is free to publish that letter as they see fit.
14. The complainant acknowledged that there may be a concern that disclosure would make it easier for motorists “*to know what excuses might work*” to avoid liability for Penalty Charge Notices (PCN). However, he countered this argument by stating that all challenges are required to be supported by evidence and the statutory grounds for appealing a PCN are all public knowledge. He also set out that the Parking Adjudicator decisions are publicly available.
15. On 12 February 2019, the Council provided the outcome of its internal review. It agreed that the original response had not fully explained how publicising the withheld information would limit the effective of parking enforcement. It confirmed that it was upholding the decision to withhold the information but on the basis of a different limb of section 31 as its previous reliance on section 31(1)(c) was incorrect.
16. The Council stated that it now considered section 31(2)(c)² applies to the withheld information as this limb relates to information the release of which would prejudice the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. The Council explained that the enforcement of parking restrictions is a regulatory duty conducted by the Council under its statutory obligations and if the release of the withheld information could be found to prejudice this activity, then the exemption applies.
17. The Council explained that the release of relevant paragraphs would prejudice this activity as the paragraphs apply to situations where public

² Section 31(2)(c) cannot be applied as an exemption by itself. Please see the “Scope of the case” section of this notice for confirmation of the correct way to apply section 31(2)(c).

knowledge could affect the behaviour of motorists, either before the issue of a PCN by potentially engineering situations where discretion would be applied in spite of the contravention or after the issue of a PCN by tailoring a plea of mitigation so that discretion would be applied.

18. The Council explained that disclosure would be likely to reduce the effective of parking enforcement, both in application of penalties and application of discretion, where this is felt necessary, thus prejudicing the service's ability to ascertain the necessity of regulatory action.
19. The Council explained that it considered the public interest test carried out in its original response also applied, and was more relevant, to the limb of the exemption now being applied.
20. The Council addressed the complainant's point regarding the paragraphs being designed for public use. It explained that it is not necessarily the case that they have all been used in public correspondence and the circumstances may not have arisen where they apply. It also explained that whilst some of the information will be in the public domain, the nature of the information would be specific to the context in which it was sent. It is not stated in correspondence with members of the public which paragraphs are taken from templates and which are not. The Council considered that once the information is released under the class of 'template paragraph', the nature of the information changes.
21. The Council also addressed the complainant's argument that the statutory grounds for appeal are public knowledge. It explained that the paragraphs do not apply to statutory grounds for appeal but to the application of discretion when considering mitigating circumstances.

Scope of the case

22. The complainant contacted the Commissioner on 14 February 2019 to complain about the way in which his request for information had been handled.
23. During the investigation, the Commissioner confirmed to the Council that section 31(2)(c) is not an exemption in its own right. Sections 31(2)(a)-(j) are the purposes referred to in sections 31(1)(g)-(i)³. The Council therefore confirmed to the Commissioner and the complainant

³ <http://www.legislation.gov.uk/ukpga/2000/36/section/31>

on 2 August 2019 that it was relying on the exemption at section 31(1)(g) with the specified purpose being that at section 31(2)(c). The Council also introduced section 31(1)(a) in respect of one of the withheld paragraphs. The Council also reconsidered its position with regard to some of the withheld information and disclosed this to the complainant.

24. The Commissioner therefore considers the scope of this investigation is to determine whether section 31(1)(g) and section 31(1)(a) are engaged regarding the withheld information and whether the balance of the public interest lies in maintaining the exemption or disclosure of the withheld information.

Reasons for decision

Section 31 – Law Enforcement

25. Section 31(1)(g) of the Act states 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)".

26. The Council has confirmed that the relevant purpose is section 31(2)(c):

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

27. In order for a prejudice based exemption, such as section 31, to be engaged the Commissioner believes 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 to 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 it 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 chance 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.

The Council's position

28. The Council provided the Commissioner with a copy of the withheld information. It confirmed that a significant amount of the requested information was disclosed with only seven out of 136 paragraphs being withheld originally. One of these seven paragraphs was subsequently disclosed to the complainant following review of the Council's position whilst preparing its submissions, leaving only six out of 136 paragraphs withheld.
29. The Council explained that, as set out in its internal review response, the release of the relevant paragraphs would be likely to prejudice the activity specific in section 31(2)(c) as the paragraphs apply to situations where public knowledge could affect the behaviour of motorists, either before or after the issue of a PCN.
30. The Council therefore considers that disclosure would be likely to reduce the effectiveness of parking enforcement, both in the application of penalties and the application of discretion, where this is felt necessary, thus prejudicing the service's ability to ascertain the necessity of regulatory action.
31. The Council confirmed that it has the statutory authority to undertake Parking Enforcement, including the issue of PCN, under the Traffic Management Act 2004 and associated regulations.
32. The Council believes that the release of the withheld information would be likely to have a prejudicial impact on this statutory function, not only in the taking of enforcement action when it is merited, but also in the application of discretion when it is thought appropriate.
33. The Council explained that while some of withheld information may be, to some extent, considered in the public domain, this consists solely of private correspondence to individual appellants. It may not be the case that some of these paragraphs have in fact been used in such correspondence and it is not stated in the correspondence whether the discretion used is taken from a template, as the use of templates is in itself discretionary.

34. The Council considers the nature of the exemption to be contextual, once this information is released under the class of 'template paragraph' to a much wider audience, the nature of the information and its potential misuse changes and the exemptions apply.
35. The Council confirmed that it was relying on the "would be likely" threshold of prejudice but considered that the likelihood was exceptionally high given the contentious nature of Parking Enforcement and the strong financial motive for those who have parked illegally to circumvent enforcement penalties.
36. The Council provided individual explanations for each of the withheld paragraphs. The Commissioner cannot set these explanations out in detail as to do so would reveal the withheld information, however, she can set out that the paragraphs are regarding specific circumstances in which an officer may exercise discretion despite the parking contravention having occurred.

The Commissioner's position

37. 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 exemption contained at section 31(2)(c) is 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, PCNs could interfere with its ability to ascertain whether regulatory action is required in individual circumstances.
38. With regard to the second criterion, the Commissioner accepts that there is a clear causal link between the disclosure of the withheld information and the Council's ability to effectively apply discretion where appropriate and therefore ascertain where regulatory action is appropriate. This is because the withheld information would provide the public with a clear 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 would 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.

39. With regard to the third criterion, the Commissioner is satisfied that the threshold of would be likely to 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."

40. The Commissioner is satisfied that there is a real and significant risk of this prejudice occurring. She has reached this conclusion on the basis that the withheld paragraphs relate to specific situations and would therefore provide an insight into the circumstances in which the Council has decided are likely to justify discretion and no regulatory action. Furthermore, whilst not every member of the public would necessarily be motivated to use the withheld information in order to attempt to have a PCN cancelled, the information could in theory be used by any motorist in the borough or indeed any visitors to the borough. In the Commissioner's view, the significant number of people who could potentially use the information to engineer situations in which discretion may be applied should a PCN be issued, combined with the insight into these situations the withheld information would provide such individuals, persuades her that disclosure presents more than a hypothetical risk of prejudice occurring.
41. Section 31(1)(g) is therefore engaged and the information is exempt from disclosure.

Public interest test

42. Section 31 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosure

43. The Council acknowledged that there is a general public interest in local authorities being open and transparent. It recognised that there is a legitimate public interest in how parking authorities carry out their enforcement activities and that these are conducted properly. However, it considers that this public interest is not best served by disclosure of the withheld information. The Council explained that it publishes more than the majority of Local Authorities in England and Wales by

publishing an annual report, information on its Special Parking Account and detailed PCN data dashboards, as well as a large amount of raw data⁴. The Council considers that this publication of data demonstrates the Council's commitment to transparency in terms of how enforcement activities are conducted.

44. The Council also considers that there may be a public interest in knowing where discretion may be applied regarding honest mistakes made resulting in enforcement action.
45. The complainant argued that the public interest manifestly favours disclosure. He considers that it is a well-recognised facet of good decision-taking that where a public authority exercises discretion, it should be transparent about the grounds on which that discretion is exercised. This helps ensure consistency between decisions, public confidence that decisions are taken fairly and rationally and according to clear criteria, and that those with legitimate grounds of appeal are aware of this.
46. The complainant considers that a closely analogous issue is *R Walmsley v Lane [2005]*⁵, a judicial review of a decision made by an adjudicator under the Road User Charging (Enforcement and Adjudication) (London) Regulations 2001. The appeal considered the issue as to the scope of the adjudicator's powers under regulation 16(2) of those Regulations.
47. The complainant quoted the decision, paragraphs 56-58:

"It has emerged only during the course of these proceedings that TFL has for some time had a policy for waiving fines in meritorious cases falling outside the prescribed grounds of appeal. For the reasons I have mentioned (and which echo the remarks of Stanley Burnton J) this is to be welcomed. The policy and the changes it has undergone are described in general terms in the evidence tendered to this court, though not to the court below, of Paul Cowperthwaite, TFL's representations and appeals manager for congestion charging.

*It is no part of this court's task to say what such a policy should contain. But it is right to say that it is inimical to good public administration for a public authority to have and operate such a policy without making it public: see **R v Home Secretary, ex parte Urmaza***

⁴ <https://open.barnet.gov.uk/dataset/traffic-penalty-charge-notice-dashboards>

⁵ <https://www.bailii.org/ew/cases/EWCA/Civ/2005/1540.html>

[1996] COD 479. It also exposes such an authority to the risk of lawsuits based on ignorance of how it has gone about taking the material decision. In any such proceedings the policy would probably have to be disclosed. Indeed, because of our admission of Mr Cowperthwaite's evidence in the present appeal, the existence and outlines of TFL's policy have become public property.

What TFL now does is for it to decide. Its counsel, Mr Charles George QC, has pointed out the risk that publishing a set of guidelines on the discretionary waiver of fines will encourage some people, perhaps quite a lot of people, to fabricate excuses which will fall within the guidelines. But it is clear that a very large number of people -- the majority, we are told, of the 110,282 who asked TFL for remission or waiver of penalties from January to July 2005 -- write in anyway with non-scheduled reasons, true or false, for letting them off their fines. TFL has to make up its mind what to do about each of these: whether to accept the excuse or to investigate it, and if the latter, how far. It may be that an increase in such submissions is a price that has to be paid for being fair to the public. For it is unfair that those who, despite the absence of any indication that they can do so, write to TFL in the hope of clemency, at present obtain an advantage over those who assume, from looking at the Regulations, the penalty charge notice, the appeal form and TFL's website, that there is no way of doing any such thing, and pay a fine which they ought not in fairness to be required to pay."

Public interest arguments in favour of maintaining the exemption

48. The Council considers that there is a strong public interest in not prejudicing parking enforcement activities. It stated that an inability to properly enforce parking is likely to lead to congestion, obstructions, environmental harm, serious health and safety concerns and infringement of the rights of disabled motorists.
49. The Council explained that there is an additional public interest inherent in the fact that the release of these paragraphs would make it very difficult for the Council to ascertain the difference between honest mistakes and those cases which involve dishonesty and/or fraud. This would limit the Council's ability to apply discretion and have a knock-on effect to those motorists that have made genuine errors.
50. The Council also explained that there is a very strong public interest in withholding information that withholding information that could assist in fraudulent practices, specifically in the case of Blue Badge fraud. Not only is this a criminal offence, it also creates inconvenience for disabled motorists as well as potentially infringing their rights under the Disability Discrimination Act.

51. The Council provided the Commissioner with copies of PCNs and Enforcement Notices to evidence the information provided in relation to appealing the relevant notice. The information provided on making representations varies dependent on the notice issued, however, the minimum amount provided is that representations can be made and how to do so. Some notices also state that the Council will take into account mitigating circumstances or compelling reasons for why discretion should be used to cancel the PCN.
52. The Council also set out that there is no obligation, statutory or otherwise, for the Council to provide discretion. Discretion is provided as an act of good faith in those cases where it is felt to be genuinely merited. The Council consider that should the withheld information be disclosed and therefore show the potential nature of this discretion, this would undermine the act of discretion itself.
53. The Council considers that the release of the withheld information could lead to the Council ceasing to provide discretion in cases where there is a genuine mistake, which would be within the the Council's rights in order to safeguard the statutory enforcement process. This would act against the public interest in there being an opportunity to request discretion where mitigating circumstances apply.
54. The Council considers that the public interest in it being able to carry out its regulatory duties with regard to parking enforcement is extremely strong. The Council is required by statute to provide this function, and the release of this information would undermine these lawful activities. Not only would this allow for breaches of civil and criminal law, but it would also have an impact on council resources and the public purse, as well as greatly inconvenience residents and visitors to the borough.

The Commissioner's position

55. The Commissioner agrees that there is a strong public interest in allowing the public to understand how public authorities operate. In the circumstances of this case, disclosure of the withheld information would allow an insight into how the Council uses its discretion in relation to cancelling PCNs where contraventions have occurred. However, in the Commissioner's opinion, there is a stronger and more compelling public interest in ensuring the effective compliance of these parking laws.
56. The withheld paragraphs will give the public an insight into the situations in which the Council may exercise discretion but it does not provide any insight into the frequency or consistency of their use. As the Council set out to the complainant, there is no indication that the paragraphs have ever been used as they are a tool for officers to use rather than automated messages.

57. The Commissioner has considered the judicial review raised by the complainant. Whilst the case may have some relevance to this case, she does not consider it sufficient to influence her decision. The judicial review was regarding the remit of adjudicators in parking enforcement appeals and not regarding information rights law. The Commissioner notes that the decision concludes that it is not in the public interest to have a policy of discretion and not make this public. However, the Commissioner also notes that the withheld information is not the policy for applying discretion but templates used for specific circumstances in which the Council may apply discretion. The Council has provided the Commissioner with evidence that those in receipt of a PCN are informed that appeals and representations can be made and that that Council will consider mitigating circumstances in instances where contraventions did take place but the recipient of the charge feels it should be cancelled.
58. Due to the very specific nature of the withheld information, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure of the withheld information.
59. As the Commissioner has concluded that section 31(1)(g) is engaged and the public interest favours maintaining the exemption, the Commissioner will not go on to consider section 31(1)(a) for the specified paragraph as to do so would be academic.

Section 17: Refusal Notice

60. As set out in paragraph 6 of this notice, the Council required further time to consider the public interest in disclosure or maintaining the exemption.
61. As the Council did not cite the exemption it was relying on to withhold the information, it has breached section 17(1) of the Act.

Right of appeal

62. 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

63. 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.
64. 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
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