

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

### **Decision notice**

**Date:** 16 July 2020

**Public Authority:** Royal Borough of Kingston Upon Thames  
**Address:** The Guild Hall  
High Street  
Kingston Upon Thames  
Surrey  
KT1 1EU

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

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1. The complainant has requested information related to Penalty Charge Notices (PCNs).
2. The Council relied on sections 31(1)(g) and 43(2) to withhold the requested information.
3. The Commissioner's decision is that the Royal Borough of Kingston Upon Thames (the Council) is not entitled to rely on either section 31(1)(g) or section 43(2) to withhold the requested information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information
5. 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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6. On 11 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 cancellations 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."*

7. On or before the 12 March 2019, the Council provided its response. It confirmed that it was withholding the requested information and was relying on section 31 to do so. The Council did not provide its reasons for doing so and did not provide any public interest considerations.
8. The complainant wrote to the Council on 12 March 2019 and requested an internal review of the handling of the request for information. The complainant cited section 17(1)<sup>1</sup> and requested an explanation

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<sup>1</sup> 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.

regarding why the Council considers that the exemption applies. He also confirmed that the Council had not provided the outcome of its public interest considerations, in accordance with section 17(3)<sup>2</sup> of the Act.

9. On 2 July 2019, the Council provided the outcome of its internal review. The Council acknowledged its failure to comply with section 17(1) and (3) and confirmed that the issue had been raised with its contractors. The internal review upheld the original decision to rely on section 31(1)(g) and explained that it considered the release of the requested information would lead to an increased number of 'false' representations and challenges. The Council explained that if it were to provide the requested information, an individual would have knowledge of the criteria to be met when challenging contraventions. The Council further explained that if this information was publicly available, it would be likely to lead to challenges misrepresenting the facts and worded in line with its policies in an attempt to have a legitimate PCN cancelled. The Council stated that this would prevent it applying a fair, equitable and consistent approach when assessing PCN challenges.
10. The Council did not provide details of a public interest consideration.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 4 July 2019 to complain about the way his request for information had been handled.
  12. During the course of the investigation, the Council introduced section 31(1)(c) in relation to Query 1 and section 43(2) to the information falling within the scope of Query 2.
  13. The Commissioner considers that the scope of this investigation is to determine whether the Council is entitled to rely on sections 31(1)(c), 31(1)(g) and 43(2) to withhold the requested information.
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<sup>2</sup> A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

14. The Commissioner will also consider whether the Council handled the request in accordance with the procedural requirements of the Act.

## Reasons for decision

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### Section 31: Law Enforcement

15. Section 31(1)(c) & (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 –*

*(c) the administration of justice,*

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

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

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

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

17. 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 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.

18. 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*".
19. The complainant considers that the Council has taken an overly broad approach to the exemption and has not considered whether the information could be disclosed with redactions.
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, however, he considers that this suggests that disclosure would not have the level of prejudice claimed by the Council.
21. The Council explained that the adjudication of a request to cancel a PCN would be carried out either by personnel acting on behalf of the Council or, in rare cases, by the officer who issued the PCN.
22. The Council explained that it has objective criteria that it follows when considering a request for cancellation and that is what is set out in the policy and guidance documents that the complainant has requested under Query 1. The Council gave the example that if a motorist received a PCN for overstaying the time allowed in a particular parking bay and requested cancellation, the motorist would be required to give an explanation. The Council explained that the policy and guidance documents set out guidelines for considering the reasons given.
23. The Council disputed the complainant's arguments that the statutory guidance on Civil Enforcement of Parking Contraventions obliges the Council to publish the requested information. It set out that the guidance does not make publication of this information mandatory, section 87 of the Traffic Management Act 2004 requires local authorities to "have regard" to the guidance, but nothing further.

24. The Council confirmed that it did publish information in line with the statutory guidance and provided a link<sup>3</sup>.
25. The Council confirmed that disclosure would be likely to prejudice the functions set out in section 31(2)(a) & (c).

### **The Commissioner's considerations**

26. The Commissioner has considered the submissions provided by the Council and the complainant as well as reviewing the withheld information. She has also considered the recent decision by the First Tier Tribunal<sup>4</sup>, EA/2019/0369, regarding similar information.
27. The Commissioner is disappointed at the quality of the submissions provided. She expects public authorities to provide detailed submissions setting out why it considers an exemption is engaged and evidence the prejudice that would occur. In this case, the Council has simply stated that knowledge of the guidance would be likely to prejudice the Council.
28. 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.
29. 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

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<sup>3</sup> [https://www.kingston.gov.uk/info/200195/parking/627/penalty\\_charge\\_notices-parking\\_tickets\\_and\\_bus\\_lane\\_fines](https://www.kingston.gov.uk/info/200195/parking/627/penalty_charge_notices-parking_tickets_and_bus_lane_fines)

<sup>4</sup>

[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)

evidence required by the Council and decisions that can be made when provided with such evidence.

30. 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.
31. The Commissioner therefore considers that sections 31(1)(c) or 31(1)(g) are not engaged in relation to this part of the information.
32. 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.
33. 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".*
34. 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.

35. For this reason, the Commissioner is not persuaded that sections 31(1)(c) or 31(1)(g) are engaged in relation to the information held in scope of both requests.
36. The Commissioner requires the Council to disclose the withheld information within the scope of "Query 1".

### **Section 43: Commercial Interests**

37. Section 43(2) states that:

*"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)".*

38. As set out above, in order for a prejudice based exemption to be engaged, the Commissioner considers that three criteria must be met.
39. The Council confirmed that it was relying on section 43(2) in relation to the information within the scope of "Query 2" ie the training material provided to officers performing PCN reconsiderations.
40. The Council explained that the requested information consists of training material produced for the Council by its contractor or in consultation with its contractor.
41. It therefore considers that it contains the results of the skills, expertise and intellectual efforts of that organisation in providing a training regime for use by the Council and those engaged by it to consider PCN cancellations.
42. The Council explained that the training materials manifest the skill and expertise of the authors acting for the contractor and provide the contractor with a valuable asset that can be marketed to its benefit. The Council considers that if the results of their activities were in the public domain, then competitors could access them and make free use of their efforts. The Council considers that the work of a commercial organisation that is the result of its own labours and is exploited in the market should remain so far as is practicable its own "property".
43. The Council confirmed that it considers that disclosure would be likely to prejudice the commercial interests of the contractor.
44. It also provided an email from the contractor confirming that it agreed with the Council's position.

### **The Commissioner's position**



45. With regards to the first criterion of the prejudice test set out above, the Commissioner is satisfied that the prejudice described by the Council, namely that the contractor's competitors could use its training material and market it to other councils, clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
46. With regards to the second criterion, the Commissioner can understand the rationale of the Council's argument that if it disclosed information created by the third party provider, it could undermine the provider's market position by allowing its competitors access to the materials the provider has expended resources to create. On this basis, the Commissioner accepts that there is a causal link between disclosure of the withheld information and the prejudice to the third party provider's commercial interests.
47. With regards to the third criterion, the Commissioner has considered the content of the withheld information and she notes that while it may have been produced by, or in conjunction with, the third party provider, it comprises guidance and matrices of how to apply the Council's policies regarding PCNs. The Commissioner is therefore less persuaded that information relating to a specific Council's PCN enforcement policy would be useful to a competitor. Should the competitor seek to use the information to provide a service to a different council, this would be ineffective as it is applying an incorrect policy.
48. The Commissioner also notes that numerous Councils proactively publish their PCN guidance and matrices and, having reviewed the withheld information, the Commissioner is unable to distinguish how it represents a unique piece of work in comparison. The major differences across the local government documents appears to be the policies themselves.
49. This leads the Commissioner to question how genuinely prejudicial disclosure of the withheld information would be to the third party provider.
50. For the above reasons, the Commissioner is not persuaded that disclosure of the withheld information would be genuinely prejudicial given that it is specific to the implementation of the Council's policy. Therefore, although the Commissioner accepts that there is, in theory, some risk in prejudicing the third party provider's commercial interests by disclosing documents it has created, in relation to the re-use of this information by a competitor, she is not persuaded that this more than a hypothetical possibility.
51. The Commissioner therefore considers that section 43(2) is not engaged. She requires the Council to disclose the information requested in "Query 2".

## Procedural matters

52. 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) states (if that would not otherwise be apparent) why the exemption applies.*

53. Section 17(3) states of the Act states:

*"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –*

*...*

*(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

54. As set out above in the "Request and Response" section of this notice, the Council did not provide the complainant with its reasons for relying on section 31(1)(g) in its original refusal notice and did not provide any consideration of the balance of the public interest.

55. At internal review, the Council acknowledged that the refusal notice was not in accordance with section 17(1) and 17(3) and provided a brief reasoning for why it considered the information was exempt under section 31. However, it did not provide any details of its public interest considerations.

56. The Commissioner therefore finds that the Council has breached both section 17(1) and section 17(3) in relation to this request.

## Other matters

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57. The Commissioner is highly concerned regarding the handling of this request for information. The Council did not provide an adequate refusal notice breaching section 17(1) and 17(3). The Commissioner also notes that the internal review took more than 40 working days to complete and the Council stated that this was due to confusion with another request for information. The Commissioner would expect a public authority to have systems in place to track specific requests and their progress. The Commissioner also notes that the complainant chased the outcome of his internal review on 10 May 2019, the Commissioner would expect a public authority to look into the reasons for an internal review being chased and acknowledge this to the requester.
58. During the course of the investigation, the Commissioner was required to issue an Information Notice as the Council failed to meet two deadlines for its submissions.
59. The Commissioner considers that the submissions provided are of very low quality and would expect a council of the size of the Royal Borough of Kingston Upon Thames to know what level of detail the Commissioner requires when conducting an investigation. The Commissioner's letters to public authorities make clear that she will provide one opportunity to put forward arguments before proceeding to decision notice. She also asks public authorities to use the time before a complaint is allocated to one of her officers to *"have thoroughly reviewed its handling of the request and to ensure that it is **fully prepared and ready** to provide its final, detailed submissions to the Commissioner"* [original emphasis].
60. She also notes that when corresponding with the contractor to obtain its opinion on disclosure of the requested information, the Council provided the contractor with the name of the requester. It is not apparent why this was necessary as the Act is motive and applicant blind and the identity of the requester is not relevant to the considerations of the contractor. The Commissioner expects the Council the review its procedures for consulting with third parties to ensure that it is not unnecessarily sharing personal data.
61. The above concerns will be logged and used by the Commissioner when considering whether further regulatory action is required.
62. 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](#).

## Right of appeal

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63. 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)

64. 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.
65. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**