

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2020

Public Authority: Swansea Council

Address: freedomofinformation@swansea.gov.uk

Decision (including any steps ordered)

1. The complainant requested information relating to the cancellation of Penalty Charge Notices (PCNs). Swansea Council ('the Council') stated that the information was exempt under section 31(1)(a) of the FOIA. During the course of the Commissioner's investigation the Council disclosed some information but maintained that the remaining information was exempt. The Council also confirmed that it was relying on section 31(1)(g) of the FOIA. The Commissioner's decision is that the remaining withheld information is exempt from disclosure under section 31(1)(g) by virtue of section 31(2)(c) and the public interest favours maintaining the exemption. The Commissioner also finds that the Council breached section 10(1) in failing to disclose some of the information requested within the statutory time for compliance. The Commissioner does not require any steps to be taken.

Request and response

2. On 15 April 2019, the complainant wrote to the Council and requested information in the following terms:

"Query 1: I would like to request a copy of all policy and guidance documents that are available to council officers who are tasked with considering the question of whether a Penalty Charge Notice should be cancelled. For the avoidance of doubt, this request covers any policy that is published or otherwise publicly available, plus any internal council guidance or policy that is only available internally to council staff (such

as any internal policy that outlines in what circumstances the council may exercise its discretionary powers to cancel a PCN).

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

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

3. The Council responded on 14 May 2019 and confirmed it held the information requested but stated it was exempt from disclosure under section 31(1)(a) of the FOIA.
4. The complainant wrote to the Council on 14 May 2019 and requested an internal review of its handling of the request. He acknowledged that some information may be exempt from disclosure but advised that he did not think this applied to *all* of the information caught by the request. The complainant also advised that he had made a similar request to another local authority who provided redacted copies of the information in question. He also pointed out that most local authorities published their enforcement policies online and provide a number of examples to support this statement.
5. On 1 July 2019 the complainant wrote a further email to the Council referring to statutory guidance relating to civil enforcement of bus lane and moving traffic conventions which he believed required authorities to publish certain information relating to the matter.
6. The Council provided the outcome of its internal review on 12 July 2019 and upheld its decision that the information requested was exempt under section 31(1)(a) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner 12 July 2019 to complain about the way his request for information had been handled.
8. During the course of the Commissioner’s investigation the Council disclosed some information relevant to the request. The Council also confirmed that it did not use penalty charge notices for enforcement of

bus lanes and moving traffic conventions and as such it did not hold any information relating to this subject. The Council also confirmed that it was now relying on section 31(1)(g) by virtue of section 31(2)(c) to withhold the remaining information held relevant to the request.

9. In light of the above, the scope of the Commissioner's investigation into this complaint is to determine whether the Council correctly applied section 31 to the remaining withheld information.

Reasons for decision

Section 31 – Law Enforcement

10. Section 31(1)(g) of the FOIA 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)".

11. The Council 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"

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

- a. Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- b. Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged to be real, actual or of substance; and
- c. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority 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

13. The Council provided the Commissioner with a copy of the withheld information. It comprises a table of scenarios where parking enforcement officers are able to exercise discretion and judgement in terms of waiving any PCNs. The table shows details of representations/reasons that a motorist might submit in support of their position that a PCN should be cancelled, along with details as to when such representations will be accepted and rejected. The table also indicates what evidence/proof, if any, is required to support any representations, for example evidence that a vehicle has broken down. During the course of the Commissioner's investigation, the Council disclosed the majority of information contained within the table but continued to withhold some entries.
14. The Council confirmed that it was relying on the "would" threshold of prejudice as it considers that it is more probable than not that the prejudice would occur. The Council considers that disclosure of the withheld information would have a significant effect on the ability of its Parking Services to carry out its functions and *"to a certain extent impact on other local authorities carrying out the same function"*. This is because, if members of the public were aware as to exact scenarios which are 'accepted' as justifiable reasons to waive a PCN, and what evidence is required to support such reasons it could lead to widespread adoption of methods to evade penalties for illegal parking.
15. The Council provided individual explanations for each of the remaining withheld entries. The Commissioner cannot set these explanations out in detail in this notice as to do so would reveal the withheld information, however, the information concerns specific circumstances in which an officer may exercise discretion despite a parking contravention having occurred.

The Commissioner's position

16. With regard to the first criterion of the three limb test described previously, 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.

17. With regard to the second criterion, the Commissioner accepts that there is a clear causal link between the disclosure of details as to when the Council will accept or reject representations submitted by a motorist and the evidence required to support the representations, including circumstances where no evidence is required. This information would clearly provide the public with knowledge into specific scenarios 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, they could request the Council use discretion to cancel a PCN. The Commissioner also accepts that this would, in turn, 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 cancellation of a PCN is based on the knowledge that the Council is likely to accept this situation as a reason for applying discretion.
18. With regard to the third criterion, the Commissioner notes that the Council is relying on the higher threshold of prejudice that disclosure 'would' result in the prejudice claimed. This means that the Council considers that there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so. If an authority claims that prejudice would occur they need to establish that either
 - the chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice would occur on only one occasion or affect one person or situation; or
 - given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not.
19. The complainant considers that there is no evidence that the withheld information would be misused in the manner suggested by the Council and he considers that, at best, its arguments are speculative. The complainant also pointed out that there are significant factors that would mitigate the risk that the Council had not taken into account. He referred to regulation 11 of the Civil Enforcement of Road Traffic Contraventions (Representations and Appeals) (Wales) Regulations 2013. These Regulations provide that any person convicted of an offence of making false representation can be fined an unlimited amount.

20. The complainant also pointed out that, if members of the public fabricated evidence in order to try to get a PCN cancelled, it might be an offence of forgery under section 1 of the Forgery and Counterfeiting Act 1981. The Council would be within its right to criminally prosecute anyone submitting false representations and false evidence. This could lead to punishment of the offender with a custodial sentence and could also lead to the individual being charged with perverting the course of justice. The complainant considers that the Council has failed to provide sufficient evidence that members of the public would be willing to risk any criminal penalties, which could include imprisonment for the sake of avoiding payment of a PCN.
21. The Commissioner accepts that there are potentially serious consequences if a member of the public was caught fabricating evidence in order to avoid paying a PCN. However, she does not consider that this alone would prevent the withheld information being used in the way suggested by the Council. In addition, having had sight of the withheld information, the Commissioner considers that in some cases it would be quite difficult to prove that a member of the public had submitted false representations in order to try to get a PCN waived. The Commissioner is therefore not persuaded that any potential criminal penalties would be sufficient to prevent any prejudice to the Council's parking enforcement activities.
22. Based on the representations provided by the Council and the nature of the withheld information the Commissioner is satisfied that there is a real and significant risk that prejudice would occur. She has reached this conclusion on the basis that the withheld information provides detail about specific situations which could lead to a PCN being cancelled. It would provide an insight into the circumstances, and the evidence required in cases which the Council has decided are likely to justify discretion and no regulatory action will be taken. Whilst the Commissioner accepts that not every member of the public would 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 living, or visiting, within the geographical boundary of the Council. 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 there is more than a 50% chance of the prejudice occurring.
23. In light of the above, the Commissioner is satisfied that section 31(1)(g) is engaged in respect of the remaining withheld information.

Public interest test

24. 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

25. The Council accepts that there is a general public interest in local authorities being open and transparent, particularly in this highly contentious area where members of the public often feel emotionally aggrieved when recorded as parking illegally and want to better understand the reason(s) why a PCN has been issued.
26. The Council recognises 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 in light of the strong public interest in protecting the ability of public authorities to enforce the law.
27. The complainant pointed out that Traffic Penalty Tribunals "*cannot allow an appeal against a PCN on the basis of discretion or mitigation, but they can allow an appeal against a PCN on the basis that the council's own policy has now been correctly applied*". He referred to the case of *Joseph Coen v London Borough of Greenwich*. In this case the applicant had only been able to lodge the appeal as he had obtained a copy of the authority's Exemption and Waiver Policy. If such policies are not made public the complainant believes there is a risk that a motorist's circumstances fall into one of the scenarios where discretion is used to waive a PCN, but an officer makes a mistake and overlooks it. The complainant considers that not making such policies publicly available denies motorists a judicial remedy as they would be unaware of their right of appeal to a Traffic Penalty Tribunal on the basis that an authority had not applied its policy correctly because they would be unaware if their circumstances fall within one of the scenarios where discretion can be used.
28. The complainant also considers that there is a clear public interest in ensuring any discretionary policies are lawful. He referred to the High Court Case in *Westminster, R (on application of) v Parking Adjudicator [2002] EWHC 1007 (Admin)*. In this case the High Court confirmed that enforcement authorities always had a discretion not to pursue a PCN. The complainant pointed out that tribunals had long held that this means discretion cannot be removed by, for example an internal policy. He considered that any policy that limits an officer's use of discretion is

unlikely to be lawful. As a practical example of this point, the complainant referred to Traffic Penalty Tribunal decision involving *Susan Cook v Trafford Borough Council (TR05993K, 25 January 2013)*. This case involved an appeal against a PCN that had been issued in respect of a failure to display a resident's permit. The motorist had been able to prove to the Enforcement Officer on the day the PCN was issued that she had a valid permit, which had fallen off the dashboard. The Council had refused to waive the PCN as it had waived a previous PCN on the same basis and it had a 'first waiver policy'. The Tribunal determined that "*the concept that only the first PCN will be waived is entirely wrong. Every case must be considered on its individual merits*". The Tribunal found that "*not only is the policy a fettering of the Council's discretion, which is unlawful, it is so clearly unfair that it is hardly surprising the Appellant complained as she did*".

29. Finally, the complainant referred to the case in *Walmsley v Transport for London & Ors [2005] EWCA Civ 1540*. This case is 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. The complainant pointed out that this case adopted and endorsed the decision in the High Court case referred to in paragraph 28 above. He suggested that Court of Appeal decisions are binding on the Commissioner, and as such, the information requested in this case should be disclosed and it is in the public interest to do so. The complainant specifically referred to paragraphs 54 to 58 of this decision which he considers are analogous to this case:

54. LORD JUSTICE SEDLEY: I agree with Chadwick LJ that this appeal succeeds. One important thing that emerges from his reasons, with which I agree, is that while Adjudicators at present have no power to remit or quash penalties on grounds other than the prescribed ones, TFL does possess a general power not to enforce a penalty charge.

*55. Any public body exercising discretionary powers of this kind, affecting a large number of people, risks being castigated for inconsistency if it does not have a policy to guide the officials who exercise the power. Since as long ago as the decision in *Kruse v Johnson [1898] 2 KB 91* consistency in public administration has been recognised as a judiciable question. But consistency is not the same thing as rigidity, and public authorities are also at risk if they fetter their discretion by being unduly formulaic. The courts have accordingly recognised that it is proper to adopt a policy provided it is applied flexibly in exceptional cases: *R v Port of London Authority, ex parte Kynoch [1919] 1 KB 176*; *British Oxygen v Minister of Technology [1971] AC 610*.*

56. *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.*

57. *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 [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.*

58. *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

30. The Council considers that there is a very strong public interest in protecting the ability of public authorities to enforce the law. It considers that *"it would not be possible to maintain these rules intact if it were widely known which scenarios allow parking officers to use their discretion"*.

31. The Council believes that disclosure of the withheld information could lead to widespread adoption of methods to evade penalties for illegal parking would. The Council considers that disclosure of such information *"is not in the interest of law-abiding majority of our citizens who are negatively impacted by inconsiderate and illegal parking, offences which may on occasion cause a road traffic accident, a pedestrian or a cyclist injury"*.

The Commissioner's position

32. The Commissioner agrees that there is a public interest in members of the public having access to information which allows them to understand how public authorities operate. Disclosure in this case would provide an insight into how the Council uses its discretion to waive a PCN in certain circumstances, and what evidence is required to support any mitigating reasons provided by members of the public in appealing against a PCN.
33. The Commissioner understands that there is no obligation on the Council, statutory or otherwise, to provide discretion in respect of waiving a PCN. The Council has also indicated that if the withheld information were to be disclosed, it could lead to the policy having to be withdrawn from use and/or rewritten.
34. The Commissioner has considered the tribunal and court cases cited by the complainant in this case. Whilst she accepts that they have some relevance to this case, she does not consider it sufficient to influence her decision as to where the public interest lies in this case. The Commissioner notes that there is information on the Council's website which informs individuals that appeals and representations can be made against PCNs and that the Council will consider mitigating circumstances where contraventions occurred but the individual considers that a PCN should be cancelled.
35. The Commissioner notes that during her investigation the Council disclosed the majority of information contained within the document in question and has only withheld the information which it considers would lead to widespread adoption of methods to evade PCNs. The Commissioner has accepted that disclosure of the withheld information in this case would prejudice the Council's ability to carry out its regulatory functions as efficiently and effectively as possible. The Commissioner considers that parking enforcement serves an important function and improves safety for pedestrians, cyclists and other road-users. She is of the opinion that any prejudice to the Council's ability to enforce compliance of parking laws would not be in the public interest.
36. In light of the above and taking into account the very specific nature of the withheld information, and the Council's representations the

Commissioner is of the view that, in this case, there is a stronger and more compelling public interest in ensuring the effective compliance of parking enforcement. She has therefore concluded that the public interest in maintaining the exemption at section 31(1)(g) outweighs the public interest in disclosure.

Section 10 – time for compliance

37. Section 10(1) of the FOIA requires that a public authority complies with section 1(1) promptly and in any event not later than 20 working days following the date that a request was received. Section 1(1) states that a public authority should confirm whether it holds relevant recorded information and, if so, to communicate that information to the applicant.
38. In this case the request for information was submitted on 15 April 2019. The Council initially withheld all of the information requested. However, during the Commissioner's investigation the Council identified additional information that it had not originally considered, which it disclosed. The Council also made two additional disclosures of information that it has originally withheld. As this information was not disclosed within the statutory time for compliance the Commissioner finds that the Council breached section 10(1).

Right of appeal

39. 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

40. 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.
41. 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

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