

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2021

Public Authority: Hastings Borough Council
Address: Queens Square
Hastings
TN34 1TL

Decision (including any steps ordered)

1. The complainant requested from Hastings Borough Council ("the Council") information relating to the cancellation of Penalty Charge Notices ("PCNs"). The Council withheld some of the requested information under section 31(1)(a) (prejudice to the prevention or detection of crime) of the FOIA.
2. The Commissioner's decision is that the Council was not entitled to withhold the requested information under section 31(1)(a). The Commissioner has also found that the Council was not entitled to withhold the requested information under section 31(1)(g) / 31(2)(c) (ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise), and that the Council has breached the requirement of section 10.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
4. The Council 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

5. On 21 January 2020, 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."

6. The Council responded on 6 May 2020. In respect of Query 1 it disclosed some information and withheld the remainder under the exemption provided by section 31(1)(a). In respect of Query 2 it stated that no information was held.
7. On 6 May 2020, the complainant requested an internal review in respect of Query 1 and the Council's application of section 31(1)(a).
8. Following an internal review, the Council wrote to the complainant on 30 June 2020. It maintained the application of section 31(1)(a).

Scope of the case

9. The complainant contacted the Commissioner on 15 July 2020 to complain about the way his request for information had been handled, and specifically that the Council was not entitled to withhold information under section 31(1)(a).
10. In reviewing the Council's submissions, the Commissioner considers that it has potentially misunderstood the legislation, and that its arguments

are more relevant to the exemption provided by section 31(1)(g) (in conjunction with section 31(2)(c)).

11. The Commissioner has therefore applied her discretion and considered both exemptions.
12. The scope of this notice is whether the Council was entitled to rely on either section 31(1)(a) or section 31(1)(g) / 31(2)(c) to withhold some of the information requested by the complainant.

Reasons for decision

Section 31 – Law enforcement

13. Sections 31(1)(a) and 31(1)(g) of the FOIA state that:

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice—

(a) the prevention or detection of crime,

[...]

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

14. Section 31(2)(c) of the FOIA states 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...

15. In order for prejudice-based exemptions, such as section 31(1)(a) or section 31(1)(g), to be engaged prejudice must be at least likely to occur to the interest that the exemption is designed to protect. The Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed, has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of

the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., whether disclosure “*would be likely*” to result in prejudice or disclosure “*would*” result in prejudice. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority; the public authority must show that the anticipated prejudice would be more likely than not to occur as a result of disclosure of the requested information.
16. Consideration of sections 31(1)(a) and 31(1)(g) is a two-stage process; even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The withheld information

17. The information withheld in this case is a single document (revised on 1 November 2019) that contains a table providing guidance for the cancellation of PCNs in specific contexts – each of which has a ‘cancellation code’ ascribed to it.

Section 31(1)(a)

The applicable interest

18. The first criterion in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to “*the prevention or detection of crime*”.
19. In its internal review outcome, the Council confirmed that it considered the release of the information would assist individuals in committing a crime through circumventing parking controls.
20. The Commissioner is aware that the Council issues PCNs for parking contraventions in accordance with the Traffic Management Act 2004.

However, having had regard to the related statutory guidance¹ published by the Secretary of State for Transport, it is the Commissioner's understanding that these contraventions represent a civil rather than criminal offence. Relatedly, the Commissioner's guidance on section 31 (page 20)² refers to the First-tier Tribunal (Information Rights) ("the Tribunal) decision of *Ms Pauline Reith v Information Commissioner and London Borough of Hammersmith and Fulham (EA/2006/0058)*³, in which it was found by the Tribunal - and accepted by the Commissioner - that parking contraventions are a decriminalised matter, and that section 31(1)(a) could not apply to the withheld information in that case (which was a public authority's policy on the removal of improperly parked vehicles).

21. The Council has not provided any response to the complainant, or submission to the Commissioner, that provides evidence that suggests the withheld information in this case - relating as it does to the cancellation of PCN's - would prejudice the prevention or detection of any criminal offence through its disclosure.
22. On this basis the Commissioner must find that the first criterion is not met, and that section 31(1)(a) is not engaged.

Section 31(1)(g) / 31(2)(c)

The applicable interest

23. The first criterion in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to "*the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise*".
24. In its submission to the Commissioner, the Council has explained that the information describes the contexts where it may cancel a PCN. The Commissioner notes that these contexts are highly specific, but can be broadly described as representing circumstances that are either

¹ <https://www.gov.uk/government/publications/civil-enforcement-of-parking-contraventions/guidance-for-local-authorities-on-enforcing-parking-restrictions>

² <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

³ <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i145/Reith.pdf>

confirmed through specific evidence, or where the Council may apply discretion.

25. The Commissioner has recently considered several cases (FS50867388⁴, FS50847772⁵) with strong similarity to that under consideration here. In those cases, the Commissioner accepted that any infringement on the public authority's function to issue, and apply discretion to, PCNs could interfere with its ability to ascertain whether regulatory action is required in individual circumstances.
26. Having considered the above, the Commissioner is satisfied that the prejudice the Council is envisaging in this case, is relevant to the particular interest which section 31(1)(g) ((for the purpose of section 31(2)(c)) is designed to protect. Accordingly, the first criterion is met.

The nature of the prejudice

27. With regard to the second criterion, the Council argues that public knowledge of the content of the information would allow individuals to gain a whole day of free parking. The Council also appears to argue that disclosure would impede its ability to consider each request to cancel a PCN on its own merits.
28. The Commissioner has reviewed the withheld information, in conjunction with the Council's arguments. Having done so, she considers that for the majority of the information there is no clear casual link between its disclosure and the prejudice described. This is because the majority of the information relates to the specific circumstances - and the evidence required of them - in which the Council would cancel a PCN. It is not clear to the Commissioner how the disclosure of this information would prejudice the Council's ability to ascertain whether a reconsideration is genuine, as it is evident that the Council's reconsideration will either rely upon compelling evidence provided by the individual, or else factual evidence that the Council already has access to.

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618032/fs50867388.pdf>

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618030/fs50847772.pdf>

29. The Commissioner also notes, as she did in decision notice IC-62211-X4P7⁶, that there is already a significant amount of similar information already in the public domain, published by other public authorities (such as Calderdale Council⁷) or third-party organisations (such as on moneysavingexpert.com⁸). In particular, the Commissioner notes that Calderdale Council has published a list of 44 mitigating circumstances for which an appeal against a PCN can be made, which includes significant overlap with the information under consideration here⁹.
30. On this basis, the Commissioner is not satisfied that the second criterion is met in respect of the majority of the information.
31. However, there is a minority of information where the Commissioner does consider there to be a clear casual link between disclosure and the claimed prejudice. This is because the information describes the circumstances where the Council may apply discretion to cancelling a PCN, including circumstances based on the specific status of the vehicle.
32. The Commissioner recognises that individuals may potentially use such knowledge to commit a parking contravention in the knowledge that they can seek to have any issued PCN cancelled.
33. On this basis, the Commissioner is satisfied that the second criterion is met in respect of the minority of the information.

The likelihood of prejudice

34. With regard to the third criterion, the Council confirmed (in its original response to the request) that it was relying upon the lower threshold of prejudice of "would be likely to".

⁶ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619552/ic-62211-x4p7.pdf>

⁷ <https://www.calderdale.gov.uk/v2/residents/transport-and-streets/parking/parking-fines/challenging-parking-ticket>

⁸ <https://www.moneysavingexpert.com/reclaim/parking-ticket-appeals/>

⁹ <https://www.calderdale.gov.uk/v2/residents/transport-and-streets/parking/parking-fines/challenging-parking-ticket/mitigating>

35. The Tribunal considered this threshold in *John Connor Press Associates v Information Commissioner (EA/2005/0005)*¹⁰, where it stated that “*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*” (paragraph 15).
36. In respect of that information that describes the circumstances where the Council may apply discretion to cancelling a PCN, the Commissioner recognises that some individuals may utilise this information and deliberately commit a parking contravention. However, having considered the circumstances where the Council may apply such discretion it is evident to the Commissioner that these only relate to highly specific scenarios that are supported by factual evidence – either provided by the individual or else accessible to the Council.
37. Having considered the restrictive nature of these circumstances, the Commissioner is not convinced (as she was not in the above cited similar cases of FS50867388 and FS50847772) that public awareness of them would be likely to impact upon the Council’s ability to enforce PCNs. On this basis she does not find that the third criterion is met for this information.
38. In respect of that information which describes how the Council may approach PCNs based on the status of the vehicle, the Commissioner recognises that the owners, or drivers of, such vehicles may deliberately utilise such knowledge in deciding whether to commit a parking contravention.
39. However, the Commissioner understands that there is already significant awareness of how public authorities approach PCNs issued against certain types of vehicles, including the challenges associated with this. This knowledge has been enhanced through the disclosure of such information by other public authorities^{11 12 13}, which includes information similar to that withheld in this case

¹⁰

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i89/John%20Connor.pdf>

¹¹ <https://www.cornwall.gov.uk/media/aykeki0i/cpe-procedures-and-codes-2018.pdf>

¹²

https://www.aylesburyvaledc.gov.uk/sites/default/files/page_downloads/Enforcement%20Guidelines.pdf

40. It is also relevant for the Commissioner to note that the Council appears to have already revealed the substantive content of this information (that is, the approach taken by the Council to PCNs issued against certain types of vehicles) to the complainant when providing an internal review outcome on 30 June 2020.
41. It is therefore reasonable for the Commissioner to consider that there is already significant awareness by the public of how local public authorities address PCNs for some vehicles. In the context of this case, there is no compelling evidence, provided either by the Council or in the public domain, that suggests to the Commissioner that the disclosure of the information would consequently prejudice the Council's ability to enforce PCNs. On this basis she does not find that the third criterion is met for this information.

Section 10 – Time for compliance with request

42. Section 10(1) of the FOIA states that:

Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

43. In this case the Council issued a response outside of twenty working days, and therefore breached section 10.

Right of appeal

44. 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

45. 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.
46. 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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