



Tribunals Service
Information Tribunal

Appeal Number EA/2006/0058

Freedom of Information Act 2000 (FOIA)

Decided upon the Papers

Date 13th April 2007

Decision Promulgated

1st June 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Fiona Henderson

And

LAY MEMBERS

Gareth Jones

and

Rosalind Tatam

Between

Ms Pauline Reith

Appellant

And

Information Commissioner

Respondent

And

London Borough of Hammersmith and Fulham

Additional Party

Decision

The Tribunal allows the appeal and substitutes the following Decision Notice:

For the reasons set out in the Tribunal's decision, it is the Tribunal's decision that the London Borough of Hammersmith and Fulham did not deal with the complainant's request in accordance with Part I of the Freedom of Information Act 2000 in that the London Borough of Hammersmith and Fulham failed to disclose the following information:

“the Council's policy relating to the towing of vehicles under parking regulations (i.e. which factors are taken into consideration in the decision of when, and when not to use the limited resources of the borough's towing vehicles”..

Action Required

The London Borough of Hammersmith and Fulham shall provide a copy of the said information to the complainant within 28 days from the date of this decision.

Dated this 31st day of May 2007



Deputy Chairman

Reasons for Decision

1. The Tribunal has had sight of the disputed information (the Removal of Vehicles Criteria) and is satisfied that it can explain its reasoning without disclosing the contents; consequently, there is no confidential schedule to this decision.

The request for information

2. In an email dated 4th January 2005, the Appellant wrote to the London Borough of Hammersmith and Fulham (LBHF) asking to know:
“the Council’s policy relating to the towing of vehicles under parking regulations (i.e. which factors are taken into consideration in the decision of when, and when not to use the limited resources of the borough’s towing vehicles”...

3. The Council sent a substantive reply by email on 1st February 2005 which stated:

“The Council’s policy in relation to the towing away of vehicles is to target its removal resources against what it considers the worst and most anti-social types of illegal parking e.g. illegal parking in disabled person’s bays, doctors’ bays, at bus stops and in bus lanes, on the footway or on pedestrian crossings or where obstruction is caused to traffic flow or junctions etc.”

The email indicated that there was a more detailed set of priorities but in not disclosing the full set, they were relying on section 31 of FOIA as they felt that its disclosure *“would be likely to encourage unlawful parking in areas of low priority”*.

4. Ms Reith asked for the decision to be reconsidered under the Council’s internal review procedure asserting that:
 - She believed that section 31 FOIA was designed for protection against gross infringement of law and order and/or injustice,

- The consideration that illegal parking in low priority areas would be encouraged was immaterial or of minor consequence because of the deterrence provided by incurring a Penalty Charge Notice (PCN).
5. The Council upheld the decision upon review (in their letter dated 24th February 2005) and the reliance upon section 31 FOIA, reiterating the examples already given but stating:
- “Beyond this, there are issues of public interest to be balanced..”*
- In the review an analogy was drawn with the Police withholding the exact thresholds above the published speed limit at which they took enforcement action, and stating their belief that this was shared by other local authorities and enforcement agencies.
6. In a further letter to Ms Reith dated 4th March 2005 the Council expanded further:
- “The Council’s view based on its enforcement experience, is that the risk [of encouraging illegal parking] is not a minor one and that hence exemption of information under section 31 of the Act is appropriate.”*
7. Ms Reith sought a further review under stage 3 of the Council’s complaints procedure on 9th March 2005 in which she expanded her arguments to include her view that :
- The Council had not provided any support for its view that illegal parking would be encouraged,
 - The public were being put at a disadvantage in challenging towing decisions at the Parking and Traffic Appeal Service (PATAS).
8. Geoff Alltimes (Managing Director, LBHF) wrote on 28th April 2005 pursuant to this stage 3 review, upholding the earlier decision to withhold some of the information under section 31 FOIA and adding:
- “The legislative powers available to tow-away a vehicle are governed by statutory regulations across Greater London and apply to any illegally parked vehicle of a general motorist. This means that vehicles would be appropriately towed away if they offend “parking restrictions”.*

My view is that the potential for legitimate tow-away also acts as an effective additional deterrent and that publishing operational policy would affect that enforcement function making the illegal parking of vehicles more likely”.

The complaint to the Information Commissioner

9. Ms Reith appealed to the Commissioner by letter dated 17th May 2005 in which she stated:

“I have been refused access to information from the London Borough of Hammersmith and Fulham.. due to the application of exemption section 31. I am dubious that their application of this exemption is proper and was ever meant to apply to policy areas dealing with parking regulations and enforcement”...

10. Lisa Whitwell wrote to Ms Reith on 1st February 2006 on behalf of the Commissioner indicating that:

- Section 31(1)(a) was the part of FOIA being applied by the Council and that in the Commissioner’s view this was correctly applied to the request,
- The Council has taken a balanced approach in reviewing public interest and has correctly weighted their decision in favour of non-disclosure based on a desire to avoid unlawful behaviour.
- “It must be a fact that the threat of towing remains an additional deterrent where it is not clear a non-parking area is a “fine only” area, particularly to those who do not feel overly inconvenienced by a fine”.
- A Decision Notice to this effect would be issued if Ms Reith required.

11. The Tribunal wishes to note that it finds it extraordinary that the Commissioner should have communicated a decision to the applicant and sought to uphold the Council’s refusal of information without having investigated the matter at all. At the date of this letter, the Commissioner’s office had not:

- seen the disputed information,

- asked for any evidence in support of the bare assertion that illegal parking would be encouraged,
- sought an explanation of why the information already disclosed would not increase illegal parking, whereas that withheld would.

The Tribunal recognises that this complaint was received when FOIA was still in its infancy and understands that having greater experience and in light of comments made by the Tribunal (differently constituted) in other cases, a more thorough approach is now taken by the Commissioner in investigating complaints.

12. Correspondence ensued between Ms Reith and the Commissioner's office relating to Ms Reith's assertion that the public were deprived of relevant information in mounting a defence to a towing penalty when appealing to PATAS and confirming that she did wish a Decision Notice to be issued.

13. On 31st March 2006 Ms Whitwell wrote to Mr Alltimes indicating that she was going to have to issue a Decision Notice and asking for more information in relation to *"how prejudice will be suffered in accordance with the subsections set out in section 31 supported by evidence if appropriate/possible."* And quoting from the Council's letter of 4th March 2005 (that in the Council's enforcement experience, the risk of encouraging illegal parking was not a minor one) she asked whether *"there is some evidence in support of the assertion which you can produce which would considerably strengthen the public interest argument"*.

14. The Council replied by letter dated 26th April indicating inter alia:

- The Council had provided *"most of the categories that are a priority for removal"*,
- The Council was not prepared to publish the complete list due to variously the "significant" and "major" risk that the overall deterrent effect in relation to all illegal parking would be lost,
- Subject to a few caveats the regulations allow that any vehicle illegally parked vehicle can be removed,

- Parking Attendants can only “*authorise the removal of a vehicle if it is within laid down removal criteria*”.
- Certain categories of offending e.g. parking in a bay without displaying a permit or pay and display ticket will only result in a PCN and not removal.
- The Council primarily focuses its removal resource on the worst categories of illegal parking and gives examples of these. This approach does not “*rule out the possibility that illegally parked vehicles outside the priorities may be removed*”.
- There was no empirical study that showed the measured impact of publishing complete removal criteria.
- Many Councils do not have removal criteria, and publishing removal criteria would discourage Councils from having them.
- Disclosure of these enforcement criteria would impact on enforcement criteria in other areas.

A copy of the disputed information was also provided to the Commissioner.

15. The Commissioner issued a Decision Notice FS50075960 dated 31st July 2006. Unfortunately, due to an administrative mix up, a draft copy of the decision (purporting to order the disclosure of the disputed information because the prejudice test was not met, and the public interest lay in disclosure) was sent to Ms Reith. The Tribunal disregards this draft version of the Decision Notice and the consequential grounds referring to the confusion that arose therefrom, on the basis that it has no legal status because:

- It was never served upon the Council,
- It did not reflect the Commissioner’s decision,
- It was not signed,
- It was sent in error,
- Ms Reith has suffered no prejudice from the draft disclosure, as she appealed to the Tribunal in time in any event and has therefore not relied upon the erroneous notice to her detriment.

16. The actual Decision Notice (withholding the information) found that the exemption which applied was:

- Section 31(1)(a) and (b) FOIA,
- The exemption was engaged as disclosure would, or would be likely to, prejudice a section 31 purpose namely that it would encourage illegal parking in areas identified as low priority for towing,
- Disclosure of the policy would cause LBHF difficulties in prosecuting cases where they acted outside the policy,
- The public interest lay in withholding the policy because:
 - It would reduce the effectiveness of the attempt to reduce illegal parking (by assisting motorists prepared to risk a fine alone),
 - It would limit the use of the enforcement powers currently available to LBHF.

The Appeal to the Tribunal

17. The Appellant appealed to the Information Tribunal by letter dated 12th August 2006 on the following grounds:

- The Commissioner was wrong to presume that all towed vehicles were in fact illegally parked,
- Towing an illegally parked vehicle can be contrary to the Human Rights Act,
- The PCN is a deterrent in the prevention of illegal parking.

This was supplemented by a completed appeal form, dated 30th August 2006. Here the grounds were expanded in that the Appellant asserted that LBHF should have provided evidence in support of their assertions (Decision Notice FS50072190).

18. Under rule 11 of the *Information Tribunal (Enforcement Appeals) Rules 2005* an Appellant is permitted to amend or supplement their grounds of appeal with leave. The Tribunal grants leave for the additional grounds to be considered and notes that the Commissioner dealt with the additional ground in his reply

and both the Commissioner and LBHF have addressed this additional ground in their submissions to the Tribunal.

19. The Commissioner opposed this appeal and served a reply dated 7th September 2006 in which:

- He accepted that section 31(1) (a) and (b) FOIA did not apply to the decriminalised enforcement of parking restrictions, and that the exemption which pertained was in fact section 31(1)(g) in conjunction with section 31(2)(c),
- He relied upon the arguments set out in the Decision Notice in relation to prejudice and the balance of the public interest,
- He noted that the Appellant had not provided any evidence in support of her contention that disclosure would not undermine the deterrent effect of the Council's parking enforcement mechanisms to contradict the Council's assertion based upon enforcement experience.

20. London Borough of Hammersmith and Fulham (LBHF) were joined as an additional party by the Tribunal on 3rd November 2006 pursuant to Rule 7(1) to (8) of the *Information Tribunal (Enforcement Appeals) Rules 2005*.

21. It was agreed by all parties at the directions hearing on 3rd November 2006 that the case be listed for a paper determination, and in consequence the case was determined by the Tribunal on the 13th April 2007 on the basis of the written evidence and representations before it.

The issues for the Tribunal to decide

22. The issues for the Tribunal to determine can be distilled as follows:

- Does the disputed information come within the exemption set out in section 31 FOIA?
- Would the disclosure of the disputed information prejudice or be likely to prejudice LBHF's parking enforcement functions?
- Where does the balance of public interest lie?

The Powers of the Tribunal

23. The Tribunal's powers in relation to appeals under section 57 FOIA are set out in section 58 of FOIA, as follows.

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

24. The questions whether the exemption in section 31 FOIA applies, the prejudice test met and where the balance of public interest lies in relation to the disputed information are questions of law based upon the analysis of the facts. The Tribunal may substitute its own view for that of the Commissioner on this issue if it considers that the Commissioner's conclusion was wrong.

Does the disputed information come within the exemption set out in section 31 FOIA?

25. FOIA provides that information shall be communicated to an applicant unless certain circumstances arise. Section 1 FOIA provides as follows:

(1) Any person making a request for information to a public authority is entitled-

- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) *if that is the case, to have that information communicated to him.*
- (2) *Subsection (1) has effect subject to the following provisions of... section 2..*

Section 2 provides as follows:

- ...(2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that-*
 - (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

The absolute exemptions are set out in Section 2(3) and do not include section 31.

26. Section 31. provides as follows –

- (1) *Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-*
 - (a) *the prevention or detection of crime,*
 - (b) *the apprehension or prosecution of offenders, ...*
 - (g) *the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*
- (2) *The purposes referred to in subsection (1)(g)... are- ...*
 - (c) *the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,...*

27. It is accepted by the Commissioner that Section 31(1)(a) and (b) does not apply to the facts of the case, the withheld information dealing with the decriminalised parking system as it does. The Commissioner now asserts that the exemption that should apply is Section 31(1)(g) and 31(2)(c) as the towing policy is the exercise by LBHF of its functions for ascertaining whether circumstances which would justify regulatory action pursuant to the parking regulations exist or may apply. To that extent it is conceded that Ms Reith's appeal should succeed in that the Commissioner was wrong in law in the exemption that was relied upon.
28. The Tribunal is satisfied that section 31(1)(g) in conjunction with 31(2) (c) is the exemption which would apply to the disputed information if the prejudice test is met, for the reasons set out by the Commissioner and rehearsed above.

Would the disclosure of the disputed information prejudice or be likely to prejudice LBHF's parking enforcement functions?

29. It is suggested by the Commissioner that Ms Reith is not disputing that section 31(1)(g) and 31(2)(c) is engaged as her grounds of appeal appear to concentrate on the public interest test. Whilst it is accepted that there is no challenge to the fact that it is section 31(1)(g) and 31(2)(c) which would apply were it engaged, in light of the factual overlap between the factors which apply to the prejudice test and the public interest test, the Tribunal is satisfied that both limbs fall to be considered by the Tribunal and that in any event, in order to uphold the Commissioner's decision, the Tribunal would have to be satisfied that the exemption was engaged.
30. In her amended grounds of Appeal, Ms Reith relied upon the Commissioner's approach in Decision Notice FS50072190. This decision has now been appealed to the Tribunal in *England & London Borough of Bexley v Information Commissioner EA/2006/0060 & 66*. That decision was not available at the time that the parties in this case made their submissions and consequently the Tribunal has not been addressed upon that decision. The Tribunal notes that that case rests upon its own facts and that that decision did

not depart from the analysis of the law set out by the Tribunal (differently constituted) in *Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 30*. The Tribunal therefore applies the points of principle made by both parties in relation to the Bexley Decision Notice to the facts of this case and the law as it is stated to be in *Hogan*. That case set out the steps for consideration of whether the section 31 exemption was engaged:

- *“First, there is a need to identify the applicable interest(s) within the relevant exemption”...*
- *“Second, the nature of the ‘prejudice’ being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is... “real, actual or of substance”. If the public authority is unable to discharge this burden satisfactorily, reliance on ‘prejudice’ should be rejected. ... “*
- *“A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner (EA/2005/0005)* interpreted the phrase “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”.*

31. This Tribunal finds no reason to dissent from this analysis of the prejudice test. Applying the law to the facts in this case:

- i. The applicable interest has to be identified. In this case, the Tribunal is satisfied that this is LBHF’s parking enforcement functions.
- ii. The “nature” of the prejudice must be considered. The burden is on the LBHF to show a causal relationship between the disclosure (if it were to happen) and the prejudice, which must be “real, actual or of substance”. (In this case, the relationship has been claimed but the Tribunal is satisfied has not demonstrated).

- iii. The chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. The Tribunal is not satisfied that this has been demonstrated by LBHF.

32. Before the Commissioner, LBHF asserted in their letter dated 26th April 2006 that there was a “significant” and “major” risk that the overall deterrent effect in relation to all illegal parking would be lost. The Tribunal has not seen any evidence to suggest that this risk has been demonstrated or is even likely. LBHF rely upon their parking enforcement expertise, however their evidence is not independent, and being unsupported amounts to a bare assertion. Such examples as given by LBHF do not demonstrate anything more than an unsupported fear that disclosure might increase illegal parking.

33. Whilst it is acknowledged that there is no empirical study that shows the measured impact of publishing complete removal criteria. LBHF have not provided:

- Any evidence of the consequences of their partial disclosure of the policy,
- What factors they took into account in disclosing some aspects of the policy and not others and why they can be distinguished.

To follow LBHF’s argument to its logical conclusion one would have expected that disclosure of the certain knowledge that towing from e.g disabled bays was a priority would have decreased the incidence of the illegal parking in that category.

34. LBHF draw an analogy with the Police speed camera cases (where site sensitive information such as the actual trigger speed for speed cameras has been withheld), in support of their position in applying the public interest test to details of the criteria and priorities used in enforcement policies, adding:

“We believe this to be a position shared by other local authorities and other enforcement agencies”. (Letter dated 24 February 2005).

However, they do not state why they believe this to be the position of other local authorities, which authorities or provide any evidence in this regard to support the assertion or their case.

35. The Police speed camera cases relied upon by LBHF are exemplified by the case of *Helmsley v Information Commissioner & the Chief Constable of Northampton EA/2005/0026*. In that case the site specific information sought (which included when the cameras were active and the trigger speed of cameras) was refused under section 31 FOIA. It is notable in that case that the Appellant conceded prejudice and that the Tribunal and Commissioner were provided with independent evidence, namely a report by the Hampshire and Isle of Wight Safety Camera Partnership, to assist them in evaluating the prejudice and public interest tests.
36. LBHF assert (letter of 26th April 2005) that many Councils do not have removal criteria, that implies that many do. Similarly in the digests of case law annexed to the Joint report of the Parking Adjudicators 2003/4 and National Parking Appeal Service Report for 2004 it is clear that many Councils do have removal criteria and rely upon them at appeal. Whilst the Tribunal would not wish to prescribe what evidence LBHF ought to provide, the Tribunal notes that LBHF are a member of the Association of London Government (ALG) Transport and Environment Committee along with more than 30 other London Boroughs. The decriminalised parking regime in London has been in place for more than 10 years and each Borough is in a position to monitor its own trends. As such the Tribunal feels that, despite the absence of an official report, LBHF were in a strong position to investigate whether supporting evidence from other London Boroughs could be obtained.
37. This Tribunal supports the approach set out in *Hogan* that in order to engage the exemption a causal link must be demonstrated supported by evidence. The Commissioner argues that such evidence has been provided by LBHF before this Tribunal. In particular he relies upon the Council as having “*particular experience and expertise in the field of parking enforcement*”, having been carrying out the function since 1993. They also rely upon Mr Taylor’s evidence (Head of LBHF Parking Services) that publication of the full criteria used.. “would undermine the general deterrent effect”. The Tribunal is of the

view that LBHF has not explained why their expertise has led them to this conclusion.

38. Mr Taylor notes that prior to 1993 (when LBHF took over parking enforcement) the Police towed almost 4 times as many cars (as evidence of the deterrent effect on all illegal parking of the prospect of being towed). The Tribunal does not follow how the threat of being towed is more of a deterrent than the likelihood of being towed. Equally the disputed information post dates 1993 by some years. There is no analysis over time to explain the position between 1993 and the introduction of this policy which would allow a conclusion to be drawn that the policy was responsible for the reduction in anti-social parking. Additionally, the Police would have had other priorities than illegal parking and it is highly likely that they concentrated their resources on towing offences rather than handing out PCNs. It is just as likely that the increase of dedicated parking attendants, their visibility, publicity campaigns etc. and the increase of PCNs issued is the deterrent responsible for this decrease.

39. The Commissioner found in his Decision Notice and advanced in his submissions the contention that the prejudice test is met because it would or would be likely to “enable” individuals who unscrupulously breach parking regulations to know when they can do so with relative impunity. Whilst the Tribunal agrees that any such individuals would be “enabled” it is not satisfied that this meets the test because:

- there is no evidence before us that there are any such individuals (the fine for a PCN still being considerable) and
- whilst the consequences of a fine are considerably less than the consequences of being towed, the fine for a PCN is substantial.
- conversely, it might **reduce** the incidences of anti social parking (which would assist the Council in their function).
- The Commissioner further recognised that it was arguable that by a process of deduction, anyone could work out (with a reasonable degree of accuracy, from information already in the public domain) the less blatant forms of illegal parking that might attract only a PCN. The

Tribunal agrees with this proposition and is of the view that if such risk takers exist they can already make an educated guess on the basis of the material already disclosed .

- From the content of the policy (as seen by the Tribunal) publication might itself reduce instances of all illegal parking as illegal parkers may realize that they are liable to be towed in a greater number of circumstances than they had previously realized.

40. For all the reasons set out above, the Tribunal is not satisfied that the disclosure of the rest of the policy would or would be likely to prejudice the exercise of the Council's parking enforcement function.

Where does the balance of public interest lie?

41. Notwithstanding the Tribunal's finding that the prejudice test is not met, for the sake of completeness the Tribunal nevertheless considers where the balance of public interest lies. *Derry City Council v Information Commissioner EA2006/0014* (a decision from this Tribunal differently constituted) notes that section 2 (2) (b) proceeds from the presumption that information should be disclosed unless one of the exemptions applies. This Tribunal finds no reason to dissent from that proposition.

42. The Tribunal must balance against all the factors in favour of disclosure, the factors against disclosure. The Information Commissioner and LBHF rely upon the following factors in asserting that the public interest lies in favour of withholding the information. The Tribunal deals with each argument in turn:

- Disclosure of the policy would cause LBHF difficulties in prosecuting cases where they acted outside the policy.

For LBHF to prosecute outside the policy would itself require a change in policy (since LBHF's current stance is that Parking Attendants may only tow vehicles within the policy).

- It would limit the use of the enforcement powers currently available to LBHF.

However, the Policy (as shown to the Tribunal) does not support this assertion.

- It would reduce the effectiveness of the attempt to reduce illegal parking (by assisting motorists prepared to risk a fine alone).

This aspect has already been considered at paragraphs 29-40 above, and the Tribunal is satisfied that this argument is not substantiated for the reasons set out above.

- Being required to publish removal criteria would discourage Councils from having them.

The *Joint Report of the Parking Adjudicators for England and Wales 2004* recommended that Councils set out their policies, consequently Councils would be assisted in presenting cases at Appeal if they can demonstrate that they have applied a fair and proportionate policy.

- Disclosure of this enforcement criteria would impact on enforcement criteria in other areas.

This case is confined to its own facts (as is accepted by the Commissioner who does not support this argument), other areas will have different considerations both in terms of the prejudice and public interest tests.

43. In support of disclosure the Appellant states that there is no mechanism for public scrutiny and challenge of the policy. Consequently there is no accountability or ability to challenge the prioritisation set out in the policy.

The Commissioner maintains that:

- The public can argue in relation to the general thrust of the policy which has been disclosed,
- A mechanism for independent review is available by way of an appeal to PATAS.

The Tribunal rejects these arguments of the Commissioner. The general thrust of the policy does not enable comment upon the detail, the order of priority and the ambit of the whole of the policy. Cases appealed to PATAS are confined to their own facts, and it is not a function of the Appeal Service to review the policy in its entirety. A factor in deciding whether to appeal (and therefore subject part of the policy to scrutiny) would be the contents of the policy, to which an Appellant would not have access.

44. The Tribunal is further concerned that parts of the information that have been provided by the Council may be slightly misleading (when compared to the entirety of the policy). In particular that relating to:

- a) “parking in a bay without displaying a permit or pay and display ticket” ,
- b) The Council primarily focuses its removal resource on the worst categories of illegal parking and gives examples of this, this does not rule out the possibility that illegally parked vehicles outside the priorities may be removed, and yet conversely: Parking Attendants can only authorise the removal of a vehicle if it is within laid down removal criteria.

45. For the avoidance of doubt, the Tribunal also addresses the proposition that a significant number of tow-aways relate to “legally” parked cars. On the face of the policy there is no evidence that it provides for the towing of legally parked cars, this would in any event be in contravention of the parking regulations. Consequently disclosure of the policy would not assist someone whose legally parked car had been towed. The Tribunal understands Ms Reith’s arguments regarding “legally” parked cars to include cases where the towing has been found to be “illegal” because it was disproportionate.

46. The Appellant further argues that the disclosure of the policy would assist members of the public to gather evidence in support of an appeal to PATAS.

The Commissioner argues:

- That this is speculative and that the Appellant has not provided evidence to support her contention.

The Tribunal has sympathy with the Appellant’s complaint that she is being subjected to a different treatment from LBHF whom the Commissioner did not task to provide evidence (beyond an opinion formed in their own expertise). Additionally the Appellant has provided a digest of cases contained in the

Joint Annual Report of the Parking Adjudicators 2003/4 from which the following flows:

- The removal of a vehicle is a power that the local authority has a discretion to exercise,
- This is subject to judicial control,
- Proportionality is a principle of law that must be applied in judicial proceedings in England and Wales

(Douthit v Hammersmith and Fulham PATAS case No. 2030276743)

47. In contesting an appeal to PATAS the Council has to prove that the removal was proportionate and necessary. As the *Special Report on Parking Enforcement by Local Authorities* states, Councils: “...need to be able to justify in every case why the issue of a PCN would not have achieved the desired objective”.

The Tribunal considers an Appellant could be at a considerable disadvantage if when deciding whether to appeal they are unable to assess whether the Council will be in a position to meet that burden.

48. The Commissioner argues that the policy is not listed in the *Code of Practice on Civil Parking and Traffic Enforcement* as the type of material that needs to be provided in the event of an appeal. However, from the digest of case law (e.g *Rickman v Waltham Forest PATAS Case No 2030279242*) it is clear that Councils have chosen to disclose their policy in defending appeals. Further disadvantages to an Appellant are that:

- They are fettered in deciding whether to make a representation,
- Being able to make their representation relying upon the policy is likely to increase their likelihood of success at an early stage and reduce financial inconvenience (the fine and towing charge having already been paid).

49. The Commissioner argues that Appellants to PATAS are a limited category of the public, however, the Tribunal notes that:

- The fair administration of justice is in the general public interest,

- ❑ Disclosure would provide public confidence in the LBHF decision making process and public confidence that they are applying the law accurately.
- ❑ All members of the public who park in Hammersmith and Fulham are bound by the regulations and affected by the towing policy,
- ❑ The publication of the policy might result in fewer parking offences in locations where towing was known to be undertaken,
- ❑ The publication of the policy might reduce the number of appeals, if potential Appellants realized that they did not have a strong case.

50. The Tribunal does not accept the Appellant's claim that illegal parking is "a relatively minor matter". Neither does the Tribunal consider that any evidence of maladministration has been advanced in relation to Hammersmith and Fulham's conduct. Equally, the Tribunal does not consider that Ms Reith's contention that PATAS have found a "worryingly high level" of withdrawn PCNS and non-contested successful appeals is of assistance because:

- ❑ LBHF do not have a bad record of withdrawn or allowed appeals compared to other Councils,
- ❑ Such statistics as there are relate to all PCNs and not just towing cases and so is not probative of any matter relating to the disclosure of the towing policy,
- ❑ Having viewed the policy itself, the Tribunal is satisfied that it is not evidence of a "badly formulated policy, or maladministration".

The Tribunal accepts the Commissioner's contention that even if there were a significant number of successful LBHF towing appeals (and there is no evidence of this before us) this could be just as easily a product of a well drawn policy being improperly enforced.

51. In light of the above, the Tribunal is satisfied on the facts before it, that the public interest factors in favour of disclosure strongly outweigh any public interest factors in withholding the disputed information and that the disputed information should therefore be disclosed.

Fiona Henderson
Deputy Chairman

Dated this 31st day of May 2007