



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA.2017.0182

**Held at Fleetbank House, on 13 February 2018,
and Field House on 3 July 2019.
Further Panel deliberations in two parts.**

Before

**JUDGE C TAYLOR
M HOWARD
D SIVERS**

Between

STEPHEN BAKER

Appellant

**and
INFORMATION COMMISSIONER**

First Respondent

**and
LONDON BOROUGH OF LAMBETH**

Second Respondent

OPEN DECISION

REPRESENTATION:

Mr Baker, for himself.

Ms Kelsey for the Commissioner.

Ms Consses, Ms Shields and Mr Animashaun of and for the London Borough of Lambeth.

DECISION:

We allow the appeal in part, as follows:

- First, the Commissioner's Decision Notice was issued on the basis of a wrong assessment as to what was held. (*See para.17 below*). This was evident from the Closed Bundle, such that we find that she should have investigated it more thoroughly. This is particularly given that:
 - The Appellant was not legally represented or able to see the closed material.
 - Under the Freedom of Information Act 2000 ('FOIA' or 'the Act') the requester is entitled to be told whether the public authority held the information at the time of the request, subject to the provisions of the Act. (*See s.1 FOIA*).
 - It was of particular consequence here inasmuch as we find that data concerning numbers of issued PCNs provided against location - originally stated not to have been held - should have been disclosed. (*See para.36 below.*)
- During the hearing, the Council confirmed that it would promptly disclose the information we found below should have been disclosed. If it has not done so, it is required to do so within 15 working days. (*See para.s 27 and 36*).
- Second, the Decision Notice failed to consider an aspect of the request referred to in para. 26(e) below. We find that no information relating to this aspect was in fact ever held, and no further steps are required.

In all other regards, the appeal fails.

REASONS

The Request

1. On 17 October 2016, the Appellant made a request under the Act to the London Borough of Lambeth ('the Council'). It stated:

“The following request relates to mobile enforcement vehicles (**MEVs**) that employ cctv cameras for the issuing of Penalty Charge Notices (**PCNs**). For the period **1 April 2015 to 30 September 2016** please provide the daily on-street logs, grouped by date, for each MEV paid for by the council. The logs should show:

- | | |
|---------------------------------------|------------|
| 1) Vehicle registration number | [‘Part 1’] |
| 2) Location | [‘Part 2’] |
| 3) Start time/end time | [‘Part 3’] |
| 4) PCNs issued | [‘Part 4’] |

Nb. The logs should include those of all MEVs paid for by the council, regardless of whether they have been deployed on street.” (*Emphasis added*).

2. On 28 December 2016, the Council stated that in relation to Parts 1 to 3 of the request, it held information, but this was exempt from disclosure under the Act. Initially it relied on the exemption in s.31(1)(a) FOIA (*concerning law enforcement*) but an internal review clarified reliance on s.31(2)(a) (*concerning ascertaining failure to comply with the law*). Regarding Part 4, the Council explained that it did not hold data on PCNs that distinguished between MEVs and other CCTV devices and that it was therefore unable to provide that part of the request. During the course of this appeal, the Council has accepted that its response to Part 4 was inaccurate, as discussed below.
3. The Appellant progressed the matter resulting in an investigation by the Commissioner. Her Decision Notice of 25 July 2017, found that the information had been properly withheld. The Appellant appealed to the Tribunal in relation to Parts 1 to 3 of his request.

The Task of the Tribunal

4. The Tribunal’s remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether she should have exercised any discretion she had differently. The Tribunal is independent of the Commissioner and considers afresh the Appellant’s complaint. The Tribunal may receive evidence that was not before her and make different findings of fact. This is the extent of the Tribunal’s remit in this case. Accordingly, addressing the Appellant’s complaint that cites s.77 FOIA (*Offence of altering etc. records with intent to prevent disclosure*) is beyond our remit.¹ Likewise, alleged bad behaviour by MEV drivers forms no part of this decision.
5. We have received a bundle of documents, further documents and submissions, and a ‘Closed Bundle’ comprising a sample of the requested information. We have heard from all parties.
6. We have carefully considered everything that has been put to us, even if not specifically referred below. We have found it necessary to issue a very short part of this decision on a closed basis that is not to be disclosed to the Appellant or otherwise published. This is because to disclose it would reveal an example within the deployment plan which we accept

¹ It seems to us to be a matter for the Commissioner.

is confidential and would help a motivated individual to decipher part of the requested information. It concerns a factor that we have considered when applying the public interest test referred to below.

The Law

7. Under s.1(1) of FOIA, a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have it communicated to him, unless it is exempt from disclosure under the Act.
8. For our purposes, information is exempt under s.31(2)(a) FOIA, where (a) that exemption is engaged²; and (b) it satisfies what we refer to as the public interest test set out in s.2(2)(b) FOIA.
9. So far as is relevant to this appeal, section 31 provides:

*“31(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** ... (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) to (i) are -
(a) the **purpose of ascertaining whether any person has failed to comply with the law.**”* (Emphasis added.)

10. Section 2(2)(b) FOIA is in the following terms:

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

11. The Respondents maintain that the section 31 exemption is engaged in this case reasoning that prejudice ‘would be likely’ to occur on disclosure.
12. The Commissioner navigates us to judicial consideration of the meaning of ‘likely’ for these purposes. From this, we see:

- a. *“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.”* (See para 15., *John Connor Press Associates v IC* (EA200510005,25 January 2006);
- b. *“Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well be prejudice to those interests, even if the risk falls short of being more probable than not.”* (see para 100. - *Mr Justice Munby in R (on the application of Lord) v SoS for the Home Office* [2003] EWHC 2073 (Admin))

(Emphasis added.)

13. There is no dispute as to the meaning or interpretation of the relevant exemption as set out in para. 12 above and the criteria the Commissioner believed needed to be met for the exemption to be engaged, as set out in para.9 of the Decision Notice. Accordingly, we adopt that approach here.
14. Reference was made by the Commissioner to an earlier decision notice concerning a different case. We are not bound by the decisions of the Commissioner, and were not pointed to any parts that we found to be of particular relevance to this case.

² We refer to this below as the exemption being ‘engaged’.

Case Management

Pre-Hearing Directions

15. The papers before us indicate that the Tribunal Registrar agreed for the First Respondent to provide a sample of the disputed information in the Closed Bundle instead of the complete information.³ When the panel received this bundle, there were evident anomalies. We issued closed directions on the matter prior to the hearing, keeping the Appellant informed. The Commissioner speedily responded, but was unable to assist with some of the issues of concern.

First Hearing

16. On 13 February 2018, an oral hearing was held. We heard from Mr Baker and Mr Colin Thomas for the Appellant. The Commissioner elected not to attend. The hearing was adjourned because we remained concerned that the Closed Bundle indicated that the Appellant's request had not been properly handled.

17. The Appellant's appeal had not included Part 4. The Closed Bundle indicated that contrary to the Council's response, at least part of Part 4 was held or if not, that it was of sufficient relevance that the Council should have considered its duties under s.16 FOIA (*duty to advise and assist*) when responding to the request. We determined that it was correct to address Part 4 and all parties have since agreed with this.

Directions of 1 June 2018

18. Closed Directions of 1 June 2018 were issued, contemporaneously informing the Appellant of this. Under rule 33 of The Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 S.I. 2009 No. 1976 (L.20) ('rule' or 'rules'), we directed the input of the Council as well as the Commissioner.

Directions of 18 June 2018

19. Responses to our directions still did not fully clarify what was held or assuage our concerns. For instance, it appeared that from the response that contrary to the Council's original response of 28 December, information in relation to Part 4 of the request had been held at the time of the request. However, it was no longer held. Our understanding from this was that PCN numbers were no longer held against each MEV, but were held for MEVs in total.

20. We issued further directions of 18 June 2018. Those directions (and others) were ordered to be disclosed to the Appellant subject to any application under rule 14. We ascertained that these were not provided to him and issued further directions such that he has now received all directions made in this case.

Panel deliberations and directions of 10 July 2018

21. On 10 July, the panel reconvened to consider responses received since the hearing. Following this, detailed directions of that date were issued, that included:

- a. Our understanding (in tabular form) of what the Council maintained was and was not held, where the situation seemed confusing.
- b. Why a sample rather than the complete information provided in the Closed Bundle would suffice. This has not been disputed since, such that we do not repeat our reasons here.

³ Due to the means in which the data was recorded, the fuller information was contained on a USB stick not readily readable in Court.

- c. That the Commissioner had accepted that Part 4 was not held despite having provided the Closed Bundle. She was directed to provide her position on how best to proceed.
- d. To identify outstanding issues and pose relevant questions on these.

22. The Commissioner's response to these directions included:

- a. Notwithstanding the developments as to what was held, her conclusions in the Decision Notice stood.
- b. The Council ought to be joined as a party to the appeal, to assist any future oral hearing. This might address: the extent of information held as a factual matter; how the Council had searched for information in response to the Appellant's request; how it held the information at the relevant time; and how the errors in its initial response occurred.
- c. Part 4: As the Council now confirmed it held Part 4 information, (albeit not in conjunction with specific VRMs), it ought to clarify if and why Part 4 information was exempt from disclosure.

23. The Council set out its position in relation to the extent of material held. The Appellant submitted his response after further directions were issued for him to do so on 9 October 2018.

Joinder and further directions

24. The Registrar's directions of 2 November 2018 joined the Council as a party and made arrangements for an oral hearing. Under direction 5, the Council were required to provide submissions which were not provided. Our directions of 6 November stated:

"The parties will have seen the directions that I have previously issued, which set out some of the history of this case. At the oral hearing some time ago, the Appellant attended on his own. The panel was provided with an incomplete Closed Bundle, and as the Respondent was not present to address matters, the appeal needed to be adjourned. The Closed Bundle contents also indicated inaccuracies regarding part 4 of the request. This made clear that the London Borough of Lambeth ('Council') had dealt with the matter wrongly and the Commissioner had not addressed that fact. Pursuant to subsequent directions, the Council stated that material that was held at the time of the request, is no longer held.

In view of the history of this case, and in accordance with rule 2(4) of The Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 S.I. 2009 No. 1976 (L. 20), I consider that:

- a) *Both Respondents should attend the oral hearing to ensure that all matters will be able to be addressed without further delays.*
- b) *The Council should provide a suitable witness or witnesses who can properly explain and expand upon those matters raised in directions and Council responses made since the last oral hearing. This would include providing full details of what is and is not held in relation to the Appellant's request, their reasoning for this and what searches have been made to ascertain what is held. The witness/witnesses should provide a statement by 18 December in accordance with the Registrar's direction 8. The witness/witnesses should also attend the oral hearing.*

The case raises some unusual issues and the Tribunal would wish to hear the positions of all three parties."

Second Hearing

25. We note the following in relation to the second hearing:

- a. A part was conducted on a closed basis, such that the Appellant was not present. We gave him a gist of what had been said.
- b. We explained the closed session was to fully probe the Council with close reference to the contents of the Closed Bundle. We asked questions we considered a legal representative for the Appellant would have posed. For instance, with direct reference to the material, we explored the Respondents' arguments:
 - i. disclosing the information would provide the public with a clear insight into the specific areas in which MEVs operate, their times of operation and their registration numbers;
 - ii. this could assist an individual in avoiding detection by an MEV;
 - iii. the resultant prejudice was real, actual or of substance.
- c. Unusually, the Council were not legally represented at the hearing. Three employees appeared on its behalf. In accordance with rules 2(b), (c) and (e), we pragmatically allowed their contribution despite the absence of substantial prior submissions or named witness statements. Each had a different area of expertise, although none had dealt substantively with the request. They explained that there were potentially two other employees still working for the Council who had dealt substantively with the request. We noted that these two had not attended the hearing despite our directions of 6 November 2018.
- d. Those absent officials ought to have been able to explain:
 - i. why material within the scope of a request was, according to the Council, subsequently no longer held.⁴ Certain details in relation to this have since been provided by the Council submissions of 22 July 2019 which, as has been a pattern in this case, raised at least as many questions as they answered.
 - ii. how they had searched for information in response to the Appellant's request to ascertain what was held, and how the errors in its initial response occurred.⁵
- e. At the hearing and thereafter, the Appellant has not asked for the officials' attendance to be compelled. We consider he was right not to, because it is unnecessary, disproportionate and inexpedient to have required it at this late stage – by virtue of rule 2. Attendance was unnecessary in part because the Appellant accepted the Council's position - as presented at the hearing – on what was held at the time of the request. The Appellant's position may have since altered in relation to whether he accepted Part 2 is no longer held. However, as elaborated upon below, we remain satisfied that we have sufficient information before us to fairly reach a decision on the issues of contention that are before us.
- f. The additional material provided since the first hearing was not presented in a bundle format for the parties and the panel. This was addressed at the hearing to ensure everyone was able to fully participate and follow proceedings.

⁴ It has since become questionable that Part 2 material is no longer held. There has clearly been lack of effort by the Council to fully ascertain what precisely was held and to ensure it was secured properly. We have addressed Part 4 and the aspect of the request referred to in para. 26(e) below. In relation to Part 2, for reasons set out below we do not consider this to be within our purview to probe further. It may be within the Commissioner's.

⁵ (We asked the Council these questions at the hearing.)

- g. On 30 July, the panel reconvened to make determinations. Further deliberations were necessitated as a consequence of matters set out in para. 28 below.

The Issues

Scope of information held

26. The Council maintained during proceedings the following:
 - a. At the time of the request, it held the full vehicle registration marks (VRMs) for each MEV. Whilst partial VRMs had been provided in the sample, the Council assured us that full VRMs were still held.
 - b. It had held the location of each MEV, but no longer did.
 - c. It held the start and end times and date of deployment of MEVs and still held this.
 - d. It had never held details of each PCN against each MEV. It held the PCN data against location and date and still did.
 - e. At the time of the request, there were no MEVs that the Council had paid for but not used on the streets. This part of the Appellant's request, had never previously been dealt with.
27. The Council confirmed it would provide the Appellant with certain Part 4 information concerning the numbers of PCNs promptly after the hearing.
28. Regarding whether Part 2 was no longer held, the panel directed the Council to ascertain during a break in proceedings whether its former contractors held the GPS information relating to the MEVs. It was unable to ascertain a response. Directions were made at the hearing for the Council to issue further submissions, copying in the other parties (as was consistent with the other directions of in this appeal.) The Council sent to the Tribunal office submissions on 22 July 2019. At a very late stage that the panel discovered that the Commissioner and Appellant had not been sent these further submissions. The Commissioner had no comments. The other two party's submissions are addressed as Issue 3.
29. The issues in dispute before us concern factual matters:
 - a. Is section 31(1)(g) so far as it relates to section 31(2)(a) engaged for the requested information? (The Council has accepted that it is not engaged in relation to the Part 4 material now disclosed.) **(Issue 1)**.
 - b. In all the circumstances of the case, does the public interest in maintaining the exemption outweigh the public interest in disclosing the requested information? **(Issue 2)**.
 - c. Is our decision altered in any way as a result of the submissions of 22 July 2019 and the Appellant's response in relation to Part 2 of the request? **(Issue 3)**.

Appellant's evidence and submissions

30. The following are some of the main arguments made by the Appellant in written submissions; or in the first or second hearing:
 - a. Disclosure of the information could not be said to cause prejudice. If there were no breach of the road traffic laws, there would be no prejudice in the Council's ability to ascertain or detect it. Disclosure would result in no offence taking place, discourage offences and encourage road safety.

- b. The Decision Notice encourages the Council to covertly deploy closed circuit television cameras (CCTVs) despite central government guidance that encourages the overt use of CCTV in the interest of encouraging compliance with traffic law to ensure public safety.
- c. MEVs are, according to the Decision Notice, mainly used to enforce parking contraventions and/or moving traffic violations.

Parking contraventions

- d. The Secretary of State for Transport's Statutory Guidance for Public Authorities on the Enforcement of Civil Parking Contraventions (of 28 February 2008) states:
 - i. "7.6 ...section 87 of the Traffic Management Act 2004 stipulates that local authorities must have regard to the information contained in this Guidance... "
 - ii. "2.2 Enforcement authorities should aim to increase compliance with parking restrictions through clear, well designed, legal and enforced parking controls. Civil parking enforcement provides a means by which an authority can effectively deliver wider transport strategies and objectives. Enforcement authorities should not view it in isolation or as a way of raising revenue...."
 - iii. "2.4 Enforcement authorities should design their parking policies with particular regard to: managing the traffic network to ensure expeditious movement of traffic, (including pedestrians and cyclists), as required under the Traffic Management Act 2004 Network Management Duty; improving road safety; ..."
 - iv. "2.6 Enforcement authorities should run their enforcement operations (both on and off- street) efficiently, effectively and economically. The purpose of penalty charges is to dissuade motorists from breaking parking restrictions. The objective of civil parking enforcement should be for 100 per cent compliance, with no penalty charges ..."
 - v. "8.12 The primary objective of any camera enforcement system is to ensure the safe and efficient operation of the road network by deterring motorists from breaking road traffic restrictions and detecting those that do. To do this, the system needs to be well publicised and indicated with lawful traffic signs."

Moving traffic violations

- e. The London Councils' "Code of Practice for Operation of CCTV Enforcement Cameras" states:
 - i. "The Code has been designed... To satisfy the community that the camera enforcement system is being operated competently and honestly by its operators..., To use cameras as a deterrent and improve driver compliance with traffic regulations..."
 - ii. "2.3.1 The primary objective of any CCTV camera enforcement system ('the system') is to ensure the safe and efficient operation of the road network by deterring motorists from breaking road traffic restrictions and detecting those that do. To do this, the system needs to be well publicised and indicated with lawful traffic signs."

- f. The information requested is historic, and there is no reason the Council could not despatch the MEVs to other locations at any time now, or in the future. It may even be the case that this has already happened.
- g. The Commissioner accepts that publishing the requested data would have the immediate and positive effect of actually deterring motorists from committing offences that have the potential to endanger public safety. This would therefore be in full accordance with the Secretary of State's stated objective of "100 per cent compliance, with no penalty charges."
- h. However, she also accepts the Council's contention that allowing motorists to avoid fines is not in the public interest.
- i. Despite that it is most definitely in the interests of public safety that the requested information be published in order for it to have an immediate and positive effect on public safety by actually deterring unlawful actions by motorists, the Respondents effectively assert that the public interest is better served by allowing motorists to commit offences that would endanger public safety, thereby allowing Lambeth Council to maintain its revenue stream by issuing PCNs to motorists who would receive them in the post long after any threat to public safety had occurred.
- j. Unless MEVs are visible and a "well-publicised" deterrent, motorists are more likely to perform manoeuvres that risk public safety.
- k. The Appellant claimed that in seeking to minimise visibility of MEVs, Councils were prepared to risk public safety in order to ensure revenue streams continue to flow.
- l. At the second hearing, the Appellant's submissions included:
 - i. He already knew where a lot of cars were deployed because of his research and freely available information online. There is freely available information on static cameras, and newspaper articles stated where a lot of PCNs have been issued. This has not stopped tickets being issued.
 - ii. As regards possible assaults, it is common knowledge that there are MEVs in specific roads in the area. The harm has already happened, and if there were no MEVs there, there would be less likely to be harm.
 - iii. The public interest is better served by disclosing the information. The only deterrent effect comes seven days later as most drivers do not see the MEVs at the time and so this is dangerous. The MEVs should be brightly painted so that they are a proper deterrent, as one day someone will get killed.

31. The Appellant provided various witness statements. In these, Mr Prestidge claimed to have been pelted by eggs and spat at by an MEV operator. Other witnesses explained efforts to locate MEVs and inform the public of their location; told of the MEVs seeking to minimise visibility cameras being difficult to see, claimed an MEV being parked on a double yellow line with engine idling for long periods of time despite air quality concerns; claimed that efforts to warn motorists of the MEVs, had resulted in MEVs speeding and going through red lights and on one occasion went through a one-way street to avoid their attention. We have not been presented with a reason as to why these alleged incidents advance his case within the defined remit of what we need to consider.

Issue 3

32. The Appellant's response of 12 September 2019 to the Council's submissions of 22 July was as follows:

- a. The Council implies that because the contract with NSL has expired, all contractual obligations between the parties have expired, and we must therefore accept that NSL cannot be compelled to provide the requested information.
- b. However, it is not uncommon for contracts to contain clauses pertaining to contractual obligations between parties that go beyond the expiration of such contracts. The Council should explore whether a clause exists within its contract that would compel NSL to provide the requested information.
- c. If such a clause exists, the Council should enforce it forthwith and provide any information provided by NSL to the Tribunal for its consideration.
- d. If no such clause exists, it should provide details to all parties of the resources it used to establish this, and thereafter make a request to NSL to provide the requested information on a voluntary basis.
- e. The Council should also consider whether there are any legal obligations contained within FOIA that it could rely upon in order to compel NSL to provide the requested information, having particular regard to the fact that the information was gathered and held by NSL on behalf of the Council. If no such legal obligation exists, the Council should provide details to all parties of the resources it used to establish same.

Council's evidence and submissions

33. The Council explained at the hearing that:

Issue 1

- a. It endorsed the Commissioner's arguments and clarified that its concern related to prejudice concerned the various road contraventions and not just those concerning on-street parking. Mr Animashaun stated that the aim of the policy of using MEVs was to ensure 100% compliance with the traffic regulations. It was not to issue PCNs and the concern in relation to disclosure is not limited to on street parking but a broader spectrum of contraventions.
- b. The Council regularly provided details of numbers of PCNs including against location. However, it objected to giving out individual VRMs against location, start and end time, including the times the drivers took breaks. It also objected to disclosing partial VRMs of the MEVs, as this would still make the vehicles identifiable.
- c. This objection was because MEVs operated in accordance with a deployment plan. The plan had been decided by the contractor, but approved by the Council, and had mainly not changed to date. It was therefore not historic. The plan told MEV drivers where to go and the rationale for doing so. (This was explained in more detail during the Closed Hearing.)
- d. In response to the question as to why the Council could not disclose the information and simply change the deployment plan, it was explained that the plan was made according to where the Council thought contraventions were likely to occur, to try to address the areas where most danger of contraventions, that in turn could affect public safety. It was not in the public interest for the plan to be changed prompted by the need to avoid detection following disclosure or to avoid assaults on drivers.
- e. Disclosing the information would help those - including drivers determined to attempt to ascertain a pattern - to work out both where they were likely to be at risk

of fines, and where they were not during different parts of the day. This, disclosure would be likely to reduce the deterrent effect of the use of MEVs. Mr Baker himself had spent a lot of time gathering information.

- f. Disclosure would also be very likely to risk the health and safety of drivers of MEVs. This was because members of the public had attacked MEV drivers before. The Appellant questioned as to whether these incidents would happen regardless of disclosure, given that information was already in the public domain. Mr Animashaun responded that if someone with intent had prior knowledge of when an MEV was where, it would be easier for them to abuse the drivers. A lot of people did not like civil enforcement officers and they were there to do a job in the public interest.
- g. In response to whether it would be better to know the location of MEVs to ensure their deterrence in those places:
 - i. Disclosure would help individuals know in advance when and where the MEVs would be. The Council had few MEVs in use for hundreds of locations. If the drivers knew in advance where the MEVs would be likely to be, there would be some who would be likely to go to other locations and contravene. They could plan a route according to where the MEV would be unlikely to be. Similarly, where there were no MEVs, people were likely to make contraventions without having planned to do so in advance. Disclosing the information would both help road users who knew the area to plan contraventions and enable more spontaneous contraventions where the information was known to them.
 - ii. The Council had seen from experience that that the presence of MEVs did not necessarily stop road-users from contravening. However, the MEV drivers have been insulted. There were incidents in the past where members of the public had threatened MEV drivers and tried to attack them. Three men had thrown eggs when the windows had been down. This had been recorded, and reported to the police. These incidents distressed the drivers even if they were not physically hurt by them. This was relevant to how disclosure of the information could hinder the Council's functions. If a driver was injured, they would not be working, and it would also impact recruitment for other drivers. There had been drivers off sick related to stress and threatening behaviour.
- h. The failure in the Council's response of 28 December 2016 had been due to a lack of expertise in the Council's team to understand the reports and information available that the contractor held. It had been wrong to say that it did not hold data on PCNs that distinguished between MEVs and other CCTV devices. It had ended its contract with the contractor a month after receiving the request.

Issue 2

- i. The Council did not provide the Court with extensive arguments in relation to the public interest test. However, the Decision Notice makes clear it had formerly argued:
 - i. Public interest arguments in support of disclosure:
 - 1. It is important that the public have confidence in the public authorities responsible for enforcing the law and that there is a general public interest in disclosing information that promoted accountability and transparency in order to maintain that confidence and trust in the local authority.

2. There was a particular public interest in the disclosure of information concerning road safety.
- ii. Public interest arguments in support of non-disclosure:
1. The specific information requested would not greatly increase public understanding of these issues.
 2. Maintaining road safety and its ability to effectively ensure that vehicles were safely parked were strong public interests.
 3. It was firmly against the public interest to disclose information which may assist individuals intent on avoiding parking fines.

Issue 3

- j. The Council sent to the Tribunal office submissions on 22 July 2019, stating:

“We have contacted NSL with regards to the GPS data held at the time of the FOI request. NSL have advised that any data for these vehicles will now be archived but we cannot access this data ourselves or guarantee of our own knowledge that the data is still available. NSL advised it would now only usually be accessed in the event of a motor or injury claim against NSL or if requested as part of an investigation by a law enforcement agency; neither of these scenarios would apply in this context. Although we can ask NSL to supply us with the data, it is possible that they would refuse and we cannot compel them to provide it as we have no contractual relationship anymore.”

Commissioner’s Submissions

34. The Commissioner’s position as set out in the Decision Notice and elaborated upon in her Response of 20 September 2017 includes:

Issue 1

- a. In relation to whether the exemption was engaged, and the underlying criteria required to be met (as set out in para 9 of the Decision Notice):
- i. **Actual Harm:** First, any infringement on the Council's function to issue PCNs could interfere with its ability to ascertain whether any person has failed to comply with the law, specifically road traffic laws. Disclosure would allow an individual to avoid parking or other fines and impede its ability to enforce parking regulations. Disclosure may also lead to its vehicles being damaged by road-users unhappy at having received parking tickets. Disclosure would be likely to have these effects.
 - ii. Disclosure would allow individuals to assess the likelihood of apprehension at various locations across its borough. It would allow motorists intent on avoiding fines to move without detection.
 - iii. **Causal Relationship:** Second, there was a demonstrable causal relationship between disclosure and the identified prejudice, which was real, actual or of substance. Disclosing the information would provide the public with a clear insight into the specific areas in which MEVs operate, their times of operation and their registration numbers. This could assist an individual in avoiding detection by an MEV, and the resultant prejudice was real, actual or of substance.

- iv. **Harm would be likely:** Third, there was a real and significant risk of this prejudice occurring given the amount of data that would be disclosed. The request sought information for an 18-month period and would therefore provide a detailed insight into the operation of MEVs in the borough. The significant number of people who could in theory use the information to attempt to avoid PCNs meant there was more than a hypothetical risk of the prejudice occurring.
- b. There has not been any evidence to indicate the Council is not fulfilling its obligations pursuant to any relevant legislation or Code of Practice in respect of its use of CCTV in its exercise of its parking enforcement functions. While the Code of Practice cited by the Appellant stated that CCTV systems should be well-publicised, the Commissioner was not aware of any obligation, in the Code or elsewhere, requiring the Council to publish the specific information sought by the information request.
- c. She accepts the position set out in the Code, that publicising the use of CCTV generally assists in deterring motorists from breaking road traffic restrictions. It did not follow, that publication of the requested information is necessary to achieve this affect. For example, a deterrent effect may be achieved by disclosure of the fact that CCTV is generally used within a specific area in the borough. Disclosure of the information would allow motorists to avoid detection, rather than deterring the violation of traffic restrictions.
- d. There is no evidence to suggest the Council unlawfully took into account financial implications in reaching its decision.

Issue 2

- e. The public interest in maintaining the exemption outweighs the public interest in disclosure of the withheld information.
- f. Public interest arguments in support of disclosure:
 - i. There is a strong public interest in allowing the public to understand how public authorities operate, disclosure of the withheld information would provide a clear insight into how the Council uses MEVs in its enforcement of parking laws in the borough.
- g. Public interest arguments in support of non-disclosure:
 - ii. There is a stronger and more compelling public interest in ensuring the effective compliance of the parking laws.
 - iii. The specific information requested would not greatly increase public understanding of these issues.
 - iv. Maintaining road safety and that its ability to effectively ensure that vehicles are safely parked are strong public interests.
 - v. It was against the public interest to disclose information which may assist individuals intent on avoiding parking fines.

35. The Commissioner's submissions at the second hearing included:

Issue 1

- a. The evidence presented showed that disclosure would not stop contraventions happening and allows drivers to potentially know in advance where the MEVs will

be so that they will not make a contravention there. Whilst this means that in an individual location disclosure may reduce an amount of contraventions, it still reduced the effectiveness of the deployment of MEVs as a whole. This was because it told people with local knowledge that they could safely plan or make a wrong turn at certain points of the day in the knowledge that they are unlikely to be detected. This affected the ability to exercise the function as a whole of ensuring overall compliance with the traffic rules. The likelihood of this happening was sufficient to meet the legal threshold. Road-users with local knowledge can plan safely.

Issue 2

- b. It was in the strong public interest to ensure that the Council are able to effectively exercise its functions. The interest was not outweighed by any or all of the public interests put forward by the Appellant.
- c. It was not the case that disclosure would make roads safer. The positions of static cameras were well-known. Yet they still record contraventions, and likewise even when there were MEVs present, drivers still contravened. The disclosure would be likely to move contraventions from one place to another.

Findings

Issue 1

36. Based on the information and submissions before us, on balance, we find that disclosing the numbers of issued PCNs provided against location does not engage the exemption, and accordingly these should have been disclosed.⁶ This is because, in the absence of disclosing further information, we find that prejudice would not be likely to occur. The information is not at a sufficiently granular level to enable discernment of patterns (if such exist) that are likely⁷ to substantively influence future behaviour. For the avoidance of doubt, this is our finding as to what needs to be disclosed under the Act. The Council always has discretion to disclose more than that, but in our view, is not required to under FOIA.
37. On balance, we find that section 31(1)(g) so far as it concerns 31(2)(a), is engaged for the remaining parts of the requested information. We accept and adopt the Commissioner's reasoning in para.s 34(a) to (d) and 35(a) above in its entirety. This is because we also accept the evidence set out in para. 33(a) to (h) above as persuasive and find no compelling reason to doubt it. We found the oral explanations made by Council staff to be palpably honest and forthright. Our view was reinforced by the Council's openness as to mistakes and lack of understanding described above.
38. We accept that the Council has functions to ascertain whether any person had failed to comply with road traffic laws. We do not think the Appellant has effectively disputed this. He argues that it is the Council's duty to publicise the cameras on MEVs. Regardless of whether this is so, the Council has a function to ascertain failure to comply with the law, and this is the relevant point in relation to section 31(2)(a).
39. We accept that there are sufficient individuals who are (and were at the time of the request) determined to ascertain any patterns from the material. The Appellant clearly demonstrated from the information he provided to us the extent of his own research and application in this area. Further, as it is known that drivers use information as to where static cameras are, it is

⁶ As is clear from para. 27, this has not been disputed by the Council.

⁷ We use 'likely' in accordance with paragraphs 12 and 13 above.

likely that there would be significant interest in knowing the likelihood of the presence of MEVs if it is as extensive as that requested here.

40. The Appellant argues that as drivers would be deterred from committing offences in front of them, the drivers would not be contravening the law. Therefore, there would not be a prejudice to the Council's ability to ascertain a failure. However, we accept that disclosure would provide sufficient information related to the deployment plan so as to assist drivers to know not only where the MEVs were likely to be but also where they would most likely not be. Accordingly, contraventions would be more likely to occur in the places the road users were able to assess MEVs probably would not be. Disclosure resulting in a likely increase of infringements in places where MEVs would likely not be in, would directly impede (and prejudice) the Council's ability to ascertain failures to comply with the law.
41. For the reasons given by the Council, it is not correct to state that the requested the data is historic. (*See para 33(c) above.*)
42. The Appellant argued that the deployment plan could be changed. Whilst MEVs are necessarily mobile, they operate according to the plan, based on an assessment of the most efficient and effective means to deter contraventions, particularly in areas of concern. Therefore, if disclosure were to result in a change to the deployment plan, this in itself would cause prejudice to the Council in its exercise of the identified function.
43. A second reason given for disclosure causing harm has been that it would be likely to cause harm to the MEV vehicles. The Appellant's witness statements indicated a level of friction between their organisation and MEV drivers. We accept Mr Animashaun's description of the difficulties MEV drivers already face and that there are those who do not like civil enforcement officers or treat them with appropriate respect. We accept that disclosure would be likely to assist in the detection of MEV drivers, and that there are those who do not like civil enforcement officers or treat them with appropriate respect and will be inappropriately aggressive to them. This would at the very least disrupt the MEV driver's ability to perform functions related to ascertaining whether any person has failed to comply with the law.
44. The Appellant gave detailed evidence in his submissions of 18 December 2018. This effectively claimed that no prejudice would result from disclosure because there was significant information already in the public domain. Information he set out that had been obtained under FOIA was not at the same level of detail as he has requested. For instance, he states that in relation to Riggindale Road, information on the number of PCNs issued by MEVs was disclosed. This type of information the Council has now agreed to disclose. It discloses neither the individual VRMs, nor start and end times. It is this granular level of detail that the Council convincingly argues will engage the exemption because it will place drivers at risk, and the ability to predict when MEVs are likely to be where.
45. Other examples given by the Appellant were not derived from the Council. These are also distinguishable from the information requested in this case. First, information provided by the Council itself is official information and therefore likely to be considered a more reliable source of confirmation indicating its policies in where and when it uses MEVs. Second, unlike the examples given, the degree and extent of material the Appellant requested is far reaching as stated by the First Respondent above. It would therefore allow an individual to decipher any patterns that may exist.

Issue 2

46. We find that the public interest in maintaining the exemption outweighs the public interest in disclosure of the withheld information. We accept and adopt the reasoning set out in para.s 33(i)(i) and (ii); 34(e) to (g); and 35(b) to (c) above.

47. The Appellant has not presented any strong reasons why disclosure is in the public interest. Dealing with points arising directly or indirectly from points he has raised:

- a. We were not persuaded by the Appellant's assertion that disclosing this particular information would increase road safety or that unless the MEVs were more publicised, motorists were more likely to perform manoeuvres that risk public safety.
- b. First, we found that even if disclosure reduced contraventions in areas of direct MEV deployment, it was likely to increase contraventions elsewhere. This increase was likely to be greater than any reduction within the area of direct deployment. This is because road-users would have increased certainty as to an MEV's whereabouts.
- c. Lack of certainty seems to us an obvious tool in the Council's armoury in deterring contraventions and ascertaining where they are being committed. This is particularly where the Council has a limited number of MEVs being used.
- d. Further, due to that limited number, comparisons with static cameras and their being publicised does not seem apposite. We do not think it is in the public interest or in the interest of public safety for MEVs to be overtly publicised by the disclosure of the requested information.
- e. Disclosure would also be highly likely to limit the effectiveness of the deployment plan, which is also not in the public interest. This would reduce the Council's ability to run its operations efficiently, effectively and economically. The plan is configured to work best to achieve its objectives, based on an assessment of where MEVs can be most effectively deployed, including for reasons of safety. If disclosure resulted in the need to change the deployment plan, (a strategy suggested by the Appellant), that would interfere with the Council's functions under section 31, clearly this would not be in the public interest.
- f. If the plan were not altered after disclosure, we accept that to some degree, the safety of MEV drivers would be more compromised than at present for the reasons given by the Council.

Avoiding Fines and Reduction of PCNs?

- g. Road-users avoiding fines is not in the public interest, if this means that they have committed contraventions that are not addressed and/or the Council's functions under s.31(2)(a) FOIA are being less effectively performed.
- h. On balance, we find that the only reason that disclosure would mean a reduction in issuance of PCNs and Council revenue, would be due to the reduced ability to perform its function for the purpose set out in s.31(2)(a) FOIA. This reduced ability is not in the public interest. Conversely, we have found above that it is more likely that more undetected contraventions would occur as the use of MEVs under the plan would be less effective, again not in the public interest.

48. We emphasise that our decision includes that it is not in the public interest to disclose VRMs and any information that would help a determined person decipher a meaningful part of the Council's extant deployment plan.

Issue 3

49. The Appellant's response is well-argued and brings squarely into question whether the Council are right to say Part 2 is no longer held. The Council fails to provide (a) probing analysis; (b) documentary evidence as to contract terms, or (c) proper consideration of the meaning of 'held' under the Act. It seems clear the contractor still holds GPS material in archive. We would be surprised if it were not 'held' on behalf of the Council within the meaning of the Act.

50. Whilst we do not have sufficient legal analysis or argument to make a finding on whether Part 2 is currently held, it is not necessary to do so either legally or for practical reasons:

- a. The s.1 FOIA duty to inform the Appellant as to whether the Council holds the requested information relates to whether it was held at the time of the request.⁸ The Appellant has been informed of this.
- b. We have found that the material ought not to be disclosed. Therefore, at a practical level it is not necessary to determine if it is currently held. For the avoidance of doubt, our findings in Issues 1 and 2 included Part 2, because it was held at the time of the request. Our reasoning has included that disclosing the level of detail contained in Part 2 would allow an individual to decipher any patterns (and strategy) that may exist. Under para. 36 a level of detail has or is already to be disclosed. The more precise the location, the more any pattern (or lack) would be revealed.
- c. The Appellant has since suggested we ought review the GPS material. At a practical level, we can find no reason why seeing the precise details of location would add materially to our understanding or assist us further in our deliberations. Therefore, it is not proportionate under rule 2 to probe as to whether there is GPS data to be seen. The Appellant did not previously object to the Closed Bundle comprising a sample of the requested information. Admittedly, it did not contain a specific sample of Part 2. It did provide sufficient understanding of the nature of the material being requested for us to determine how the Act may apply to it. It helped us to contextualise so that we could envisage the nature of the Part 2 data and understand how it fits in with what we have seen.

51. Notwithstanding para. 50, that whether Part 2 of the request is currently held remains a mystery is irksome. It is clear that the Council did not handle the request or subsequent matters satisfactorily, and we have spent ample time (as has the Appellant) trying to address this. However, we take into account the various aspects of rule 2. We have made finding on all the matters within the scope of the appeal. It is not proportionate, to the importance of the case; costs of the parties and Tribunal; and need to avoid delay for us to explore this further.

Conclusion

52. In conclusion, we have found that the exemption is engaged for majority of information requested and that the public interest in withholding this information strongly outweighs that in disclosure.

⁸ (Various cases deal with what is the relevant time in which to consider whether requested material is held. It is not as late as at the time of the appeal to the Tribunal.)

53. We find that the Council and Commissioner failed to correctly ascertain the full scope of the request or the full extent of material held. We know for certain that there was more material held than the Council stated in its response of 28 December 2016.

Other

54. The Appellant made extensive submissions such that it is not proportionate to address them all. To the extent that his arguments have not been addressed, this is because we found them not to be at all persuasive.

55. We were grateful to all the parties for their attendance and contributions at the second hearing. Nonetheless, the appeal has taken a long time to reach resolution. As made clear above, there were problems in the way the Council dealt with the request and thereafter. The Council has consistently failed to follow Tribunal procedure or seemingly to bring itself up to speed on the full workings of the FOIA. This has caused considerable delays and further work for the parties and the Tribunal. For instance, even after some of these failures had been highlighted, it still failed to comply with directions such as those concerning furnishing submissions prior to the second hearing or copying in other parties on its submissions. Further, certain information that was held at the time of the request, we were told was no longer held by the time of the appeal. In our view, the Council failed to probe this sufficiently at any stage. We hope that it learns from this experience and amends its practises.

Signed

Claire Taylor

Judge of the First-tier Tribunal

Date: 31 October 2019