

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)**

**Decision notice**

**Date:** 21 December 2020

**Public Authority:** Cardiff & Vale University Health Board  
**Address:** [CAV\\_FOI.Requests@wales.nhs.uk](mailto:CAV_FOI.Requests@wales.nhs.uk)

**Decision (including any steps ordered)**

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1. The complainant requested information about parking enforcement at various hospitals. Cardiff and Vale University Health Board ('the Health Board') provided some information and stated other information was not held. During the course of the Commissioner's investigation the Health Board disclosed some additional information and withheld information relating to part 9 of the request under section 43 of the FOIA. The Commissioner's decision is that the Health Board has incorrectly applied the provisions of section 43 and the exemption is not engaged. The Commissioner also finds that the Health Board breached section 10(1) in failing to disclose some of the information requested within the statutory time for compliance.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld relating to part 9 of the request, namely the number of PCNs issued and the number cancelled in February 2019.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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4. On 28 February 2019, the complainant wrote to the Health Board and requested information in the following terms:

*"1. How many calls and emails has the Concerns Team received about parking tickets issued at the University Hospital Wales for the following three periods:*

- a. from 5 June 2018 to 4 January 2019*
- b. from 5 June 2017 to 4 January 2018*
- c. from 5 January 2018 to 4 June 2018*

*2. How many calls and emails has the Concerns Team received about parking tickets issued at the Llandough Hospital for the following two periods:*

- a. 2017*
- b. 2018*

*3. How many calls and emails has the Concerns Team received about parking tickets issued at the Barry Hospital for the following two periods:*

- a. 2017*
- b. 2018*

*4. How many calls and emails has the Concerns Team received about parking tickets issued at the Cardiff Royal Infirmary for the following two periods:*

- a. 2017*
- b. 2018*

*5. How many calls and emails has the Concerns Team received about parking tickets issued at the St David's Hospital for the following two periods :*

- a. 2017*
- b. 2018*

*6. How many times has CVUHB received a concern raised by an AM/MP about parking tickets, and what was the result of those complaints, for the following two periods :*

- a. 2017*
- b. 2018*

*7. What is the cost of operating the Parking Office for the following two periods:*

- a. 2017*
- b. 2018*

*8. When the Parking Office receives a complaint about a disputed PCN at any CVUHB site, what powers, if any, do your officers have to intervene and have the PCN cancelled? What is the procedure for having a PCN issued on a CVUHB site cancelled? How many times has CVUHB asked a contractor to cancel a PCN, and how many were successfully cancelled, for the following three periods:*

- a. from 5 June 2018 to 4 January 2019*
- b. from 5 June 2017 to 4 January 2018*
- c. from 5 January 2018 to 4 June 2018*

*9. Under clause 5.5 of the contract with Parking Eye, CVUHB has the right to audit all of the contractor's records. Has CVUHB conducted any such audit, and if so, has that audit looked at the number of PCNs issued and the number of PCNs cancelled. If so, please provide the information gathered by auditors on the number of PCNs issued and the number of PCNs cancelled".*

5. The Health Board responded on 28 March 2019 and provided information relating to parts 7 and 8 but stated that it did not hold information concerning complaints received about the issuing of a parking contravention notice (PCN) (parts 1 to 6 of the request). The Health Board also suggested the complainant contact ParkingEye regarding part 9 of the request.
6. On 9 April 2019 the complainant requested an internal review of the Health Board's handling of request.
7. The Health Board provided the outcome of its internal review on 27 September 2019 and upheld its position that it did not hold "a complete record on the number of complaints received relating to parking concerns".

## **Scope of the case**

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8. The complainant contacted the Commissioner initially concerning the delay in the Health Board providing the outcome of its internal review. He subsequently contacted the Commissioner again following receipt of the internal review response to confirm he remained dissatisfied with the handling of his request.
9. During the course of the Commissioner's investigation, the Health Board recovered some information on complaints relating to parking which was provided to the complainant. The Health Board also confirmed that it did hold some information relating to part 9 of the request but it considered it to be exempt under section 43 of the FOIA.

10. Following the Health Board's revised responses to the complainant, he confirmed that he wanted the Commissioner to investigate whether the Health Board had correctly applied section 43 to part 9 of his request.

## Reasons for decision

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### Section 43 – Commercial interests

11. Section 43(2) of the FOIA states that information is exempt if its disclosure would prejudice the commercial interests of any person, including those of the public authority holding it.
12. The exemption can be engaged on the basis that disclosing the withheld information either 'would' or 'would be likely to' prejudice commercial interests. This establishes two thresholds for engaging the exemption. The lower one, 'would be likely to' prejudice has been interpreted by the Tribunal as meaning that the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk. It follows there must be a greater risk of the prejudice occurring for the exemption to be engaged on the basis that the prejudice 'would' occur.
13. The withheld information in this case comprises a spreadsheet showing the total number of PCNs issues, the number paid, percentage paid, number cancelled, and percentage cancelled for each of the Health Board's car parks for the month of February 2019. The Health Board advised the Commissioner that the contract with ParkingEye commenced on 5 June 2018 and up until early 2019 it was still in the process of determining the required type, style and content of reports required. Established and regular reporting was not in place until early 2019 and as such information relevant to part 9 of the request is only held for February 2019.
14. The Commissioner notes that the Health Board appears to have applied the higher threshold i.e. that disclosure 'would' prejudice its own interests and that of third parties. The Commissioner has therefore considered the application of the exemption on the basis of the higher threshold initially but may revert to the lower threshold if she considers it more appropriate.
15. In terms of ParkingEye's commercial interests, the Health Board provided evidence to show it had consulted with ParkingEye to ascertain their views on disclosure of the information in question. Essentially, ParkingEye considers that disclosure of the withheld provide "*a methodology for the calculation of the costs of operation*", including the revenue and profitability of the contract. This would give its competitors

a competitive advantage in any re-tendering of the contract in the future.

16. ParkingEye stated that it is regularly engaged in competitive tenders of similar contracts and the smallest margin can make a difference between a bid being successful. It considers that *"Whilst it is unlikely all new business would be effected, if even 1 new client is compromised, this could prejudice profit of approximately £500k per annum and typically similar contracts have a 5 year term making the potential loss of a single contact worth a high percentage of our predicted EBITDA (Earnings before interest, taxes, depreciation and amortization)"*.
17. ParkingEye also considers that disclosing information concerning cancellations and earnings would cause *"public perception and credibility issues for the parties"*. Disclosure could also damage the integrity of the car park management solution as a whole by creating a situation where car park users will submit falsified reasons why a PCN should be cancelled if for example it is made public that there is a policy of accepting an appeal for a particular reason.
18. Finally, ParkingEye pointed out that the withheld information is very subjective and could cause commercial prejudice if it is taken out of context. The withheld information shows a snapshot over a particular time period and *"may not provide an accurate commercial view over a truly representative sample period"*. ParkingEye considers this could create an adverse public relations impact - for example cancellations could have been particularly high over one period because of a specific issue which was subsequently resolved. Affected individuals *"may have been compensated or other actions may have been taken to mitigate or remediate, which would not be visible of [sic] from the statistics"*.
19. The Health Board has provided somewhat limited representations to support its position that disclosure of the withheld information would prejudice its own commercial interests, and simply contends that:  
  
*"Disadvantaging a supplier by disclosure of commercially prejudicial information is likely to damage the UHB's commercial relationship with the supplier and deter other companies from contracting with the UHB in the future. This may also have the impact of discouraging competition in the sector, resulting in a smaller pool of bidders during subsequent tender processes. Ultimately, a detrimental impact on the UHB's bargaining position with suppliers would lead to less effective use of public funds in future"*
20. The Health Board believes that the information would be current enough to be used by ParkingEye's competitors in future tender exercises. In addition, it also considers that disclosure may set a precedent which would prevent it from withholding similar information in response to any

future requests for similar information, which may be received following any disclosure in this case.

21. In order for a prejudice based exemption, such as section 43(2), to be engaged, the Commissioner believes that three criteria must be met:
  - Firstly, the actual harm which the public authority believes would, or would be likely, to occur if the withheld information was disclosed has to be related 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 potential prejudice against 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., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
22. In relation to the lower threshold, 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 anticipated prejudice must be more likely than not.
23. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Health Board clearly relates to the interests which the exemption contained at section 43(2) is designed to protect. The Health Board has provided arguments relating to prejudice to both its own commercial interests and those of the bidding companies.
24. The Commissioner accepts that the amount of revenue ParkingEye generates from issuing PCNs is commercial information which goes some way to accounting for the total revenue received from car park management services it provides. However, the Commissioner has to consider whether disclosure of the actual withheld information would prejudice any party's commercial interests.
25. The Commissioner accepts that disclosure of the withheld information could provide a methodology for the approximate revenue received over a period of time – in this case February 2019. However, she notes that there are two different payment amounts for a PCN depending on how

quickly a payment is made. As such, disclosure of the withheld information would give an incomplete/inaccurate picture of the total revenue received by ParkingEye during the period.

26. The Commissioner accepts that if the withheld information shows that there is a high number of PCNs issued and paid at a particular site it would give an indication that a significant revenue has been generated. This in turn may encourage potential bidders to tender for future contracts. However, the withheld information only relates to one month (February 2019) of a five year contract so it would clearly not provide the full picture of the profitability of the contract, particularly as the income from each PCN varies depending on how quickly it is paid. The Commissioner notes that ParkingEye itself has referred to the fact that the withheld information only shows a snapshot and may not give an accurate commercial view. ParkingEye has also referred to the fact that a particular issue may have affected the number of PCNs issued/paid/cancelled during a specific period, so again the withheld information would not be an accurate picture of the overall revenue or profitability of the contract over the contract period.
27. If the potential revenue that could be obtained from the contract had the effect of encouraging new bidders in any future tender exercise, it is not clear to the Commissioner how this would prejudice ParkingEye's commercial interests as there is no reason to believe that any bidder would provide better value for money or a better service than ParkingEye as they would still have no knowledge of the current contract between the Health Board and ParkingEye. On the other hand, if the numbers of PCNs issued/cancelled/paid suggests that the contract was not profitable and discouraged future bidders, whilst this may have an impact on the pool of bidders available to the Health Board, it would not have any effect on ParkingEye's commercial interests as there would be less competitors.
28. The Commissioner is not convinced that disclosure of the withheld information would affect the behaviour of any future companies wishing to bid for contracts for any future car park services. It is clear that ParkingEye does not have a monopoly on car park services but it does manage a number of car park sites across the country and is regularly engaged in competitive tenders for similar contracts.
29. ParkingEye has argued that disclosure of the withheld information could result in users submitting false claims for cancellation of a PCN if they became aware that the Health Board has a policy of accepting appeals for a particular reason. However, the Commissioner notes that the withheld information refers to the numbers and percentage of PCNs issued, paid and cancelled and does not in any way reveal any waiver

policy or information about the reasons why a PCN has been cancelled. The Commissioner does not, therefore, consider that this argument holds any weight in terms of engaging the exemption.

30. The Commissioner is mindful of not ordering disclosure of information which might affect open competition by revealing any information which would prejudice one company over another. However, she must be convinced that disclosing the information in question would provide any competitors with information that could be used to undercut ParkingEye. To accept this argument the Commissioner must be satisfied that there is a causal link between disclosure of information and the prejudice that the Health Board argues would result. The Commissioner notes that the withheld information in this case would not reveal the revenue received by ParkingEye as there are other variables such as the value of the payments and the contract with the Health Board. In addition, the information only shows a snapshot of the situation over one month and is not necessarily indicative of the longer term picture, a fact which has been acknowledged by ParkingEye itself.
31. The Commissioner considers that the Health Board has not demonstrated that the withheld information would either encourage more interest in companies bidding for future services or that any new bidder would have a competitive edge over ParkingEye in winning any new contracts. Neither has the Health Board demonstrated that disclosure of the withheld information would be likely to result in fewer companies choosing to bid for contracts in the future.
32. In summary the Commissioner considers that the Health Board has failed to explain any causal link between disclosure of the withheld information and the commercial prejudice claimed. As the Health Board has not sufficiently demonstrated that disclosure would, or would be likely to, prejudice any party's commercial interests, the Commissioner has concluded that section 43 is not engaged.

### **Section 10 – time for compliance**

33. Section 10(1) of the FOIA requires that a public authority complies with section 1(1) promptly and in any event not later than 20 working days following the date that a request was received. Section 1(1) states that a public authority should confirm whether it holds relevant recorded information and, if so, to communicate that information to the applicant.
34. In this case the request for information was submitted on 28 February 2019. The Health Board responded on 28 March 2019 and provided some information and stated other information was not held. During the course of the Commissioner's investigation the Health Board disclosed



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information held relating to parts 1 to 6 of the request. As this information was not disclosed within the statutory time for compliance the Commissioner finds that the Health Board breached section 10(1).

## Right of appeal

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35. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.

37. 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** .....

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**