

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 December 2022

**Public Authority:** Department for Levelling Up, Housing and Communities

**Address:** Fry Building  
2 Marsham Street  
London  
SW1P 4DF

### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the Private Parking Code of Practice. The above public authority ("the public authority") provided some information but relied on section 35 (development of government policy) and section 42 (legal professional privilege) of FOIA to withhold the remainder.
2. The Commissioner's decision is that sections 35 and 42 are engaged and that the balance of the public interest favours maintaining these exemptions. As the public authority failed to respond to the request within 20 working days, it breached both section 10 and section 17 of FOIA.
3. The Commissioner does not require further steps.

### **Request and response**

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4. On 24 March 2022, the complainant wrote to the public authority and requested information in the following terms:

"Please can you supply me with copies of the following in relation to the Private Parking Code of Practice:

"[1] Copies of any correspondence between the Ministry of Housing Communities and Local Government, and the Ministry of Justice, in relation to the charging of debt fees to motorists on unpaid Parking Charge Notices.

- "[2] Copies of any legal advice obtained by the Ministry of Housing Communities and Local Government in relation to the charging of debt fees to motorists on unpaid Parking Charge Notices.
- "[3] Copies of any other advice (either internally from government departments, or externally from other sources) obtained by the Ministry of Housing Communities and Local Government in relation to the charging of debt fees to motorists on unpaid Parking Charge Notices.

"For the avoidance of doubt "debt fees" here include any escalation of costs (as defined in Section 9 of the Private Parking Code of Practice - published 7 February 2022) or any additional charges, levied by Parking Companies or Debt Collection Agencies where pursuing unpaid Parking Charge Notices from motorists."

5. The public authority responded on 10 June 2022. It provided some information but withheld the remainder, relying on sections 35 and 42 of FOIA in order to do so. It upheld this position at internal review.

## **Reasons for decision**

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### **Section 42 – legal professional privilege**

6. The public authority has relied on section 42 to withhold a copy of an opinion that had been provided by a barrister. It is self-evident from both the request and the information itself that this document was created by a legally-qualified individual – and for the purpose of providing professional legal advice. Section 42 is therefore engaged.
7. The Commissioner has set out in multiple decision notices<sup>1</sup>, the considerable weight he attaches to the importance of maintaining the principle of privilege. Whilst he recognises that parking charges is an issue that affects large numbers of people, he does not consider that this outweighs the considerable public interest in allowing public authorities to seek and receive high quality legal advice. He also notes that the legality of any policy is ultimately judged by the courts and not by barristers.

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<sup>1</sup> See for example paras 41-52: <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021498/ic-128434-x4x7.pdf>

## **Section 35 – development of government policy**

8. The public authority has relied on section 35 to withhold a chain of emails exchanged between itself and interested stakeholders
9. The Commissioner is satisfied that this information relates to the development of government policy. In February 2022, the government published a Private Parking Code of Practice (“the Code”) – something the Secretary of State is required to do by law. The withheld information clearly relates to the development of that Code and so the exemption is engaged.
10. On public interest, the Commissioner recognises that at the time of the request, a version of the Code had been published (though it was subsequently withdrawn in June 2022). However, at some point between the publication of this version of the Code and the beginning of June 2022, a number of private parking companies launched a legal challenge against the Code. It is not clear from the evidence before the Commissioner, exactly when that action was launched, but it seems likely that pre-litigation correspondence would have commenced (or at least would have been anticipated) at the point at which the public authority should have responded to the request at the end of April.
11. The Upper Tribunal recently ruled that the public interest must be considered at the point at which the public authority was required to comply with the request. Given that the public authority would have been at least aware of pending litigation at that point, the Commissioner considers that, although a version of the Code had already been published, the issue was still one that was “live” rather than settled.
12. The complainant did not seek to challenge that the policy process remained live at the point the request was responded to, but they considered that this was irrelevant because of, what they considered to be, the “basic flaws” in the public authority’s process.
13. The complainant argued that the public had a right to know why the process of producing a Code of Practice had taken so long. They noted that the public authority had been required to run two separate consultations prior to the current version being published and therefore:

“the public are entitled to know what keeps going wrong in this process, and how efficiently public funds are being used, irrespective of whether that process is still ‘live.’”
14. The Commissioner considers that the public interest arguments in this case are finely-balanced. Had the published Code been broadly accepted it is possible that the public interest would have favoured disclosure

because the policy process would have reached, if not a natural conclusion, then at least the end of one chapter.

15. However, given the fact that, as mentioned above, the Commissioner considers that the policy was still in development at the point the request should have been responded to, he considers that the balance of the public interest should favour maintaining the exemption.
16. The Commissioner recognises, as he has done in previous cases, that civil servants should be afforded a certain degree of protection when discussing and debating new policy ideas. The protection required is strongest when the policy-making process is ongoing and will decline once a policy has been formally announced.
17. The Commissioner accepts that the withheld information would have been of some use in understanding how the Code had been prepared but, given the relatively narrow focus of the request, any public interest would be limited.
18. The Commissioner considers that, in the circumstances of this case, disclosing the information would make civil servants and stakeholders more reticent in discussing novel policy ideas – particularly in relation to controversial issues. He is therefore satisfied that the balance of the public interest lies in favour of maintaining the exemption.

### **Procedural matters**

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19. As the public authority failed to disclose the non-exempt information that it held within 20 working days it breached section 10 of FOIA.
20. As the public authority failed to issue a refusal notice within 20 working days it breached section 17 of FOIA.

## Right of appeal

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21. 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: 0203 936 8963

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)

22. 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.
23. 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 .....**

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