Neutral citation number: [2025] UKFTT 00434 (GRC)

Case Reference: FT/EA/2024/0235

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard by Cloud Video Platform
Heard on: 25 February 2025
Panel Deliberations: 28 March 2025
Decision given on: 23 April 2025

Before

JUDGE S. BUCKLEY
MEMBER A. CHAFER
MEMBER P. DE WAAL

Between

THE BRITISH PARKING ASSOCIATION

Appellant

and

(1) INFORMATION COMMISSIONER
(2) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Respondents

Representation:
For the Appellant: Timothy Pitt-Payne KC
For the Respondent: Did not appear
For the Second Respondent: Nicholas Ostrowski

Decision: The appeal is allowed

Substituted Decision Notice:

Organisation: The Secretary of State for Levelling Up, Housing and Communities

Complainant: The British Parking Association

The Substitute Decision – IC-272450-X8D6

1. For the reasons set out below the public authority is not entitled to rely on section 14 of the Freedom of Information Act 2000 (FOIA) and is obliged to comply with section 1(1) FOIA.

2. The public authority is required to comply with section 1(1) FOIA and must respond to the request for information within 35 days of the promulgation of this decision, and either supply the information sought or serve a notice under section 17 FOIA including the grounds it relies on other than section 14(1).

REASONS

Introduction

1. This is an appeal by the British Parking Association (the BPA) against the decision notice of the Information Commissioner (the Commissioner) with reference IC-272450-X8D6 and dated 20 May 2024, which held that the Department for Levelling Up, Housing and Communities (the Department) was entitled to rely on section 14(1) FOIA (vexatious requests) to refuse BPA's request for information.

2. The Commissioner does not oppose this appeal. The Department continues to rely on section 14 and in its response sought to rely in the alternative on two exemptions under part II: section 40(2) (personal information) and sections 36(2)(b)(i) and (2)(c).

3. Following the hearing, the tribunal sought further written submissions on the question of whether, if the appeal succeeded in relation to section 14, the tribunal should order the Department to provide a fresh response to the BPA's request (without reliance on section 14) or if it should and/or has the jurisdiction to deal substantively in these proceedings the Department's additional reliance on the exemptions in section 40(2) and section 36(2) under Part II FOIA. Those submissions were provided by all parties, including the Commissioner.

4. The tribunal, having allowed the appeal in relation to section 14, decided that the correct outcome was to issue a substitute decision notice requiring the Department to issue a fresh response to the BPA's request. The tribunal decided that it did not have jurisdiction in this appeal to determine the Department's reliance on the exemptions in Part II FOIA (sections 40(2) and 36).

5. The tribunal went on to determine in the alternative, that if it did have jurisdiction in this appeal to make a decision on those exemptions, it was, in any event, not appropriate in this case in circumstances where the Department has not complied with the obligations of a public authority under Part I FOIA to provide the information requested (the section 1 duty) or to give notice to the requestor if to any extent the public authority relies on a claim that any information is exempt

information under Part II, specifying the exemption/s in question and stating why they apply (the section 17 duty); and neither the Department nor the tribunal has reviewed the withheld information.

6. The structure of this decision is as follows:-

Factual background

7. The tribunal has adopted some of this background from the tribunal decision in **Trace Debt Recovery UK Limited and Information Commissioner** [2023] UKFTT 00600. The remainder is either undisputed information provided by one or other party in this appeal or based on the evidence and submissions before us.

8. The BPA is a not-for-profit trade association representing parking and traffic management organisations, including operators of parking on private land. It has over 800 corporate members and a further 650 individual members.

9. There are two different legal frameworks applicable to the enforcement of parking charges. These are: (a) the local authority framework, regulated by the Traffic Management Act 2004; and (b) the framework which applies to parking on private land in England and Wales, primarily governed by the law of contract.

10. Private parking companies will typically: (a) charge a tariff for parking at the sites that they manage; and (b) issue a Parking Charge Notice ("PCN") for noncompliant parking, that is to say, parking that breaches the terms and conditions applicable to the parking location in question (e.g. because the tariff has not been paid, or the maximum stay period has been exceeded). About 99.7% of parking events on private lands are compliant with the terms and conditions in force at that location and do not result in the issue of a PCN.

11. One of the key functions of parking tariffs is to enable parking operators to provide parking management services to landowners, it being impossible to provide such services without an appropriate level of payment (see **ParkingEye Ltd v Beavis** [2016] AC 1172).

12. Where the terms and conditions of parking are breached, the private parking company may do one or more of the following: (a) issue a PCN; (b) obtain the details of the registered keeper of the vehicle in question from the Driver and Vehicle Licensing Agency ("DVLA") and seek to recover the amount of the PCN against the registered keeper; (c) make use of the services of a specialist debt recovery agency ("DRA") in order to recover any unpaid amount; and (d) charge a further fee in addition to the PCN (a "debt recovery fee"), to reflect the cost of debt collection.

13. Both PCNs and debt recovery fees provide a deterrent against non-payment of parking tariffs. The involvement of a DRA provides an opportunity for the motorist or registered keeper to engage in relation to their unpaid parking debt before the matter goes to Court.

14. The Parking (Code of Practice) Act 2019 sets out a framework for the statutory regulation of the private parking industry. The Secretary of State for the Department is required, pursuant to section 1 of the 2019 Act to 'prepare a code of practice containing guidance about the operation and management of private parking facilities'.

15. Section 5(2)(a) of the 2019 Act provides that the Secretary of State must have regard to a failure to act in accordance with a provision of the code of practice when deciding whether to disclose DVLA details for a vehicle in respect of which a parking breach has occurred.

16. The practical effect of section 5(2)(a) is that the Secretary of State can restrict access to DVLA details for operators whose car parking management is not in accordance with the code of practice, thereby making it extremely difficult for such operators to enforce any parking charges.

17. There have been repeated unsuccessful attempts to put in place a code of practice under the 2019 Act.

18. In August 2020 the Secretary of State issued a consultation document. The purpose of this consultation, together with a parallel consultation run by the British Standards Institute, was to produce a code of practice for the purpose of the 2019 Act. Neither of these parallel consultations raised any issues as to debt recovery fees.

19. A consultation outcome document was published and a further consultation launched in March 2021 in relation to the code of practice. Judicial Review proceedings were then issued by parties other than the BPA. There was then a further technical consultation launched in July 2021. That included a proposal to cap the level of debt recovery fees, but no proposal to remove them. The government prepared a response to the technical consultation in February 2022 and a code of practice and an explanatory document was issued at that stage. The government proposed in those documents to reduce the parking charge and to remove debt recovery fees. The code of practice was laid before Parliament on 7 February 2022 for a 40-day period, allowing both Houses with an opportunity to resolve not to approve it. No such resolution was passed but a second set of Judicial Review proceedings was then issued by parties other than the BPA in April 2022 and the Code was withdrawn in June 2022.

20. On 30 July 2023 the Department issued a call for evidence in relation to the terms of the proposed statutory code of practice regarding private parking accompanied by a draft regulatory impact assessment (the impact assessment).

21. Under the heading 'Who is this for' the call for evidence stated:

    a. 'The government is keen to ensure that any further additional evidence which is material to the impact assessment is gathered through this call for evidence, therefore responses from all interested parties are invited and welcomed.

    b. However, this call for evidence is technical in nature and is likely to be of most interest to those involved specifically in the private parking industry who are likely to be best placed to assist the government with relevant evidence.'

22. Under the heading 'About this call for evidence' it stated that:

    - 'The call for evidence is focused on the impact assessment, published alongside the call for evidence. Respondents are strongly encouraged to familiarise themselves with the impact assessment before responding.

    - The government will carefully consider the responses received and will use these along with evidence already available to compile a final impact assessment. Consultation is then expected to be undertaken on the options for parking charges and debt recovery fees, with the final impact assessment published to ensure sufficient information is available at that point for

respondents to express views on those options with awareness of the implications.

- As the final impact assessment will be compiled following this call for evidence, it is important that anyone who feels important evidence is missing from the current draft document, that assumptions are incorrect, and/or that they are able to provide further insights into issues covered, provides that evidence now so that it can inform the consultation on parking charges and debt recovery fees.'

23. The call for evidence said that it aimed to:

- 'Test assumptions underpinning the draft impact assessment;
- Strengthen the evidence base underpinning the government's understanding of the implications of the proposed measures; and
- Gather information to better understand the industry's current use of parking charges and debt recovery fees so that we can better understand the impacts on different operators.'

24. By way of background and context, the call for evidence said:

> 'There is evidence to suggest that the current system of private parking regulation is not fit for purpose. Key indicators of this are:
>
> …
>
> Concerns raised about existing industry standards (with a large volume of qualitative evidence emerging consistently highlighting similar themes relating to negative use experience with private car parks).'

25. The impact assessment similarly said that 'there is evidence to suggest that the current system of private parking regulation is not fit for purpose'.

26. Under the heading 'Concerns regarding existing industry standards' the impact assessment said, in summary:

• Large volume of qualitative evidence which consistently highlights similar themes relating to negative user experience with private car parks.

• 416 pieces of correspondence received by DLUHC and 224 news articles analysed.

• Common themes include poor operator practices (particularly miscommunication of information), issues with the debt recovery process, and issues with the appeals process.

27. It was also said that 'rapidly increasing volumes of parking charges has led some consumer and motoring groups, and members of the public, to suggest that there are major problems in the system' and that:

    'A similar narrative is also prevalent in various media reports and documentaries about private parking industry, as well the correspondence the Department for Levelling Up, Housing and Communities (DLUHC) receives from Parliamentarians and the public. To understand the issues in the market, analysis was conducted of 416 pieces of correspondence DLUHC had received over a 12-month period from 2021-22 related to parking.'

28. The 416 pieces of correspondence form the disputed information in this appeal. Those letters are unsolicited correspondence over a 12 month period from MPs or members of the public.

29. The impact assessment included a table breaking down the correspondence by reference to the frequency with which various sub-themes were mentioned in the correspondence as follows: (a) operator behaviour/practices 53%; parking charges 50%; code of practice 40%; debt recovery process/fees 34%; appeals process 28%. Paragraph 3.15 of the risk assessment breaks down these sub-themes in more detail.

30. Under the heading 'Rationale for intervention' the impact assessment identified three inter-related issues with the current private parking system arising from the correspondence, media articles and a substantial increase in parking charge volumes.

31. Based on an assessment of the correspondence and other information, the impact assessment identified a list of problems relating specifically to parking charges and debt recovery fees and five options developed to address those problems, four of which involved reducing parking charge levels and either removing or reducing debt recovery fees.

32. The BPA's position is that reducing parking charge levels and removing or reducing debt recovery fees is unlikely to solve the problems that the government has identified. The BPA points to evidence that it says shows that setting penalty charges too low is ineffective.

33. The BPA is concerned that neither the correspondence nor the news articles referred to and relied upon in the impact assessment were checked for their veracity, accuracy and relevance. It is concerned that the government was being led by unchecked and misleading information driven by negative media bias. It considers that there is a risk that there may be a failure to understand factually and from an impact perspective how the private parking industry is regulated, why parking enforcement is needed, and the fact that the majority of parking events pass without a PCN being issued.

34. While the call for evidence was ongoing, the BPA made a request for disclosure of the correspondence and the news articles referred to in the impact assessment. It requested the correspondence because it wanted to understand the context in which the themes were identified from the correspondence in the impact assessment and to

understand whether or not the correspondence supported the government's view that reducing parking charge levels or reducing/removing debt recovery fees would solve the problems identified from the correspondence in the impact assessment.

35. The call for evidence concluded in October 2023.

36. Following the call for evidence it is intended that there will be a further consultation on a new draft code of practice. Whilst the BPA have formed the impression that the government was not minded to change the options outlined in the impact assessment, we accept that the government is obliged to conduct any public consultation fairly and it is possible that the government's proposed approach to parking charges and debt recovery fees may change.

The request and response

37. The BPA made the following request to the Department on 9 March 2024:

> "I previously asked if it was possible for the 416 pieces of correspondence and 224 news articles to be shared to help our understanding and best target an informed response from our association. Regarding the 416 complaints, we would be happy to receive redacted copies leaving just PCN and operator references to enable analysis, which in turn can ensure DLUHC is fully informed as to the specific matters that have been used as direct evidence in your modelling."

38. On 23 August 2023 the Department provided the 224 news articles. On 18 September 2023 the Department confirmed that it held the 416 pieces of correspondence but refused this part of the request in reliance on section 14(1) (vexatious requests) on the basis of the significant burden of compliance. That burden, the Department said, included the time that it would take for the Department to consider whether exemptions under section 40(2) (personal data), section 41(1) (information provided in confidence), section 43(2) (prejudice to commercial interests) and section 35(1)(a) (formulation or development of government policy) applied to any of the requested information and to apply the necessary redactions.

39. The Department upheld its position on internal review.

Decision notice

40. In a decision notice dated 20 May 2024 the Commissioner upheld the Department's reliance on section 14.

41. The Commissioner accepted that there was a clear purpose and value of the request in terms of providing greater transparency and scrutiny of the information the Department had taken into account when developing policy in this area.

42. Having viewed a sample of 5 pieces of correspondence, the Commissioner's view was that it was highly likely that all of the pieces of correspondence will contain information that is exempt from disclosure under section 40(2). The Commissioner

also considered that many will contain information that may be exempt from disclosure under section 41(1) (information provided in confidence) as disclosure of the information to the world at large under FOIA may constitute a breach of confidence.

43. While the Commissioner considered it unlikely that disclosure of any single complaint about a parking company or car park would impact the commercial interests of either the parking company or landowner, he accepted that if the information across the 416 pieces of correspondence showed a high number of complaints about specific operators or identified particular repeated practices of concern relating to specific operators, disclosure of this information may prejudice the commercial interests of these companies. The Commissioner therefore accepted that the Department would need to consider whether information contained in the correspondence may be exempt under section 43(2) when dealing with the request.

44. Given the link between the requested correspondence and the impact assessment, the Commissioner considered that it was reasonable for the Department to consider whether any of the information was exempt under section 35(1)(a).

45. The Commissioner accepted that, in order to comply with the request, it would be appropriate for the Department to consider whether any of the information within the correspondence was exempt under the identified exemptions. The Commissioner also accepted that the potentially exempt information was likely scattered throughout the correspondence in such a way that it could not easily be isolated.

46. The Commissioner considered that the Department's estimate of 43 hours to comply with the request (including its assessment of potentially exempt information) was reasonable. That time estimate was based on a sampling exercise undertaken by the Department, resulting in an overall estimate of 6 minutes per item of correspondence. On that basis the Commissioner concluded that the burden of complying was significant. He accepted that the burden would be grossly oppressive and the value in disclosure was not sufficient to justify placing such a burden on the Department.

47. The Commissioner noted that the BPA had offered to fund the costs involved in the analysis and provision of the information but said that the Department was not under any obligation to comply with the request on this basis.

Grounds of appeal

48. The grounds of appeal are, in essence, that the Commissioner erred in understating the purpose and value of the request and overstating the burden imposed on the Department.

The Commissioner's response

49. In his response the Commissioner indicated that he did not oppose the appeal.

The response of the Department

Section 14

50. The Department submitted that the Commissioner correctly understood and correctly articulated the purpose and value of the request. The Department submitted that it is unclear why the BPA needed to see the individual pieces of correspondence in order to make an informed response to the impact assessment:

    a. The Department said that the correspondence was aggregated by the Department to give it an idea, in percentage terms, of what correspondents who were sufficiently exercised to write to the Department about a parking issue were concerned about. The correspondence was used to inform a thematic understanding of the main issues which car park users were writing about and was also considered with media reports and a RAC opinion panel which surveyed 2,194 drivers. The correspondence was not used by the Department to make any finding about what car park users had actually experienced. The Department said that it was unclear why the BPA's request to see details of the individual pieces of correspondence to 'enable analysis' had any utility in allowing the BPA to make a full response to the question of whether the themes identified by the Department were the relevant issues which the Department should consider when developing the policy.

    b. The Department openly acknowledged the limitations of the evidence. The purpose of the call for evidence was, explicitly, to strengthen the Department's evidence base about the contents of the code of practice. No decision on policy had been reached at the time the call for evidence and draft risk assessment were published.

51. The Department submitted that the Commissioner's findings about the burden imposed on the Department were reasonable and appropriate weight was given to it:

    a. redacting material that is exempt under section 41 and section 40(2) is not merely a mechanical process and every document will have to be looked at individually and by a human and then, where appropriate, a redaction applied.

    b. While it may be unlikely, disclosure of information to the BPA, a trade association, may well facilitate damage to a particular car park's commercial interests if, for instance, it emerges that a large number of letters relate to a particular car park or to a particular practice used by one operator. There must be a risk that the correspondence will be seen by the individual members of the BPA and those individual members may take steps to take commercial advantage of that information by, for instance, changing their practices so that they enjoy a competitive advantage over the car parks or operators identified in the correspondence. At the very least the Department will have to review the correspondence to see if any such information needs to be redacted under section 43(2).

c. In relation to section 35(1)(a) the correspondence was received from Parliamentarians and the public and there is plainly the possibility that it was written with a view to modifying or influencing public policy and so 'relates to' government policy. Members of the public and Parliamentarians may be disinhibited from corresponding with the Department if their responses could be disclosed to the parties involved and who may be adversely affected by any proposed change in the law.

Section 40(2)

52. The Department noted that although the BPA accepted that personal data should be redacted it also contended that the PCN should remain unredacted. The Department argued that a PCN constitutes personal data because those in possession of a PCN and the relevant records or database (which will be controlled either by the BPA itself or by car park operators, some of whom may be members of the BPA) will be able to identify the name of the recipient of the PCN, the address the PCN was sent to, the car involved and the date and time of the alleged infraction.

53. The Department argued that as the BPA do not seek the correspondence without the PCN the operation of the exemption in section 40(2) amounts to a complete reason why the request should not be granted and/or is material to the burden under section 14.

Section 36

54. It was submitted for the first time in the response that section 36(2)(c) (prejudice to the effective conduct of public affairs) was engaged because a 'qualified person' (the Parliamentary Under Secretary of State for Democracy and Local Growth) is of the opinion that there would be an unavoidable erosion of trust between Ministers, MPs and the public if the unsolicited correspondence was disclosed to the trade association potentially representing the very operators that the correspondents were discussing in their letters. This would prejudice or would be likely to prejudice the conduct of public affairs because if such correspondence is disclosed it will result in the trust between Ministers, MPs and the public breaking down. In turn this will make people less likely to write into government departments and Parliamentarians which will make the process of government (such as the development of the Code) more difficult as the Department and other departments will be forced to make decisions (for example about the development of the Code) based on a less comprehensive understanding of the evidence.

55. Similar concerns were relied on in relation to section 36(2)(b)(ii) (inhibition of the free and frank exchange of views for the purposes of deliberation).

The BPA's offer to fund the costs of the work

56. The Department said in its response that it would call evidence to demonstrate that, it would not be feasible to outsource or subcontract the estimated 43 hours work to an external contractor, because the correspondence is contained in the Department's

secure system. Even if it were possible to do so, facilitating external access to the system with the necessary training and protection of other data contained in the system, would require and additional and extensive amount of time. Further, even if this could be achieved, the work done by those contractors would require significant checking by more senior civil servants. Together, it was argued, this would amount to an oppressive burden on the Department even if the BPA could defray some or all of the financial cost of contracting an external agent to review and provide the information.

The BPA's reply

Purpose and value

57. It was submitted that it is apparent that the impact assessment was prepared on the basis that, viewed as a whole, the correspondence showed that in various respects car park users consistently suffered certain kinds of negative experience with private car park operators.

58. The BPA argued that it follows that, for the purposes of responding to the call for evidence and impact assessment in a properly informed way, it was (and remains) highly material for the BPA to be able to conduct its own analysis as to whether the correspondence does indeed constitute evidence of the issues complained of.

Burden

59. It was submitted that the Department has significantly overstated what is involved in redacting personal data, which can be treated as a largely mechanical process.

60. In relation to the Department's time estimates for assessing whether information is potentially exempt, the BPA argued that the suggestion that section 43(2) might apply is speculative and highly improbable. The correspondence relates to the entire country and is most unlikely to be damaging to the commercial interests of any specific operator. If disclosure resulted in a particular operator deciding that particular operator complaints about its practices were well-founded and that the practices should be modified, then such an outcome would be beneficial rather than harmful in public interest terms.

61. The BPA said it was also fanciful to suggest that the exemption in s.35(1)(a) (information relating to the formulation or development of government policy) might apply. The withheld information is unsolicited correspondence from Parliamentarians and members of the public. It was not submitted as part of a process of policy development. For instance, it did not form part of a response to a specific consultation exercise carried out by the government. The connection between the correspondence and the process of formulating or developing policy is far too remote for this information to fall within s.35(1)(a). The mere fact (if it be the case) that some of the correspondents might have hoped to influence government policy would not be sufficient to bring the correspondence within s.35(1)(a). The logical implication of the Department's position is that any correspondence intended to influence the

development of policy – including, for instance, unsolicited communications from lobby groups or campaigning organisations – would necessarily engage section 35(1)(a), which cannot be right.

62. In respect of the Department's assessment of the exemptions in s.36(2)(b)(ii) and s.36(2)(c) in relation to the withheld information, the BPA submitted that the qualified person's opinion supporting reliance on those exemptions was unreasonable. In particular, it is not reasonable to suggest that Parliamentarians or members of the public would be deterred from corresponding with a government department in the future if the 416 letters were disclosed. Members of the public (and still more so Parliamentarians) can be taken to be aware that any correspondence with a government department will be come within the scope of FOIA and will potentially be disclosable under that legislation. The suggestion that there might be such a deterrent effect is still more far-fetched given that the identity of the authors of the letters would not be made public.

63. It submitted that even if either or both of the relevant s.36 exemptions are engaged, the public interest in maintaining the exemption would not outweigh the public interest in disclosure.

64. In respect of the Department's assessment of the s.40 exemption with reference to the withheld information, the BPA submitted that the only body that could potentially identify someone from a PCN would be the parking operator that issued the PCN and could link the PCN number with its own records. The BPA wishes to be able (with the assistance of parking operators) to link the requested letters with details of the incidents that led to the issue of the PCN in question, so that the BPA can test whether a letter gives a fair and accurate account of the relevant circumstances. There is no 'motivated intruder' and no reasonable likelihood that the PCN would be used to identify any individual.

65. It was also argued that in any event disclosure would not breach any of the data protection principles. At the very most there would be a disclosure of personal data to the parking operator that issued any relevant PCN and could link the PCN reference to a person from its own records. It was submitted that in these circumstances and in view of the legitimate interest in the information, such limited disclosure would be fair and lawful.

The BPA's offer to fund the costs of the work

66. The BPA submitted that if the work can be done only by the Department's internal staff, then the BPA can defray the costs of the time spent by those staff. Alternatively, the work could be divided, with internal staff searching for the correspondence, downloading it and converting it to PDF, and with an external contractor then carrying out the remaining tasks. The BPA could fund both the internal and external work. If the work was divided in this way, there would be no need for the external contractor to access the Department's systems.

Disposal of the appeal

67. The BPA's primary position is that the tribunal allowed the appeal against the Department's reliance on section 14 the the tribunal should order disclosure of the requested information, rather than requiring the Department to issue a fresh response to the request.

Legal framework

68. Under section 1(1) FOIA there is a general right of access to information held by public authorities.

69. Under section 1(1) a person making a request for information is entitled:

    a. to be informed in writing by the public authority whether it holds information of the description specified in this request (the duty to confirm or deny), and

    b. if that is that case to have that information communicated to him.

70. Section 1(1) is subject to the remainder of section 1 and sections 2, 9, 12, and 14.

71. Section 2(1) provides that the duty to confirm or deny does not apply if a relevant section in part II is engaged and, unless the exemption is absolute, the public interest favours the exclusion of the duty to confirm or deny.

72. Section 2(2) provides that section 1(1)(b) does not apply in respect of any information that is exempt information by virtue of Part II if the exemption is absolute or if the public interest favours maintaining the exemption.

73. Section 9 provides that if the applicant is provided with a fees notice, a public authority is not obliged to comply with section 1(1) unless the fee is paid.

74. Section 12(1) provides that section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit. Section 12(1) does not exempt the public authority from its duty to confirm or deny unless the estimated cost of complying with section 1(1)(a) alone would exceed the appropriate limit.

75. Section 14(1) provides that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. Section 14(2) provides that a public authority is not required to comply with repeat requests in certain circumstances.

76. The obligations under section 17 when a public authority relies on section 14 are different from the section 17 obligations when a public authority relies on an exemption in Part II.

77. Under section 17(1) if a public authority is relying on a provision in part II relating to the duty to confirm or deny or a claim that the information is exempt information, the public authority must give the applicant a notice which states that

fact, specifies the exemption in question, and states (if that would not otherwise be apparent) why the exemption applies. Under section 17(3), unless the exemption is absolute, the public authority must also state the reasons for its conclusions on the public interest balance.

78. As the Upper Tribunal in **Malnick** [2018] UKUT 72 (AAC) noted in paragraph 74, under section 17(1)(b) 'the public authority must state all the exemptions which is relies on' and must set out 'the basis on which it is claiming all exemptions relied on'. The public authority's duties when relying on section 14 are set out in section 17(5) and are less extensive. The public authority is simply obliged to give the applicant a notice stating the fact that they are relying on section 14. There is no requirement for an explanation of why the public authority has reached this conclusion. Under section 17(6) the public authority is not required to issue any notice if they have already given the same person a refusal notice for a previous vexatious request and it would be unreasonable to issue another one.

79. All notices issued under section 17 have to contain details of any complaints procedure and the right conferred by section 50.

80. In summary, where a request is vexatious a public authority is not obliged to comply with section 1(1)(a) or (b). It is not obliged to confirm or deny if it holds any information. Nor is it obliged to issue a substantive refusal notice under section 17(1) or 17(3) setting out the reasons for refusal. If section 17(6) applies it is not obliged to issue any refusal notice.

81. An applicant who is unhappy with the public authority's response to their FOIA request may make an application (a complaint) to the Commissioner under s.50:

> **50.— Application for decision by Commissioner.**
>
> (1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.
>
> (2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
>
> (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
>
> (b) that there has been undue delay in making the application,
>
> (c) that the application is frivolous or vexatious, or

(d) that the application has been withdrawn or abandoned.

(3) Where the Commissioner has received an application under this section, he shall either—

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17, the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.

…

82. Therefore, section 50(4) permits the Commissioner to specify in a decision notice further steps to be taken by the public authority in relation to:

a. The requirement to confirm or deny whether requested information is held;

b. The requirement to communicate the requested information;

c. The means by which requested information is to be communicated; and/or

d. The requirement to explain to the applicant why an information request has been refused.

83. If a public authority fails to comply with steps specified in a decision notice the Commissioner may, at his discretion, certify the public authority's failure to the High Court, where the public authority may be dealt with as if it had committed a contempt of court (section 54(1) & (3)).

84. Section 57 and section 58 provide a right of appeal against a s.50 decision notice and set out the tribunal's jurisdiction:

> **57.— Appeal against notice served under Part IV**.
>
> (1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.
>
> …
>
> 58.— Determination of appeals.
>
> (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.

85. Where a public authority fails to comply with the terms of a substituted decision notice issued by the tribunal under section 58(1), any application to certify this failure as a potential contempt of court must be made to the Upper Tribunal (section 61).

Vexatious requests

86. Guidance on applying section 14 is given in the decisions of the Upper Tribunal and the Court of Appeal in **Dransfield** ([2012] UKUT 440 (AAC) and [2015] EWCA Civ 454). The tribunal has adapted the following summary of the principles in **Dransfield** from the judgment of the Upper Tribunal in **CP v Information Commissioner** [2016] UKUT 427 (AAC).

87. The Upper Tribunal held that the purpose of section 14 must be to protect the resources of the public authority from being squandered on disproportionate use of FOIA. That formulation was approved by the Court of Appeal subject to the qualification that this was an aim which could only be realised if 'the high standard set by vexatiousness is satisfied' (para 72 of the Court of Appeal judgment).

88. The test under section 14 is whether the request is vexatious not whether the requester is vexatious. The term 'vexatious' in section 14 should carry its ordinary, natural meaning within the particular statutory context of FOIA (para 24). As a

starting point, a request which is annoying or irritating to the recipient may be vexatious but that is not a rule.

89. Annoying or irritating requests are not necessarily vexatious given that one of the main purposes of FOIA is to provide citizens with a qualified right of access to official documentation and thereby a means of holding public authorities to account. The Commissioner's guidance that the key question is whether the request is likely to cause distress, disruption, or irritation without any proper or justified cause was a useful starting point as long as the emphasis was on the issue of justification (or not). An important part of the balancing exercise may involve consideration of whether or not there is an adequate or proper justification for the request.

90. Four broad issues or themes were identified by the Upper Tribunal as of relevance when deciding whether a request is vexatious. These were: (a) the burden (on the public authority and its staff); (b) the motive (of the requester); (c) the value or serious purpose (of the request); and (d) any harassment or distress (of and to staff). These considerations are not exhaustive and are not intended to create a formulaic checklist.

91. Guidance about the motive of the requester, the value or purpose of the request and harassment of or distress to staff is set out in paragraphs 34-39 of the Upper Tribunal's decision.

92. As to burden, the context and history of the particular request (in terms of the previous course of dealings between the individual requester and the public authority in question) must be considered in assessing whether the request is properly to be described as vexatious. In particular, the number, breadth, pattern, and duration of previous requests may be a telling factor. Thus, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious. A requester who consistently submits multiple FOIA requests or associated correspondence within days of each other or who relentlessly bombards the public authority with email traffic is more likely to be found to have made a vexatious request.

93. Ultimately the question was whether a request was a manifestly unjustified, inappropriate, or improper use of FOIA. Answering that question required a broad, holistic approach which emphasised the attributes of manifest unreasonableness, irresponsibility and, especially where there was a previous course of dealings, the lack of proportionality that typically characterises vexatious requests.

94. In the Court of Appeal in **Dransfield** Arden LJ gave some additional guidance in paragraph 68:

> "In my judgment the Upper Tribunal was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my

own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available..."

95. Nothing in the above paragraph is inconsistent with the Upper Tribunal's decision which similarly emphasised (a) the need to ensure a holistic approach was taken and (b) that the value of the request was an important but not the only factor.

96. The lack of a reasonable foundation to a request was only the starting point to an analysis which must consider all the relevant circumstances. Public interest cannot act as a 'trump card'. Rather, the public interest in the subject matter of a request is a consideration that itself needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious (see **Cabinet Office v Information Commissioner and Ashton** [2018] UKUT 208).

The role of the tribunal

97. 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, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

List of issues

98. The parties agreed that the issues for the tribunal to determine were:

(1) With reference to FOIA section 14:

(a) What is the purpose and value of the request?

(b) Are FOIA sections 40(2), 41(1), 43(2) and 35(1)(a) relevant matters to be taken into account when considering whether FOIA section 14 is applicable?

(c) What does the evidence show about the time it will take the Department to consider and redact text from the requested correspondence which engages FOIA sections 40(2), 41(1), 43(2) and 35(1)(a) FOIA?

(2) Is FOIA section 40(2)(a) applicable as an exemption on the basis that the request for disclosure of the PCN and operator references constitutes personal data?

(3) Is FOIA section 36(b) (ii) and (c) applicable as an exemption on the basis that the request relates to information which would prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs and the free and frank exchange of views for the purpose of deliberation?

(4) What is the relevance, if any, to the above exemptions of the BPA's offer to fund the costs of the work by Department?

(5) How should the tribunal dispose of this appeal?

99. Following the hearing the tribunal identified an additional issue relating to its jurisdiction, plus a number of issues which fall broadly under (5) above (how the tribunal should dispose of the appeal). The parties were given the opportunity to and did provide written submissions on these additional issues:

    a. whether the tribunal had jurisdiction to determine the application of substantive exemptions in a 'gateway' appeal, i.e. where the public authority has relied on, for example, section 12 or 14 and the tribunal determines that they are not entitled to rely on section 12 or 14?

    b. If the tribunal does have jurisdiction (and if it were to conclude in this appeal that section 14 does not apply):

        i. Is it appropriate for the tribunal to determine the application of substantive exemptions (either in this appeal or generally), before the public authority (or the Commissioner or the tribunal) have read and reviewed the withheld information?
        ii. Can (and/or should) the tribunal decide to order the public authority to issue a fresh response rather than determining the application of the substantive exemptions?
        iii. If the tribunal determines the application of the section 40(2) and 36 and decides that the information cannot all be withheld, is it appropriate to allow the public authority to raise other exemptions? If so, can and/or should this be done by ordering a fresh response or by allowing further exemptions to be raised in the course of the tribunal proceedings.

Evidence

100. We read an open and a closed bundle. The closed bundle consists of five items of sample correspondence from the withheld material. The tribunal was satisfied that it was necessary to withhold this information under rule 14.

101. The open bundle included witness statements from:

    a. Alison Tooze, Chief Engagement and Policy Officer at the BPA

    b. Caroline MacDonald, Assistant Director for the Department.

102. We heard open evidence from those witnesses.

103. It was necessary to hold a short closed session to hear closed evidence from Ms McDonald. The following gist of the closed session was provided to the BPA and the BPA was given the opportunity to make written submissions after receiving the gist:

    "1. On 25 February 2025 at 15.30 until 15.40 the Tribunal panel and the Second Respondent entered into a CLOSED session.

    2. The panel considered the CLOSED bundle which consisted of a sample of five pieces of correspondence taken from the 416 pieces of correspondence which form the subject of the request. The sample of five letters consisted of different types of letters including short emails to the Second Respondent, longer letters to MPs and letters which referred to and disclosed the PCN.

    3. The panel asked Ms Caroline MacDonald some questions about the sample of five letters.

    4. Counsel for the Second Respondent made no submissions in CLOSED."

Skeleton arguments/oral submissions

<u>Submissions on behalf of the BPA</u>

104. Mr Pitt-Payne KC said, with reference to Cabinet Office v Information Commissioner and Ashton [2018] UKUT 208, that the application of section 14 FOIA requires a holistic assessment of all the circumstances and that the public interest in the subject matter of a request needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious.

105. He submitted that the relevant time for the assessment of whether the request is vexatious is 18 September 2023, the date on which the Department responded to the BPA's request.

106. Mr Pitt-Payne KC reminded the tribunal that vexatiousness is a high hurdle, consistent with the constitutional nature of the right of access to information under FOIA.

107. Mr Pitt-Payne KC noted that it was clear from Ms McDonald's evidence that she considered the BPA to be a responsible body and that she regarded as helpful the BPA's engagement with the Department on policy issues. He submitted that the BPA did not fit what one would expect in a maker of vexatious requests.

108. Mr Pitt-Payne KC submitted that difficulties in preparing the code of practice are an important part of the context for this appeal. Mr Pitt-Payne KC noted that Ms McDonald accepted in evidence that it was important to get the evidence base right and therefore the replies to the call for evidence were an important matter.

Public interest/serious purpose and value

109. Mr Pitt-Payne KC submitted that the serious purpose and value of the request is very substantial. The BPA relies on the importance of the proposed code of practice, specifically the issues about debt recovery fees and the level of PCN charges and the history in terms of the difficulty in seeking to frame a code of practice. Mr Pitt-Payne KC argued that the importance of the call for evidence and the BPA being able to respond properly was not diluted by the fact that there would be a further consultation. The response to the call for evidence would feed into the preparation of the proposed code and the BPA's concern was to have their input sooner rather than later given the fraught history.

110. It was submitted that the 416 items of correspondence were an important part of the evidence base for the proposals set out in the impact assessment and the accompanying call for evidence. Mr Pitt-Payne submitted that the items of correspondence were not being relied on by the Department simply as evidence of the concerns that the public have, but as evidence that those concerns were well-founded. The impact assessment states that there are problems in various respects with the private parking regime and that has informed the proposals in the impact assessment. The BPA wants to carry out its own scrutiny of whether or not the letters are in fact evidence of the things the impact assessment says they are evidence of.

111. For the purposes of responding to the call for evidence in a properly informed way, he argued that it was (and remains) highly material for the BPA to be able to conduct its own analysis as to whether the correspondence does indeed constitute evidence of these matters complained of. The public interest in ensuring that responses to the call for evidence are as well-informed as possible is a compelling one, particularly given the history of repeated unsuccessful attempts to put in place a Code under the 2019 Act.

112. The BPA wanted to analyse the letters as part of the process of testing the assumptions made in the impact assessment. Mr Pitt-Payne KC argued that the evidence base can be strengthened not only by putting in additional information

but also by re- analysing the information that the government has analysed and looking at the inferences that can properly be drawn from it.

113. It was noted that the call for evidence and the impact assessment make clear that the 416 letters form part of the rationale for the proposed intervention to which the impact assessment relates i.e. limits to the parking charge and limits to or removal of debt recovery fees.

114. Mr Pitt-Payne KC noted that Ms Tooze's evidence was that she understood that the government's position was that they were not minded to depart from the options already set out in the impact assessment without good reason. He said that it was not suggested that the consultation was a sham or that the government had completely closed its mind but this evidence supports the importance of a full and proper response to the call for evidence, because it is an indication that the government would need some persuading to depart from the five options identified in the impact assessment.

115. Although the letters requested by the BPA have not informed the modelling in a narrow economic sense, he submitted that they certainly informed the impact assessment's overall assessment of what the options ought to be.

116. He submitted that it was important for the BPA, its members and the public that the BPA and others could give a full response to the call for evidence.

117. Mr Pitt-Payne KC argued that the public interest is compelling where the withheld material had been considered in the course of the impact assessment and formed part of the evidence base by reference to which options were identified and framed in the impact assessment. He said that disclosure would assist those with relevant expertise, including the BPA, in responding to the call for evidence and improving the evidence base. The impact assessment made clear that the correspondence painted a negative picture of the private parking industry in many respects. That fed into the government's policy position and the options that were under consideration. In those circumstances he submitted that it was material for the BPA to conduct its own analysis to ascertain whether the inferences drawn by the government were correct.

118. Mr Pitt-Payne KC said that there was always a strong public interest in well informed responses to public consultations, particularly where the consultation is ongoing at the relevant date and where the consultation affects the BPA, its members and the public generally in particular the compliant motorist.

119. Although there will be a further iteration of the code of practice, Ms McDonald accepted that the call for evidence will feed into and inform that iteration. Mr Pitt-Payne KC said that this was an opportunity to affect the government's thinking before they get to the stage of formulating a draft.

120. He noted that R v Secretary of State for Health exp United States Tobacco International Inc [1992] 1 QB 353 was a pre-FOIA authority directed to the different issue of common law fairness in relation to consultations.

Burden

121. The Department said that both the time estimate for responding to the request (43 hours) and the level of officer/s that would be required (Executive Officer or Higher Executive Officer checked by Grade 6) feed into the disruption to the Department's work. The BPA challenged both the time estimate and the level at which the work would need to be done.

122. Mr Pitt-Payne KC said that the time estimate is predicated on the four exemptions the Department relies on requiring significant consideration and judgment. He submitted that this is overstated and that much of the exercise would be 'mechanical' in the sense that it would be of a routine nature and not involve significant elements of judgement.

123. Mr Pitt-Payne KC argued that much of the work in relation to identifying personal data and confidential information could be done as a routine matter by a relatively junior member of staff requiring little skill, judgment or effort. He said that the other exemptions relating to commercial interests and policy development were unlikely to be relevant.

124. In relation to personal data the BPA said that the PCN number and operator references should be disclosed, but obvious identifiers like names and addresses should be redacted and would be regularly present and easily identified. Mr Pitt-Payne KC acknowledged that there may be cases requiring a further element of judgment but a very great part of finding and redacting personal data would be wholly routine.

125. In relation to sensitive or confidential data falling potentially under section 41 FOIA, Mr Pitt-Payne KC submitted that those who were generally familiar with the correspondence could draw up a list of categories of information that should be redacted and more junior staff could do the redactions. Much of the task would then be relatively routine not requiring large amounts of skill and judgment.

126. In relation to the section 43 exemption, Mr Pitt-Payne KC submitted that it was speculative and inherently unlikely that this exemption 'would be in play'. The correspondence covers operators and locations all over the country. He said that it was highly unlikely that the requested correspondence would include sufficient information about a parking operator, location or private landowner to have an impact that would or would be likely to be prejudicial to their commercial interests.

127. In relation to the exemption in section 35 Mr Pitt-Payne KC noted that the requested correspondence was unsolicited, ad hoc and not submitted as part of a

policy making exercise. The Department said that there was the possibility that it was written with a view to modifying or influencing public policy. Mr Pitt-Payne KC argued that this was insufficient to bring the correspondence within the scope of section 35 and that it would be too broad an interpretation of that section.

128. Mr Pitt-Payne KC made four further general points about burden:

    a. Whoever carries out the exercise of responding to the request will get faster as they go on, whereas the Department's estimate is simply extrapolated from the time it took to deal with the first five sample items.

    b. The Department is the author of its own misfortunes because its system makes it difficult to locate items of correspondence. The letters requested by the BPA have not been separately filed and retained despite being subject to detailed analysis as part of the impact assessment.

    c. Identifying and downloading the correspondence can be done by the most junior staff available.

    d. The Department overstates the seniority of staff required to undertake the work and therefore the anticipated level of disruption.

129. Mr Pitt-Payne KC reminded the tribunal that the BPA had offered to fund the work by defraying the costs of the time of departmental staff or paying for some of the work to be done by external staff or an external law firm. He said that if internal staff produced a PDF of the correspondence there would be no need for anyone external to access the Department's systems.

130. Finally Mr Pitt-Payne KC argued that even if the tribunal accepted the 43 hour estimate this was not a vexatious request in the light of the significant public interest considerations. The burden amounts to a little over a week's work, most of which can be done at a junior level. He submitted that the evidence from Ms McDonald that it would be disruptive to the Department's wider policy work in this area was overstated.

Submissions on disposal of the appeal

131. Mr. Pitt-Payne submitted that if the tribunal found that the request was not vexatious the tribunal should determine the application of the exemptions relied on by the Department in Part II FOIA (section 40(2) and section 36). If the tribunal determined that those exemptions did not apply, it should order the Department to disclose the information. He submitted that the Department should not be given the opportunity to rely on additional exemptions.

132. The tribunal also read and took account of written submissions on the gist, provided after the hearing.

Submissions on behalf of the Department

133. Mr Ostrowski made the following overarching points. He said that the requested letters were used to inform a thematic understanding of concerns which informed the impact assessment underlying the call for evidence. He noted that this was a call for evidence, not a consultation. The call was for evidence to inform a draft code of practice and an amended impact assessment that would be the subject of consultation. He argued that there was a very important next stage where the BPA or members of the public could shape policy and the Department's thinking. If the Department does not conscientiously take account of responses to the consultation, there is a route for redress.

Public interest/purpose and value

134. He submitted that the draft impact assessment refers to common themes which are 'mentioned' in the correspondence. The Department did not evaluate individual letters or make any findings about whether correspondents were accurately describing the facts and circumstances surrounding their complaint. The letters were only part of the evidence that informed the themes and the Department openly acknowledged the limitations of the evidence identifying the themes. All respondents were therefore aware of the limited weight that the Department was placing on the evidence and that there would be another round of consultation.

135. Mr Ostrowski noted that the impact assessment showed very clearly that the 416 letters were used to identify themes related to private operators. The information was not used to inform the Department's modelling. The modelling relates to the costs of the proposals not the benefits. The BPA therefore does not need this information in order to consider the modelling.

136. Mr Ostrowski noted that the BPA intended to analyse and check the veracity of the complaints in the requested correspondence. He submitted that this does not acknowledge that the correspondence was used to inform an understanding of the themes and issues that members of the public had with private parking charges. If the BPA was able to prove or disprove the veracity of the concerns raised, that would not, it was submitted, affect the thematic understanding revealed by the correspondence and echoed in other sources. He argued that the analytical process the BPA claims it would embark on is not material to the use to which the correspondence was put by the Department when devising the call for evidence, nor will it be material to the drafting of the new code of practice.

137. He noted that Ms Tooze accepted that the five themes were likely to be the themes about which aggrieved motorists would write to their MPs or Ministers. The BPA have not identified any other issues or themes.

138. Mr Ostrowski stated that the evidence given by Ms Tooze to the effect that the analysis of the news articles did not reflect the contents of those news articles did not appear in her witness statement, nor is it pleaded in any of the documents. It

was not developed in evidence or fleshed out in closing submissions by Mr Pitt-Payne KC by, for example, identifying the figures that the BPA's analysis had shown were wrong. Mr Ostrowski urged the tribunal to treat with extreme caution the assertion that the BPA need to analyse the letters because the Department might have got the numbers wrong.

139. Mr Ostrowski highlighted that it was said in evidence on behalf of the BPA for the first time that the Department was not intending to take into account the responses to the consultation and that is why the BPA need to see these letters at this earlier stage. Ms Tooze accepted that she was not in the meeting when this was said, and she had not seen any notes of the meeting. Mr Ostrowski submitted that it was unattractive to make a serious accusation of a sham consultation in such a way and this should affect the weight given to the evidence from the BPA.

140. Mr Ostrowski submitted that this reveals the underlying reason for wishing to see the letters, which is that the BPA have a wrong and unevidenced concern that the Department will not take into account the concerns that they raise. If that really is correct, he noted that there is a remedy by way of judicial review.

141. Mr Ostrowski acknowledged that Mr Pitt-Payne KC said in closing that it was not being suggested that the consultation was a sham, but that the conversation showed that there was a need for a proper responses to the call for evidence. Mr Ostrowski submitted that first, that presupposes such a conversation took place and second, even if it did, that fact does not explain why the BPA needs the details of what is set out in the correspondence to undermine the thematic understanding set out in the impact assessment, particularly when it was accepted by Ms Tooze that the issues identified in the impact assessment reflect the broad issues that are likely to exercise motorists who have received PCNs.

142. Mr Ostrowski submitted that there is no evidence that the Department is intending to take a decision without proper consultation.

143. On that basis Mr Ostrowski submitted that the purpose and value of the request is overstated by the BPA.

Burden

144. Mr Ostrowski noted that it was agreed that information provided in confidence and personal data would need to be redacted. He submitted that Ms McDonald gave compelling evidence about the ways in which, in her experience, people do provide sensitive information or information that may be sufficient to identify the writer. He said that it was clear from her evidence that in her experience, which should be given some significant weight, redaction of this type of information is not something that can be done on a mechanical basis. It involves the application of thought and cannot simply be delegated to a very junior person to rattle through.

145. In relation to section 43 Mr Ostrowski reminded the tribunal that Ms McDonald properly accepted that it was unlikely that material relevant to damage to commercial interests would feature in the letters, but she maintained that it could not be discounted. He noted that examples are given in the pleadings.

146. In relation to section 35 it was submitted that there is a wide meaning of 'relates to' and Mr Ostrowski said that it was possible that correspondence might have been sent with a view to influencing the formulation or development of government policy.

147. Mr Ostrowski said that the Department has always candidly accepted that the letters are unlikely to feature information that would fall under section 43 or 35 but a person with judgment will have to consider, in relation to each item of correspondence, whether they do. That is not a straightforward task that could be done by a very junior member of staff. In any event, Mr Ostrowski noted Ms McDonald's evidence that there were no administrative officers in her team and that it would not be realistic to use administrative officers from other teams.

148. Mr Ostrowski submitted that there is no quicker or easier way of undertaking the six-step process that is set out in the pleadings:

    a. Searching for the relevant correspondence on the Department's correspondence system

    b. Downloading the correspondence

    c. Converting the correspondence to PDF

    d. Reading each piece of correspondence and considering whether any FOIA exemptions apply

    e. Redacting the correspondence as necessary

    f. Review of the redactions by team leaders

149. The Department estimates that the process for all 416 letters would take 43 hours in total.

150. The evidence of Ms McDonald was that the first three steps would need to be carried out individually for each piece of correspondence.

151. Mr Ostrowski submitted that society rightly expects that Ministerial correspondence is treated with considerable care and protection and it would be quite wrong to allow access to everyone in the civil service or to allow bulk downloads of correspondence to be extracted and saved in a separate folder where it could be viewed by different people. The evidence shows instead that Ministerial correspondence is properly protected. That has implications for the amount of time it would take to do the work. He submitted that certainly the first three steps would not get any quicker as the work progressed.

152. In relation to the BPA's offer to fund the work, Mr Ostrowski noted Ms McDonald's evidence that although she was not an expert in procurement, she had serious concerns that the process of enabling someone external (either at a law firm or a contractor) to gain access to the system, to be briefed appropriately and to then undertake the job to the same standard as would be expected of a civil servant is not something that is likely to result in any time saving and would require quite significant input from others. Mr Ostrowski submitted that the burden would be oppressive burden even if some or all of the costs could be defrayed and that the problem was capacity as much as cost.

Submissions on disposal of the appeal

153. In his skeleton argument Mr. Ostrowski merely submitted that the tribunal should uphold the Commissioner's decision and dismiss the appeal. The Judge asked him in the hearing what the tribunal should do if the tribunal decided that the request was not vexatious. He submitted that the conventional order would be that the Department take the decision again and maintain its reliance on other exemptions. Although he initially suggested that the Department would be able to rely on section 14 again, he accepted that this was unlikely although not 'inconceivable'.

Discussion and conclusions

154. In summary, whilst we find that responding to this request will place on the Department a significant burden, albeit not a grossly oppressive one, we have concluded that this burden is not disproportionate taking a holistic approach and in the light of our conclusions below. In our view, in the particular circumstances of the case, the strong and compelling purpose and value of the information requested by BPA outweighs the Department's resource burden of complying with its duty to respond to the request.

155. In **Kennedy v Charity Commission** [2014] 2 WLT 808, Lord Sumption, with whom Lord Neuberger and Lord Clarke agreed, said as follows, at para 153:

> The Freedom of Information Act 2000 … introduced a new regime governing the disclosure of information held by public authorities. It created a *prima facie* right to the disclosure of all such information, save in so far as that right was qualified by the terms of the Act or the information in question was exempt. The qualifications and exemptions embody a careful balance between the public interest considerations militating for and against disclosure. The Act contains an administrative framework for striking that balance in cases where it is not determined by the Act itself. The whole scheme operates under judicial supervision, through a system of statutory appeals.

156. It is important to remind ourselves of those observations. FOIA creates a *prima facie* right to disclosure of information held by public authorities, save in so far as that right is qualified by the terms of FOIA or the information in question is exempt. Further, we remind ourselves that the qualifications and exemptions embody a

careful balance between the public interest considerations militating for and against disclosure.

157. The purpose of section 14 is "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA." (Upper Tribunal, **Dransfield,** para 10). This formulation was approved by the Court of Appeal subject to the qualification that that Parliament had chosen to use a strong word to achieve this purpose and therefore the hurdle of satisfying it is high (see paragraph 72 of **Dransfield** in the Court of Appeal and paragraph 22 of **Cabinet Office v Information Commissioner and Ashton** [2018] UKUT 208 (AAC).

158. Section 14 may be invoked on the ground of resources alone and a substantial public interest underlying the request does not necessarily trump a resources argument. The public interest in the subject matter is a consideration that needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious (paragraph 27 of **Ashton**).

Factors not present

159. The Department does not assert, and there is no evidence of, harassment or distress or inappropriate motive. It is clear from Ms McDonald's evidence that she regards the BPA as a responsible body that engages effectively and helpfully with the Department on policy issues.

Purpose/value/public interest

160. The regulation of private parking has a wide impact. Given the high percentage of households that have use of a car, a code of practice on private parking has the potential to affect a very large proportion of the population. As the tribunal notes above, there have been repeated unsuccessful attempts to put in place a code of practice under the 2019 Act. There is a high public interest in ensuring that an effective Code is put in place.

161. The information requested relates to a call for evidence. This is not the final stage in the consultation process, and we bear that in mind. The call for evidence is intended to inform and will be followed by a new draft code of practice and an amended impact assessment. Those documents will be the subject of consultation. We accept that there remains a further opportunity for members of the public and the BPA to shape policy and the Department's thinking. We accept that the government has not closed its mind to suggestions of other approaches.

162. The 416 letters have not been used to inform the 'modelling' in the impact assessment in a narrow sense, but the draft impact assessment and the call for evidence have used these 416 letters as an evidential base, which has influenced the options currently included in the draft impact assessment. This is clear from the wording of the impact assessment and the call for evidence.

163. The call for evidence states that 'there is evidence to suggest that the current system of private parking regulation is not fit for purpose' and identifies as one of two key indicators of this the qualitative evidence which consistently highlights similar themes relating to negative user experience with private car parks. That is a reference, inter alia, to the 416 letters.

164. The call for evidence stresses the importance of this stage in the process:

> As the final impact assessment will be compiled following this call for evidence, it is important that anyone who feels important evidence is missing from the current draft document, that assumptions are incorrect, and/or that they are able to provide further insights into issues covered, provides that evidence now so that it can inform the consultation on parking charges and debt recovery fees.

165. The impact assessment itself, under the heading 'What is the problem under consideration? Why is government action or intervention necessary?' states:

> …there are concerns from consumer groups, MPs, and the public highlighting a range of poor practices and behaviours within the sector that the current system of self-regulation has not adequately dealt with…. Given the current system of self-regulation does not appear to be working in addressing these issues, it is necessary to introduce a new code of practice.

166. The impact assessment later states 'There is evidence to suggest that the current system of private parking regulation is not fit for purpose. The substantial increase in parking charge volumes since the introduction of the POFA and the concerns raised about existing industry standards are key indicators of this'. The text that follows makes clear that the evidence of those concerns includes the 416 letters and the analysis of the themes identified from that correspondence.

167. The impact assessment makes clear, in our view, that the Department's analysis of those letters forms part of the evidence base upon which the Department has concluded that the current system is not fit for purpose.

168. The letters are part of the justification for intervention and have informed the proposed options set out in the impact assessment. The Department has specifically justified its conclusion that there is public concern about the level of parking charges and debt recovery fees, at least in part, by reference to its analysis of the correspondence.

169. We accept that the analysis of the letters that was carried out to determine 'relevant themes and sub-themes' was done on the basis of the percentage of correspondence that 'mentioned' a particular theme or sub-theme.

170. We do not accept that this means that there is no useful analysis of that correspondence that could be carried out by the BPA. Questions such as whether that correspondence supports the conclusion that the current system is not fit for

purpose or, for example, whether concerns are 'frequently raised through correspondence… about the private parking business model, suggesting that operators profiting from the enforcement of charges can incentivise them to adopt poor practices to increase the number of parking charges issued' (open bundle p 254) are questions that can be informed by a deeper and more context-based analysis than the one the Department has carried out.

171. The call for evidence was intended to test assumptions made in the impact assessment and, where relevant, strengthen the evidence underpinning the impact assessment.

172. Ms McDonald accepted in evidence that getting as good a response as possible to the call for evidence was an important matter in itself because it would feed into the preparation of the proposed code and the proposal that the government would put forward to the next stage of consultation.

173. Given the wide impact of the proposed measures, we accept that there is a strong and compelling public interest in responses to the call for evidence being well-informed and we accept that disclosure of these letters at the relevant date when consultation was ongoing and before a draft code of practice was formulated for consultation would serve that public interest.

Burden

174. We are not satisfied that this case can properly be characterised as one where is a grossly oppressive burden on the public authority, particularly when weighed against the purpose and value of request.

175. It has not been necessary for us consider whether the burden is, in reality, lower than asserted by the Department either in terms of the time it would take to respond to the request or in terms of the level of seniority of staff that would be required. Nor has it been necessary for us to consider the practicality or the impact of the BPA's offer to fund the work.

176. That is because we take the view, even assuming that the Department is correct in its estimate that it will take 43 hours in total to respond to the request including a first line review by and Executive Officer or Higher Executive Officer and then a second line check by Grade 6, this is not a grossly oppressive or disproportionate burden when considered against our findings on the purpose and value of the requested information.

177. Although Ms MacDonald indicated that the time estimate was likely to be exceeded under the new system, no revised estimate has been produced and we have accordingly proceeded on the basis of the original estimate.

178. Although not directly relevant to determining whether the BPA's request may be labelled as vexatious, we have found it helpful to contextually take account of the section 12 limit as an indication of the maximum amount of time that Parliament

considered it was appropriate to spend on the specified tasks when answering a FOIA request, no matter how high the public interest in the requested information.

179. The cost limit for central government departments gives, in effect, a time limit of 24 hours work for specified tasks involved in responding to a request. This is not a section 12 appeal and the Department has included in its time estimate tasks that were not included by Parliament in the regulation 4(3) of the Fees Regulations.

180. Assuming a 37-hour week for a civil servant, the section 12 limit amounts to about 3 ¼ days' work, whereas the Department estimates that responding to this request would take just under 6 days' work. Compared to the section 12 limit, this is an additional burden of just over 2.5 days work. While the Department's estimate does exceed the section 12 limit, it is not radically out of line with the burden that a government department would be expected to absorb for purposes of the section 12 cost limit.

181. We accept that there is likely to be some impact on the ability of the relevant team to also carry out its other functions whilst responding to the request, but given the estimated amount of work involved, we do not accept that this is likely to seriously delay, disrupt or impact upon either the progress of the code of practice or the other work of the department. Taking account of the value of the request we do not accept that the impact is disproportionate.

182. In conclusion, and taking all the above into account, we find that nearly 6 days' work to answer the BPA's request is a significant, but not grossly oppressive, burden on the Department. Taking a holistic approach and taking account of the purpose and value of the request, we have concluded that this is not a disproportionate burden and that the request is not a manifestly unjustified, inappropriate or improper use of FOIA.

183. For those reasons we find that the Commissioner was wrong to conclude that the request was vexatious and the appeal is allowed.

Observation on the BPA's offer to fund the work

184. This does not form part of our decision. We observe that it ought to be possible to make use of the BPA's offer to pay for the work to reduce the impact on public funds and resources to at least some extent. For example, in our view, the use of external lawyers or other suitable qualified agents to review and redact the requested information ought not to lead to the difficulties envisaged by Ms McDonald in relation to confidentiality and procurement if the work is done by someone who is regularly instructed by the Department on a confidential basis. The BPA could simply bear the costs.

185. There is no reason, in our view, for the BPA to insist that the persons undertaking the work must be 'independent' (or jointly instructed) when it is the Department as the public authority who must form a view on any applicable exemptions or proposed redactions.

Can or should the tribunal go on to determine the application of exemptions in Part II FOIA?

186. Mr Pitt-Payne urges the tribunal, having allowed the appeal, to go on to determine the application of section 40(2) and section 36, and if we reject those exemptions to order disclosure of the withheld material.

187. The other parties submit that we have no jurisdiction to determine the application of those exemptions, and that, having allowed the appeal, the tribunal should require the Department to provide a fresh response to the request.

How this issue arose and the parties' positions

188. The Department initially refused to comply with the request under section 14. It has not yet reviewed the content of each piece of correspondence to consider if any exemptions apply, because that is part of what it says is an unreasonable burden. It has not yet complied with its section 1 duty or issued a substantive refusal notice under section 17 setting out the exemptions claimed and why they apply.

189. The outcome of requiring a fresh response was anticipated by the BPA as at least a potential outcome of the appeal. In section 8 of the notice of appeal and in the grounds of appeal the BPA specified the following outcomes sought in the alternative:

> "The BPA asks the Tribunal to set aside the Commissioner's Decision Notice and to substitute a Decision Notice:
>
> (a) requiring DLUHC to disclose the information falling within the scope of the Request ("the Disputed Information"); or alternatively
>
> (b) requiring DLUHC to serve a further response to the Request on the basis that the Request is not vexatious."

190. The matter was then complicated by the Department in its response to the appeal stating as follows:

> "18. Additionally, pursuant to **Birkett v DEFRA** [2011] EWCA Civ 1606, [2012] PTSR 1299, DLUHC seeks to rely on two separate free-standing exemptions which were not considered by the Commissioner:
>
> a. First, DLUHC seeks to rely on s.40(2) FOIA as a free-standing exemption as the Request to provide the correspondence with Parking Charge Notice ('PCN') and operator reference will, inevitably, result in the disclosure of personal data.

b. Secondly, DLUHC seeks to rely on the exemption in s.36 FOIA that disclosure of the information would prejudice the effective conduct of public affairs."

191. Whilst it was clear that these were not the only exemptions that the Department anticipated might apply (it was inherent in the Department's section 14 argument that sections 41(1), 43(2) and 35 might apply), the Department set out its substantive arguments only on the 'two free-standing exemptions' and it included only those two exemptions in the proposed list of issues for the tribunal to determine.

192. The BPA's reply provided a substantive response to the exemptions in section 40(2) and section 36 and indicated that its primary position on disposal was that the tribunal should determine all issues raised by its request, including the application of the various exemptions raised by the BPA. If the appeal succeeded, the BPA submitted in its reply, the tribunal should require the Department to disclose the disputed information rather than requiring it to issue a revised request.

193. In response to the tribunal's directions following the hearing, the Department revised its position and submitted that the tribunal, having allowed the appeal in relation to section 14, has no jurisdiction to determine the application of any substantive exemptions under Part II and submitted that we should require the Department to issue a fresh response to the request.

194. The Commissioner takes the same view. We accept that the Commissioner, in his submissions on this issue, appears not to have appreciated that the Department explicitly pleaded reliance on section 40(2) and section 36 FOIA in its response. That does not, in our view, affect the validity of the Commissioner's submissions on jurisdiction. If the tribunal has no jurisdiction to deal with a matter, the question of whether or not it is pleaded is not relevant.

195. The BPA's primary position is that the tribunal should determine the application of sections 14, 40(2) and 36 and if the tribunal concludes that none of these apply, we should simply order disclosure of the information without giving the Department the opportunity to consider the content of the information and to determine if they contain information that is exempt under other provisions. This is not, in our view, sustainable. This submission underlines the undesirability of the tribunal determining substantive exemptions before the public authority has had the opportunity to review and consider the withheld information.

196. The Department's alternative position is that we should determine the application of sections 36 and 40(2) and then:
    a. The tribunal should direct the Department, within 28 days of the tribunal's decision to disclose all of the disputed information, save for any information that it considers is exempt under section 35(1) and section 43(2).

b. If the Department withholds any information under section 35(1) and/or section 43(2) then the case should come back before the Tribunal for it to consider whether those exemptions have been properly applied.

The issues we need to determine

197. It is necessary to consider the following:

a. Does the tribunal have the power to require the public authority to issue a fresh response to the request, in the light of **Information Commissioner v Malnick and the Advisory Committee on Business Appointments** [2018] UKUT 72 (AAC) and **NHS England v Information Commissioner and Dean** [2019] UKUT 145?

b. Does the tribunal, having allowed the appeal in relation to section 14, have jurisdiction to determine the application of any substantive exemptions under Part II?

c. How should the tribunal dispose of the appeal?

The usual approach

198. Where the public authority refuses the request in reliance on one or more of the exemptions under Part II FOIA, including exemptions relied on at the time of responding to the request and any exemptions raised during the course of the Commissioner's investigation, the Commissioner will determine the application of those exemptions. If the Commissioner concludes that the public authority was not entitled to rely on any of those exemptions, he will issue a decision notice requiring the public authority to disclose the information. In those circumstances the public authority has issued a substantive refusal notice having had the opportunity to locate and review the requested information and to identify any potential exemptions. Following the Commissioner's decision notice the public authority does not get the opportunity to consider the request again and raise any alternative exemptions (unless the Commissioner's decision is subject to the full merits review of the tribunal).

199. Similarly, in an appeal to the tribunal, if the request was initially refused in reliance on one or more exemptions under part II, the tribunal will determine the application of any exemptions determined by the Commissioner or raised by the public authority during the tribunal proceedings. If the tribunal concludes that the public authority was not entitled to rely on any of those exemptions, it will order the public authority to disclose the information. The public authority does not get the opportunity, following the tribunal's decision, to consider the request again and raise any alternative exemptions.

200. A different approach is taken where the public authority relies initially on section 14 (or 12). Where the Commissioner determines that a public authority cannot rely on section 12 or section 14, the usual approach is to issue a decision notice

requiring the public authority to issue a fresh response which does not rely on section 12 or 14. This is because the public authority has not yet complied with its section 1(1) duty or issued a substantive refusal notice under section 17(1).

201. Since it relied on section 14 (or 12) it is likely that the public authority has not located and reviewed the requested information to identify any potential exemptions. The Commissioner does not simply require the public authority to disclose the information without allowing it the opportunity to substantively consider the request, review the withheld information and issue a substantive response in compliance with its section 1(1) duty or a refusal notice under section 17 specifying any exemptions that it relies on under part II FOIA.

202. The tribunal often, although not invariably, takes the same approach. A section 12 or 14 appeal is sometimes referred to by the tribunal as a 'gateway' appeal. The public authority has not yet passed through the 'gateway' of its duty to comply with section 1 or section 17 FOIA which, following the Upper Tribunal's Decision in **Malnick v IC and ACOBA** [2018] UKUT 72 (AAC), the public authority would have to do before it can raise 'late' exemptions before the tribunal. Having allowed an appeal against a decision that a request was vexatious, the tribunal requires the public authority to provide a fresh response which does not rely on section 14.

The distinction between section 14 and the exemptions in Part II

203. It is clear from the statutory framework set above, as the Upper Tribunal noted in paragraphs 10 and 11 of **Dransfield,** that section 14 is of a different nature from the exemptions in Part II FOIA:

> 10. It is sometimes said that there is an "exemption" under FOIA for public authorities faced with vexatious requests. This is not strictly accurate. There are, of course, a number of absolute and qualified exemptions, properly so-called (see section 2 and Part II FOIA), which turn on the nature of the requested information. Section 14, on the other hand, is concerned with the nature of the request and has the effect of disapplying the citizen's right under section 1(1). It follows that the purpose of section 2 and Part II is to protect the information because of its inherent nature or quality. The purpose of section 14, on the other hand, must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA…
>
> 11. To that extent, section 14 FOIA operates as a sort of legislative "get out of jail free card" for public authorities. Its effect is to relieve the public authority of dealing with the request in issue, except to the limited extent of issuing a refusal notice as required by section 17. In short, it allows the public authority to say in terms that "Enough is enough – the nature of this request is vexatious so that section 1 does not apply." …

204. In **McInerney v Information Commissioner and the Department for Education** [2015] UKUT 0047 Upper Tribunal Judge Jacobs concluded at paragraph 37 that the difference between sections 12 and 14 and the exemptions in Part II was a difference not a distinction, for the purposes of the issue relevant in that appeal i.e. whether late reliance on section 12 or 14 should be allowed.

205. In that appeal Upper Tribunal Judge Jacobs held that the Department of Education could rely on section 14 for the first time before the First-tier Tribunal where it had initially relied on a substantive exemption under Part II. In those circumstances, the public authority will already have complied with its duties when it responding to the request. It will have confirmed or denied whether the requested information is held and communicated that information or reviewed that information and issued a refusal notice setting out the exemptions claimed and why they apply.

206. Where section 14 is relied on in a public authority's response to a request those statutory differences are material. We find that they are material for the purpose of considering the appropriate outcome when the tribunal determines that the public authority was not entitled to rely on section 14.

Malnick and Dean

207. We considered whether the Upper Tribunal's decisions in **Information Commissioner v Malnick and the Advisory Committee on Business Appointments** [2018] UKUT 72 (AAC) and **NHS England v Information Commissioner and Dean** [2019] UKUT 145 meant that the tribunal did not have the power to require the public authority to issue a fresh response to the request after the tribunal had determined that section 14 did not apply.

208. In **Malnick** the Upper Tribunal held that the First-tier Tribunal does not have the power to remit a case to the Information Commissioner to consider the application of alternative exemptions. The Upper Tribunal said as follows in paragraph 74:

> 74. The first decision-maker in the statutory process is the public authority. Its duties are found in Part 1 of FOIA. An authority must confirm or deny whether requested information is held, and communicate the information which it holds, unless a relevant exemption applies: section 1(1). If an authority communicates information it must do so in accordance with section 11. Where it refuses to either confirm or deny, or to communicate information, it must issue a refusal notice in accordance with section 17 setting out all the exemptions claimed and why they apply. A public authority which correctly applies one of the exemptions on which it relies but incorrectly relies on others, and provides reasons and information in accordance with section 17, has complied with its duties under Part 1. It has complied with its duties under section 1 because section 1 permits it to withhold information to which any exemption applies. It has complied with its duties under section 17 because it has set out the basis on which it is claiming all exemptions relied on. It does not matter that it also incorrectly

relies on other exemptions because the scheme of Part 1 means that, although a public authority must state all the exemptions which it relies upon, it need only be right about one of them.

209. In **Dean** Upper Tribunal Judge Jacobs considered the question of whether or not the tribunal was wrong to remit a case back to the public authority after it had determined that the public authority was not entitled to rely on the Part II exemption claimed but considered that other exemptions might apply. He concluded that it was and set out what **Malnick** decided as follows:

> 8. The 'public authority must state all the exemptions which it relies upon', although 'it need only be right about one of them' (paragraph 74). That duty arises from section 17(1)(b). 'Once the authority has complied with its obligations under sections 1 and 17, it has fulfilled its duties in relation to that request' (paragraph 76).
>
> 9. The Commissioner must consider all issues necessary to support her decision under section 50. If she finds that the public authority was entitled to rely on one exemption, that is sufficient to show that the authority dealt with the request in accordance with Part I of FOIA and she may decide accordingly. If she finds that the authority was not entitled to rely on the exemptions it identified, her duty is to decide whether 'the authority has complied with section 1, and so the Commissioner must decide whether any of the disputed information is exempt in any respect and, if so, specify that respect' (paragraph 80). That duty arises from section 50. And 'once the Commissioner has issued a decision notice stating that the authority has complied with section 1 …, the Commissioner has entirely discharged her functions under section 50' (paragraph 81). This is against the background of the decision in Birkett v the Department for the Environment, Food and Rural Affairs [2011] EWCA Civ 1606, [2012] AACR 32, which decided that the Commissioner was not limited in her consideration to exemptions raised by the parties.
>
> 10. The First-tier Tribunal 'exercises a full merits appellate jurisdiction and so stands in the shoes of the IC and decides which (if any) exemptions apply' (paragraph 90). That follows from section 58(2) and Birkett. As does this crystal clear statement of the tribunal's powers and duties at paragraph 102:
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> > … the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law, and so includes consideration of exemptions not previously relied on but which come into focus because the exemption relied upon has fallen away. It cannot be open to the FTT to remit consideration of new exemptions to the Commissioner …

> 11. It follows that once the public authority has given its response to the request, it has no further role 'save for compliance with a decision notice of the IC or a decision of the FTT' (paragraph 76). And, as I have shown, both the Commissioner and the tribunal are under a duty to consider any exemption that might apply, regardless of whether it has been raised. Once the case is before them, that is their role, not the authority's.

210. We have concluded that it is not impermissible, as a result of **Malnick** as applied in **Dean,** for the tribunal to require the public authority to issue a fresh response where it concludes that the public authority is not entitled to rely on section 14. **Malnick** concerned the question of whether or not the tribunal was permitted to remit the case to the Commissioner. That is not the issue here. Further, the reasoning in **Malnick,** as applied in **Dean** rests on the public authority having confirmed or denied whether the requested information is held and communicated that information or having issued a refusal notice setting out the exemptions claimed and why they apply. None of that is applicable where the public authority asserts that a request is vexatious. If the Commissioner or the tribunal rules that section 14 does not apply, the result is that the public authority has not yet fulfilled all its duties in relation to the request.

211. The position is different where the Commissioner or the tribunal rules that one of the exemptions relied on under Part II is not engaged or the public interest favours disclosure. In those circumstances, as **Malnick** makes clear, the public authority has complied with its duties under section 17 'because it has set out the basis on which it is claiming all exemptions relied on. It does not matter that it also incorrectly relies on other exemptions because the scheme of Part 1 means that, although a public authority must state all the exemptions which it relies upon, it need only be right about one of them'. In those circumstances it is appropriate for the tribunal to move on to determining reliance on other exemptions rather than require the public authority to issue a fresh response.

212. That there is a material distinction between section 14 and the exemptions in Part II that justifies a different approach where the public authority relies initially on section 14 is apparent from paragraph 75 of **Malnick:**

> 75. This analysis is consistent with the powers of the Commissioner to issue a decision notice under section 50(4). Under paragraph (a) the Commissioner must require a public authority to take steps to correct a failure to communicate information or issue confirmation or denial where it is required to do so by section 1(1). But where one exemption is correctly relied on by the authority, there has been no failure to comply with section 1(1) even if the other claimed exemptions do not apply. This explains why section 50(4) does not make any provision for a decision notice to address those other exemptions. Under paragraph (b), the Commissioner must specify the steps to be taken to correct a failure to comply with sections 1(1) or 17. But, even if an authority wrongly relied on some exemptions included

in its refusal notice, this would not amount to a failure to comply with either section.

213. Conversely, where the public authority has wrongly relied on section 14 this would amount to a failure to comply with section 1(1) and section 17. Therefore it is in our view permissible for the Commissioner and the tribunal to take the approach of ordering the public authority to comply with its duties under section 1 where they have found that the public authority is not entitled to rely on section 14.

Having allowed the appeal in relation to section 14, does the tribunal have jurisdiction to determine the application of exemptions under Part II?

214. Both the Commissioner and the Department submitted that the tribunal not only has the power to require the public authority to issue a fresh response but also that the tribunal must do so, because the tribunal does not have jurisdiction to consider substantive exemptions in a case where the public authority only relied on section 14 initially and has not yet complied with its duty under section 1 FOIA.

215. The Commissioner relies on the case of **Dr Michael Smith v Information Commissioner** [2022] UKUT 261 (AAC) in which the Upper Tribunal stated:

> "36. … The FTT's jurisdiction under s.57 is to hear appeals against first instance regulatory decisions. It considers the regulator's decision afresh and is empowered by s.58(1) to serve any notice that the regulator could have served at the time of the decision notice. (emphasis added by the Commissioner).
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> …
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> 42. Nothing in the language of s.57, which refers simply to *'an appeal to the Tribunal against the notice* [served]', suggests that the complainant is permitted to introduce a wholly new complaint, either in addition or in substitution, the subject matter of which is incapable of having been the subject matter of the Commissioner's decision notice. Although there may be good reasons why appeals linked to the same FOIA request should be heard together, that is a matter of case management rather than extension of jurisdiction.
>
> …
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> 51. The Appellant is correct in his observation that the FTT can "substitute other such notices as could have been served by the Commissioner" up to the date of the FTT's decision, but this only applies to the subject matter of the original decision notice. The subject matter of a decision notice will generally be a specified response (or lack of response) by a public authority to a FOIA request. The correct way to reflect the effect of any subsequent response by

> the public authority in the decision notice is the approach taken by the FTT in the Appellant's case.
>
> …
>
> 53. I agree with Mr White [Counsel for the Commissioner] that there is nothing in the language of FOIA that prohibits a second complaint being made under s.50, nor a successive decision notice being issued, in relation to a subsequent, substantially different response by a public authority to a FOIA request. Neither is it prohibited by case law."

216. In our view the complaint that the Department, if it had complied with its duties under section 1(1) and section 17(1), would not be entitled to rely on sections 40(2) and 36 'is a wholly new complaint… the subject matter of which is incapable of having been the subject matter of the Commissioner's decision notice'.

217. As **Montague** makes clear, and as highlighted by Upper Tribunal Judge McMillan in **Smith:**

> 62. …, if the Information Commissioner finds that a public authority has failed to communicate information under section 1(1) when it ought to have done so, has failed to communicate the information by an appropriate means (per section 11 of FOIA), or has not given the requestor an appropriate notice of its refusal decision (per section 17 of FOIA), by section 50(4) he is required to serve a decision notice on the public authority specifying the steps the public authority must take to remedy the failure. As a matter of statutory language, the Information Commissioner is not himself charged with redeciding the request. … He is to decide whether the public authority dealt properly with the request. Likewise, the FTT's role under section 58 is focused on the correctness of the Information Commissioner's notice under appeal. Again as a matter of the statutory language, the FTT's function is not to redecide the request….

218. We accept that **Smith** concerned a different factual scenario, where the appellant had asked the tribunal to consider substantive responses to the same request given after the decision notice, but in our view the principles underlying that decision are applicable to this situation where the public authority had not yet issued a substantive response and had not complied with its duties under section 1(1) and 17 (1).

219. We do not accept Mr Pitt-Payne KC's submission that **Smith** concerns a 'wholly different' scenario. If the Commissioner had correctly found that the request was not vexatious and that the Department had failed to comply with its obligations under section 1(1) the Commissioner would have been required to serve a decision notice specifying the steps that the public authority must take to remedy the failure. The Commissioner would not be charged with deciding or redeciding the request. Nor is the tribunal. The tribunal's jurisdiction under section 57 is to hear appeals against first instance regulatory decisions. We consider the regulator's

decision afresh and we are empowered by section 58(1) to serve any notice that the regulator could have served at the time of the decision notice.

220. For those reasons we accept that the tribunal has no jurisdiction to move on to considering substantive exemptions.

221. Further, there are a number of reasons why it is not, in our view, appropriate to determine substantive exemptions before the public authority has complied with section 1(1) and 17.

222. First, as Upper Tribunal Judge McMillan noted in paragraph 36 of **Smith v Information Commissioner** [2022] UKUT 261 (AAC) it would require the First-tier Tribunal to assume the role of the Regulator. The tribunal would have to determine an appeal without a prior decision against which an appeal has been brought. Upper Tribunal Judge McMillan said:

> "There is no support in the language of FOIA or in the Tribunals, Courts and Enforcement Act 2007 for such a proposition. The FTT's jurisdiction under s.57 is to hear appeals against first instance regulatory decisions. It considers the regulator's decision afresh and is empowered by s.58(1) to serve any notice that the regulator **could have** served at the time of the decision notice."

223. Second, usually where a public authority relies on section 14 it will not yet have located or reviewed all the information in scope of the request. The aim of section 14 is to protect the resources of the authority. If the public authority had to first locate and review the information before relying on section 14, that would seriously undermine that aim. If reliance on section 14 does not succeed and the public authority is required to provide a fresh response the public authority can locate and review the information and consider its response in compliance with its section 1 and 17 duties outside the tribunal process.

224. Third, if the public authority is not given the opportunity to comply with the requirements of section 1 and section 17(1) the requestor is deprived of the opportunity to complain to the Commissioner about any refusal with a subsequent opportunity to appeal leading to a further full merits review by the First-tier Tribunal. If the matter remains with the First-tier Tribunal the requestor is only entitled to one review of the decision of the public authority by the tribunal from which any further appeal to the Upper Tribunal can only be on the basis of an error of law.

225. There are also a number of practical considerations which, in our view, suggest that is unlikely that Parliament intended the BPA's contended approach to be taken where section 14 is relied on:

    a. In section 14 cases the public authority is unlikely to have yet located or reviewed the requested information. In many cases that would defeat the purpose of section 14 which is intended to protect the squandering of resources. On the BPA's approach, section 14 appeals would place the public

authority in the difficult position of either having to speculatively identify substantive exemptions in its response (before it had reviewed the requested information) or having to rely on the discretion of the First-tier Tribunal to allow it to rely on substantive exemptions that had not been pleaded. Although a public authority is permitted to rely on additional exemptions 'as of right' in its response, exemptions raised at a later stage are subject to the tribunal's case management powers under rule 5.

b. In other section 14 cases, the public authority may not be a party to proceedings. Even if it is, it is unlikely to have considered the requested information and may not be aware if there are any potentially applicable exemptions. The tribunal is also unlikely to be in a position to know if there are any potentially applicable substantive exemptions, because it will not have seen the information.

c. There are differences between the investigative powers of the Commissioner and the case management powers of the tribunal as noted by Judge McMillan in paragraphs 39 and 40 of **Smith.**

226. For the above reasons we agree with the Commissioner and the Department that we do not have jurisdiction to consider the substantive exemptions raised by the Department and that the appropriate outcome is to issue a substitute decision in notice in the terms that the Commissioner would have issued, had he rejected the Department's reliance on section 14.

What the tribunal would have done if we had concluded that we had jurisdiction

227. In case we are wrong on jurisdiction, we make the following findings on the alternative basis that we do have jurisdiction to determine the application of Part II exemptions having allowed the appeal against the Department's reliance on section 14.

228. The application of section 40(2) and section 36 are dependent on the content of the information and cannot, in our view, be determined without considering that information. To illustrate this point, we might, for example, be able to determine the question of whether or not a 'PCN' is personal data without viewing the withheld information, but the question of whether or not an individual's PCN should be disclosed will depend on the weight that is attached to their fundamental rights and freedoms. This will depend on that individual's legitimate expectations, which will in turn depend, in part, on that person's status and whether they are, for example, acting in a public capacity or private capacity. It will depend on the impact of disclosure on that individual, which may be affected by the other information contained in the letter. The question of whether or not the legitimate interests are outweighed by an individual person's rights and freedoms will be influenced by the extent to which disclosure of the individual letter is necessary for or serves those legitimate interests.

229. If we were to reach a final decision on section 36 or 40(2), when neither the tribunal nor the public authority has reviewed the correspondence, there is a clear possibility and risk that the information, when properly reviewed, may turn out to contain matters that would have led to a different conclusion.

230. For those reasons it is not in our view desirable to determine the application of those exemptions as part of this appeal without sight of the withheld information and without the benefit of an explanation from the public authority as to how and why the exemptions apply in the light of the content of the requested information.

231. Further, for all the reasons set out in above, it is not in our view appropriate to determine the application of substantive exemptions before the public authority has complied with its duties under section 1(1) and 17 having reviewed the content of the withheld information.

232. Taking all the above into account, we allow the appeal and substitute a decision notice in the terms set out in paragraphs 1 and 2 above.

Signed

Sophie Buckley

Date:

22 April 2025