

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 25 July 2007

Public Authority: Transport for London ("TfL") (acting on behalf of any subsidiary authority)
Address: Windsor House
42-50 Victoria Street
London
SW1H 0TL

Summary

The complainant made a request for all information held by the public authority in relation to an investigation which was conducted into alleged irregularities with the public authority's pension fund. The request was originally refused on the basis of section 21. However, at the internal review the public authority withdrew its reliance on this exemption and instead provided the complainant with a number of documents, although certain documents were redacted on the basis of section 40 and section 42. Following the Commissioner's intervention the public authority disclosed the information it had redacted on the basis of section 40. The Commissioner has concluded that the public authority were correct to rely on section 42 to withhold some information, but breached section 1 of the Act by failing to disclose to the complainant information that it had previously withheld on the basis of section 21.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant submitted the following request to TfL on 17 April 2005:

'I am aware that an Internal Audit investigation was undertaken by [name redacted], Operation Gilcrux, into financial anomalies under the Pension Fund relating to mis-operation of VAT and misappropriation of member

funds. I request the release of the full paper work created by the said investigation'.

3. On 13 May 2005 TfL informed the complainant that it considered the information requested was exempt from disclosure by virtue of section 21 of the Act - information accessible to the applicant by other means. The full details of the relevant sections of the Act are included in the legal annex attached to this notice. TfL provided the complainant with the following reasoning in order to explain its reliance on section 21:

'It is particularly relevant to this request to note that the Act grants a right of access to information, not documents. I understand that all substantive information relating to this investigation has been disclosed to you previously. Accordingly, the "full paperwork created by the investigation" will not be disclosed in response to your request. The applicable exemption in the FOI Act is section 21, which states that information "accessible to the applicant by other means" does not have to be provided in response to a request – in this case the "other means" is the disclosure that has already been made to you'.

4. On 13 May 2005 the complainant emailed TfL and informed it that he was dissatisfied with this response and asked TfL to 'review your position and upon receipt, I will decide how to proceed'.
5. On 27 September 2005 the complainant contacted the Commissioner in order to complain about TfL's handling of a number of his FOI requests, including his request for information relating to Operation Gilcrux. The complainant informed the Commissioner that despite requesting an internal review of the decision to refuse his request on the basis of section 21, TfL had not contacted him again in relation to this issue.
6. The Commissioner's findings in relation to the other issues raised by the complainant in his letter of 27 September 2005 are outlined in decision notice number FS50090632.
7. The Commissioner wrote to TfL on 1 August 2006 in order to discuss the issues the complainant had raised. With regard to the complaint about Operation Gilcrux, the Commissioner asked TfL to confirm whether an internal review into the handling of this request had in fact been undertaken and if so, to inform the Commissioner of the outcome of that review.
8. TfL informed the Commissioner on 22 September 2006 that due to the absence of a number of staff, it needed more time in order to respond to the Commissioner's enquiries concerning the complainant's request for information about Operation Gilcrux.
9. On 23 October 2006 TfL informed the Commissioner that on 1 February 2005 the complainant had been provided, outside of the Act, with extracts from a document held by TfL which outlined the outcome of the Operation Gilcrux investigation. TfL explained to the Commissioner that on the basis of this previous disclosure it

considered it appropriate to refuse the complainant's freedom of information request on the basis of section 21:

'...bearing in mind that the Act provides a right of access to information and not documents, it was considered that when [the complainant] made his request in April 2005 that the information that he had been provided with on 1 February 2005 met the requirements of his further request, hence our reliance on section 21'.

10. However, TfL suggested to the Commissioner that it ought to have considered the complainant's request of 17 April 2005 more fully. TfL also informed the Commissioner that it did not consider the complainant's correspondence of 13 May 2005 as a request for an internal review (see paragraph 4).
11. TfL acknowledged to the Commissioner that with hindsight it should have clarified with the complainant whether he wanted an internal review to be conducted. Following the Commissioner's intervention as outlined above, TfL conducted an internal review into the decision to refuse the original request.
12. On 1 February 2007 TfL informed the complainant of the outcome of its internal review. This review concluded that section 21 had been misapplied because further information related to Operation Gilcrux was held by TfL but was not reasonably accessible to the complainant. Following this review, TfL provided the complainant with a number of further documents related to the Operation Gilcrux investigation. However, TfL explained that it had made redactions to some documents on the basis of the exemptions contained at sections 40 and 42 of the Act.

The Investigation

Scope of the case

13. On 5 March 2007 the complainant contacted the Commissioner to complain about TfL's decision to redact parts of the documents disclosed in response to his request on the basis of sections 40 and 42. The Commissioner and the complainant agreed that the TfL had made redactions to eight documents in total. However, the complainant explained that as he was the author of two of these documents, and was therefore in possession of the originals, he did not require the Commissioner to investigate whether the exemptions had been correctly applied to these two documents.
14. Therefore, the Commissioner only considered whether the exemptions had been applied correctly to six documents. All six documents had redactions made on the basis of section 40 and in addition one of these documents also had redactions made on the basis of section 42.
15. During subsequent correspondence with the Commissioner, the complainant also alleged that TfL had not provided him with all of the information which fell under

the scope of his request. The complainant alleged that there were a number of emails dating from October 2002 which may have been held on the Operation Gilcrux file but these were not disclosed to him.

Chronology

16. On 16 March 2007 the Commissioner contacted TfL and asked it to provide him with unredacted copies of the documents which TfL had decided to apply redactions to. The Commissioner also invited TfL to provide any further submissions in order to support its decision to apply sections 40 and 42 of the Act.
17. TfL provided the Commissioner with unredacted copies of the documents on 11 April 2007 along with further arguments about the applicability of sections 40 and 42.
18. Having reviewed the withheld information the Commissioner contacted TfL on 26 April 2007 in order to question its decision to apply section 40 to some of the redacted information. TfL subsequently informed the Commissioner that it had reconsidered its decision to withhold information on the basis of section 40 and was now prepared to provide the complainant with unredacted copies of documents to which section 40 had been applied. As the information originally redacted on the basis of section 40 has now been provided to the complainant, the Commissioner has not gone on to consider TfL's application of section 40 any further in this notice.
19. On the 2 May 2007 the Commissioner contacted TfL again and asked it to establish if it held the additional emails referred to in paragraph 15 above and if so, whether TfL considered that they fell within the scope of the request. The Commissioner explained to TfL that if its position was that it did not hold any emails to answer the following questions:
 - *Does TfL have a record of the emails' destruction?*
 - *What does TfL's formal records management policy say about the retention and deletion of records of this type?*
 - *What steps were taken to locate this information?*
20. TfL provided the Commissioner with a response to these questions on 15 June 2007. TfL explained that the additional emails of October 2002 referred to by the complainant were not held on the Operation Gilcrux file. TfL explained that as the complainant's request asked for 'the release of the full paperwork created by said investigation' the emails of October 2002 were not provided to him because they fell outside the remit of his request.

Findings of fact

21. Operation Gilcrux was the name given to the investigation carried out by the Fraud and Security team within TfL's Internal Audit department into concerns expressed by the complainant regarding TfL's pension fund's method of calculating and accounting for VAT on the professional services provided to its

members. The investigation concluded that there was no substance to the allegations made by the complainant and the investigation was closed in February 2005.

- .22. As noted in paragraph 18, the information redacted on basis of section 40 has now been provided to the complainant. However, one of the documents that TfL redacted on the basis of section 40, an internal email between two TfL employees dated 27 January 2005 had also been redacted on the basis of section 42. In providing the complainant with the section 40 parts of this document replaced, TfL inadvertently disclosed the information it also considered to be exempt on the basis of section 42. Having discussed this issue with TfL the Commissioner has established that this disclosure was made in error and if it received a further request under the Act for this information, TfL would withhold this information on the basis of section 42. The Commissioner's role in this case has been to establish whether the section 42 exemption was applied correctly at the time it was applied, i.e. February 2007. Therefore, the Commissioner has not considered how this inadvertent disclosure may have affected the privileged status of the legal advice in question.

Analysis

Procedural matters

Section 1

23. The complainant explained that in response to his request for information TfL had provided him with a number of documents including a copy of an email dated 11 October 2002. This email was actually sent by the complainant to a number of TfL employees and in this email the complainant raised a number of issues relating to the administration of TfL's pension fund. The complainant explained to the Commissioner that he knew that this email of 11 October 2002 had resulted in a number of further internal emails being sent to TfL in relation to the same subject, i.e. the administration of the pension fund.
24. The complainant argued that as the email of 11 October 2002 had been provided to him in response to his request for information held on the Operation Gilcrux file, it was logical to assume that the further emails of October 2002 would also be held on the file and therefore these should have also been disclosed to him.
25. The Commissioner has established that the original email of 11 October 2002 was not in fact placed on the Operation Gilcrux investigation file. However, in an email dated August 2004, which did form part of the Operation Gilcrux file, the author quotes all of the complainant's email of 11 October 2002. Consequently, when TfL provided the complainant with a copy of all the documents held on the file, he was effectively provided with the content of the 11 October 2002 email by virtue of the fact that it was quoted in the email from August 2004.

26. The Commissioner is satisfied that if the original version of the email dating from 11 October 2002 is not held on the Operation Gilcrux file then it is unlikely that the original versions of the email responses to this email would be held on the Operation Gilcrux file.
27. The Commissioner believes that as the complainant's request asked for all information held on the Operation Gilcrux file, and the further emails of October 2002 were not held on the file, then TfL was under no obligation under the Act to provide this further information.
28. However, the Commissioner notes that when TfL were made aware of the fact that the complainant wanted to be provided with the further emails of October 2002, it conducted further searches of its records and these emails were subsequently provided to the complainant.

Section 17

29. The Commissioner believes that if a public authority later relies on an exemption that it did not cite in the original refusal notice then the public authority will have breached section 17(1) of the Act. In this case, TfL originally cited the exemption contained at section 21 of the Act when refusing the request on 13 May 2005. However, TfL later relied on two further exemptions, section 40 (personal data) and section 42 (legal professional privilege) as a basis upon which to withhold parts of the requested information. Therefore, in dealing with this request the Commissioner is satisfied that TfL breached section 17 of the Act.

Exemptions

Section 21

30. Section 21 of the Act allows a public authority to refuse a request for information if that information is reasonably accessible to the applicant by other means. As outlined above, TfL originally refused the complainant's request on the basis of section 21 because he had already been provided with some information related to Operation Gilcrux.
31. However, the Commissioner has established that the information previously provided to the complainant in February 2005 did not constitute all of the information TfL held about Operation Gilcrux. The information already in possession of the complainant consisted of an email which summarised the outcome of the Operation Gilcrux investigation. However, following TfL's later disclosures to the complainant in February 2007 it is clear that TfL held substantially more information about Operation Gilcrux.
32. Consequently, the Commissioner is satisfied that TfL were incorrect to initially refuse to answer the complainant's request on the basis of section 21 of the Act and in doing so breached section 1 of the Act.

Section 42

33. Section 42 of the Act provides that information is exempt from disclosure if the information requested is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. There are two types of privilege, legal advice privilege and litigation privilege.
34. TfL argued that the redacted information is covered by legal advice privilege. This type of privilege applies to confidential communications made between a client and its professional legal advisor or any part of a document which evidences the substance of such a communication.
35. The Commissioner has established that the document from which the information has been redacted consists of an internal email sent between two TfL employees, neither of whom were professional legal advisors. Therefore, the document cannot be described as communication between a client and a lawyer.
36. The Commissioner considers that for privilege to continue to apply to a summary of legal advice, the summary must consist of a direct and accurate representation of, or extract from, the original legal advice. If the summary contains any additional information which was not part of the original legal advice, then this will not attract privilege.
37. Having reviewed the information TfL has redacted on the basis of section 42 the Commissioner accepts that this information can be correctly described as an accurate summary of the issues about which TfL asked its external lawyers, Eversheds, for advice and is an accurate summary of Eversheds' response.
38. Therefore, the Commissioner is satisfied that the exemption contained at section 42 of the Act is engaged.

Public Interest Test

39. Section 42 is a qualified exemption and is therefore subject to the public interest test. Public authorities can only refuse to supply information where the public interest in maintaining the exemption outweighs the public interest in disclosure.
40. TfL has argued that the disclosure of this information would be contrary to the public interest because disclosure would have the effect of limiting the free and frank exchange of views between a legal adviser and their client.
41. The Commissioner accepts that a client needs to be confident that information shared with a lawyer, and advice received from that lawyer, will remain confidential. Without such a confidence there are risks of lack of openness between client and lawyer which could reduce the ability of public authorities to seek and obtain unfettered, frank advice without the fear of intrusion.
42. The Commissioner is also mindful of the Information Tribunal's decision of 27 April 2006 in *Christopher Bellamy v The Information Commissioner and the Secretary of State for Trade and Industry* (Appeal No: EA/2005/0023). The

judgement comments on the public interest inherent in maintaining legal professional privilege and states that:

“there is a strong public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.” (Paragraph 35)

43. However, it is important to remember that these factors are balanced against the arguments in favour of disclosing the legal advice which forms part of the requested information. The Commissioner recognises that there is a strong public interest in people understanding the reasons for decisions made by public authorities. In this case the legal advice was sought by TfL in relation to allegations about the administration of TfL's pension fund. The investigation concluded that there were no irregularities regarding the administration of the pension fund. However, disclosure of the withheld information may provide the public with a greater understanding of why the investigation concluded that the allegations were without merit.
44. The Commissioner has established that once the allegations were investigated by TfL's internal fraud and security department, TfL sought advice from tax experts in the accountancy firm, KMPG. The Commissioner notes that it could be argued that the accountability and transparency of TfL's investigation into these allegations has been satisfied by the fact that the outcome of investigation has been validated by an external body, namely KMPG.
45. Furthermore, the Commissioner recognises the fact that TfL has disclosed all of the information it holds concerning Operation Gilcrux, except for the redactions which have been applied on the basis of section 42.
46. Whilst it will sometimes be appropriate to overturn legal professional privilege where a strong public interest exists in disclosure, in this case the Commissioner has concluded that the public interest in maintaining the exemption overrides the public interest in disclosure.

The Decision

47. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
48. TfL correctly applied section 42 of the Act in redacting information contained in the email between two TfL employees dated 27 January 2005
49. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
50. TfL incorrectly applied section 21 of the Act by initially refusing to supply the complainant with further information covered by the scope of his request and in doing so breached section 1 of the Act.
51. TfL also breached section 17(1) of the Act by relying on exemptions cited in its original refusal notice.

Steps Required

52. The Commissioner requires no steps to be taken.

Other matters

53. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
54. The Commissioner notes that TfL did not consider the complainant's email of 13 May 2005 in which he stated 'I am extremely disappointed by this reply as the information has not been given to me...please review your position' to be a request for an internal review. This is contrary to the guidance contained in the section 45 Code of Practice which states that:

'Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint'. (paragraph 38).

It was not until the Commissioner's intervention that an internal review was conducted into this request and following this review a significant amount of further information was disclosed to the complainant. The Commissioner has established that TfL has now introduced a formal and detailed policy for handling internal reviews and is satisfied that the introduction of this policy will ensure that

any expression of dissatisfaction by an applicant following TfL's initial response to a request will ensure that an internal review is conducted.

Right of Appeal

55. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 25th day of July 2007

Signed

**Jane Durkin
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 17

Section 17(1) provides that –

“A public authority, which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information, must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies”

Section 21

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection)

to members of the public on request, whether free of charge or on payment.”

Section 42

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”