

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 January 2013

Public Authority: Transport for London
Address: 42-50 Victoria Street
London
SW1H 0TL

Decision (including any steps ordered)

1. The complainant has requested information relating to an investigation into allegations of wrong doing, made by the complainant, as well as Transport for London's (TfL) policies on reporting wrong doing and fraud. TfL provided the complainant with some of the requested information but refused to disclose some information under section 30(1)(a), section 30(2)(a)(i), section 31(1)(g) with subsection 2(b), section 40(1), section 40(2), section 41 and section 42 of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that TfL has correctly applied section 40(1), section 40(2) and section 42 FOIA to part of the withheld information. However he has not upheld TfL's application of section 30 and section 31 to the remaining parts of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose all information which has not been redacted under section 40(1), 40(2) and 42. TfL should not however disclose the anonymous letters as the Commissioner considers that these should have been withheld under section 40(2).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 May 2011, the complainant wrote to TfL and requested information in the following terms:
 1. The file of the investigation into alleged wrong doing by the Director of Internal Audit in January 2010, including statements by [named individuals].
 2. The file of the previous Director of Audit into the issues you raised.
 3. The file of [named individual] containing your memorandum to him.
 4. A copy of the latest TfL policy relating to 'Fraud and You'.
 5. A copy of the 2002 Standing Orders with reference to the obligations upon employees to report wrong doing and the actions they should take if their line manager is involved.
6. TfL responded on 1 July 2011. It refused to provide the information requested at points 1 and 2 of the request under section 30(1)(a) FOIA. It asked for further clarification in relation to point 3 of the request. In relation to point 4 of the request it explained that this information was not held, however it provided the complainant with a copy of another policy which was similar to the information he had requested. Finally it provided the complainant with the information he requested at point 5 of the request.
7. On 26 July 2011 the complainant asked TfL to carry out an internal review in relation to points 1 and 2 of the request, in relation to which exemptions had been applied. Following an internal review TfL wrote to the complainant on 25 August 2011. It upheld its application of section 30(1)(a) FOIA and also applied section 40 and section 41 FOIA to parts of the withheld information.
8. During the course of the Commissioner's investigation TfL also applied section 31(1)(g) with subsection 2(b) to all of the withheld information and section 42 to some of the withheld information FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 31 October 2011 to complain about the way his requests for information had been handled. He asked the Commissioner to consider whether or not exemptions had been correctly applied to the withheld information.

10. The Commissioner will therefore consider whether section 30(1)(a), 30(2)(a)(i), 31(1)(g) with subsection 2(b), section 40(1) and (2), section 41 and section 42 were correctly applied in this case to withhold the information requested at point 1 and 2 of the request.
11. TfL has provided the Commissioner with a copy of the withheld information. It has applied section 30(1)(a) and 31(1)(g) with subsection 2(b) to the withheld information in its entirety. It has applied section 30(2)(a)(i), 40(1), 40(2), 41 and 42 to make redactions to the withheld information and has clearly marked where it considers these exemptions to apply.

Reasons for decision

Section 30(1)(a) and 30(2)(a)(i)

12. Section 30(1) states that "information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-
 - (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - i. whether a person should be charged with an offence, or
 - ii. whether a person charged with an offence is guilty of it,"
13. Section 30(2) states that, "information held by a public authority is exempt information if-
 - (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (a) investigations falling within subsection (1)(a) or (b) and
 - (b) it relates to the obtaining of information from confidential sources."
14. TfL explained that section 30(1)(a) must be considered to apply to all of the documents within the file, it said this is consistent with the terms of section 30(1) which states that information is exempt if it has at any time been held by a public authority for the purposes listed. It said that some of the information is also exempt under section 30(2)(a)(i) as much of the information was originally obtained or recorded solely for the investigation.

15. TfL explained that the investigation was carried out by TfL's audit department, which derives its authority primarily from the Accounts and Audit Regulations 2003 as amended by the Accounts and Audit (Amendment) (England) Regulations 2006. These established a statutory requirement to have an internal audit function.
16. TfL explained that it is a non-regulated organisation within the meaning of the Financial Services Act and therefore under no statutory duty to conduct investigations into all alleged criminal conduct against its business interest. However, it explained that in complying with statutory obligations, it has created the internal audit department in accordance with section 151 of the Local Government Act 1972 and the Accounts and Audit Regulations 1983, with the aim of maintaining an adequate and effective internal audit function. It said that the fraud and security team is an arm of internal audit, with responsibility for conducting financial investigations arising out of audit exercises or other independently referred criminal investigations within the organisation. It said that in accordance with the Audit Commission's Fraud and Corruption Manual for Local Government, "any indication of fraud and irregularities from whatever source and whatever the likely amount involved should be followed up forthwith". It summarised that whilst TfL has no statutory duty, and is not therefore a prosecuting authority for the purposes of the allegations in this case, it is obliged to conduct investigations under the Local Government Act and Audit Commission Regulations.
17. In addition TfL explained that under section 3 of the Local Government Act 1999, it does have a duty to, "make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness". It said that it considers that TfL's Fraud and Security team, and their investigations into allegations of wrongdoing, to be an important element of TfL's compliance with this duty.
18. Having considered the arguments above the Commissioner is not satisfied that TfL has the necessary duty, normally be imposed by statute, to determine whether a person should be charged with an offence or whether a person charged with an offence is guilty of it, required by section 30(2)(a)(i). Therefore he has concluded that that section 30(1)(a) is not engaged in this case. Furthermore he has also determined that the requirements of s section 30(2)(a)(i) are not met for the same reason. Having reached this conclusion in relation to section 30(2)(a)(i) the Commissioner has not gone on to consider the extent to which the withheld information relates to the obtaining of information from confidential sources as required by section 30(2)(b).

Section 31(1)(g) with subsection 2(b)

19. Section 31(1) states that, "information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
 - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),"
20. Section 31(2) states that, "the purposes referred to in subsection (1)(g) to (i) are-
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper"
21. TfL said that it considers that disclosure of the withheld information would be likely to prejudice the operations and efficacy of its audit and assurance functions. It referred to the same statutory obligations in relation to its audit functions as mentioned in paragraphs 15 to 17 above to demonstrate that the requirements of sections 31(1)(g) and 31(2)(b) were met.
22. The Commissioner considers that in order for 31(1)(g) with 31(2)(b) to be engaged public authorities must be able to identify the specific function it has been given by statute or the Crown which corresponds with a 31(2) purpose. In other words they must point to a provision which imposes upon them a specific function of ascertaining whether any person is responsible for any conduct which is improper. Section 3 of the Local Government Act 1999 doesn't refer to any such specific function relevant to TfL, rather it provides that the TfL must secure continuous improvement in the way it exercises all its functions.
23. In relation to section 151 of the Local Government Act 1972 and the Accounts and Audit Regulations, the Commissioner has considered this legislation in the context of section 31(1)(g) with subsection 2(b) in a previous decision notice (reference FS50210000).
24. Para 23 of the notice states as follows:-

"...In his [the Commissioner's] view all organisations would investigate matters if they believed they had been defrauded in order to ascertain whether money could be recovered, however, they would not be doing this in connection with a function relevant for the purposes of s31(1)(g) but would be doing so because it was in their interests. Whilst the council conducted an internal investigation and formed the view that a fraud had been committed it then relayed its suspicions to the police and it was the function of the police to ascertain whether someone had failed to comply with the law".

25. In view of the above, the Commissioner is not persuaded in this case that that section 31(1)(g) with subsection 2(b) is engaged, based upon the submissions put forward by TfL. He does not consider that TfL has demonstrated that a function that corresponds with the specified section 31(2)(b) purpose has been entrusted to it. The functions specified appear to the Commissioner to be more general in nature and applicable to a range of public authorities. 26. As the Commissioner does not consider that sections 30(1)(a), 30(2)(a)(i) or section 31(1)(g) with subsection 2(b) are applicable in this case, he has gone on to consider the redactions made under sections 40(1), 40(2), 41 and 42.

Section 40(1)

27. Section 40(1) of FOIA states that "any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."
28. In this case TfL has explained that some of the requested information is the personal data of the complainant and it has indicated where it considers this exemption to apply.
29. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:
- "data which relate to a living individual who can be identified –
- (i) from those data, or
 - (ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."
30. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
31. Having reviewed the information redacted under section 40(1) the Commissioner is satisfied that it relates to the complainant and the complainant could be identified from it. The Commissioner therefore considers that TfL correctly applied section 40(1) in this case.

Section 40(2)

32. Section 40(2) FOIA provides an exemption for information which is the personal data of any individual, aside from the requester, and where disclosure of that personal data would be in breach of any of the data protection principles.
33. The Commissioner has first therefore considered whether the information redacted under section 40(2) is the personal data of one or more third parties.
34. The information redacted under section 40(2) relates to individuals who were interviewed as part of the investigation and individuals who were allegedly involved in fraudulent activity.
35. The Commissioner considers that the information redacted under section 40(2) constitutes third party personal data as it relates to living individuals who can be identified from it. The Commissioner also considers that the anonymous letters contained in the withheld information also constitute third party personal data as, if released, they could lead to those against whom allegations have been made being identified. Therefore he has considered the content of the letters in addition to the redactions made by TfL.
36. TfL has said that it has considered whether it was possible to anonymise the information withheld under section 40(2), however it considers that if it disclosed information into the public domain this could be used with other information to enable individuals to be identified. TfL provided the Commissioner with further submissions, contained in the Confidential Annex to this Notice which further supports its position. The Commissioner accepts that TfL is unable to adequately anonymise the requested information.
37. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.

Likely expectation of the data subject

38. TfL has explained that neither individuals who were allegedly involved in fraudulent activity nor those who contributed to the investigation but were not the subject of it, would expect information relating to the investigation, from which they could be identified, to be disclosed into

the public domain. In particular, contributors would have a reasonable expectation that any information was provided in confidence in the context of the investigation and also would have legitimate concerns that they may be seen some how to be involved in the allegations.

39. The Commissioner agrees with TfL that those alleged to have committed fraud would have a reasonable expectation that the information would not be disclosed into the public domain, particularly as the investigation found that the allegations were unsubstantiated. The Commissioner also agrees with TfL regarding the expectations of those who simply contributed to the investigation.
40. The Commissioner therefore considers that the data subjects would not have expected the information redacted under section 40(2) to be disclosed into the public domain.

Would disclosure cause damage and distress to the data subject

41. TfL has explained that disclosure of information which would identify or may enable individuals to be identified as being alleged to have been involved in fraudulent activity, which was not substantiated as a result of the investigation, would cause those data subjects damage and distress.
42. The Commissioner accepts that disclosure of information which links individuals to fraud allegations or information which was provided by individuals in confidence as part of the investigation process, would likely cause damage and distress to those data subjects. Disclosure of information about the allegations, although unsubstantiated, may cause damage to the data subjects privately as well as professionally.

The legitimate public interest

43. The Commissioner considers that there is a legitimate interest in disclosure of information which demonstrates that TfL is taking adequate measures to protect itself from fraudulent activity. This argument is likely to carry more weight in instances where there is evidence that a public authority does not have sufficient measures in place.
44. However in this case TfL has conducted an internal investigation which did not conclude that the allegations could be substantiated. Therefore disclosure of information identifying the individuals accused of committing the fraud or other individuals involved in the investigation process would be unfair to those data subjects. This is because they would have a reasonable expectation that , in the circumstances, this information would not be disclosed into the public domain and

furthermore disclosure would likely cause significant damage and distress particularly in relation to those accused of wrongdoing.

45. Whilst he acknowledges the legitimate interests of the public in having access to the withheld information, the Commissioner considers that on balance, in the circumstances of this case, disclosure would nevertheless be unfair for the reasons given above. Therefore he has concluded that section 40(2) was correctly engaged to make redactions to the requested information and furthermore that it should also have been applied in relation to the information in the anonymous letters.

Section 41

46. The redactions made under section 41 applied to the same material that was withheld under section 40(2). As the Commissioner has found that section 40(2) was correctly engaged he has not considered the application of section 41 any further.

Section 42

47. Section 42(1) of the Act provides that information is exempt from disclosure if it is protected by legal professional privilege and the claim to privilege could be maintained in legal proceedings.
48. There are two categories of legal professional privilege advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
49. TfL has confirmed that in this case the category of advice privilege is applicable. Advice privilege covers confidential communications between a client and their lawyer, made for the dominant (main) purpose of seeking or giving legal advice. The dominant purpose of a communication is a question of fact, which can usually be determined by inspecting the relevant information.
50. TfL has explained that the requested file contains several documents referring to meetings and discussions involving TfL's in-house legal advisers, or advice received from them. It confirmed that it is satisfied that the information meets the criteria for engaging the exemption in that the legal advice is the following:
 - a. confidential;
 - b. made between a client and professional legal adviser acting in their professional capacity; and
 - c. made for the purposes of obtaining legal advice or assistance in relation to rights and obligations.

51. TfL also confirmed that it was satisfied that the privilege attached to the withheld information had not been waived.
52. Having considered the withheld information and the submissions provided by TfL, the Commissioner considers that the section 42 exemption was correctly engaged.
53. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.
54. The Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* in which it was stated:

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."

55. The Commissioner considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The Commissioner has also noted the comments of the Tribunal in *Calland v Information Commissioner (EA/2007/0136)* that the countervailing interest must be "clear, compelling and specific".

Public interest arguments in favour of disclosing the requested information

56. TfL recognises that there is a general public interest in disclosure of information which demonstrates that allegations of fraud are properly investigated.

Public interest arguments in favour of maintaining the exemption

57. TfL argued that there is a strong public interest in the maintenance of legal professional privilege, in the provision of protected space for

public authorities to be able to seek and receive legal advice. It said that it would be strongly against the public interest to risk public authorities' readiness to seek legal advice or the candour with which that advice is given.

58. The Commissioner considers that the legal advice is fairly recent, and whilst it relates to a completed investigation, TfL has confirmed that if more evidence came to light there is potential that it could be reopened. The fact that the advice was provided recently and the investigation only concluded fairly recently, adds significant weight to the public interest arguments in favour of maintaining the exemption.

Balance of the public interest arguments

59. The Commissioner considers that there is a strong public interest in promoting openness, transparency and accountability in TfL's fraud investigation processes. He recognises that the withheld information would be genuinely informative and would provide the public with greater insight into the legal issues relevant to this particular investigation.
60. However the Commissioner also considers that there is a very strong public interest in TfL being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions, within the fraud investigation process, without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure is likely to have a negative impact upon the frankness of legal advice provided in similar circumstances. This in turn is likely to have a negative impact upon the quality of fraud investigations conducted by TfL which would not be in the public interest.
61. In this case, the Commissioner is not aware of any evidence to suggest that appropriate steps, including relevant legal advice, have not been taken by TfL in relation to the fraud allegations. In view of this, the content of the disputed information and particularly the fact that the advice is fairly recent, the Commissioner considers that the arguments in favour of maintaining the exemption outweigh those in favour of disclosure.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

63. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
64. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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