

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2015

Public Authority: Transport for Greater Manchester
Address: 2 Piccadilly Place
Manchester
M1 3BG

Decision (including any steps ordered)

1. The complainant has requested from Transport for Greater Manchester (TfGM) information about Metrolink. TfGM released some of the information, said it did not hold some information and said that some of the information is exempt under section 21 (information already accessible) and section 42 (legal professional privilege).
2. The Commissioner's decision is that TfGM:
 - Breached section 10(1) and 10(3) because it did not provide a response within 20 working days or within a reasonable extension to this limit.
 - Breached section 16 as it did not offer the complainant satisfactory advice and assistance within an appropriate timescale.
 - Breached section section 17 because it did not issue a refusal notice within 20 working days.
 - Correctly applied the exemption at section 42 to some of the information it has withheld.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 8 November, the complainant wrote to Transport for Greater Manchester and requested information in the following terms:

"8. Publicity material concerning the amendment of the MCOC created, developed, published or released between Sunday Information requested: "First, I wish to inspect the Transport for Greater Manchester ["TfGM"] Official Fares Table at the TfGM Trading Office, pursuant to the presently subsisting Metrolink Conditions of Carriage [MCOC] n. 5. I do not require to be provided with a copy of this information, merely to inspect it.

I wish to obtain copies of all information listed in the Schedule to this email, whether hard copy or electronic, that is held by TfGM.

SCHEDULE

N.B. In this Schedule, references to any body corporate or organisation shall be taken to include any predecessor body or organisation.

1. Customer comment and complaint handling procedures, processes and standards applicable to TfGM, the Metrolink System and Metrolink RATP Dev UK Ltd, (including appeals and review stages and external ombudsmen and regulators) and any related material, including but not limited to minutes, correspondence (internal and external), advice, consultations, policies and other records

2. Correspondence (internal and external), advice, consultations, policies, minutes and other records in respect of ticket terms and conditions and inter-availability between Manchester, Altrincham and Mouldsworth (and places in between) and vice versa on the Metrolink System and the National Rail Network

3. Procedures, actions and processes undertaken in the formulation, adoption, authorisation and review of the Metrolink Byelaws, MCOC and TfGM Official Fares Table (insofar as those documents were in force on or after Sunday 28 September 2014) and any related material, including but not limited to minutes, correspondence (internal and external), advice, consultations, policies and other records

4. Names, personalised/direct corporate/office address particulars (postal, telephone and email) and areas of responsibility for all current directors of TfGM and Metrolink RATP Dev UK Ltd and for the current personal assistants, diary secretaries, general secretaries or similar of those directors

5. Correspondence (internal and external), advice, consultations, policies, minutes and other records in respect of the following parts of the presently subsisting MCOC, even if created, sent/received, undertaken or recorded in relation to equivalent parts of any previous or superseded versions of the MCOC:

A- nn. 5 and 6, insofar as they relate to the words "other authority to travel" and/or "other approved authorisation to travel"

B- n. 30

C- n. 48, including the incorporation (in whole or in part) of the National Rail Conditions of Carriage

D- nn. 50 and 51, including a copy of the regulations stipulated under n.50 E- n. 53

6. The full text of the Metrolink Byelaws and MCOC in force on Sunday 28 September 2014

7. Correspondence (internal and external), advice, consultations, policies, minutes and other records in respect of the conformity of the Metrolink Byelaws, MCOC and TfGM Official Fares Table (insofar as those documents were in force on or after Sunday 28 September 2014) with the Unfair Contract Terms Act 1977 c. 50 and the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)

8. Publicity material concerning the amendment of the MCOC created, developed, published or released between Sunday 28 September 2014 and Saturday 8 November 2014 inclusive"

5. TfGM responded on 27 February, as follows:

[1] TfGM released some information - a Customer Feedback Handling procedure - and said it did not hold some information that would fall within the scope of this part of the request: the Metrolink RATP Dev UK Ltd's customer comment and complaint handling procedures.

[2] Information not held.

[3] Some information not held, other relevant information exempt from disclosure under section 42 of the FOIA (legal, professional privilege).

[4] Information exempt from disclosure under section 21 as the information is already reasonable accessible to you. TfGM provided the names of some senior personnel.

[5] Information not held.

[6] TfGM provided a link to where some of the information is already published and provided the complainant with other related information – a copy of the MCOC.

[7] Information not held.

[8] TfGM released relevant information – publicity material.

6. Following an internal review TfGM wrote to the complainant on 20 April. It maintained its position regarding part 2 of the request – that it does not hold this information. It also maintained its position regarding part 3 – that the information it holds is exempt under section 42.

Scope of the case

7. The complainant contacted the Commissioner on 2 July to complain about the way his request for information had been handled.
8. Having liaised with the complainant, the Commissioner has focussed his investigation on TfGM's application of section 42 to some of the information it is withholding. He has also considered whether it has met its obligations under section 10 (time for compliance) and section 17 (refusal notice), its handling of the internal review and its approach to FOIA requests more generally.

Reasons for decision

Section 10 – time for compliance

9. Section 1(1) of the FOIA says that when a public authority receives a request, it must confirm or deny whether it holds the information and, if it does, the information must be communicated to the requester.
10. Section 10(1) of the Act says that public authorities must comply with section 1(1) within 20 working days of receiving the request.
11. Section 10(3) gives provision for an authority to claim a reasonable extension to this limit, up to an additional 20 working days, where it needs more time to consider the public interest test.
12. In this case, the complainant submitted his request to TfGM on 8 November 2014. TfGM wrote to the complainant on 9 December advising that it needed more time to consider its application of exemptions but did not state what exemption/s it was applying or make any reference to needing more time to consider the public interest test. It did not provide a final response until 27 February 2015. By 9 December – 20 working days after receiving the request - TfGM should have been satisfied that it could apply section 42 to some of the requested information. In order to fully engage section 10(3) therefore, TfGM should have clearly stated on 9 December that it needed extra

time to consider the public interest arguments with respect to this exemption.

13. TfGM therefore breached section 10(1) and 10(3) and the Commissioner notes that it acknowledged this in its internal review. TfGM has also explained to the Commissioner how it has now revised its request handling processes in order to avoid breaching section 10 in the future.

Section 16 – advice and assistance/internal review

14. Section 16 of the FOIA places an obligation on public authorities to offer applicants advice and assistance.
15. Having mistakenly considered TfGM's correspondence of 9 December to be a refusal notice (see paragraph 21) and not having received a response, the complainant requested a review on 30 January.
16. TfGM has told the Commissioner that at this point it was still handling the complainant's request and its view was that it would be more appropriate to review its compliance with FOIA timescales once it had finally responded to the request.
17. In correspondence dated 2 February TfGM apologised to the complainant for the time being taken to provide a response and assured him that it was still working on his request and determining whether it held any relevant information.
18. TfGM subsequently addressed its compliance with section 10 in its internal review of 20 April, following the complainant's second request for a review on 19 March.
19. The Commissioner recommends that an internal review is carried out within 20 working days of the request for one (and no longer than 40 working days). He considers that, following the complainant's request for a review on 30 January, TfGM could and should have reviewed its non-compliance with section 10(1) within 20 working days (and no longer than 40 working days). The Commissioner acknowledges that TfGM did update the complainant more than once. However he considers that it breached section 16 by incorporating its delay in responding in its review of 20 April, rather than reviewing this matter separately, and within 20 days of 30 January.

Section 17 – refusal notice

20. Section 17(1) of the FOIA says that if a public authority is relying on an exemption it must give the applicant a notice which: states that fact; specifies the exemption in question and states why the exemption applies. It must issue the notice within 20 working days.

21. In his request for an internal review on 30 January, the complainant claimed that TfGM had issued a refusal notice on 9 December. In a response dated 2 February, TfGM explained that this was not a refusal notice but, as described above, a holding response which advised that it needed more time to consider the request and the application of any exemptions. The Commissioner has seen the correspondence in question and agrees with TfGM's description of it.
22. In its final response on 27 February, TfGM told the complainant that some of the information he had requested was exempt from disclosure; specified the exemptions (sections 21 and 42) and said why the exemptions applied. The response then gives details of the internal review process and the Commissioner's details. The Commissioner considers that although the refusal in TfGM's response did meet the obligations under section 17 given at paragraph 20, it did not issue the notice within 20 working days of receiving the request. It consequently breached section 17.

Section 42 – legal professional privilege

23. Section 42(1) of the FOIA says that information is exempt if it is subject to legal professional privilege.
24. TfGM has applied this exemption to legal advice it sought from Counsel in 2005. The purpose of the advice was to seek a legal opinion on the application of the Byelaws to any new Metrolink extensions.
25. The purpose of legal professional privilege is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore legal professional privilege evolved to make sure communications between a lawyer and their client remain confidential.
26. There are two forms of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about pending or contemplated legal proceedings.
27. Advice privilege applies where there is no litigation contemplated or in progress. It also protects confidential communications between a lawyer and their client, and the communications have to be made for the dominant purpose of obtaining or providing legal advice. TfGM has told the Commissioner that the information attracts advice privilege.

28. Having had sight of the information in question, the Commissioner is satisfied that the information does constitute legal advice.
29. The Commissioner considers that the legal advice will remain confidential if it has only been shared with a limited number of people on a restricted basis. TfGM has confirmed to the Commissioner that the advice has not been communicated or made available to a third party without restriction. The Commissioner is therefore satisfied that the advice has remained confidential.
30. Consequently, he is satisfied that the information is capable of attracting legal professional privilege and is exempt information under section 42(1).
31. Section 42 is, however, subject to the public interest test. The public interest test requires the public interest in favour of maintaining the exemption to be weighed against the public interest in disclosing the information. The information can only be withheld if the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure.

Public interest test

Arguments in favour of maintaining the exemption

32. The Commissioner notes that the advice in question is now 10 years old. TfGM has told him that, given the continuing expansion of the Metrolink network, the advice is still applicable and releasing it would prejudice future reviews of the Byelaws and/or Metrolink Conditions of Carriage.
33. TfGM says that unlike general law, Byelaws are subject to challenge by individuals who are subject to prosecution on the grounds of validity, and that the relevant case law relating to this is summarised in the advice in question (*Secretary of State for Transport ex parte Factortame*). It says that the law as outlined in the advice remains current and applicable.
34. TfGM has explained that it is open for the validity of its legal advice to be challenged in each individual prosecution and it would be for the Magistrates Court or relevant tribunal, to determine the validity on a case by case basis.
35. TfGM therefore argues that there is a very strong public interest in it retaining legal professional privilege because if the advice were to be disclosed it would assist claims being made and compromise TfGM's strategy to respond.

36. In addition, TfGM says that there is a strong case that as a matter of principle, public authorities should be able to retain the benefit of privilege where legal action may still be brought on the subject matter of the advice.

Arguments in favour of releasing the information

37. TfGM recognises that there is a public interest in disclosing such information, where appropriate, as it helps to demonstrate that TfGM's decision making is based on relevant and robust advice.

Balance of the public interest

38. The complainant has not provided any public interest arguments in favour of releasing the information. The Commissioner is therefore satisfied that the inherent necessity for TfGM to be able to seek and receive confidential legal advice, without the expectation that it will be disclosed to the public, outweighs TfGM's argument for disclosure in this case.

Other matters

Transport for Greater Manchester's FOIA compliance

39. The Commissioner has considered the small number of complaints he has received about TFGM. He does not consider that there is sufficient evidence that would suggest systemic failures with the way that TfGM handles FOIA requests that it receives, more generally.

Right of appeal

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

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

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

Pamela Clements
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