

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2016

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

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Transport for Greater Manchester (TfGM) for details of the termination of its contract with Atos for the 'Get me there' smart ticketing scheme. TfGM disclosed some of the requested information but also withheld some information under the exemption in section 43(2) (commercial interests).
2. The Commissioner's decision is that the section 43(2) exemption is not engaged and the information was wrongly withheld.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - TfGM shall disclose to the complainant the information in part 4 of his request.
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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 6 August 2015 the complainant made a freedom of information request to TfGM which read as follows:

Further to recent press reports on your termination of contract with ATOS in respect of the roll out and implementation of the "Get me there" ticketing scheme, My FOI request relates to the following information:

- 1. A summary of the project including critical timelines/stages*
 - 2. A summary of failed key stages Vs implementation plan*
 - 3. A financial overview of the costings for the ticketing scheme*
 - 4. A summary of compensation/costs following the termination. Whilst, I accept some of the data will be sensitive, the summary can use percentages rather than monetary figures ie: A total cost of x (Point 3) was invested and x% will be recouped as part of the compensation package from Atos.*
 - 5. A summary of dates/times when you realised the project was not achievable from Atos*
6. TfGM responded to the request on 4 September 2015 and provided answers to parts 1 – 3 and part 5 of the request. For part 4 of the request TfGM explained that disclosure would prejudice the commercial interests of Atos and that therefore the section 43 exemption applied. It also concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
7. The complainant subsequently asked TfGM to carry out an internal review of its handling of the request and it presented its findings on 15 October 2015. The review upheld the application of section 43.

Scope of the case

8. On 16 October 2015 the complainant contacted the Commissioner to complain about TfGM's decision to withhold the information in part 4 of his request under the section 43(2) exemption.

Reasons for decision

9. The complainant's request relates to the 'Get me there' Scheme – Greater Manchester's electronic ticketing system which has been described as comparable to the London Oyster Card system. In 2012 Atos were appointed to design, build and operate the scheme but in August 2015 it was announced that TfGM and Atos had agreed the mutual termination of the contract after it became clear that Atos could not deliver the scheme as contracted. TfGM announced that whilst

precise details of the termination of the contract were confidential it provided "substantial compensation to TfGM in respect of the costs incurred and which will enable TfGM to develop a smart ticketing system with alternative providers".¹

10. Part 4 of the complainant's request asked for details of the compensation payments and it is this information which has been withheld under the section 43(2) exemption.

Section 43(2) – Commercial interests

11. Section 43(2) provides that information is exempt if disclosure would or would be likely to prejudice the commercial interests of any person including the public authority holding it. In this case TfGM has said that disclosure of the withheld information would prejudice the commercial interests of Atos.
12. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
13. Furthermore, in relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account

¹ http://www.tfgm.com/Corporate/media_centre/Pages/News.aspx?articleId=740

speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

14. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case the withheld information relates to the termination of a commercial contract to undertake services for a fee - a commercial activity in which both TfGM and the service provider have an interest. The information is clearly commercial and the Commissioner accepts that the prejudice envisaged by TfGM falls within the scope of the exemption. The Commissioner is satisfied that this first element of the test is met.
15. As regards the nature of the prejudice TfGM has explained that disclosure would prejudice the ability of Atos to negotiate and agree terms to vary, settle or otherwise compromise commercial disputes under contracts with its customers in the future. It said that if the information was disclosed it could be used as a 'precedent' and harm its ability to negotiate on an arms length basis with its customers and suppliers.
16. It appears that TfGM's arguments for engaging the exemption are essentially that disclosure of the levels of compensation paid in this case would prejudice Atos' ability to negotiate similar payments in future projects. However, TfGM have not provided the Commissioner with any details of specific projects which might be prejudiced or shown that other negotiations are in prospect. Indeed it is unclear if Atos are currently involved in similar schemes. However, even if Atos were involved in similar schemes, or were negotiating similar compensation payments the Commissioner is unconvinced that disclosure of the compensation paid in this particular case would necessarily prejudice any similar negotiations in future. The amounts of compensation would be based on the particular set of circumstances of the case for instance the size and value of the project, the amount of work undertaken by Atos prior to termination, legal fees etc.
17. TfGM did provide the Commissioner with copies of correspondence with Atos to demonstrate that it had sought the views of the third party before applying the exemption. However, having considered this information the Commissioner notes that when TfGM initially consulted Atos its reasons for refusing the exemption amounted to little more than it objecting to disclosure and its belief that disclosure would prejudice its commercial interests, without any explanation of how this might occur.

Certainly it seems that at this stage TfGM were applying the section 43 exemption without any real sense of why it was engaged except that it would be against the wishes of Atos.

18. Following the complaint to the Commissioner TfGM did contact Atos again to discuss withholding the information. However, after failing to receive an initial response to its enquiries it was in fact TfGM which suggested the arguments on which the exemption should be applied and which are described above. Atos accepted the arguments made by TfGM but also added the comment that where it was "bidding and negotiating with potential customers in competition with competitor organisations that such competitor organisations may refer to it in that process to the commercial detriment of Atos". It did not explain how the use of this information would be detrimental.
19. This leads the Commissioner to conclude that whilst TfGM sought the views of Atos, the arguments for engaging the exemption are overstated, not properly explained and not supported by any evidence. The Commissioner has decided that TfGM has failed to demonstrate that there is a causal link between disclosure of the information and prejudice to the commercial interests of Atos. On the basis of TfGM's arguments the Commissioner has found that section 43(2) is not engaged.

Right of appeal

20. 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

21. 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.
22. 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

Paul Warbrick
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF