

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 2019

Public Authority: Transport for London
Address: 55 Broadway
London
SW1H 0BD

Decision (including any steps ordered)

1. The complainant made a freedom of information request for the schedule of rates for damage repairs. Transport for London (TfL) refused the request under the section 43(2) (commercial interests) exemption.
2. The Commissioner's decision is that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 7 May 2019 the complainant requested the following information:
*'Q1. How many invoices have Kier sent you and others this year?
Q2. Are they using the same rates for you and others as for Highways England?
Q3. What schedule of rates do they use for Damage repairs to the road network?
I am asking for all information.'*
4. On 15 May 2019 TfL provided an answer to the first 2 parts of the request but refused to provide the requested information for Q3 citing section 43(2), commercial interests:
'In this instance the exemption has been applied as disclosure would be likely to prejudice our commercial interests, as well as Kier's, by hindering their ability to operate competitively in the market place for future contracts of this nature. Provision of this information would allow

rival bidders and potential clients to have an insight on their pricing structure and manipulate this to hinder the ability of our contractors to conduct their business as competitively as possible...The Information Commissioner's Office have also issued a decision notice (FS50693918) upholding the use of section 43(2) to withhold this information.'

5. The complainant requested an internal review on 16 May 2019: 'I've read that DCP Rates are not commercially sensitive. I ask to be provided them.'
6. TfL sent him the outcome of its internal review on 3 June 2019 upholding the decision to refuse the requested information for Q3 citing section 43(2).

Scope of the case

7. The complainant contacted the Commissioner on 6 June 2019 to complain about the way his request for information had been handled.
8. The Commissioner has focussed her investigation on whether TfL correctly applied the exemption under section 43(2) of the FOIA to Q3 of the complainant's request for the schedule of rates.

Reasons for decision

Section 43(2) - Commercial interests

9. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.
10. The Commissioner notes that the requested information, the '*schedule of rates*' has been previously requested by other complainants to TfL and in her decision notices, the Commissioner considered that the exemption at section 43 had been correctly applied in all cases and that the public interest in maintaining the exemption outweighed the public interest in disclosure. The decision was also upheld on appeal to the First Tier Tribunal (FTT). These decisions are available at the following links:

<https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2173211/fs50688840.pdf> (dated 5 February 2018)

<https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258452/fs50693918.pdf> (dated 13 March 2018) which was appealed to <http://www.englandhighways.co.uk/wp-content/uploads/2019/01/EA-2018-0081-28.09.18.pdf> promulgated on 28 September 2018

<https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615082/fs50764553.pdf> dated 5 June 2019.

11. The Commissioner has therefore considered whether the circumstances in the above cases have altered by the time of the current request, i.e. 7 May 2019 which is one month earlier than the decision notice above dated 5 June 2019.
12. In broad terms, the arguments presented in respect of the earlier requests concerned the prejudice to the commercial interests of both TfL and the contractor involved. TfL explained that the schedule of rates is a highly detailed breakdown of the rates for the work carried out under the contract and these maintenance tasks are unlikely to change when the contracts are retendered in the future.
13. To release information on the process charged by one contractor would be likely to undermine the negotiating position of TfL to obtain value for money and place the incumbent contractor at a disadvantage when that contract was retendered.
14. In the decision notice FS50764553, TfL argued that the '*public interest favours maintaining the exemption as disclosing the schedule of rates would be likely to harm the commercial interests of both the contractor and TfL itself and their ability to compete fairly and competitively when the contract is retendered. This could lead to increased costs for the public. It has stated that the four contracts forming the LoHAC are estimated to save £450m over the life of those contracts. There is therefore clearly a public interest in preserving the competitive environment in which such contracts are negotiated.*'
15. TfL has advised the Commissioner that the contractor's position and TfL's position remains the same: '*the application of the exemption remains appropriate and justified*'.
16. Therefore in line with the reasons set out in her earlier decision notices the Commissioner is satisfied that the exemption is engaged and that the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosing the schedule of rates.

Right of appeal

17. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

18. 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.
19. 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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Wilmslow
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SK9 5AF