

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 November 2019

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant made two freedom of information requests for costs of implementing wifi for rail passengers. The Department for Transport (DfT) refused the requests 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.

Background

3. DfT provided the following as a background.
4. DfT's on-train wifi policy was introduced in 2014 with the aim to fit trains with equipment that allowed them to offer a wifi service to their passengers. This policy has been delivered through the rail franchising system at either the point of renewing or extending a franchise and, in a few select cases, by amending an existing franchise agreement to require this service to be provided.

Requests and responses - summary of correspondence

5. On 13 January 2019 the complainant made the first request (F0016955) for the following information:

'... a breakdown, by rail franchise operator, of the sums of money paid to each operator by the UK government, in order to implement free Wifi for rail passengers.'

6. On 22 February 2019 DfT interpreted this as including all current rail franchise operators in England and Wales. Rail franchising is devolved in Scotland. As the request was for the 'amount paid to operators to implement free wifi' DfT considered this was only relevant to the four rail franchise operators where DfT amended their existing franchise agreement.
7. DfT required four rail franchise operators to provide free on-train wifi and paid them to implement this requirement. DfT withheld this information under section 43(2) as the information relating to payment for services is commercially sensitive to the operators and the disclosure of it would be likely to prejudice the commercial interests of DfT and the rail franchise operators, both now and in the future.
8. The complainant requested an internal review on 8 March 2019. He argued that he was *'enquiring about public money paid to a private company. This is public money, and the public should have full transparency over the use of their money, in the interests of public confidence and accountability.'*
9. DfT sent him the outcome of its internal review on 5 April 2019 upholding the decision to cite section 43(2).
10. On 22 February 2019 the complainant made a further request (F0017163) for the following information:

'...how much, in total, public money you gave to private rail franchises to provide free Wi-Fi, and which franchises received a share of this money.'
11. On 20 March 2019 DfT stated that it had interpreted the request as regarding all current rail franchise operators in England and Wales. Rail franchising is devolved in Scotland.

'DfT required four rail franchise operators to provide free on-train wifi and paid them to implement this requirement. We have discussed this request with those affected rail franchise operators and under section 43(2) of the FOI Act we are withholding this information as disclosure of the information would be likely to prejudice the commercial interests of DfT.'
12. The complainant requested an internal review on 21 May 2019. He argued that he was asking for the total figure, not individual sums. He also argued that the information can be inferred from information that is already in the public domain and referred to an article:

'Department for Transport has invited the owners of four franchises with no current plans to deploy Wi-Fi to bid for a share of £50 million to accelerate the rollout. Thameslink, Southern and Great Northern (TSGN), Southeastern, Chiltern, Arriva Trains Wales will be eligible to apply for the grants.'

13. On 10 June 2019 DfT sent him the outcome of its internal review. DfT split the request into 2 parts:

1) The total amount of public money provided to rail franchises to provide free Wi-Fi. DfT upheld the decision to cite section 43(2) as *'providing the total costs for these four in-franchise changes, even at an aggregate level, could still provide an unfair advantage for certain organisations in future franchise competitions. This is because, of the four franchises concerned, two were owned by GTR and two by Arriva at the time the franchises were re-let, so it would be possible for each of these owning groups to deduce their competitors' costs with a reasonable degree of accuracy from the release of this information. This could in turn place the franchisees in breach of confidentiality agreements with third parties.'*

2) Which franchises received a share of this money? DfT stated that the section 43 exemption was incorrectly applied in relation to this part of the request, because this information may be readily inferred from information already in the public domain, namely the franchise agreements for the franchises in question so disclosing the names of the franchises who received public money for this purpose would not in itself prejudice their commercial interests. DfT disclosed the names of the 4 franchises that received public money to provide free Wi-Fi on trains were: Thameslink, Southern and Great Northern (TSGN); SouthEastern; Wales & Borders (operated by Arriva Trains Wales at the time); and Chiltern.

Scope of the case

14. The complainant contacted the Commissioner on 12 June 2019 to complain about the way his requests for information had been handled.
15. The Commissioner has focussed her investigation on whether DfT correctly applied the exemption under section 43(2) of the FOIA as a basis for refusing to provide the withheld information from the first request (13 January - a breakdown of sums paid to each franchise operator) and the first part of the second request (22 February - the total amount paid to the 4 franchise operators)

Reasons for decision

Section 43(2) - Commercial interests

16. 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.
17. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests.
18. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which DfT alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
 - Secondly, DfT must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; 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. whether there is a real and significant risk of the prejudice occurring.

Commercial interests

19. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her awareness guidance on the application of Section 43. (<https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>). This comments 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."
20. DfT identified numerous parties whose commercial interests would be likely to be prejudiced if the withheld information was disclosed. As well as DfT the list included the 4 named Train Operating Companies (franchisees), the 2 Owning Groups (Arriva and Govia), Mobile Network Operators, Telecommunications Integrating Companies and their third

party suppliers. The complainant referred to 'Rail Franchise Operators' which in broad terms for DfT, refers to Train Operating Companies and their Owning Groups taken together.

21. DfT explained that the in-franchise changes were the result of significant commercial negotiations between DfT, the Train Operating Company and its Owning Group. Following the conclusion of these negotiations, the contracts underwent a redaction process in which all relevant parties agreed on the information that was commercially sensitive and would be redacted. *'This included all information related to costs, such as equipment, fitment and data. In some cases, the information is also the subject of confidentiality provisions between the Train Operating Company, its Owning Group and their supplier.'*
22. The Commissioner is satisfied that the actual harm alleged by DfT relates to its commercial interests. Accordingly, she is satisfied that the first criterion is met.

Causal link

23. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some *causal* link between the potential disclosure and the prejudice.
24. DfT has provided the Commissioner with details of the way in which it believes its commercial activities would be affected by disclosure of the requested information. DfT has pointed out that:
 - given the highly commercial and sensitive nature of this information, which has been redacted, if DfT were to now disclose this information it is likely to undermine the relationship of trust and confidence between DfT and the franchisees. This could mean that other franchisees may be unwilling to negotiate in confidence with DfT if they believe that details on payments are going to be disclosed.
 - Disclosure of the information requested would be likely to prejudice any future negotiations that the Department may undertake to improve on-train wifi and mobile connectivity if it became known how much money had already been paid to each operator.
 - There would be an expectation that any future funding would be at least the same as the previous. This would undermine DfT's negotiating position and may lead to DfT paying a higher figure than they would otherwise have. Clearly this would not be the best use of public money.

25. DfT also stated that from the Train Operating Company and Owning Group perspective, disclosure would be likely to prejudice any future franchise competitions as rival bidders would be able to view this information and have an unfair advantage over these rail franchise operators.
26. Even at an aggregate level, the total cost would still provide an unfair advantage for certain organisations in future franchise competitions. This is because at the time, the four franchises were owned by 2 Owning Groups who would be able to deduce their competitors' costs with a reasonable degree of accuracy from the release of this information.
27. The Commissioner is satisfied that DfT has provided reasonable arguments to suggest that there is a causal link between the requested information and its (and the rail franchise operators') commercial interests.

Likelihood of prejudice

28. In *Hogan and Oxford City Council v the Information Commissioner [EA/2005/0026 and 0030]* the Tribunal said:

“there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”(paragraph 33)
29. In this case, DfT has confirmed that it is relying on the lower threshold to engage the exemption. The Commissioner's view is that “would be likely to” places an evidential burden on the public authority to show that the risk of prejudice is real and significant.
30. The withheld information in this case constitutes a breakdown of the sums paid and the total sum paid to operators to implement free wifi and the Commissioner is satisfied that this information would be of use to a competitor.
31. When a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns. In this case DfT has provided the Commissioner with copies of communications with the companies concerned and from this it

is clear that the reasons for applying the section 43 exemption reflect the genuine concerns of the third parties.

32. This is not in itself a reason not to disclose the information under FOIA. However, it does indicate the importance that DfT and the rail franchise operators attach to this information and the prejudice that would be likely to be caused if it was disclosed.
33. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and therefore has now gone on to consider the public interest test.

Public interest test

34. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

35. The complainant stated that he was *'enquiring about public money paid to a private company. This is public money, and the public should have full transparency over the use of their money, in the interests of public confidence and accountability'*.
36. DfT stated that disclosure would contribute to the Government's wider transparency agenda and allow the public to see how much public money has been spent on providing wifi on certain rail franchises.

Public interest arguments in favour of maintaining the exemption

37. As regards the public interest in maintaining the exemption DfT said that there was a public interest in ensuring that it operates in a proper competitive environment:
 - The cost information detailed in the franchise agreement was the result of significant negotiations between the Department and the four rail operators, including additional negotiations with suppliers, and was done so on a strictly confidential basis and disclosure of the information would likely damage the relationship and trust.
 - The information requested is subject to confidentiality provisions that are within the respective agreements between the operator and their supplier. As such any disclosure would be likely to prejudice the relationship with the supplier and hinder the ability to obtain competitive pricing for future tenders, extension etc.

- Disclosure would be likely to prejudice future bidding processes by undermining confidence that current and future franchise partners have in DfT to maintain necessary confidentiality. This would be likely to prejudice DfT's commercial interests as it would find it harder to run the rail franchise programme without information supplied by franchise partners that they were not mandated to provide.
- The prospects for the four rail franchise operators on future franchise bids would likely be prejudiced as rival bidders would be able to view this information and it would give them an unfair advantage over these rail franchise operators.

Balance of the public interest arguments

38. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
39. The Commissioner notes that there is already some information in the public domain as Claire Perry (previous Rail Minister at DfT) stated that *'around £50million would be committed to delivering on-train wifi in these franchises'*. The Commissioner is satisfied that this approximate value goes some way to satisfying the public interest in transparency and provides an indication of the scale of investment for on-train wifi. She understands that release of the actual total or the more detailed breakdown of information into the public domain would undermine DfT's competitive ability to negotiate in the future.
40. The Commissioner's view is that in this case there is a stronger public interest in protecting the commercial interests of the DfT, the rail franchise operators and the other parties to ensure that they are able to compete fairly. Companies should not be disadvantaged as a result of doing business with the public sector.
41. Therefore, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

Procedural matters

42. Section 10(1) of the FOIA states that a public authority should respond to a request promptly and in any event no later than 20 working days following receipt. It is apparent in this case that DfT failed to respond to the complainant's initial request within 20 working days and so breached section 10(1) of the FOIA.

Right of appeal

43. 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

44. 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.
45. 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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