

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 March 2021

Public Authority: Cardiff City Transport Services Limited
(Cardiff Bus)

Address: talktous@cardiffbus.com

Decision (including any steps ordered)

1. The complainant requested the raw data used to compile performance figures for the Cardiff Bus customer charter. Cardiff Bus withheld the information requested under section 43 of the FOIA. The Commissioner's decision is that Cardiff Bus has incorrectly applied the provisions of section 43 and the exemption is not engaged.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information - namely the raw data used to assess performance against the first section of its customer charter, (to operate 99.5% of all journeys, and 95% of all buses will depart from the starting point of the journey within a window of no more than one minute early or five minutes late except where delays or interruptions are caused by factors outside our control), for the period 1 July 2018 to 30 June 2019.
3. 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

4. On 30 April 2019 the complainant wrote to Cardiff Bus and requested all the raw data used to assess performance against the targets within its customer charter for the period 1 May 2018 to 30 April 2019.
5. Cardiff Bus refused the request under section 12 of the FOIA as the cost of complying with the request would exceed the appropriate limit.
6. Following an internal review where Cardiff Bus upheld its position that section 12 applied to the request, on 17 July 2019, the complainant submitted a refined request for information in the following terms:

*"..., I am primarily interested in the first section of the customer charter:

'We will endeavour to operate 99.5% of all journeys, and 95% of all buses will depart from the starting point of the journey within a window of no more than one minute early or five minutes late except where delays or interruptions are caused by factors outside our control.'

So if it would be possible for Cardiff Bus to provide me with all of the raw data used to assess performance on that section in the customer charter, for the year July 1 2018 to June 30 2019, that would be helpful".*
7. Cardiff Bus responded on 9 August 2019 and stated that the information requested was exempt under section 43 of the FOIA.
8. On 9 August 2019 the complainant requested an internal review of the decision to withhold the information requested. She stated that she did not consider that Cardiff Bus had demonstrated any prejudice would be likely to result through disclosure and provided public interest arguments in favour of disclosure which she considered relevant.
9. Cardiff Bus provided the outcome of its internal review on 9 September 2019 and upheld its decision that the information requested was exempt under section 43 of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 12 September 2019 to complain about the way her refined request of 17 July 2019 for information had been handled.

11. The scope of the Commissioner's investigation into this complaint is to determine whether Cardiff Bus should disclose the information requested on 17 July 2019.

Reasons for decision

Section 43 – Commercial interests

12. Section 43(2) of the FOIA states that information is exempt if its disclosure would prejudice the commercial interests of any person, including those of the public authority holding it.
13. The exemption can be engaged on the basis that disclosing the withheld information either 'would' or 'would be likely to' prejudice commercial interests. This establishes two thresholds for engaging the exemption. The lower one, 'would be likely to' prejudice, has been interpreted by the Tribunal as meaning that the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk. It follows there must be a greater risk of the prejudice occurring for the exemption to be engaged on the basis that the prejudice 'would' occur.
14. The withheld information in this case comprises spreadsheets showing the raw data used to compile statistics on the punctuality of each of Cardiff Bus' bus routes, showing the number early, on time and late on each day.
15. The Commissioner notes that Cardiff Bus has applied the higher threshold of likelihood i.e. that disclosure 'would' prejudice its own commercial interests. The Commissioner has therefore considered the application of the exemption on the basis of the higher threshold initially but may revert to the lower threshold if she considers it more appropriate.
16. Cardiff Bus is a private limited company whose sole shareholder is Cardiff Council ('the Council'). It provides public transport services in and around the Cardiff area. It has a commercial interest in generating revenue from its network of local bus services, which not only relates to making a profit but also to cover operating costs and maintaining solvency. It depends on passenger revenue to remain operational in a competitive environment.
17. Cardiff Bus advised the Commissioner that its "*business ethos involves taking a holistic network approach to determining and providing city-wide bus routes, which differs to a wholly private operator which is solely concerned with the return rate and maximising profit*". Cardiff Bus

contend that disclosure of the withheld information would impact on its ability to generate income and compete in a commercial environment because:

"to disclose raw data of such granularity relating to Cardiff Bus's journeys, routes and performance would create an unfair competitive advantage in the market in which Cardiff Bus operates, which would not be in the public interest."

18. Cardiff Bus argues that disclosure of the withheld information would allow competing companies to analyse the data and target routes where there are any perceived weakness. Competitors would then be able to use this analysis, alongside existing marketing knowledge of busier and/or potentially more profitable routes, to target perceived weaknesses on these routes to their competitive advantage. This would adversely affect Cardiff Bus's overall profitability and its ability to operate in the marketplace. If Cardiff Bus is unable to cover its operating costs it would have a significant detrimental impact on the business.
19. Cardiff Bus also contends that both its competitors and members of the public may misinterpret the withheld information and draw inaccurate conclusions about its performance. It considers that this would *"create and/or would be used by competitors to cause unjustified reputational damage and/or loss of customer confidence. This risk is not easily mitigated by Cardiff Bus due to the length of the requested period and the granularity of the requested raw data"*.
20. Cardiff Bus explained that the withheld information is collated to aid with the confidential analysis of its services. The data is particularly granular – far more than it is believed is gathered by its competitors – due to the technology it uses. The granularity of the data also goes far beyond the level of data which is required by its regulator to assess performance against service standards. As far as Cardiff Bus is aware, no UK bus operators voluntarily publish data similar to the withheld information.
21. In addition, Cardiff Bus pointed out that the withheld information does not include what is considered to be a key factor of the regulatory performance standards - as noted in the customer charter – *"except where delays or interruptions are caused by factors outside [Cardiff Bus'] control"*. This means that, in order for public perception to be accurate and for incorrect conclusions not to be drawn, the raw data needs to be accompanied with full, detailed information about delays or interruptions caused by factors outside Cardiff Bus' control such as accidents, roadworks, road closures, protests etc. The collation of information about these factors *"is not automated in the way the requested raw data analytics are. It is therefore a very time-consuming*

task to collate this information. As a result, the extent of this information held by Cardiff Bus does not match the granularity of the requested raw data. It is also not necessary to collate these factors to the same granularity as the full set of raw data for the purposes of assessing performance against the regulatory targets”.

22. Although Cardiff Bus accepts that the Commissioner considers the position at the time of the request, it referred to the current time period where transport operators are readjusting and rebuilding in the wake of the Covid-19 pandemic. Cardiff Bus considers disclosure at the current time will heighten the competition from other operators to use the opportunity to gain a competitive edge bus, targeting 'known' busier routes to their advantage.
23. In order for a prejudice based exemption, such as section 43(2), to be engaged, the Commissioner believes that three criteria must be met:
 - Firstly, the actual harm which the public authority believes would, or would be likely, to occur if the withheld information was disclosed has to be related 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 potential prejudice against 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.
24. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by Cardiff Bus clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
25. The Commissioner accepts that information about the reliability of services which it operates is commercial information which could affect the revenue that Cardiff Bus generates. However, The Commissioner has to consider whether disclosure of the actual withheld information would prejudice any party's commercial interests.
26. The Commissioner notes that disclosure of the withheld information would provide both the public and competitors an insight into the reliability of every single route which Cardiff Bus operates on a daily

basis. The withheld information shows the number of stops on a route which were on time, early and late, however it does not provide any information about passenger numbers on each route, or the potential/actual revenue from each route.

27. During her investigation the Commissioner specifically asked Cardiff Bus to explain exactly *how* disclosure of information on service reliability would allow competitors to be able to identify the more profitable routes. To date Cardiff Bus has not explained how the withheld information itself could be used to identify the more profitable routes. It simply asserts that the data could be analysed by its competitors to target routes with perceived weaknesses and then competitors could combine this analysis with "*existing market knowledge of busier or potentially more profitable routes*". However, again Cardiff Bus has not specifically explained how the withheld information could be interpreted to identify perceived weaknesses in a route.
28. Even if it was possible to identify the more profitable routes/weaknesses in a route through disclosure of the withheld information, the Commissioner notes that Cardiff Bus has acknowledged that the raw data does not include any narrative about performance, for example where delayed services resulted from external factors such as roadworks and road closures. As such, the withheld information does not provide 'the full picture' in terms of the reliability of each service.
29. The Commissioner accepts that other bus operators may not be able to undertake a similar level of market analysis to obtain the level of detail contained within the withheld information about the reliability of either its own or Cardiff Bus services. However, Cardiff Bus has acknowledged that the withheld information would need to be combined with *existing* market knowledge of the busier routes, in order for competitors to gain an advantage. It would appear to the Commissioner, therefore, that Cardiff Bus has confirmed that there is already information in the public domain and/or available to its competitors about busier bus routes in the area.
30. Based on the evidence available to her and the representations submitted by Cardiff Bus, the Commissioner is not convinced that disclosure of the withheld information would have any significant effect on the behaviour of any competitors wishing to bid for contracts for any future transport services in the area. The Commissioner considers that companies wishing to bid for future services would conduct their own research into establishing the most profitable routes and/or any potential weaknesses in any route. In reaching this view, the Commissioner has taken into account the fact that the withheld information does not provide the full picture in terms of reliability of

services, as referred to in paragraph 28 or, as far as she can see, the amount of revenue received/profitability of each service.

31. Cardiff Bus has also argued that disclosure would lead to the public and/or competitors drawing inaccurate or incorrect conclusions from the raw data which could in turn result in a loss of customer confidence and/or be used by competitors to cause reputational damage. It has not explained how inaccurate conclusions could be drawn from the information, or indeed what potentially inaccurate conclusions could be drawn. The Commissioner accepts that it may not be possible or indeed practical to highlight the specific reason for each and every delay caused by external factors such as road closures or accidents. However, she is not satisfied that Cardiff Bus has provided sufficient arguments to demonstrate that it would not be possible to correct any misinterpretation or misunderstanding of the raw data through issuing general contextual explanations about delays caused through external factors.
32. The Commissioner is mindful of ordering the disclosure of information which might affect open competition by revealing any information which would prejudice one company over another. However, she must be convinced that disclosing the information in question would provide any competitors with information that could be used to undercut Cardiff Bus. To accept this argument the Commissioner must be satisfied that there is a causal link between disclosure of the actual withheld information and the prejudice that Cardiff Bus argues would result.
33. For the reasons set out above, the Commissioner considers that Cardiff Bus has not provided sufficient evidence to demonstrate that the withheld information would either encourage competitors to target specific bus routes in the future or that any company would have a competitive edge over Cardiff Bus in winning any new contracts. Neither has Cardiff Bus demonstrated that it would not be possible to provide contextual information to address the potential for the withheld information to be misinterpreted and/or inaccurate conclusions being drawn about its performance.
34. In summary, the Commissioner considers that Cardiff Bus has failed to explain any causal link between disclosure of the withheld information and the commercial prejudice claimed. As Cardiff Bus has not sufficiently demonstrated that disclosure would, or would be likely to, prejudice any party's commercial interests, the Commissioner has concluded that section 43 is not engaged.

Right of appeal

35. 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

36. 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.
37. 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

Joanne Edwards
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