

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2023

Public Authority: Transport for Wales
Address: 3 Llys Cadwyn
Rhondda Cynon Taff
CF37 4TH

Decision (including any steps ordered)

1. The complainant requested various information in respect of an Accessibility Email Group (the AEG) from Transport for Wales (TfW). TfW confirmed that it did not hold some information and refused the remainder of the request on the basis of section 40(2) (personal information), section 41 (information provided in confidence), and section 21 (information accessible to the applicant by other means) FOIA. During the course of the Commissioner's investigation, TfW disclosed redacted copies of some of the emails to the complainant.
2. The Commissioner's decision is that TfW has complied with its obligations under section 1(1) FOIA and that it was entitled to rely on section 40(2), section 41 and section 21 for the information it does hold. However, its failure to disclose the redacted copies of some of the emails until recently, represents a breach of section 10(1) FOIA. Additionally, the Commissioner has also recorded a breach of section 17(1) as a result of TfW's failure to issue its refusal notice within the required timescales.
3. The Commissioner does not require further steps

Request and response

4. On 19 March 2022, the complainant wrote to TfW and requested the following information:

"I understand that there's an "Accessibility Email Group" by which members of the rail industry communicate on accessibility matters in service provision...

Please can you advise the current membership of the group?

If you feel that S40 applies to the list of members please can you list the positions of said people and the organisation for which they work / whom they represent?

Please can you supply all messages sent on this group over the past year."

5. TfW responded on 11 May 2022. It confirmed that the list includes three members of TfW staff, however it refused to provide the names and roles of its staff on the basis of section 40(2) FOIA. In terms of other members of the group, TfW informed the complainant that it does not hold full membership details as the group is owned and managed by the Rail Delivery Group (the RDG).
6. Following a request for an internal review on 12 May 2022, TfW contacted the complainant on 9 June 2022 confirming that a total of 556 emails had been retrieved from TfW, the RDG and 18 other member organisations which may fall within the scope of their request. However, TfW refused to disclose the information citing section 12 FOIA on the basis that it would require a significant undertaking and exceed the appropriate limit. TfW also invited the complainant to refine their request. However, although the complainant contacted TfW on 10 June 2022, they did not refine their request.
7. TfW proceeded on the basis that the complainant did not wish to refine their request and following an internal review of the full request, wrote to the complainant on 26 August 2022. It upheld its reliance on sections 40(2) and 41 FOIA, withdrew its reliance on section 12 and applied section 21 to those emails which had been disclosed by other Train Operating Companies (TOC's) in response to a separate request for information from the complainant.

Scope of the case

8. The complainant first contacted the Commissioner on 20 April 2022 to complain that TfW had not responded to their request. Having

subsequently received a response and an internal review, the complainant contacted the Commissioner again on 6 July 2022 to complain about the response to their request.

9. The complainant is not satisfied with TfW's refusal of their request or its procedural handling of their request, and in particular its timeliness.
10. During the course of the Commissioner's investigation, TfW disclosed redacted copies of emails sent by its staff member to the AEG, withdrawing its reliance on section 41 FOIA in respect of the content of these emails, whilst maintaining its reliance on section 40(2) in respect of names of the sender and recipients. It did however maintain its reliance on the exemptions cited in relation to the emails received from external members of the AEG.
11. The scope of the Commissioner's investigation is to consider whether TfW has complied with its obligations under sections 1(1), 40(2) and 41 FOIA, and its procedural handling of the request.

Reasons for decision

Section 1(1) – general right of access to information held

12. Under section 1(1) FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
13. In his consideration of this case, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that information relevant to the request does not remain undiscovered somewhere within the public authority's records. When considering whether a public authority does hold any requested information the normal standard of proof to apply is the civil standard of the balance of probabilities.
14. The Commissioner's judgement is therefore based on the public authority's submissions and where relevant, details of any search undertaken. The Commissioner expects that the public authority should take a reasonable and proportionate search in all cases.
15. The first part of the request is for details of the current membership of the AEG. However, TfW informed the complainant that it does not hold relevant information in respect of this aspect of their request.
16. The Commissioner queried this with TfW which confirmed that it is not possible to expand the generic AEG email address to see the actual

members. It also confirmed that even if this was possible, as the AEG was set up and managed by the RDG, that it would have no way of knowing whether the individuals were still members of the group.

17. It added that it is not privy to when members are added or removed, have unsubscribed or continue to receive emails despite having changed roles within their organisation. It further stated that to release the recipient email addresses of other members of the group, as they appear on emails received by Tfw members, would likewise breach UK GDPR. Tfw refused to disclose the content of the emails in reliance on section 41 FOIA.
18. The Commissioner also asked Tfw whether it had approached its staff representative of the AEG to see whether they might hold such a list. Tfw informed the Commissioner that their representative had confirmed that they do not hold such a list.
19. The Commissioner considers that Tfw conducted a reasonable and proportionate search of its records for the details specified above, and that its explanation as to why it does not hold this information is reasonable. He has therefore concluded that Tfw has complied with its obligations under section 1(1) FOIA.

Section 40(2) – personal information

20. The analysis below considers whether Tfw was entitled to apply section 40(2) of FOIA to refuse the request. Section 40(2) of FOIA states that information is exempt from disclosure if it is the personal data of another individual and disclosure would contravene one of the data protection principles.
21. The withheld information in this case is the names, organisations and in some cases, the job titles and contact details of individuals in the AEG as they appear on the relevant emails. Clearly the names and contact details of the individuals is their personal data. However, it is less clear cut whether their job titles and name of employer constitutes personal data as it depends on whether they can be identified from those organisations or job titles.
22. Tfw has stated that only one of its employees is a member of the AEG and that even a basic internet search of this particular job title quickly confirms the identity of this individual.¹ The Commissioner undertook

¹ The Commissioner clarified with Tfw the apparent discrepancy in numbers of its representatives on the AEG having previously informed the complainant there were three.

such a search and can confirm that this is correct. He is therefore satisfied that the job title of the TFW employee member of the AEG does constitute their personal data.

23. TFW has offered no information with regard to the identifiability or otherwise of the remaining members of the AEG as a result of disclosure of their job titles. However, the Commissioner has erred on the side of caution and has concluded that identifiability would be possible from such a disclosure. The Commissioner therefore accepts that the withheld information does constitute personal data.
24. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed on principle (a), which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
25. In the case of an FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
26. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider:
 - whether a legitimate interest is being pursued in the request for information;
 - if so, whether disclosure is necessary to meet the legitimate interest in question; and
 - whether those interests override the rights and freedoms of the data subject.
27. The complainant has stated that they have requested this information because they want information regarding the rail industry’s accessibility-related activities. They consider that the only personal information that would be disclosed is that they are members of the AEG, which would appear to be of minimal consequence as it is not revealing what they have done or said in the group, nor what actions they have taken or not taken.

TFW confirmed that this was incorrect as it had mistakenly included the names of two staff members who had received internal emails from its one staff representative.

28. Further, the complainant has stated that it is a legitimate assumption that all TOC Accessibility and Inclusion Managers (AIMs) are on the list, and that a five minute internet search provided the identities of these individuals at multiple TOC's. The Commissioner notes that the complainant has provided a list of the names of AIM's for multiple TOCs'.
29. The complainant has further stated that the AIM role is a senior management role with responsibility for making decisions which directly impacts on the accessibility provisions of their organisation or company to their passengers.
30. The complainant further informed the Commissioner that TfW has illegitimately personalised the potential release of this information as being to them personally. They consider that this is neither appropriate or accurate as their interests are the public's interest in the administration of accessibility provisions for disabled passengers of the railway. They further argued that to suggest that their motives are somehow individual or nefarious is inaccurate and irrelevant for the purposes of the request.
31. The complainant considers that it would be legal under GDPR to release the identities of the people involved because the legitimate interests of the public in knowing who is making and receiving critical decisions on the accessibility of the UK railways overrides their right to privacy.
32. The Commissioner accepts that there is a legitimate interest in the disclosure of this information and has therefore gone on to consider whether disclosure is necessary to meet those legitimate interests.
33. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
34. The Commissioner is satisfied that disclosure is necessary to meet the legitimate interest identified.
35. Turning to whether that interest is sufficiently strong to override the rights and freedoms of the data subjects, TfW has explained that the withheld information is personal data about the data subjects in their work capacity.
36. In relation to its own employee it stated that if it was made public that this individual was a member of the AEG, this may have adverse ramifications for that individual.

37. TfW informed the Commissioner that the complainant is a transport rights campaigner, operating a blog. It referred to disclosures by other public authorities which resulted in the complainant writing several posts on their blog, with the content of some having led to letters from the solicitor of one of those individuals on the basis that the comments in the blog were defamatory. It should be noted however that these are merely allegations, with the outcome of these letters unconfirmed.
38. TfW expressed concern that disclosing the information about its employee could lead to a disproportionate and unwarranted level of interference with the individual's rights and freedoms due to possible onwards use of their employee's personal data on the complainant's blog with the potential to lead to harm or distress as a result.
39. In respect of the other individuals, TfW has stated that it does not consider that it has a lawful basis to disclose such information, for the same reasons as set out above in relation to its own employee.
40. From TfWs' submissions, the Commissioner considers that the data subjects have a reasonable expectation that information about their names, roles and contact details within their respective organisations will remain confidential and will not be disclosed to the world at large under FOIA, without proper justification. The Commissioner accepts that data subjects are entitled to regard such information as personal and to expect to retain control over who may have access to it.
41. Based on the above factors, the Commissioner has determined that the legitimate interests in disclosure are not strong enough to outweigh the data subjects' fundamental rights and freedoms. Therefore, he considers that there is no legal basis for TfW to disclose the requested information, and that to do so would be in breach of principle (a).
42. The Commissioner's decision is therefore that TfW was entitled to rely on section 40(2) of FOIA to refuse that part of the request which constituted personal information.

Section 41 – Information provided in confidence

43. Section 41(1) of the FOIA states that:

Information is exempt information if –

- (a) It was obtained by the public authority from any other person (including another public authority), and
- (b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person"

44. The Commissioner's guidance on section 41² states that in order for the exemption to apply, four criteria must be met:

- the authority must have obtained the information from another person,
- its disclosure must constitute a breach of confidence,
- a legal person must be able to bring an action for the breach of confidence to court, and
- that court action must be likely to succeed.

Was the information obtained from another person

45. Section 41(1)(a) requires that the requested information must have been given to the authority by another person. In this context the term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity.

46. The withheld information in this case comprises emails received by the member of TfW staff in connection with their role as a member of the AEG.

47. The Commissioner is satisfied that emails received by TfW from the AEG would have been 'obtained from another person'.

Would disclosure constitute an actionable breach of confidence?

48. In determining whether a breach of confidence would occur, the Commissioner applies the three-step test set out by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415:

- the information must have the necessary quality of confidence;
- it must have been imparted in circumstances importing an obligation of confidence; and
- there must have been an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

49. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
50. TfW has informed the Commissioner that it accepts that some of the information sought as part of this request, has been disclosed by other TOC's in response to a different (but related) FOIA request, and that these no longer have the necessary quality of confidence. It has therefore applied section 21 to these documents on the basis that they are accessible to the complainant by other means. The Commissioner will consider TfW's application of section 21 later in this notice.
51. TfW has however confirmed that the remaining information is not otherwise accessible as it was only disclosed to a select and small group for specific reasons, and therefore retains the necessary quality of confidence.
52. The Commissioner accepts that the information in question is not otherwise accessible and that it is more than trivial, and is therefore satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

53. An obligation of confidence may be expressed explicitly or implicitly.
54. TfW informed the Commissioner that all emails circulated to the AEG by the RDG attach explicit conditions relating to the subsequent use or disclosure of the information contained within those emails. It added that the information contained in those emails was disseminated on the condition that it was for their use alone and would only be disclosed in accordance with the wishes of the confider.
55. TfW has further stated that the RDG wrote to all TOCs on 7 April 2022 confirming that discussions between TOCs, emails from RDG and minutes of meetings were (and are) all confidential information and that it could not function if its members did not respect the confidentiality of discussions and decisions. TfW added that this letter explicitly confirmed its understanding that the information contained within the requested emails was imparted in circumstances importing an obligation of confidence.
56. TfW further considers that additionally, or in the alternative, the restrictions on use of the emails was obvious from the circumstances and therefore gives rise to an implicit obligation of confidence as determined by the 'reasonable person' test used by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415. 51. Judge Megarry advocated that;

"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised, that upon reasonable grounds the information was being given to him in confidence then this should suffice to impose upon him the equitable obligation of confidence".

57. TfW has argued that a reasonable person standing in its shoes, and in the context of the circumstances, would have realised that the discussions of the RDG were confidential. It added that the information was disclosed in private meetings and/or private emails between TOCs and public authorities, therefore it would be clear that such exchanges were only ever made subject to an implicit obligation of confidence.
58. The Commissioner notes that the emails themselves do not all contain an explicit obligation of confidence, and the letter of 7 April 2022 post-dates both the request and the withheld information. However, he accepts the implicit obligation of confidence in respect of information imparted via meetings and emails of the AEG, and is therefore satisfied that the information was imparted under at least an implicit obligation of confidence.

Would there be an unauthorised use of the information to the detriment of the confider

59. TfW has argued that disclosure of the withheld information could be of detriment to the RDG and member organisations of the AEG since it would stymie the ability of the AEG to have frank and open discussions in the future, as it would remove the safe space required to take on advice, deliberate and make policy decisions.
60. The Commissioner is also mindful of the Tribunal's decision in the case of Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090] paragraph 15 that the loss of privacy can be a detriment in its own right. There is no need therefore for there to be any detriment to the confider in terms of tangible loss in order for it to be protected by the law of confidence other than the loss of privacy in its own right.
61. In this particular case, the Commissioner accepts TfW's reasoning as to why disclosure of the information into the public domain is likely to cause detriment to the RDG and members of the AEG.
62. The Commissioner is therefore satisfied that all the tests set out in *Coco v Clark* have been met, and a duty of confidentiality exists.

Would the breach be actionable

63. The final criteria for section 41 to apply is that a breach of confidence must be an actionable breach. As Lord Falconer (the promoter of the

FOIA as it was passing through Parliament) said during the debate on the FOIA:

"... the word "actionable" does not mean arguable ... It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, 'I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure'. That is not the position. The word used in the Bill is "actionable" which means that one can take action and win."

64. The Commissioner must therefore consider whether any action is likely to succeed.
65. To determine whether an action would be likely to succeed, the Commissioner must assess whether TfW might be able to put forward a public interest defence. The test is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.
66. The Commissioner is mindful that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong, since the duty of confidence is not one which should be overridden lightly. These could include circumstances where the information concerns mis-conduct, illegality or gross immorality. Much will therefore depend on the facts and circumstances of each case.
67. A public authority should weigh up the public interest in disclosure of the requested information against both the wider public interest in preserving the principle of confidentiality and the impact disclosure of the information would have on the interests of the confider.
68. Whilst TfW accepts that there is a public interest in transparency and accountability, it considers that the wider public interest in preserving the principle of confidentiality and the impact of disclosure in this case, favours maintaining that confidentiality. It does not therefore consider that it would have a public interest defence in the event of disclosure and that any such action, would be likely to succeed.
69. The Commissioner acknowledges the above. However, in weighing this against the public interest in maintaining trust between confider and confidant, and the likely distress and possible detriment to the confider, the Commissioner considers that TfW would not have a public interest defence for breaching its duty of confidence.
70. Having considered all the circumstances of this case, and the information withheld under section 41 FOIA, the Commissioner has concluded that there is a stronger public interest in maintaining the

obligation of confidence. Therefore the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Section 21 – information accessible to applicant by other means

71. Section 21 of the FOIA provides an exemption to information which is reasonably accessible to the applicant otherwise than under section 1 of the FOIA. The purpose of the section 21 exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route. Therefore, unlike most exemptions, the circumstances of the applicant can be taken into consideration.
72. Although the information may be available elsewhere, a public authority will need to consider whether it is actually 'reasonably accessible' to the applicant before it can apply section 21. Defining 'reasonably accessible' is open to interpretation, however it generally applies to the following:
 - Information available via the public authority's publication scheme will be reasonably accessible to an applicant.
 - There is another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA. For example, under the Access to Health Records Act 1990.
73. Section 21 is an absolute exemption which means that where the exemption is engaged, a consideration of the public interest test is not necessary.
74. TfW applied section 21 to emails previously disclosed by other TOC's in response to a separate request which also fall within the scope of this request. It provided a link to information which had been provided to the complainant via the What Do They Know (WDTK) platform.
75. The Commissioner considers that information provided on the WDTK site is not only reasonably accessible to the complainant but in the public domain. He therefore accepts that TfW were entitled to apply section 21 to those emails falling within the scope of the request which had been provided by other TOC's in response to a related request for information. As stated above, it is not necessary to consider the public interest test.

Procedural matters

Section 17(1) refusal of request

76. Section 17 of the FOIA concerns the refusal of the request and section 17(1) states that:

“A public authority which, in relation to any request for information, is to any extent relying on a claim ... that information is exempt information must, within the time for complying with section 1(1) give the applicant a notice...”

77. The Commissioner notes that the request was received on 19 March 2022, yet the response was not issued until 11 May 2022. This is clearly in excess of the required 20 working days and therefore represents a breach of section 17(1) FOIA.

Section 10(1) – time for compliance with request

78. Section 10 of the FOIA states that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
79. As stated above, the complainant submitted their request on 19 March 2022. However, TfW has only recently disclosed some limited information to the complainant. TfW therefore breached section 10(1) of the FOIA in respect of this information.

Other matters

Internal review

Internal review

80. The Commissioner acknowledges that it is not a formal requirement for a public authority to conduct an internal review under the FOIA. However, the Section 45 Code of Practice recommends that public authorities do undertake an internal review and that it should be done promptly. The Commissioner has also produced guidance in relation to this matter which recommends that it takes no longer than 20 working days in most cases, and in exceptional circumstances, no longer than 40 working days.
81. The Commissioner notes that the complainant requested an internal review on 12 May 2022. However, TfW did not send the complainant details of its internal review until 26 August 2022.
82. The Commissioner expects TfW to deal with requests for an internal review within the recommended timescales in future.

Reference: IC-166544-K0D3

Right of appeal

83. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

84. 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.

85. 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

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