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## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 February 2023

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

#### **Decision (including any steps ordered)**

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1. The complainant requested from the Department for Transport ("the DfT") information relating to train operating companies' retail costs for selling tickets. The DfT withheld the requested information under section 44 of FOIA (prohibitions on disclosure).
2. The Commissioner's decision is that the DfT was entitled to withhold the requested information under section 44.
3. The Commissioner does not require the DfT to take any steps.

#### **Request and response**

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4. On 2 December 2021, the complainant wrote to the DfT and requested information in the following terms:

**"I understand a report was commissioned from Atkins into train operating companies' costs for selling tickets. Their online cost of sale is of particular interest. The taxpayer is paying these costs now plus a 1.5% service fee so I believe these costs should be in the public domain. Train travellers would be interested to know if it was costing them more in taxpayer subsidy to buy their ticket from a train operator web site rather than an**

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**independent retailer, they are ultimately pay the bill. For instance a few months ago there was a headline in the Sunday Times that sales through Trainline were costing the taxpayer 9% which is totally incorrect. But it shows there is enough consumer interest. Also train operating companies are going to stop running web sites soon under the proposals from the Williams Shapps Review so these costs will soon be irrelevant. I would like to see this report please."**

5. The DfT responded on 31 December 2021. It stated that the information was withheld under sections 43(2) and 44.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 23 June 2022 to complain about the way their request for information had been handled, and specifically that the DfT was not entitled to withhold the information.
7. During the Commissioner's investigation, the DfT confirmed that it was relying upon sections 35, 43(2) and 44 to withhold the information.
8. The scope of this case and of the following analysis is whether the DfT was entitled to rely upon section 44 to withhold the requested information.

### **Reasons for decision**

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#### **Section 44 – Prohibitions on disclosure**

9. Section 44(1)(a) of FOIA provides that information is exempt if disclosure is prohibited by or under any enactment. In this case the DfT has said that the relevant statutory prohibition is section 145 of the Railways Act 1993 ("RA93") and specifically section 145(1) which provides that:

**"(1) ...no information with respect to any particular business which—**

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**(a) has been obtained under or by virtue of any of the provisions of this Act; and**

**(b) relates to the affairs of any individual or to any particular business,**

**shall, during the lifetime of that individual or so long as that business continues to be carried on, be disclosed without the consent of that individual or the person for the time being carrying on that business."**

10. The withheld information in this case is a report detailing train operating companies' ("TOCs") retail costs when selling tickets to passengers.
11. The DfT has explained the "relevant provisions" of the RA93 that are referenced in section 145(1)(a) is section 28. This states that franchise agreements may include provisions relating to fares and that they must contain such provisions as the Secretary of State considers necessary to ensure that fares are reasonable. Both the pre-COVID franchise agreements and the current post-pandemic landscape of agreements between the DfT and TOCs contain provisions relating to fares. For example, Schedule 5 of the old franchise agreements and Chapter 8 of the National Rail Contracts ("NRCs").
12. The DfT has explained that these provisions are explicit in their purpose to provide for regulation of fares by the Secretary of State in accordance with section 28 of the RA93. They also include an obligation on the TOCs to provide "such further information as the Secretary of State may require for the purpose of determining the Gross Revenue of the Franchisee in relation to any particular Fare or Fares or any particular period".
13. The DfT has explained that the provisions of the RA93 relating to franchises give the Secretary of State the statutory powers to create franchise agreements, including the NRCs, under which the DfT can request information relating to fares from the TOCs. In the absence of those agreements, the DfT would not have the power to request that information from the TOCs. Although the DfT may not specifically state that information is being requested by virtue of those statutory provisions, the ticket retail information obtained from TOCs to prepare the Report was obtained under the Secretary of State's contractual relationship with TOCs, including the right to obtain further information in this area, and this right exists in order to give effect to section 28 of the RA93.
14. The DfT has confirmed that the information is information relating to fares that was obtained by the DfT from TOCs and used to prepare the

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Report. In line with section 145(1)(a), the information was obtained 'under or by virtue' of section 28 of the RA93 and therefore the section 145 prohibition on disclosure is engaged.

15. The complainant has argued that section 145(1) of RA93 does not bind the Crown, that is, it does not apply to the Secretary of State. However, the Commissioner has previously found that section 145(1) of RA93 does apply. For example, in decision notice FS50722968<sup>1</sup>.
16. The Commissioner has considered the arguments made by the DfT and is satisfied that the information would have been obtained under the RA93 and that therefore the statutory prohibition applies.
17. The Commissioner did ask the DfT to consider whether any of the gateways to disclosure or exceptions to the prohibition could be applied in this case. The DfT considered section 145(2)(a) and (aa) which are the relevant gateways for this information. These state:

**"(2) Subsection (1) above does not apply to any disclosure of information which is made–**

**(a) for the purpose of facilitating the carrying out by the Secretary of State, the Scottish Ministers, the Office of Rail and Road, or the Competition and Markets Authority of any of his or, as the case may be, their functions under this Act, the Transport Act 2000 or the Railways Act 2005;**

**(aa) for the purpose of facilitating the carrying out or carrying on by the Secretary of State, the Welsh Ministers or the Scottish Ministers of any other functions or activities of his or theirs in relation to railways or railway services".**

18. The DfT states there is no basis, legislative or otherwise, that would require the Secretary of State to disclose the withheld information into the public domain in order for the Secretary of State to continue to properly discharge his duties under the RA93 or any other enactments mentioned at sections 145(2)(a) and (aa).
19. The complainant argues that the disclosure of the information would be permitted under section 145(2)(aa), as it would represent a discharge of duty under FOIA. However, the Commissioner's guidance confirms that

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2259603/fs50722968.pdf>

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disclosure under FOIA is not a function specifically entrusted to a public authority.<sup>2</sup>

20. Having considered the above, the Commissioner must conclude that the withheld information is exempt from disclosure under section 44(1)(a) of the FOIA by virtue of section 145 of the RA93.
21. As the Commissioner has found that the information is exempt under section 44, he has not gone on to consider the DfT's application of sections 35 and 43(2).

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1186/section-44-prohibitions-on-disclosure.pdf>

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**Right of appeal**

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22. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

23. 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.
24. 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 .....**

**Daniel Perry**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**