

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 March 2023

Public Authority: Transport for London
Address: 5 Endeavour Square
London
E20 1JN

Decision (including any steps ordered)

1. The complainant made a request regarding a bus route diversion between August 2022 and October 2022. Transport for London ("TfL") refused to comply with part 3 of the request citing section 12 FOIA (cost limit) as it said it would exceed the cost limit to determine whether information was held.
2. The Commissioner's decision is that section 12 FOIA was incorrectly applied to part 3 of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide a fresh response under the FOIA to part 3 of the request not relying upon section 12 FOIA.
4. 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 FOIA and may be dealt with as a contempt of court

Request and response

5. On 10 November 2022 the complainant made the following request for information under the FOIA for:

"Please provide the following information regarding the southbound 261 route diversion between August 2022 and October 2022, along

Burnt Ash Hill, as a result of roadworks at the A205/Baring Road junction:

- 1) The date on which you became aware a diversion was necessary
 - 2) The date on which a decision on the necessary route was agreed
 - 3) All recorded information, communications, and discussions between the dates in 1) and 2) above regarding the need for a diversion, the options available, and the route chosen.”
6. TfL responded on 7 December 2022. It confirmed that the date in response to parts 1 and 2 of the request was 28 July 2022. In relation to part 3 it confirmed that no recorded information was held as the discussions took place verbally.
7. The complainant requested an internal review. On 10 January 2023 TfL provided the result of the internal review. It applied section 12 FOIA as it said that it would exceed the cost limit to determine whether it holds information in relation to part 3 of the request.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way the request for information had been handled, in particular TfL's application of section 12 FOIA.
9. The Commissioner has considered whether TfL was correct to refuse to comply with part 3 of the request under section 12 FOIA.

Reasons for decision

Section 12 – cost of compliance

10. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the “appropriate limit” as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”).
11. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for TfL is £450.

12. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for TfL.
13. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
14. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
15. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
16. TfL explained that on receipt of the internal review in this case it sought further confirmation from the appropriate individuals in its Bus Operations team that they were unable to locate any specific recorded communications regarding this bus route diversion decision on the 28 July. As the relevant individuals in its Bus Operations Team were unable to locate any recorded information falling within the scope of the request, TfL said that the only way to confirm whether it holds any recorded communications or discussions falling within the scope of the request, would be to conduct a company-wide email search. It apologised to the complainant that this had not been done from the outset.
17. It went on to say that it is able to carry out email searches using a tool called eDiscovery using keyword information. TfL therefore conducted a search using the key word terms ‘261’ and ‘diversion’ for the date 28 July 2022 (which it had already confirmed was the date TfL became

aware a diversion was necessary and the date on which a decision on the necessary route was agreed).

18. TfL explained that this search returned a result of 737 email hits which contained markers within the search parameters. TfL carried out a sample review of the results and it appeared that many are more broad reports on the status of the bus network as a whole throughout the day and other non-relevant business. However the only way to actually identify if any relevant information on the diversion of route 261 was contained within the 737 emails results would be to manually review each one. It said that this would require a significant amount of staff time and resources. It also said that the search had been carried out for one day, if the search was carried out for the period August 2022-October 2022 as specified in the request this would be likely to mean there would be further emails to review for relevance.
19. Finally TfL did confirm that it was common practice that such discussions take place verbally as it is quicker to work with a number of people on a single call rather than using chains of email correspondence to respond expediently to operational issues that arise.
20. In this case TfL has argued that it conducted a search using appropriate search terms based upon the wording of the request. This located 737 potentially relevant emails. Following a sampling exercise TfL confirmed that it would appear the results don't contain information falling within the scope of the request. Indeed it has also confirmed that it is unlikely the requested information is held as it is common practice for these types of discussions to occur verbally. That being said, to be certain no information is held falling within scope it said would be required to manually review the 737 emails. If 737 emails would have to be reviewed manually, even taking a fairly conservative estimate of 1.5 minutes per email or email chain this would amount to just over 18 hours work.
21. The Commissioner is aware that TfL has argued that the time period for the request is August 2022-October 2022. This is not correct. Part 3 of the request states explicitly that it is only seeking correspondence generated from the date on which the need for a diversion was identified to the date on which the diversion route was agreed. TfL has confirmed both dates as being 28 July 2022 – so this is the only date for which searches would be required.
22. The Commissioner considers that this is a very borderline section 12 case as allowing 1.5 minutes review time per email or email chain only brings the time estimate to just over the 18 hour cost limit. He acknowledges that some emails may be very short and quicker to peruse whilst others may be longer chains which will take more time.

23. However in this case the Commissioner considers that correspondence that discussed the diversion of a bus route is likely to also have the word "bus" or "route" in it. By failing to add one or more of these additional qualifiers to the search terms used, TfL is likely to have identified far more irrelevant emails than was necessary.
24. In this case, the fact that compliance based upon TfL's submissions would only take the request to just over the costs threshold and that other search term qualifiers could have been used to potentially reduce the number of emails located, the Commissioner considers that the TfL was incorrect to apply section 12 FOIA to part 3 of the request.

Right of appeal

25. 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

26. 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.
27. 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.....

Gemma Garvey
Senior Case Officer

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF