IN THE FIRST-TIER TRIBUNAL **Case No. Appeal No. EA/2015/0152**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50566301

Dated 29th June 2015

BETWEEN **Mr Colin Jackson** **Appellant**

And

The Information Commissioner **Respondent**

Determined at a paper hearing on 2nd February 2016

Date of Decision 7TH April 2016

Date of Promulgation 8th April 2016

BEFORE Ms Fiona Henderson (Judge)

Mr Michael Hake

And

Mr John Randall

Subject: s1 FOIA whether information held

Decision: The Appeal is allowed

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50566301 dated 29th June 2015 which held that Transport for London met its obligations under s1 FOIA to inform the complainant whether or not it held the requested information.

Background

2. In 2005[1] the Mayor launched a campaign to ensure that the London taxi trade was more representative of London's diverse communities. At that time one in 20 existing taxi drivers was from Black, Asian and other ethnic minorities (BAME), compared to nearly a third of London's population, however, no targets were set. The Mayor's strategy to improve the diversity of licensed taxi drivers was London wide and did not take into account that the capital has a number of different licensing areas including the peripheral suburban licensing areas. A programme of assisting and supporting females and members of ethnic minorities while they learnt the "Knowledge of London" was delivered by the London Development Agency (LDA) not TFL.[2]

3. The Appellant believes that Transport for London's efforts to encourage those who might not have considered becoming London Taxi Drivers has created oversupply in certain areas and that this is destroying the livelihood of existing London Taxi Drivers. He maintains that before implementing any strategy TfL should have considered under-representation on the basis of thresholds specific to local licencing areas or Great Britain as a whole but not to London as a whole.

Information Request

4. In an email dated 18th July 2014 the Appellant asked:

"I would be grateful if you could provide full details of the "positive action" work that was carried out by TfL in respect of London taxi drivers.

Please include start and end dates where appropriate. And details of the relevant legal advices obtained on the limitations of "positive action" in this field.

I would also be grateful if you could provide information on where compensation claims should be sent for persons who have suffered losses because of illegal activity on the part of TfL.

[1] TfL had originally told the Appellant that this was in 2005 but from reference to a press release corrected that to 2007 in the letter of 30.10.16 p 67. However, there is reference to the campaign starting in 2005 in TfL's 2008 press release.

[2] P67 OB letter from TfL 30.10.2014

In respect of "positive action" the Race Relations Act 1976 c 74 makes a very clear and direct link between "the area of work" and the "area of under-representation". They have to match…

He then set out 6 linked questions relating to the justification and monitoring of the "positive action".

5. Transport for London responded on 18th August 2014 referencing a previous information request about ethnicity data. The Appellant asked TfL to reconsider their response pointing out that TfL had not answered the specific elements of his request or even said where compensation claims should be sent. TfL treated this as an application for an internal review which they provided by email dated 30th October 2014. In this:
   a) TfL defined the request as referring to the Mayor's campaign to increase diversity in licensed taxi drivers but explained that the programme of assisting and supporting females and members of ethnic minorities while they learnt the Knowledge of London was delivered by the London Development Agency not TFL. They did not commission or run the project and did not hold the data.[3]
   b) They relied upon s42 (legal professional privilege) to neither confirm nor deny the request relating to legal advice.
   c) They did not provide an address to which to send compensation claims stating that it would depend on which organisation he intended to make a claim against and asserting that it was "*not clear why you believe that you are entitled to compensation or who you believe should pay it. Such matters do not fall within the scope of the Freedom of Information Act and you may wish to seek independent legal advice*".

6. The Appellant wrote to TfL providing a link to a press statement released by TfL in July 2008 in which TfL said that 1/3 of applicants to learn "the Knowledge" were now from black, Asian or other ethnic minority backgrounds which they attributed to TfL's campaign launched in 2005 and referring to an initiative called "Put yourself in

[3] P67 OB letter from TfL 30.10.2014

the Driving Seat". It is not apparent from the papers that the Appellant received a response to this email.

The complaint to the Commissioner

7. The Appellant complained to the Commissioner on the grounds that:

- TfL had wrongly concentrated on the LDA programme and not any action TfL had taken pursuant to the Mayor's campaign,[4]
- TfL had not provided the address to make compensation claims to.
- He clarified that he was not interested in the LDA programme.

8. During the investigation the Commissioner itemised the elements of the request a-j. The Appellant accepted that (j) was not a valid request and TfL changed its position relating to the legal advice (c) and accepted that the correct response would be to say that no legal advice was held in respect of any "positive action" TfL itself was responsible for.

9. Additionally, the Commissioner held that:

   i) TfL had failed to identify as a valid FOIA request item (h) (asking for any monitoring information on the outcome of the "positive action").

   ii) The "put yourself in the driving seat" initiative was the only scheme TfL was responsible for. As this programme did not involve the preferential treatment of one racial group over another and was not accompanied by any measures to confer any kind of support or advantage to BAME groups, it does not constitute "positive action" and consequently no information is held (apart from in relation to element d).

   iii) In relation to element (d) the request for where compensation claims should be sent, TfL had breached s1 FOIA as they should have provided details of where legal claims against TfL could be submitted. On the basis that the Appellant

[4] He also complained of the length of time it took to conduct the internal review. FOIA does not specify a time limit for conducting internal reviews, hence this was the subject of observations by the Commissioner in the Decision Notice rather than a formal decision and cannot therefore form part of the Appeal.

had already instituted a claim the Commissioner did not require TfL to take any further action.

Appeal to the Tribunal

10. The Appellant appealed to the Tribunal (received on 16th July 2015) on the grounds that:

    i) The Commissioner had wrongly defined what was meant by "positive action" and so mis-defined the scope of the request.

    ii) The Commissioner was wrong not to order TfL to provide details of the address to which a compensation claim could be sent.

Procedural issues

11. The Tribunal was in receipt of an open bundle of 165 pages which included TfL's submissions to the Commissioner. The Tribunal considered whether to join the public authority and whether it was appropriate to proceed on the papers pursuant to rule 32 GRC rules 2009. In proceeding without a hearing and concluding that it was not in the interests of justice to join TfL, the tribunal had regard to the overriding objective as set out in rule 2 GRC rules and that:

    a) The public authority had not applied to join,
    b) They had set out their case in detail before the Commissioner,
    c) No party had asked for an oral hearing,
    d) Joining the public authority would add delay and expense to the hearing process and was not proportionate.
    e) The Tribunal is satisfied that it has sufficient information and can properly determine the issues without a hearing.

Scope

12. The requests are based upon the premise that TfL has carried out "positive action" as part of their campaign to increase diversity. It is therefore necessary to determine what the objective meaning of "positive action" was within the terms of the information request. The Tribunal is satisfied that in defining the scope of the request

the Tribunal should look at its objective construction. A public authority is only required to seek clarification of the meaning of a request under the Act if the request cannot be answered without further information:

> *(3)Where a public authority—*
>
> *(a)reasonably requires further information in order to identify and locate the information requested, and*
>
> *(b)has informed the applicant of that requirement,*
>
> *the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.*

13. However, we accept that the objective construction of the request would include any clarification or amplification provided at the time of the request. The Commissioner argues that in light of the reference to the Race Relations Act 1976 (RRA) and the appearance of the term in the Equalities Act 2010 (EQA) he was correct to consider the use of the phrase in both RRA and EQA.

14. The Appellant's stated intention is to claim compensation from TfL for what he sees is a breach of the "discriminatory training" provisions in the RRA which was current at the time that the campaign started. Part of the information request was clearly directed at obtaining a concession from TfL in this regard. TfL dispute that their actions breach any equality law and defending this potential claim has clearly informed their handling of this information request e.g.

> *"TfL would have great difficulty in accepting that the information" Put yourself in the driving seat campaign was +ve action bearing in mind [the Appellant's] legal action"*[5].

15. The Tribunal observes that it is not within its jurisdiction to define what is meant by "positive action" within the context of equality litigation, but to define what it could reasonably be expected to mean in the context of an information request made by a lay person who is using a term that appears in one set of legislation to support his arguments in relation to an earlier statutory regime.

[5] Telephone note between Tfl and Commissioner 25.03.15 p 138 Bundle

16. The Commissioner acknowledged in his decision notice that a layman would consider it to mean– "*any steps taken with the aim of increasing or promoting participation of individuals from underrepresented groups in a particular activity/occupation*".[6] However, he did not apply that definition because of the Appellant's reference to the RRA. He has considered s35[7] and s37 RRA as material in defining the term. The Tribunal is satisfied that the relevant section to concentrate upon is s37 as this is what is paraphrased in the Appellant's request.

17. S37 (as amended) reads as follows:

Discriminatory training by certain bodies.

(1)Nothing in Parts II to IV shall render unlawful any act done in relation to particular work by any person in or in connection with—

(a)affording only persons of a particular racial group access to facilities for training which would help to fit them for that work; or

(b)encouraging only persons of a particular racial group to take advantage of opportunities for doing that work,

where it reasonably appears to that person that at any time within the twelve months immediately preceding the doing of the act—

(i)there were no persons of that group among those doing that work in Great Britain; or

(ii)the proportion of persons of that group among those doing that work in Great Britain was small in comparison with the proportion of persons of that group among the population of Great Britain.

(2)Where in relation to particular work it reasonably appears to any person that although the condition for the operation of subsection (1) is not met for the whole of Great Britain it is met for an area within Great Britain, nothing in Parts II to IV shall render unlawful any act done by that person in or in connection with—

(a)affording persons who are of the racial group in question, and who appear likely to take up that work in that area, access to facilities for training which would help to fit them for that work; or

(b)encouraging persons of that group to take advantage of opportunities in the area for doing that work.

[6] ICO DN para 22
[7] Education and Training

18. TfL maintain that "discriminatory training" as defined above is a form of preferential treatment not available to others. In support of that s37(1) (a) and (b) refer to affording training and encouragement only to persons of a particular racial group.

19. The Appellant argues that this is too narrow a construction as s37(2)(b) which is area specific rather than national does not use the word "only" and also includes:

> *(b)encouraging persons of that group to take advantage of opportunities in the area for doing that work.*

Which he argues does not envisage exclusivity as long as there is a degree of targeting. The Tribunal observes that this is more in keeping with the "layman's view" as expressed by the Commissioner above.

20. In his reply the Commissioner argues that "*the Appellant intended for the term to be given the same meaning as used in the RRA".* The Tribunal observes that the term is not used in the RRA and indeed the RRA was repealed prior to the information request. Whilst the contents of the RRA may help inform the construction of the information request it is the Equalities Act 2010 which uses the term "positive action".

21. S158 provides:

> *Positive action: general*
>
> *(1)This section applies if a person (P) reasonably thinks that—*
>
> *(a)persons who share a protected characteristic suffer a disadvantage connected to the characteristic,*
>
> *(b)persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or*
>
> *(c)participation in an activity by persons who share a protected characteristic is disproportionately low.*
>
> *(2)This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—*
>
> *(a)enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,*

(b)meeting those needs, or

(c)enabling or encouraging persons who share the protected characteristic to participate in that activity.

22. The Commissioner argues that from its context "positive action" concerns the preferential treatment of one particular racial group over another. TfL maintained that in order for any initiative to constitute "positive action" that initiative would have to include steps to actively support those from ethnic minorities which were not available to others. The Commissioner accepted this[8]. The Appellant maintains that the Commissioner has added requirements which are not supported by the statutes in defining the term as used in the request, namely that:

    - The initiative would have to include steps to actively support those from ethnic minorities and
    - The support would have to be available exclusively to those from ethnic minorities.

23. The Tribunal is satisfied that "positive action" was not being used in a strictly legal sense here as evidenced by the use of a term in one statute to mount arguments in relation to an earlier statute. The Tribunal accepts that the objective construction of the request was wide and that s37(2)(b) RRA does not at face value specify exclusivity, neither does s158 EA. Additionally, both those sections refer to "encouragement" which is different from support. Consequently, we are satisfied that for the purposes of this request "positive action" would include actions to encourage and target BAME applications.

24. The Tribunal is supported in this view when looking at the totality of TfL's submissions to the Commissioner. Whilst their case was that "positive action" had to be support not available to the wider public; in the same letter in which this was

[8] Para 24-25 Decision Notice

asserted[9] to the Commissioner, whilst arguing that there had been no "secret" positive action TfL submitted that:

> *"if TfL were carrying out any courses of action to target, encourage or support BAME and women drivers, this could only be a matter of public records…"* The Tribunal observes that this appears to be a broader definition of what would constitute "positive action" as it was understood to be being alleged by the Appellant than that referred to earlier in the letter; in that it includes targeting and encouraging in the alternative to support.

Whether information is held

25. TfL have stated that "put yourself in the driving seat":

> *" was an advertising campaign simply intended to raise awareness of the path into licensed driver employment. It was not accompanied by any measures to confer any kind of support or advantage to any group. The information would have been just as useful to anyone of any group seeking to become a taxi or private hire driver. In addition, it did not in any way discourage members of other groups from applying to become taxi drivers or indicate that members of minority groups would receive preferential treatment. We consider that in order to consider this campaign to be positive action, it would have had to have included steps to actively support BAME groups/women into taxi driving employment and that these steps would not be available to people who did not meet certain criteria, which was not the case.[10]"*

26. However, they provide further detail:

> *"A number of talks were also arranged and meetings held with women applicants already studying the Knowledge. Presentations and roadshows were held at various venues including Minories Nightclub, Kurdish Community Centre, London Muslim Centre and Finsbury Park and Brixton Job centres".*

[9] P98 et seq
[10] P98 et seq

27. The Commissioner argued that this did not show preferential treatment. However, the Tribunal has had regard to TfL's own press release dated 22 July 2008 which states:

> "*Almost one in three applicants for the London taxi "knowledge " is now from a Black, Asian and Minority Ethnic background.*
>
> *It is a welcome reflection of the hard work that TfL has been putting in…*
>
> *Since the launch of a Tfl Campaign in 2005 to encourage more applications from these groups, the proportion of applications from people of Black, Asian and Minority Ethnic backgrounds has increased by more than 50 per cent.*
>
> *The campaign started with "put yourself in the driving seat campaign" which aimed to increase awareness among Black Asian and Minority Ethnic Communities about the career opportunities available as licensed taxi drivers.*
>
> *Information booklets about how to become a licensed taxi or private hire driver have been distributed at post offices, community centres, libraries and job centres across London and publicised via a poster campaign.*
>
> *The PCO has also run roadshows and attended events and job fairs to support the initiative…*
>
> *It is a welcome reflection of the hard work that TfL has been putting in that this world-renowned service is now becoming truly reflective of the diverse communities it serves"*.

28. From this we are satisfied that:

- The purpose of "put yourself in the driving seat" was to increase awareness among BAME Communities and women about the career opportunities available as licensed taxi drivers.
- TfL attribute the rise in applications from BAME applicants to this campaign.
- Whilst leaflets can be in public spaces, some of the spaces (such as community centres) can be expected to have a more directed clientele.
- Roadshows, events and job fairs can be expected to have a selective element in that if the purpose of the campaign is to attract BAME

applicants the efforts of those staffing the stands can be expected to reflect that in terms of those that they approach and try to engage with.

- The literature is of general application, consequently the fact that the rise in BAME applications is attributed to the campaign is indicative of the way in which it has been used.

We are satisfied that this would constitute encouragement and preference in the sense that greater effort and resources are being expended upon reaching these groups even if the literature, were it to be picked up by the wider public, would be relevant and accessible to them. We are satisfied therefore that "put yourself in the driving seat" was within the scope of the request.

Is information in scope held in addition to "put yourself in the driving seat"?

29. The Appellant believes that "put yourself in the driving seat" was not the only action that would fall within the scope of "positive action" as defined within the request. He relies upon the press release in 2008 which stated that the campaign to increase BAME applications "started" with "put yourself in the driving seat". This was explored by the Commissioner during his investigation and TfL confirmed that the only additional initiative was that run by the LDA. We accept this on a balance of probabilities. Although the press release suggests a wider raft of initiatives, we note that a press release is likely to include an element of "spin" and that it is likely (as suggested by TFL) that there would be a public footprint of any interventions that would fall within scope[11], and none has been drawn to our attention.

Address for compensation claim

30. The Appellant appeals on the grounds that the Commissioner was wrong in law not to order steps for TfL to provide the information requested. He argues that the Commissioner was not entitled to presume that the Appellant had obtained the information in any event and that there was no basis for absolving TfL of their obligation to answer the information request.

[11] P99 Bundle

31. S50 FOIA provides*:*

> *(4)Where the Commissioner decides that a public authority—*
>
> *(a)has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1),*
>
> *the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.*
>
> The Commissioner found that TfL were in breach of their obligation to provide the information under s1 FOIA. Regardless of whether the Appellant had obtained the information elsewhere, we are satisfied that TfL had provided the answer to the Commissioner who had included it in his Decision Notice at paragraph 41. The service of the decision notice containing the information therefore meant that the public authority had now provided the information to the Appellant (albeit through the Commissioner) and thus complied with its obligation and there was therefore no need for it to be repeated formally.

Conclusion

32. The Appeal is allowed as the Tribunal is satisfied that TfL has breached s1(1) FOIA in that it did hold information which fell within the meaning of the request namely information relating to "put yourself in the driving seat".

33. Within 35 days of the date of the decision TfL must in relation to "put yourself in the driving seat" provide the information requested in elements i-c and e-h of the request or provide a refusal notice pursuant to s17 FOIA.

34. Our decision is unanimous.

Dated this 7th day of April 2016

Fiona Henderson
Tribunal Judge