**Appeal number: EA/2017/0052**

**FIRST-TIER TRIBUNAL**
**GENERAL REGULATORY CHAMBER**
**INFORMATION RIGHTS**

**GABRIEL WEBBER** **Appellant**

**- and -**

**THE INFORMATION COMMISSIONER** **Respondents**
**THE DEPARTMENT FOR TRANSPORT**

**TRIBUNAL: JUDGE ALISON MCKENNA**
**Mr PIETER DE WAAL**
**Mr NIGEL WATSON**

**Sitting in public at Field House on 15 January 2018**

**Appearances:**

**The Appellant did not attend**
**Rupert Paines, counsel, for the Information Commissioner**
**Tom Cross, counsel, for the Department for Transport**

## DECISION

1. The appeal is dismissed.

## REASONS

*Background to Appeal*

2. On 29 July 2016, the Appellant made an information request to the Department for Transport ("the Department") for an electronic copy of the document containing the penalty fares appeals criteria used by the Independent Appeals Service and approved by the Department. He acknowledged that he had previously asked for this information and that it had been refused on grounds that he did not accept[1].

3. The Department refused the information request on 24 August 2016, in reliance upon the Freedom of Information Act 2000 ("FOIA") sections 41(1) and 44(1)(a). In particular, the Department relied on s. 44 (1) (a) FOIA, read in conjunction with s.145 of the Railways Act 1993. On internal review, it additionally relied upon s. 43(2) and s. 31(1)(c) FOIA in confirming its decision not to disclose on 23 September 2016. The Appellant complained to the Information Commissioner.

4. The Information Commissioner issued Decision Notice FS50648036 on 23 March 2017, upholding the Department's decision in applying the absolute exemption under s. 44 (1) (a) FOIA read in conjunction with s. 145 of the Railways Act 1993. The Information Commissioner did not consider the other claimed exemptions and required no steps to be taken.

*Appeal to the Tribunal*

5. The Appellant's Notice of Appeal dated 24 March 2017 relied on grounds of appeal that the exemption was not engaged because s. 130 of the Railways Act 1993 does not itself permit penalty fares, but enables the making of secondary regulations for miscellaneous purposes. The penalty fares regime is therefore *"a long way down the legislative chain"* from the 1993 Act, with the effect that it would be wrong in principle to construe FOIA as permitting non-disclosure because all exemptions must be construed restrictively. It was also argued that the Decision Notice made an impermissible finding of fact as to the circumstances in which the Department came by the information, in the absence of direct evidence. It was submitted that the appropriate conclusion would have been that the information was provided to the Department voluntarily. The Appellant additionally relied on submissions that the Information Commissioner's reading of the legislative regime for penalty fares infringed his rights under article 10 of the ECHR and that the failure to disclose information about the penalty fares regime infringed article 6 ECHR because the absence of information about its operation infringed the right to a fair trial by those who would wish to appeal against a penalty fare. It was submitted that the Railways

[1] DN FS50619752 12 May 2016

Act and FOIA should be interpreted by the Tribunal so as to give effect to these Convention rights.

6. The Information Commissioner's Response dated 28 April 2017 maintained the analysis as set out in the Decision Notice. It was submitted that s. 130 of the 1993 Act (headed "*Penalty Fares*") was a clear statutory power to create a penalty fares regime, permitting the creation of Regulations and Rules for this purpose. The Penalty Fares Rules 2002 were made under this statutory authority, and these Rules in turn provide for appeals and for a code of practice in relation to the conduct of appeals to be approved by the Department. A document submitted as part of that process is therefore submitted under s. 130 and subject to s. 145 of the 1993 Act. It was submitted that the Information Commissioner was entitled to make a finding of fact on the balance of probabilities that the information had come into the Department's possession in the course of this process.

7. As to the Human Rights Act arguments, it was submitted by the Information Commissioner that (i) the Supreme Court's judgment in *Kennedy v Charity Commission* [2015] AC 455 was a complete answer to the appellant's assertion of article 10 rights in relation to the withheld information; (ii) if there were such a right, it would have to be enforced through judicial review and not in the Tribunal; (iii) that the Appellant's Human Rights challenge was directed at the Railways Act 1993, which argument was misconceived because the Tribunal's task is to interpret FOIA; (iv) the Appellant has not established by evidence that his own Convention rights have been infringed; and (v) the Appellant has not established that Convention rights are engaged by the information requested.

8. The Department was joined as a Respondent to the Appeal on 20 April 2017. Its Response (undated) relied on the Decision Notice, but also argued the engagement of the additional exemptions and the public interest balance in relation to those exemptions. The Department served witness statements made by Richard Mallett (Senior Revenue Protection Manager, South Western Railway), Nicola Welling (Corporate Affairs Director, Appeals Service) and Fiona Walshe (the Department's Deputy Director of Passenger Experience Policy).

9. The Appellant's Reply to both Responses (undated) submitted that, taken at its highest, the Department's case showed that the information had been provided to it "in connection with" its role under the statutory regime, but there was no evidence to support the position that it has been provided "by virtue of" the statutory regime. He argued that the confidentiality provision under s. 145 of the 1993 Act was intended only to protect those who were <u>required</u> to provide commercially sensitive information to the Department, and not those who merely <u>chose</u> to do so. As to the Convention rights issue, he submitted that he had never suggested that his own Convention rights had been breached, but had sought to persuade the Tribunal to arrive at an interpretation of the legislative regime which gives effect to Convention rights. He referred us to European jurisprudence and clarified his status as a journalist.

10. The Tribunal considered an agreed open bundle of evidence comprising some 270 pages, including submissions made by all parties, for which we were grateful. It

included the open witness statements relied on by the Department. We also viewed a Closed bundle comprising the withheld information and the closed versions of the witness statements.

*The Law*

11. S. 44 (1) (a) FOIA provides that information is exempt if its disclosure is prohibited by another enactment. This is an absolute exemption, so no public interest balancing exercise is required.

12. S.145 of the Railways Act 1993 provides that:

> *(1) …no information with respect to any particular business which –*
>
> *(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".*

13. The Railways (Penalty Fares) Regulations 1994 provide at Regulation 11 for the Regulator to make Rules with respect to penalty fares and provides at (3) that "*Rules made pursuant to this regulation shall have effect as if they were Regulations"*.

14. The Penalty Fares Rules 2002 provide at 3.2 that

> "*Any train operator who wants to introduce a penalty fares scheme must do the following.*
>
> *(a) Send a notice at least three months before the date on which it is proposed to begin charging penalty fares, to:*
>
> *(i)The SRA;*
>
> *…"*

15. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> "*If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

16. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

*Evidence and Submissions*

17. The Appellant relied on his written submissions and did not attend the oral hearing. He called no evidence.

18. The Tribunal viewed the withheld material in its Closed bundle. It consists of a document used by the Independent Appeals Service, detailing the different reasons which might be given by an Appellant when challenging a penalty notice, and the circumstances in which such an appeal may be accepted or rejected. Mr Mallett's evidence gave the Tribunal examples of how the fares system can be abused, leading to a loss of revenue by the train operating companies. The Tribunal heard oral evidence from the Department's witnesses in open and closed session. The closed evidence was "gisted" when the Tribunal returned to open session, as follows: the Tribunal looked at the withheld information itself and considered the extent to which a person seeking to appeal a penalty fare could realistically work out how to exploit the withheld information.

19. The Department relied on the evidence of Nicola Welling that the Independent Appeals Service's Code of Practice was formally approved by the Department in January 2006, following the transfer of work from the SRA to the Department in October 2005. She exhibited to her open witness statement redacted copies of e-mails to this effect, in particular an e-mail from IAS to the Department on 25 January 2006 : "*…have you had a chance to put anything together yet in respect of DfT approval of IAS?"* and a reply from the Department the next day: *"I can confirm that the DfT has approved the …IAS Code of Practice for the purposes of rule 9 of the Penalty Fares Rules 2002 (appeals handling) in respect of several train operators' Penalty Fares Schemes*…." In answer to a question from the Tribunal in closed session, Ms Welling confirmed that she had not found any other correspondence between IAS and DfT on this point. It was agreed that this information could have been given in open session, so it was repeated in full when the Tribunal resumed in open hearing.

20. Mr Paines' closing submissions on behalf of the Information Commissioner were given in open session. He submitted that s. 44(1) (a) of FOIA provides a complete answer to the Appellant's request. Although he accepted that some of the other exemptions were engaged by certain parts of the withheld material, he regarded these arguments as academic to the current appeal. He submitted that there is a coherent chain of legislation beginning with the Railways Act 1993 and ending with

the 2002 Rules, by virtue of which the train operating company was obligated to ("*must*") send information to the regulator. This information is therefore provided "*under*" or "*by virtue of*" the legislative chain beginning with the 1993 Act and ending in the Rules. This must engage s. 44 (1) (a) FOIA, because the terms of s. 44 (1) (a) do not limit or prescribe the form of the relevant legislative prohibition.

21. Mr Paines submitted that it was more likely than not that the information in question had been provided to SRA for the purposes of the statutory scheme of approval. He noted that Ms Welling's evidence (which had not been before the Information Commissioner when she issued her Decision Notice) made this scenario even more likely. It was evidence from which the Tribunal could legitimately draw an inference, whereas there was no evidence at all to support the Appellant's assertion that the information had been provided voluntarily.

22. As to the Human Rights Act points, Mr Paines submitted that the Appellant had not shown that articles 6 and 10 were engaged on the facts of this case and so the European jurisprudence to which he referred in his submissions was not on point. Furthermore, as the meaning of the relevant provision of FOIA was quite clear, there was no requirement to interpret it to have a different meaning to give effect to Convention rights.

23. Mr Cross's closing submissions on behalf of the Department were also given in open session. Ms Welling's witness statement had categorised the withheld information into three categories for the purpose of applying different exemptions and the Department's case by the close of the evidence was that the "category 1" information should be withheld under s. 44 (1) (a) but that the category 2 and 3 information should be withheld under the remaining claimed exemptions. He supported Mr Paines' submissions as to the legitimacy of an inference to be drawn by the Tribunal from the e-mails exhibited by Ms Welling.

24. The Appellant's written skeleton argument relied on submissions that the legislative prohibition of disclosure on which s. 44 (1) (a) FOIA rests must be contained in primary legislation and that the statutory provisions relied on in the Decision Notice were too remote to engage the exemption. Further, that the Decision Notice's conclusion that it was more likely than not that the information came into the possession of the Department as a result of the statutory requirements was impermissible on the evidence available. He repeated his submissions about the ECHR.

*Conclusion*

25. We agree with the Information Commissioner that, if s. 44 (1) (a) of FOIA is engaged by s. 145 of the Railways Act 1993 so as to prohibit disclosure of the information with which we are concerned, there is no need for us to look beyond that exemption and consider the other possible exemptions. Indeed, as s. 44 (1) (a) FOIA is an absolute exemption; it seems to us appropriate to consider first whether it applies to the entirety of the withheld information. If this is the case then that disposes of the appeal. If not, then we consider that it is only in those circumstances that

consideration of the engagement of the other qualified exemptions and the public interest balancing exercise in relation to all or part of the withheld information would be appropriate.

26. We find the meaning of s. 44 (1) (a) FOIA to be clear on its face and that there is no ambiguity which would require us to interpret it and in so doing seek to give effect to Convention rights. We are not persuaded that article 6 ECHR is engaged by the facts of this case in any event, as we are not here considering the right to a fair hearing. We follow the approach of the UK Supreme Court to article 10 ECHR as a matter of precedent, and were not therefore persuaded that the European jurisprudence to which the Appellant referred us was relevant to our consideration of this appeal.

27. We conclude that the Railways Act, Regulations and Rules together form a coherent statutory scheme capable of engaging s. 44 (1) (a) of FOIA. We were not persuaded by the Appellant's argument that there is test of proximity to primary legislation to be applied in considering the efficacy of a statutory prohibition on disclosure. We note that his proposed interpretation to this effect is without legal precedent.

28. We are satisfied that the factual conclusion reached in the Decision Notice, that on the balance of probabilities the information had been provided "*under or by virtue of*" the provisions of s. 130 of the Railways Act 1993, was a conclusion that the Information Commissioner was entitled to reach and we discern no error in her approach. We have additionally had the benefit of reading the e-mail exchange produced in Ms Welling's (unchallenged) evidence and we find that it provides us with an even firmer foundation from which to draw the same inference as did the Information Commissioner. We note that there is no evidence before us from which we could infer that the withheld information was provided to the Department voluntarily or otherwise outside the parameters of the statutory scheme and so we reject the Appellant's submission in this regard.

29. On the balance of probabilities, we are satisfied that the withheld information was submitted to the Department for the purposes of obtaining its approval of the penalty fares regime, as required by the coherent legislative scheme to which we have referred. We conclude therefore that it was provided "*under or by virtue of*" s.130 of the Railways Act 1993, so as to engage s. 145(1)(a) of that Act and, in turn, s. 44 (1) (a) of FOIA.

30. In view of our conclusions, we did not find it necessary to consider the other exemptions claimed by the Department or the witness evidence adduced in support of those exemptions.

31. For these reasons, the appeal is now dismissed.

**(Signed)**

**ALISON MCKENNA** **DATE: 12 February 2018**

**PRINCIPAL JUDGE**

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