

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 December 2011

Public Authority: Transport for London
Address: 5th Floor Windsor House
42-50 Victoria Street
London
SW1H 0TL

Decision

1. The complainant made a freedom of information request to Transport for London for information contained within its contract with the service provider firm Serco for the London Cycle Hire Scheme. Transport for London disclosed some of the information but withheld other information under the exemptions in sections 43(1) (Trade secrets), 43(2) (Commercial interests) and 41 (Information provided in confidence). The Commissioner has investigated the complaint and found that none of the exemptions are engaged and the information should be made available to the complainant.
2. The Commissioner's decision is that Transport for London has breached section 1 of the Act by failing to disclose information requested by the complainant.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Transport for London shall disclose to the complainant the information in parts 5, 6 and 8 of his request of 16 December 2010.
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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 16 December 2010, the complainant wrote to Transport for London to request information contained within the contract between Transport for London and the company Serco for the London Cycle Hire Scheme. Transport for London had previously published a redacted version of the contract on its website. The request asked for the following specific pieces of information:
 - (1) A list of the 100 "Priority 1" docking stations mentioned in the SLA (Schedule 5).
 - (2) The text from clause 49 of the main Agreement, headed "Liability"
 - (3) The redacted text from Schedule 17 relating to the Guarantor & trigger amount
 - (4) The redacted text from Schedule 5 relating to the Service Level Agreements:
 - (4)(a) clause 2.7
 - (4)(b) Annex A ("Performance Indicator Table")
 - (5) The Financial Model from Schedule 7 Annex A "Charging"
 - (6) The redacted text from Schedule 23 "Gainsharing"
 - (7) The redacted text from Schedule 6 "Termination Compensation"
 - (8) A list of section / paragraph, annex & table headings from Schedule 28 "Service Provider Solution"
6. Transport for London responded on 19 January 2011 and disclosed the information it held falling within the scope of part 1 of the request. The remaining information was withheld under the exemption under section 43(2) (Commercial interests). Transport for London explained that disclosure of the information would prejudice the commercial interests of both itself and the contractor responsible for implementing the Cycle Hire Scheme, Serco.
7. The complainant asked Transport for London to carry out an internal review of its handling of the request and it presented its findings on 14

April 2011. It now informed the complainant that it had reconsidered its initial response to the request and was now prepared to release the information in parts 2, 3, 4(b) and 7 of the request. The remaining information continued to be withheld under the exemption in section 43(2) of the Act.

Scope of the case

8. On 15 April 2011 the complainant contacted the Commissioner to complain about Transport for London's decision to withhold information in parts 4(a), 5, 6 and 8 of the request. The complainant also said that the information that was disclosed in relation to part 3 of the request did not include the 'trigger amount'. The complainant asked the Commissioner to consider whether an objective reading of the request would have included the trigger amount if this information was held elsewhere for example in the separate guarantee document. This element of the complaint was subsequently informally resolved and the Commissioner has not considered this issue as part of the decision notice.
9. During the course of the Commissioner's investigation Transport for London disclosed the information in part 4(a) of the request and some of the information falling within the scope of part 6 of the request. The Commissioner has not considered this information as part of this decision notice.

Reasons for decision

10. Transport for London has withheld the remaining undisclosed information (parts 5 and 8, and some of the information redacted from 6 of the request) under the section 43(2) (Commercial interests) exemption. In addition, Transport for London has said that the section 43(1) (Trade secrets) exemption also applies to the information in part 5 of the request and the section 41 (Information provided in confidence) exemption applies to the information in part 8 of the request. Section 43(2) has been applied to all of the withheld information and therefore the Commissioner has considered whether this exemption would apply in the first instance.

Section 43(2) – Commercial interests

11. Section 43(2) provides that information is exempt if disclosure would or would be likely to prejudice the commercial interests of any person, including the public authority holding it. In this case Transport for London has argued that disclosure would prejudice its own commercial interests and those of its contractor Serco.
12. Transport for London maintains that disclosure of the requested information would be likely to prejudice the commercial interests of Serco because it would undermine its negotiating position in future tendering exercises. It argued that competitors would be able to use the information to undercut Serco in a future bid and would “benefit from Serco’s knowledge and experience as applied in constructing their solution and bid”. As regards its own commercial interests Transport for London said that it was concerned that disclosure would lead to bidders such as Serco being less forthcoming during the tender process particularly with commercially sensitive information which they are under no obligation to provide such as staff salaries.
13. The Commissioner has reviewed the withheld information and found that most of the information in the financial model covered by part 5 of the request concerns the costs associated with the implementation of the London Cycle Hire Scheme. The Commissioner is not satisfied that the disclosure of this information would prejudice the commercial interests of Serco if disclosed. This is because it relates to the specific costs related to this particular scheme, for instance the costs of designing, building and implementing elements of the scheme and equipment costs. This information is specific to this particular scheme and the Commissioner does not accept that its disclosure would be likely to prejudice the commercial interests of Serco. For the remaining information there are separate concerns and this has been considered below at paragraph 19.
14. Indeed the complainant made this point to Transport for London when he asked them to carry out an internal review commenting, “Given the bespoke and individually negotiated nature of the current contract with Serco, I have doubts that any future contract would be identical (or at least very similar) to this one”. The Commissioner has some sympathy with this argument and is not aware of any other similar contracts being contemplated in future. Transport for London has not provided the Commissioner with details of any future tenders beyond a general assertion that Serco’s future negotiations with third parties may

prejudice its position in any future re-procurement of the cycle hire scheme.

15. Whilst the Commissioner understands that Transport for London has the option to re-negotiate the operator of the scheme he is not aware that such a move is contemplated and even if it were much of the information contained within the financial model would be outdated in the sense that it relates to the costs of designing, testing and building or implementing the scheme. This information would be of limited use to a rival of Serco who would only be bidding to take over the operation of what is an already existing scheme.
16. Transport for London had said that Serco provides it with a number of other services and the wider public sector including running the Docklands Light Railway and therefore disclosure could prejudice the commercial interests of Serco beyond this contract. However it is difficult to see how disclosure of information related to Serco's operation of the London Cycle Hire Scheme could prejudice its commercial interests with respect to other unrelated and very different projects.
17. The Commissioner is concerned that Transport for London has applied the section 43(2) exemption to all of the financial information without properly considering exactly how disclosure of each piece of information would prejudice the commercial interests of its contractor. For instance, some of the information appears to have been information provided by Transport for London to all of the bidders on the expected usage of the cycle hire scheme rather than information supplied by Serco in support of its bid. It is difficult to see how such information could be said to prejudice the commercial interests of Serco if disclosed. The prejudice test is not a weak one and there is an evidential burden on a public authority to demonstrate that the nature of the prejudice claimed can be linked back to the information in question. In this case the Commissioner's view is that Transport for London has failed to demonstrate a link between the disclosure of the information and the prejudice claimed.
18. The Commissioner has also rejected the application of section 43(2) to the information in part 8 of the complainant's request which was for a list of section / paragraph, annex & table headings contained within the service provider solution in schedule 28 of the contract. The Commissioner has reviewed the service provider solution in full and has found that disclosure of the information requested by the complainant would not prejudice the commercial interests of Serco if disclosed. Transport for London has argued that the way in which it structures its

bids would disclose what makes Serco's bids successful and would undermine its competitiveness. Whilst the Commissioner would accept that disclosure of the actual service provider solution in full could have this effect it is important to stress that the complainant has not asked for this. His request is much more limited and disclosure of the section and paragraph headings would not in any appreciable sense disclose information that would allow a rival to gain a competitive advantage. Again, the Commissioner is concerned that Transport for London has not adequately engaged with the complainant's request and has only offered general arguments for engaging the exemption rather than properly considering the effects of the disclosure of the requested information. Transport for London had also argued that disclosure of this particular information would prejudice its own commercial interests because it would be likely to lead to an unfavourable reaction from Serco which would damage their relationship and may discourage Serco from sharing information in future. For clarity, the Commissioner also rejects this argument because he does not accept that disclosure of such limited information would lead to Serco taking steps which could potentially weaken a future bid or damage its relationship with an important partner, Transport for London.

19. However, for some of the information contained within the financial model in part 5 of the request and the information redacted from part 6 of the request the Commissioner is satisfied that a link can be drawn between the disclosure of the information and the prejudice identified by Transport for London. That is to say he accepts it is possible that disclosure could prejudice the commercial interests of Serco by undermining its negotiating position. This is where the information relates to Serco's profit margins and the hourly rates of its staff. Transport for London's argument that a rival could use the information to undercut Serco in a future tendering exercise is more convincing for this type of information as this is likely to be of more use to a rival when framing a competing bid. The Commissioner is satisfied that a link can be drawn between the disclosure of this information and the prejudice claimed by Transport for London. However, the Commissioner still needs to consider the likelihood of that prejudice occurring before finding that the exemption is engaged.
20. In order to satisfy himself that disclosure would be likely to prejudice Serco and/or Transport for London's commercial interests it would need to be shown that the chances of prejudice occurring are significant and weighty. Although the risk of prejudice need not be more likely than not, it must be substantially more than remote. The Commissioner has considered the likelihood of disclosure and finds that the test for

engaging the exemption has not been met. As he has already said, Transport for London has failed to point to any specific tender or negotiation where Serco's commercial interests would be undermined. For the reasons given above the Commissioner has found that 43(2) is not engaged in respect of any of the withheld information.

Section 43(1) – Trade secrets

21. During the Commissioner's investigation Transport for London said that it considered that the information in part 5 of the request was additionally exempt under section 43(1). Section 43(1) provides that information is exempt if it constitutes a trade secret.
22. A trade secret is not defined in the Act but the Commissioner considers that information that constitutes a trade secret will, for instance, be the type of information that gives its owner a competitive edge over its rivals. It will be something that is commercially valuable in its own right and which can be regarded as an asset. The term trade secret implies that the information is more restricted than information that is just commercially sensitive. Information on the costs associated with a particular contract may be commercially sensitive (although on the circumstances of this case the Commissioner has found that it is not) but this does not necessarily mean that the information is also a trade secret.
23. Transport for London gave the example of "information regarding risk pricing, treatment of costs, profit margins and overhead rates, staff salaries and other rates" as information included within the financial model which Serco considers to be a trade secret. It suggested that the exemption applied because such information was not widely known and had contributed to Serco's ability to gain public contracts. The Commissioner's view is that this sort of information should not be classed as a trade secret. Rather he considers that a trade secret is something which if disclosed would allow a competitor to use the information to get the same result or advantage as the owner of the trade secret, in this case the ability to win public contracts. That the information could potentially put Serco at a disadvantage in future tenders does not mean that the information can be classed as a trade secret. Such arguments are better suited to the commercial interests exemption although on the particular facts of this case the Commissioner has found that Transport for London has also failed to demonstrate that section 43(2) is engaged.

Section 41 – information provided in confidence

24. During the course of the Commissioner's investigation Transport for London also said that it considered the information in part 8 of the request to be additionally exempt under section 41 of the Act. Section 41 provides that information is exempt if it was obtained by a public authority from any other person and disclosure would lead to a breach of confidence actionable by that or any other person.
25. When deciding whether section 41 would apply the Commissioner first needs to consider whether the information was obtained by Transport for London from another person. Firstly, the Commissioner would say that he considers that a written agreement between two parties is not information that has been 'obtained' and therefore he usually takes the view that information in a concluded contract is not covered by the section 41 exemption. However the Commissioner has reviewed the information in this particular case which he would stress is a schedule of the main contract and finds that the information should be seen more as a collection of documents provided by Serco in support of its bid and which are included as a schedule to the contract. In this case the Commissioner is prepared to accept that the information was obtained by Transport for London from Serco.
26. The next step is to consider whether disclosure of the information would constitute an actionable breach of contract. The most commonly cited test of an actionable breach of confidence is that set out in *Coco v Clark*.¹ Under this test a breach of confidence will be actionable if:
- the information has the necessary quality of confidence,
 - the information has been imparted in circumstances importing an obligation of confidence,
 - there was an unauthorised use of the information to the detriment of the confider,
 - there is no public interest defence to the breach of confidence
27. Information can be said to have the necessary quality of confidence if it is not otherwise accessible and is more than trivial. The first thing the Commissioner would say here is that Transport for London again appear

¹ *Coco v A N Clark (Engineers) Limited* [1968] FSR 415

to have applied the exemption on the basis that the complainant has requested the entire service provider solution rather than just the headings that feature within this wider body of information. As the Commissioner mentioned in relation to section 43(2), in his view this information would not have any impact on the commercial interests of Serco. As a result he is minded to characterise the information as trivial. However, even if the Commissioner were to accept that on balance the requested information is not trivial he is not satisfied that the actual information requested by the complainant is not otherwise accessible.

28. The headings from the service provider solution when viewed in isolation reveal very little about what Serco offered as part of its proposal to run the cycle scheme and in the Commissioner's view is the type of information that one might expect to find in any number of bids of this kind. Even if the complainant had requested the actual full contents of the service provider solution it is apparent that some of this information would be already accessible. For instance, part of this information concerns examples of successful services provided by Serco such as the Docklands Light Railway. It is in the public domain that Serco operates this scheme. Furthermore the details of how it operates such schemes can be ascertained through simple observation of these existing projects. Indeed, as the London Cycle Hire Scheme was itself in operation at the time of the request many aspects of the information were no longer confidential. For instance the service provider solution includes details of the proposed docking stations and the types of bicycles available for hire. Clearly such information was no longer confidential and could be said to be in the public domain through observation of the scheme as it operated in practice at the date of the request. For these reasons the Commissioner is not satisfied that the information requested by the complainant in part 8 of the request would have the necessary quality of confidence.
29. The Commissioner has already said that he does not consider the requested information to have the necessary quality of confidence and therefore section 41 is not engaged. However, for the sake of clarity, the Commissioner would also briefly say that he thinks that the information would also fail to meet one or both of the next two stages of the test. In particular the Commissioner thinks it is very unlikely that disclosure of such limited information as the headings from the service provider solution would have any commercial detriment on Serco. As he has already said, the Commissioner finds it difficult to accept that this information would put Serco at any kind of disadvantage against its competitors. For these reasons the Commissioner has decided that the section 41 exemption is not engaged.

Right of appeal

30. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. 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

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