

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 29 June 2020

Public Authority: Blaenau Gwent County Borough Council
Address: Waun-Y-Pound Road
Ebbw Vale
NP23 6LE

Decision (including any steps ordered)

1. The complainant requested information relating to subsidies paid in respect of concessionary travel. Blaenau Gwent Council (the Council) refused to provide the requested information in reliance on the exemptions at section 41 and section 43(2) of the FOIA.
2. The Commissioner's decision is that the exemption at section 41 is engaged. Therefore the Council was entitled to refuse the request. The Commissioner does not require any steps to be taken.

Background to the request

3. This complaint is about a request for information relating to the Concessionary Fare Scheme in Wales. The Scheme provides that people over 60 years old and people with certain disabilities who live in Wales can travel free on local bus services.
4. The Mandatory Travel Concessions (Reimbursement Arrangements) (Wales) Regulations 2001 set out how transport operators are reimbursed for the cost of mandatory travel concessions. Regulation 3 sets out an objective to provide that operators should be financially no better or worse off as a result of providing mandatory travel concessions.

Request and response

5. The complainant submitted the following request to the Council on 3 September 2018:

"We would like to know how much per concessionary pass Stagecoach receive in reimbursement in the Blaenau Gwent area..."

6. On 1 October 2018 the Council confirmed that it held relevant information but refused to disclose it in reliance on the exemption at section 43(2) of the FOIA. The Council did disclose the total reimbursement made in 2018/19.
7. The complainant requested an internal review on 24 October 2019. The Council issued the outcome of the review on 29 January 2019, upholding the application of the exemption at section 43(2).
8. The complainant contacted the Commissioner on 29 March 2019 to complain about the Council's refusal to provide him with the requested information. The complainant argued that there was a strong public interest in favour of disclosing the information.
9. The Commissioner accepted the complaint as eligible and proceeded to investigate. However during the course of the investigation an issue arose as to the wording and interpretation of the request. The complainant subsequently clarified that he sought the Representative Concessionary Fare (RCF), ie the total revenue from adult single ticket sales divided by the number of adult single tickets issued. The Commissioner advised the complainant that the RCF appeared to be based on revenue from ticket sales, whereas the wording of the request was asking for the amount of money received from the Council in reimbursement. Therefore disclosure of the RCF would not meet the description specified in the request.
10. The Commissioner noted that the Council appeared to have assumed that the complainant had requested the RCF. However the Commissioner is mindful that she may only make a decision regarding a particular request for recorded information. The Commissioner concluded that she could not make a decision regarding the RCF since this did not fall within the description specified in the request.

11. The complainant submitted a revised request to the Council on 18 December 2019 as follows:

"The Representative Concessionary Fare ("RCF") paid to Stagecoach depot-by-depot (South East Wales) by your authority (Blaenau Gwent)

The gross RCF (i.e. the total RCF);

The net RCF (i.e. the total RCF minus the so-called "generation factor"); plus

Confirmation of the "generation factor" used by the authorities on each occasion."

12. The Council responded to the request on 20 January 2020. It disclosed the generation factor, or modifying index factor, which it said had previously been disclosed to the complainant. The Council refused to provide the remainder of the requested information, ie the gross RCF and the net RCF, citing the exemptions at section 41(1) and section 43(2) of the FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 20 January 2020 to advise that he remained dissatisfied with the Council's decision to withhold information relating to the RCF.
14. The Commissioner has therefore considered whether the Council was entitled to rely on section 41(1) and section 43(2) in respect of the withheld information falling within the scope of the request of 18 December 2019. Given that the complainant has already exhausted the internal review process in respect of his original complaint the Commissioner accepted this complaint as eligible for investigation without requiring a further internal review.

Reasons for decision

Section 41(1): information provided in confidence

15. The Council relied on the exemption at section 41(1) in respect of the withheld information. Section 41(1) provides that information is exempt information if:

"(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

16. With regard to section 41(1)(a) the Commissioner has considered guidance produced by the Welsh Government, "Concessionary Travel Scheme: A Common Approach for Reimbursement Arrangements for Participating Operators". Paragraph 29 of this guidance explains that the RCF is calculated as follows:

"...the average adult single fare calculated by taking the total revenue from adult single ticket sales for the Participating Operator or, where appropriate, at the relevant operating depot, divided by the corresponding number of adult single tickets issued".
17. The Council explained to the Commissioner that the Welsh Government calculates the RCF on the basis of information provided to it by an operator, which the Commissioner considers to be the information set out at paragraph 16 above. The RCF is checked by an independent local authority group called the Concessionary Fare Sub Group. The Welsh Government then confirms the operator's RCF with each local authority.
18. The Council explained that the Welsh Government had made representations that the information should not be disclosed. The Council provided a copy of a letter from the Welsh Government to another public authority dated August 2012. This letter set out that the RCF was provided to local authorities by the Welsh Government on a "commercial in confidence" basis. It asked the council in question to provide assurances that "commercially sensitive information" would not be disclosed.
19. The complainant also provided the Commissioner with a copy of a letter from the Welsh Government, which stated that *"...the Welsh Government does not set the reimbursement paid to bus operators by local authorities."* The complainant therefore disputed that the RCF was obtained by the Council from the Welsh Government. However the Commissioner understands the complainant's letter to mean that the Welsh Government does not set the RCF itself.
20. As explained above the RCF is calculated by reference to an established formula which is publicly available. The Commissioner understands that the Welsh Government communicates the RCF to each local authority, therefore she is satisfied that the information is obtained by the Council from the Welsh Government. Accordingly the Commissioner accepts that

the requested information meets the requirement at section 41(1)(a) of FOIA.

21. With regard to whether disclosure would constitute an actionable breach of confidence as required by section 41(1)(b), the Commissioner follows the three-limbed test set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415.:
 - The information has the necessary quality of confidence;
 - The information was communicated in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.
22. With regard to the first limb of this test, the complainant has questioned whether the requested information can accurately be described as confidential. The Commissioner's published guidance¹ on section 41 sets out her interpretation that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial. The Commissioner further considers that information which is of importance to the confider should not be considered trivial.
23. The Commissioner is satisfied that the requested information in this case does have the quality of confidence because it is not otherwise publicly available and is more than trivial. Given that the Welsh Government considers the information to be commercially sensitive, the Commissioner also accepts that the information is clearly of importance to the confider.
24. With regard to the second limb of the test, the Commissioner considers that an obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties. In this case the Commissioner accepts that there was an express expectation that the information should be treated confidentially, again noting that the Welsh Government stated that it was provided on a "commercial in confidence" basis.

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

25. The Commissioner has then gone on to consider whether disclosure of the information would have a detrimental effect on the confider. The Commissioner's view as set out in her guidance is that the disclosure of commercial information will only constitute a breach of confidence if it would have a detrimental effect on the confider. This follows the Tribunal's finding in *Higher Education Funding Council for England*.²
26. The Council argued that disclosure of the RCF would cause detriment to the Welsh Government and all local authorities in Wales, on the basis that it would harm the operation of the mandatory travel scheme in Wales.
27. The Commissioner understands that the RCF is calculated from commercially sensitive information provided by the operators to the Welsh Government, ie information relating to revenue and ticket sales. The Welsh Government has made it clear to local authorities, including the Council in this case, that it expects them to take steps to ensure that the RCF is not disclosed.
28. If the Council was to disclose the RCF under the FOIA it would be going against the instructions of the Welsh Government. The Commissioner accepts that this would be seen as a breach of trust and would therefore be likely to cause detriment to the relationship between the Welsh Government and the Council, as well as both parties' relationships with the operators. The Commissioner further accepts that this would be likely to have a detrimental impact on the operation of the mandatory travel scheme. Accordingly, the Commissioner accepts that the third test is met, and that disclosure of the information would give rise to an actionable breach of confidence.
29. Section 41 is not subject to the public interest test at section 2(2) of the FOIA. However, an overriding public interest in disclosure may constitute a defence to an action for breach of confidence. Therefore the Commissioner has considered whether there is such a public interest in disclosure in this case.

1. Higher Education Funding Council for England v ICO & Guardian News and Media Ltd (EA/2009/0036)

30. The complainant has asserted that there is a clear public interest in disclosure of the RCF. He suspects that Stagecoach is provided with a "*significantly larger*" subsidy than other companies, and considers that disclosure of the RCF would clarify whether this is in fact the case.
31. The complainant has also argued that there is a "*public policy imperative that the tax payers of Wales be informed how their taxes are being spent particularly where there is a significant risk that more efficient independent 'new entrant' bus operators may be chased from the market as a consequence*". The complainant maintains that disclosure of the RCF is essential in order to allow effective competition among bus providers.
32. The Commissioner notes the complainant's concern about the level of subsidy. However, in the absence of any evidence of wrongdoing it is difficult to attach significant weight to this as an argument to override the duty of confidence. The Commissioner acknowledges that disclosure of the RCF would provide clarity, but mere suspicion is insufficient reason to overturn a duty of confidence.
33. The Commissioner does acknowledge that disclosing the RCF would provide transparency as to how public money is spent. However, she observes that the Council did disclose to the complainant that a total of £176,871.26 had been reimbursed to Stagecoach in respect of concessionary travel in 2018-2019. The Commissioner considers that this disclosure provides transparency as to the cost to the public purse, if not the specific amounts per route operated by Stagecoach.
34. The Commissioner considers that there is an inherent public interest in preserving the principle of confidentiality. Her published guidance sets out that any disclosure of confidential information will, to some degree, undermine the relationship of trust between public authorities and confiders of information. The importance of maintaining confidentiality is demonstrated by the fact that parties may take legal action to protect confidentiality, and to seek damages when that confidentiality is broken.
35. The Commissioner is also mindful that, when considering the exemption at section 41, the public interest in disclosure must be sufficiently strong to override the duty of confidence that has been demonstrated. As pointed out above, this is a different consideration of the public interest to that set out at section 2(2) in respect of qualified exemptions. Put simply, the presumption is in favour of maintaining confidence under section 41.

36. In this case the Commissioner considers that the public interest in disclosure, although arguable, fails to override the duty of confidentiality. The Commissioner is not satisfied that the Council could maintain a defence of overriding public interest should it be subject to an action for breach of confidence. Therefore the Commissioner finds that the exemption at section 41(1) is engaged in respect of the requested information. Accordingly she is not required to consider the Council's reliance on the exemption at section 43(2) of the FOIA.

Right of appeal

37. 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

38. 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.
39. 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

Sarah O’Cathain
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