

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 February 2023

Public Authority: Transport for Wales Rail Ltd
Address: 3 Llys Cadwyn
Pontypridd
Rhondda Cynon Taf
CF37 4TH

Decision (including any steps ordered)

1. The complainant submitted an information request to Transport for Wales Rail Ltd ("TfW") relating to decisions taken about passenger assistance during Storm Eunice.
2. The Commissioner's decision is that TfW was entitled to rely on section 41(1) of FOIA to withhold the requested information.
3. The Commissioner does not require any further steps.

Request and response

4. On 22 April 2022, the complainant made the following request for information under FOIA. For ease of reference, the Commissioner has numbered the questions to align with TfW's response:

"Please can you supply information regarding the phone meeting of Rail Delivery Group's Customer Information Group telephone meeting on 17th February?"

To identify the group, I'm informed that RDG's organisation comprises an internal governance structure, headed by its Customer Board. The Customer Board sits above the Customer Information Strategy Group ("CISG"), which itself heads two sub-groups: the Customer Information Group ("CIG"), which deals with issues related to customer information, and the Accessibility & Inclusion Group ("A&IG"), which deals with issues regarding compliance with licence-linked accessibility requirements. Apparently, the CIG and the A&IG have delegated authority from the CISG in relation to a number of matters (including, in the case of the CIG, the power to adopt a "Do Not Travel" recommendation). Representatives from all TOCs sit in the CIG. I'm assuming that a Network Rail representative also sits in the CIG. I'm informed that on Thursday 17 February 2022, shortly after the Met Office issued a Red Weather Warning for Storm Eunice, a meeting of the CIG took place, by way of a telephone call. During this call, the CIG apparently agreed a course of action which included the nationwide issue of "Do Not Travel" notices for train operators. It is this meeting that I am specifically interested in.

1.) Please could you supply me with the notes and communications your representative made during and as a direct result of this meeting? I'm wanting anything that indicates what topics were discussed and what decisions were made. Contemporaneous notes, internal or external emails received or sent that reveal what was discussed at this meeting, and what decisions were made and actions agreed, would be great.

2.) Please can you also advise me about the power and responsibility of your representative on the group? I am not wanting any personal data, I am wanting to know what their role involves and what powers they have to bind your company / to agree to proposals agreed by the group.

In specific, I am instructed that the issue of pre-booked assistance bookings was raised during the call. Apparently the CIG discussed the actions to be taken in that regard, considering the risk that TOCs would not be able to deliver the pre-booked assistance during Storm Eunice. It was apparently agreed during the call that customers with pre-booked

assistance bookings should be contacted by TOCs to cancel their assistance booking; and that no further pre-booked assistance bookings should be arranged for 18 and 19 February 2022. I'm not sure I find it credible that this group, which is not the accessibility and inclusion group, has the authority to agree to cancel and refuse assistance bookings.

3.) What I'm wanting to know is whether the group did actually discuss such and reach that decision. If so, whether your rep on that group agreed to such cancellations and refusals, whether they had authority to do so and if so, how they communicated this decision within your company."

5. A response was provided on 23 May 2022 in which TFW confirmed that in regards to question one it does not hold the notes from the meeting and that emails received from RDG, in relation to the meeting are exempt from disclosure under section 41 of FOIA. TFW provided information in relation to questions two and three.
6. Upon receiving this response, the complainant asked TFW to conduct an internal review on 27 May 2022 and on 26 August 2022, TFW provided its internal review response and maintained its original position.

Background

7. TFW explained to the Commissioner that on the same date TFW received the initial request, two other public authorities received identical requests for information from the complainant. One public authority applied the same exemption as TFW, to the requested emails, however the other one disclosed some redacted emails.
8. The complainant has made the Commissioner aware of a further request, which pre-dates this request, and which is for information fairly similar to this request and in that case the public authority disclosed some redacted emails.
9. It is important to note that when making a decision on whether or not a public authority can rely on a particular exemption to withhold the requested information, the Commissioner can only base his decision on the information provided in this particular case. He cannot base his decision on the responses of other public authorities.

Reasons for decision

Section 41- information provided in confidence

10. Section 41(1) of FOIA states that information is exempt from disclosure if it was obtained by a public authority from any other person (including another public authority) and that disclosure of the information would constitute a breach of confidence.
11. In submissions to the Commissioner, TfW confirmed that the requested information was provided to TfW by third parties, namely the Rail Delivery Group (RDG), train operating companies (TOCs) and/or Network Rail. Having accepted this, the Commissioner must next determine whether disclosure of that information would constitute a breach of confidence.
12. For a breach of confidence to occur the Commissioner must consider a three-step test:
 - The information must have the necessary quality of confidence
 - It must have been imparted in circumstances importing an obligation of confidence, and
 - There must have been an unauthorised use of the information to the detriment of the confider.
13. Information will have the necessary quality of confidence if it is not otherwise accessible and, it is more than trivial. In this case the information is not trivial as it relates to decisions regarding passenger assistance during Storm Eunice. The Commissioner accepts that the content of the information request was not in the public domain when the request was first made, and that the information was not otherwise accessible as it was only disclosed to a select and small group for specific reasons. Consequently the Commissioner is satisfied that the information has the necessary quality of confidence.
14. Regarding the second step of the test TfW explained that the information was shared with it on the understanding that it would be treated confidentially, and that the information was "for their use alone and will only be used or disclosed in according with the wishes of the confider".

15. Furthermore, after applying the reasonable person test, as detailed in the Commissioner's guidance¹, TfW also received written confirmation, from the RDG, that the discussions, emails, and minutes of meetings were confidential information and had been "imparted in circumstances importing confidentiality". Therefore the Commissioner is satisfied that the criterion is met.
16. The third part of the test concerns detriment to the confider by an authorised disclosure. In its submissions, TfW explained that disclosure would cause detriment as it would "stymie the ability of the Customer Information Group (CIG), RDG and TOCs to have frank and open discussions in the future" and that it would remove the safe space required to make policy decisions. The Commissioner is therefore satisfied that disclosure would be detrimental.
17. Section 41 is an absolute exemption and not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that a public authority should not disclose the information unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence.
18. The complainant argued that the information is of significant interest as it is in "relation to disabled people's right and ability to travel" during Storm Eunice and that "resistance to scrutiny of such should not be condoned."
19. TfW accepted that there is a public interest in the disclosure of the information in that ensuring public authorities remain transparent, accountable and open to scrutiny. However, it states that disclosure of the withheld information would undermine the principle of confidentiality and the relationship of trust between the relevant organisations. TfW further argue that "individuals and organisations may be discouraged from engaging in discussions or decisions if they do not have a degree of certainty their trust will be respected".

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

20. The Commissioner understands that there is a public interest in disclosure of the requested information in order to enable individuals to understand decisions made by public authorities that affect and impact their daily lives. However, for the reasons mentioned above, the Commissioner accepts that there is not sufficient public interest defence to warrant TfW breaking the obligation of confidence.
21. The Commissioner has therefore concluded that the requested information would meet the conditions under section 41(1) and that TfW is therefore entitled to rely on section 41 to withhold the information.

Other matters

22. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so and, where an authority chooses to offer one, the section 45 Code of Practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
23. In this case the complainant requested an internal review on 27 May 2022 and TfW provided the outcome of its review on 26 August 2022, 64 working days later. The Commissioner reminds TfW of the Code of Practice and urges it to respond in a timely manner.

Right of appeal

24. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. 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.
26. 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

Joanna Marshall
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