



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

**Case No. EA/2015/0270**

**ON APPEAL FROM:**

**The Information Commissioner's**  
**Decision Reference: FS50588003**

**Appellant:** Tobias Shaw Paul

**Respondent:** Information Commissioner

**Before**  
Melanie Carter  
(Judge)

and

Alison Lowton  
Henry Fitzhugh

**DECISION OF THE FIRST-TIER TRIBUNAL**

1. This case concerns a request for information by the Appellant, Mr Tobias Shaw Paul under the Freedom of Information Act 2000 (FOIA). On 8 November 2014 the Appellant submitted a lengthy multi-part request for information to Transport for Greater Manchester ("TfGM"), the statutory body responsible for coordinating public transport within Greater Manchester. So far as now relevant, the request included a request for the following information:

*"3. Procedures, actions and processes undertaken in the formulation, adoption, authorisation and review of the Metrolink Byelaws, MCOC and TfGM Official Fares Table (insofar as those documents were in force on or after Sunday 28 September 2014) and any related material, including but not limited to minutes, correspondence (internal and external), advice, consultations, policies and other records."*

2. It took some time for TfGM to respond substantively to the Appellant's request. After sending a holding response on 9 December 2014 and a further communication on 2 February 2015 in response to a purported request for an internal review from the Claimant on 30 January 2015, a substantive response was provided on 27 February 2015. TfGM's response in relation to the part of the request set out above was as follows:

*"We do not hold any records or information in relation to the formulation, adoption, authorisation and review of the Metrolink Byelaws, MCOC and TfGM Official Fares Table."*

*With regard to the Byelaws, these were made on 9th January 1992 and confirmed on 24th February 1992. In 2005, we did seek Counsel's opinion on the application of the Byelaws to any new extensions. TfGM consider this information to be exempt under section 42 of the Act - Legal Professional Privilege.*

*In this instance, having considered the balance of the public interest test, TJGM has concluded that the likely prejudice to TJGM is greater than the public interest in disclosure. We believe release of such information would prejudice future reviews of the Byelaws and/or MCOC. Communications between client and legal adviser are protected by Legal Professional Privilege. Legal Professional Privilege is a common law concept that protects the confidentiality of communications between a legally qualified adviser and client for the purpose of the provision of advice, or in connection with litigation.*

*Having considered the public interest, TJGM's decision is to withhold this information for the reasons stated above.*

3. The Appellant complained to the Information Commissioner who in turn investigated and then decided to uphold the decision of TfGM. He decided that the counsel's opinion was protected by legal advice privilege and that the balance of the public interest was in favour of maintaining the exemption due to the "inherent necessity for TfGM to be able to seek and receive confidential legal advice, without the expectation that it will be disclosed to the public" and the absence of any sufficiently weighty countervailing factors".

#### *The grounds of appeal*

4. The Appellant's grounds of appeal are in summary:
  - (1) The DN is 'defective' because of the unfair way in which the Commissioner carried out his investigation;
  - (2) The DN is defective because the Commissioner did not consider TfGM's failure to undertake an internal review in respect of one part of the original request;
  - (3) The DN is 'misleading'.
  - (4) The Commissioner struck the wrong balance under the public interest test. The arguments in favour of disclosure outweigh the arguments in favour of maintaining the exemption at section 42 FOIA.

#### *Analysis*

##### Grounds (1)-(3)

5. On an appeal under section 57 FOIA it is not the role of the Tribunal to scrutinise the manner in which the Commissioner carried out his investigation, but rather to consider whether the conclusions reached in the DN are in accordance with the law and/ or whether the Commissioner has exercised his discretion correctly: see section 58 FOIA. The matters raised by the Appellant in this regard thus fall outside of the tribunal's jurisdiction.

6. It is similarly outside of the tribunal's jurisdiction to consider any alleged failure of the public authority with regard to an internal review.
7. The tribunal considered the alleged factual inaccuracies in the account of the procedural history of the Appellant's complaint in the DN. Insofar as they fell within the jurisdiction of the tribunal (in light of the above paragraphs), the tribunal concluded that there was insufficient put forward to raise any inference that the Commissioner had made an error of law or exercised his discretion inappropriately. In particular, whilst it did not agree with the Commissioner that the Appellant had not put forward any public interest arguments in favour of releasing the information, it did not consider that this had led to any operative error of law (the DN did make reference to public interest factors in favour of disclosure). In any event, insofar as the Commissioner might have been said to have failed to take into account any relevant material considerations as to the public interest balancing test, this tribunal was able to cure any such failing, in its own consideration of this test.

#### The public interest balance test

8. There was no dispute between the Appellant and the Commissioner that the counsel's opinion was subject to legal professional privilege. As such, the exemption at section 42 FOIA was engaged. The issue for the purposes of this appeal, was the public interest balance test, that is whether the public interest in maintaining the exemption outweighed the public interest in disclosure.
9. The Upper Tribunal has emphasised that the exemption in section 42 FOIA is one which carries strong inherent weight, albeit not such that it is to be elevated into an absolute exemption. This was accepted by the Appellant.
10. The tribunal's attention was drawn to the leading case on the application of the public interest test, that is, *Department of Health v ICO & Lewis* [2015] UKUT 159 (Charles J). That case establishes the following propositions:
  - (1) The public interest assessment should focus on the particular content of the information in dispute and not its type or class;
  - (2) The Tribunal should assess the actual harms or benefits, and the risks thereof, of disclosure;
  - (3) There is no presumption of disclosure under FOIA.

#### The Appellant's submissions

11. The Appellant contends that the public interest arguments in favour of disclosure are sufficiently strong to outweigh those in favour of maintaining the exemption. The Appellant asserts that there is a general public interest in disclosure and that this is strengthened by a number of factors including 'the large number of people affected' and the 'large amount of money involved'. It is argued that every single passenger would benefit due to a clarification of rights and responsibilities under the legal framework. At paragraph 24 of his Reply, the Appellant asserts that "*it must be possible for reasonable men to entertain doubts as to the applicability and enforceability of the Byelaws on extensions to the Metrolink System. If it were not, TfGM would have had no need to obtain the legal advice that constitutes the disputed information in the first place. Disclosure offers a genuine opportunity to dispel these doubts*".

12. The Appellant submits that there is a strong public interest in the proper administration of justice and in this regard, prays in aid his own personal experience. The Appellant submits that there is *“reason to believe that the Byelaws are as a matter of day-to-day application administered unfairly and unlawfully.”*
13. Against, these public interest factors in disclosure, the Appellant acknowledges the importance of legal professional privilege but argues that the public interest in maintaining the exemption is weakened by the age of the advice and the fact that it was not taken to protect the rights of individuals. He also notes that *Lewis* makes clear that TfGM can have had no expectation that its legal advice would not be disclosed to the public *“because any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest”*.

#### *The Commissioner’s submissions*

14. The Commissioner argues that there is no presumption in favour of disclosure under FOIA (see *Lewis*, supra) and that the submissions that the Appellant makes are very general. It is argued that they relate to the large number of people who are users of the Metrolink system in Manchester and the revenue which TfGM accrues from penalty fares. However it is difficult to see how these matters impact upon the public interest in the disclosure of the specific information under dispute, that is, the counsel's opinion.
15. The Appellant has not suggested how *this information* could be of benefit to a large number of people or have a significant financial impact. It is not enough for him to point to the possibility of criminal sanction in the event of non-payment of a penalty charge. It was argued that there is presently no reason to think that criminal liability is being improperly imposed on TfGM's service users and no reason to think that justice is being administered anything other than fairly in this regard.
16. With regard to the age of the counsel’s opinion, the Commissioner maintains that he was entitled and correct, having seen the disputed information, to accept TfGM's contention that the advice in the disputed information remains live, notwithstanding its age. With regard to the Appellant’s assertion that the advice has not been prepared to protect the rights of individuals, but rather is *“intended to prejudice the position of individuals vis-à-vis TfGM,* it was submitted that this was to misunderstand the purpose of a public authority. Public authorities do not exist to prejudice individuals, but rather to serve them. TfGM takes advice on the applicability of its byelaws so that it can ensure that it acts lawfully in respect of the members of the public who use its services. The fact that some of those members of the public may be prosecuted for fare evasion does not mean that TfGM fails to act in the interests of individuals. Prosecuting contraventions of the byelaws is done in the interests of all of those individuals who use the services but do not contravene the byelaws. This factor, it was argued, therefore does not weaken the strength of the public interest in maintaining the exemption in section 42 FOIA.

#### *The Tribunal’s consideration*

17. The Tribunal had had the benefit of seeing the counsel’s opinion and thereby to consider the potential benefits and harm from disclosure.
18. An issue before the tribunal was the correct approach given the submissions of the Commissioner, further to the case of *Lewis*, that a contents based approach to the public interest balancing test should be taken. In this appeal, the tribunal did not, given the age and particular contents of the counsel’s opinion, consider that there

would be likely to be a high level of prejudice arising from disclosure of the opinion. Further reasoning on this point, which cannot be included in this open section of the decision given that it discloses part of the disputed information, is set out in the Confidential Annex, paragraph 1.

19. That said, the tribunal was, in line with other tribunal cases, persuaded of the significant weight which should be accorded to the public interest in maintaining legal professional privilege and the ability thereby of public authorities to obtain confidential legal advice, save in the knowledge that absent some clear and compelling consideration in favour of disclosure, the advice would remain confidential.

20. The case of *Lewis* which decided that a class based approach was wrong, had concerned the exemptions at section 35 and 36 FOIA and not section 42 as here. In that sense, whilst discussing qualified exemptions and the public interest balancing test in general terms, it could be distinguished. However, paragraph 30 of that decision did set out the way in which the weight to be accorded to the importance of preserving legal professional privilege could nevertheless be taken into account in a contents based approach. Thus, it was stated that:

*“30. So a contents based assertion of the public interest against disclosure has to show that the actual information is an example of the type of information within the class description of an exemption (eg: formulation of policy or Ministerial communications or the operation of a Ministerial private office), and why the manner in which disclosure of its contents will cause or give rise to a risk of actual harm to the public interest. It is by this route that:*

*i) the public interest points relating to the class descriptions of the qualified exemptions, and so in maintaining the exemptions, are engaged (eg: conventions relating to collective responsibility and Law Officers’ advice) and applied to the contents of the information covered by the exemption, and*

*ii) the wide descriptions of (and so the wide reach of) some of the qualified exemptions do not result in information within that description or class that does not in fact engage the reasoning on why disclosure would cause or give rise to risk of actual harm (eg: anodyne discussion) being treated in the same way as information that does engage that reasoning because of its content (eg: examples of full and frank exchanges).”*

21. In the Tribunal's view it was thus consistent with *Lewis*, having identified that the counsel's opinion falls within the class description of the exemption, to then take into account actual harm likely to be caused by disclosure to the ability of the public authority to confidently and reliably obtain legal advice. Further reasoning on this point is set out at paragraph 2 of the Confidential Annex.

22. In this case, the counsel's opinion whilst relatively old, did apply to continuing circumstances, such that it was credible and indeed likely that its disclosure would erode the confidence in which legal advice could be sought. This was not to elevate a qualified exemption to the status of an absolute exemption – rather by acknowledging the potential actual harm to legal professional privilege that could be triggered by disclosure, it underscored the need for a clear and compelling public interest in favour of disclosure to counterbalance this.

23. The Appellant had not adduced any particularly strong public interest factors in favour of disclosure. Beyond the generally desirable goals of accountability, good

administration and transparency, he had not been able to identify or evidence any particular public interest in the subject matter of the counsel's opinion and its disclosure. Other than his own personal experience in relation to the comments of one ticket inspector there was no evidence of any real concern or doubt as to the validity of the Bye-laws. The fact that a large number of persons used the Metrolink did not raise the same public interest as was in play in the Mersey tunnel case (the underlying issue in that case concerning every one of the toll payers rather than as here, where any concern could only arise in relation to those who were actually subject to a penalty fare). The doubt expressed by the Appellant as to the validity of the Bye-laws was not in and of itself sufficient to raise the other public interest factors in favour of disclosure to meet the significant weight to be attached to legal professional privilege and the maintenance of the freedom of the public authority to seek and obtain legal advice in confidence and without fear of disclosure. Officials would be aware that legal advice may be disclosed under FOIA, but equally that this would only be when there was sufficient public interest in that disclosure.

### **Conclusion**

24. In all the circumstances, the tribunal was of the view that the public interest in maintaining the exemption outweighed the public interest in disclosure and as such the section 42 exemption applied. Thus this ground of appeal was not upheld. The other grounds of appeal were similarly rejected.
25. This was the unanimous decision of the tribunal.

Signed

**Judge Carter**

**Date:** 8 June 2016