



## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Dated 5<sup>th</sup> May 2006**

**Public Authority:** Transport for London (acting on behalf of any subsidiary authority)

**Address:** Windsor House  
42-50 Victoria Street  
London  
SW1H 0TL

### **Summary Decision and Action Required**

The Commissioner's decision in this matter is that the Public Authority has dealt with the Complainant's request in accordance with Part I of the Act in that the information it withheld from the Complainant was exempt information. It has therefore fully complied with its obligations under section 1 of the Freedom of Information Act 2000 and no further action is required.

However Transport for London originally relied on two exemptions to refuse the request. The Commissioner's decision is that although all the information was exempt under section 40(2) - personal information about third parties, the second exemption that Transport for London claimed, section 21 – information accessible by other means, was not engaged.

- 1. Freedom of Information Act 2000 (the 'Act') – Applications for a Decision and the Duty of the Commissioner**
  - 1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').
  - 1.2 Where a Complainant has made an application for a decision, unless:

- a Complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

- 1.3 The Commissioner shall either notify the Complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the Complainant and the public authority.

## **2. The Complaint**

- 2.1 The Complainant has advised that on 3 March 2005 he requested files of prosecutions brought by London Bus Services Limited since the start of 2003, from the Transport for London in accordance with section 1 of the Act. The prosecutions in question relate to fare irregularities.

- 2.2 On the 11 May 2005 he complained to the Commissioner that Transport for London had refused to communicate the information to him. In particular the Complainant argued that the exemptions cited by Transport for London could not be relied on to withhold the information.

## **3. Relevant Statutory Obligations under the Act**

- 3.1 **Section 1(1)** provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

## **4. Review of the case**

- 4.1 The information requested concerns prosecutions brought by London Bus Services Limited. The prosecution files contain details of the offences allegedly committed by passengers and documents the process of taking the case to court. As such they contain personal data about the alleged offender.
- 4.2 London Bus Services Limited is a wholly owned subsidiary of Transport for London and as such is a public authority in its own right. Although the actual information may have been held by London Bus Services Limited, the actual

request was made to Transport for London, which for administrative ease dealt with the request. The Commissioner is satisfied that Transport for London is responsible for dealing with the request.

- 4.3 The Complainant, who was already engaged in correspondence with Transport for London, first raised the issue of prosecutions files on the 29<sup>th</sup> January 2005 together with a number of other access to information queries. At this time he merely asked whether Transport for London held the prosecution files with a view to arranging a suitable way for him to access the information if it was held. On the 16 February 2005 he was advised by email that the information was held but disclosing the personal data in the files would contravene the Data Protection Act 1998 and so would be exempt under section 40 of the Freedom of Information Act 2000.
- 4.4 The Complainant queried the application of section 40 that same day, suggesting that since prosecutions are carried out in open court, details of prosecutions and convictions were in the public domain and so their disclosure would not breach the principles of the Data Protection Act 1998. On the 2 March 2005 Transport for London reiterated that the information was exempt under section 40. At that time the Complainant was also advised that some information would also be exempt under section 21 – information accessible to the applicant by other means. Transport for London’s rationale for relying on the exemption provided by section 21 was that any information from the prosecution files that was already in the public domain would be held in the appropriate court records which were publicly available.
- 4.5 The Complainant responded on 3 March 2005, disputing the application of both exemptions and on this occasion referred to the information as the “The information I am requesting from you...” It is this email that the Commissioner has taken to be the request for the information for the purposes of section 1 of the Freedom of Information Act 2000. There may be some ambiguity over the date the information was actually requested as previous references to the prosecution files could be construed as soliciting advice and assistance in order to allow the Complainant to make an informed request for the files. However the Complainant’s right of access has not been affected by any ambiguity and this was not an issue that he raised with the Commissioner.
- 4.6 On 14 March 2005 Transport for London provided some other information that had also been requested but withheld the prosecution files, relying on section 40 to do so. On the 16 March 2005 the Complainant asked for an internal review of how Transport for London had dealt with the request.
- 4.7 Transport for London completed the internal review and informed the Complainant of its conclusion by letter on the 10<sup>th</sup> May 2005. In this review letter Transport for London explained that it had relied on two exemptions to withhold the prosecution files.

- 4.8 Firstly it explained that some of the information in the case files was exempt under section 21. Section 21 (1) provides that information which is reasonably accessible to the applicant otherwise than under section 1(the Act's general right of access) is exempt information. Transport for London justified its application of this exemption by explaining that some information in the case files was already in the public domain as it had been used in court proceedings and so would be available in court records which it described as being a "recognised publicly available source of information". Although the cases had been prosecuted in many different magistrates' courts throughout London, Transport for London considered that this did not prevent these records being readily accessible.
- 4.9 Secondly, Transport for London explained that it had withheld the information under the exemption provided by section 40(2). In broad terms, section 40(2) provides that information which constitutes personal data about someone other than the applicant is exempt information if its disclosure would contravene any of the data protection principles established by the Data Protection Act 1998, or a notice issued under section 10 of that Act to prevent processing likely to cause damage or distress to an individual. For the purpose of section 40(2) all manual data, except that relating to personnel matters, is viewed as receiving the full protection of the data protection principles.
- 4.10 Transport for London advised the Complainant that both sections 21 and 40 were absolute exemptions and as such there was no requirement to consider the public interest in maintaining these exemptions.
- 4.11 Following the internal review the Complainant wrote to the Commissioner on the 11 May 2005 complaining about how Transport for London had applied these exemptions. The Complainant argued that in relation to section 21 – information accessible by other means - the information could not be considered reasonably accessible as he would have to visit 37 different magistrates' courts in order to obtain the information.
- 4.12 In relation to section 40(2) the Complainant advised the Commissioner that he understood that when considering whether a disclosure would contravene the data protection principles the main issue would often be whether the disclosure would be deemed unfair to the individual who was the subject of the personal data. He argued that where information was already in the public domain, the disclosure could not be unfair. Furthermore he wanted the information to challenge the grounds on which such prosecutions had been brought and that this was to the advantage of the individuals concerned and so would not cause them damage or distress.
- 4.13 On the 7 December 2005 the Commissioner asked Transport for London to explain in more detail how it had applied the exemptions, and in relation to its application of section 40 whether it had received any notices preventing the processing of personal data likely to cause damage or distress under section 10

of the Data Protection Act. The Commissioner also asked how many prosecutions had been brought for fare dodging during the period covered by the request and to be provided with a sample of five prosecution files.

- 4.14 Transport for London responded on the 16 January 2006. In relation to its application of section 40(2) – personal information - Transport for London advised the Commissioner that it considered some of the information in the prosecution files to be sensitive personal data, as defined by section 2 of the Data Protection Act 1998, since it concerned the alleged commission of offences and that, in its view, disclosing the information without thorough redaction or the explicit consent of the data subjects would breach the first data protection principle which requires that the processing of personal data be fair and lawful.
- 4.15 In relation to the application of section 21 – information accessible by other means - Transport for London considered that court records were accessible to the public. It recognised that it would be time consuming for the Complainant to locate all the records he required through the magistrates’ courts. However it considered that this was a consequence of the volume of information that was being sought and did not in itself mean that the information was not reasonably accessible.
- 4.16 Transport for London informed the Commissioner that over the period covered by the request there had been 15,971 prosecution cases for fare irregularities on London buses.
- 4.17 The Commissioner also contacted Her Majesty’s Court Service (HMCS) in order to ascertain how easy it would be for a member of the public to obtain information held in court records. HMCS explained that generally speaking, court records are not easily accessible to members of the public and that normally an individual would need to be a party to the case, or their representative, in order to gain access to information about a particular case. Magistrates’ courts are required to maintain a register (not a public one) of the cases that they have heard. However the contents of this register are not necessarily the same information as heard in open court and ultimately access to this register is only given at the discretion of the magistrate.
- 4.18 All this presupposes that someone seeking this information would be able to identify the particular cases that they were interested in. The Complainant later advised the Commissioner that the only information he had to track down these cases was the name of Transport for London as the prosecuting authority and a list of the magistrates’ courts in Greater London where the cases would have been heard.
- 4.19 During the course of the investigation the Commissioner advised Transport for London that it seemed unlikely that the court records in question would be reasonably accessible to the Complainant. This prompted Transport for London to

reconsider its application of the exemption provided by section 21 and it later advised the Commissioner that it no longer wished to rely on section 21. It did however maintain that the information was exempt under section 40.

- 4.20 The Commissioner has viewed the five sample prosecution files that Transport for London provided. It appears that the files are manual documents rather than being held electronically. Their contents seem to follow a fairly standard pattern including a copy of the ticket inspector's note book record of the incident and a statement by the inspector based on those notes. These include the passengers' details and what the passenger said when challenged over the alleged irregularity. The file may also contain a photocopy of any ticket or pass that was produced. In the case of a pass, this will contain details of the passenger and their photo. The files also include a completed 'Passenger Travel Irregularity Report' form summarising the details of the offence, 'Case Progress Sheets' and copies of any summons served setting out the nature of the alleged offence. On two of the files there were also submissions made by the passenger explaining that there were mitigating circumstances. Having viewed these files the Commissioner is satisfied that within the context of a file created for the purpose of pursuing a prosecution against a named individual, the majority of the information contained in them is sensitive personal data about the alleged offender. Although there is some additional information which relates to the administrative procedures around each case, this would be meaningless if disassociated from the rest of the file. In the Commissioner's view the files in question constitute sensitive personal data about the alleged offender.

## **5. The Commissioner's Decision**

- 5.1 The Commissioner's decision in this matter is that the Public Authority has dealt with the Complainant's request in accordance with the requirements of Part I of the Act in that it the information contained in the prosecution files was exempt information.
- 5.2 However, for the reasons explained below, although the Commissioner considers that the information contained in the prosecution files is exempt under section 40(2) – personal information, he does not accept that any information is exempt under section 21 – accessible to the applicant by other means.

### **5.3 Section 40(2) states that:**

Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1) [personal data about the applicant], and

(b) either the first or the second condition below is satisfied.

(3) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

5.3.1 In this case the main consideration in applying section 40(2) is whether disclosing the personal data held in the prosecution files would breach the first data protection principle. This states that the processing of personal data must be fair and lawful. If disclosure would breach the first data protection principle the information in the prosecution files would be exempt information in accordance with the conditions set out in either section 40(3)(a) (i) or 40(3)(b).

5.3.2 The personal data contained in the prosecution files was collected for the primary purpose of protecting revenue and pursuing prosecutions against individuals. The alleged offender would only expect such information to be processed in connection with these purposes. As such the Commissioner considers that disclosing the information in other circumstances would be unfair and so contravene the first data protection principle.

5.3.3 In considering the matter of fairness the Commissioner has had regard to the fact that the offences would have been prosecuted in open court. The Complainant has argued that individuals would have expected the consequence of this to be that information on the alleged offence would be placed in the public domain and could be reported by journalists. As a consequence the Complainant believes that disclosing the information to him would not be unfair.

5.3.4 The Commissioner recognises that at the time a case is heard in court, personal data is inevitably disclosed to those attending court, and in the absence of

restriction on reporting, could be made known to the wider world. However the Commissioner believes that in practice public knowledge of the issues is only short lived and may be limited to only a small number of people. Even where cases are reported in newspapers this does not lead to the establishment of a comprehensive, searchable database of offenders.

- 5.3.5 To create such a data base would prejudice the principle of the rehabilitation of offenders. There is established public policy on controlling access to the records of those who have been involved with the criminal justice system as demonstrated by the creation of the Criminal Records Bureau. It is clearly not desirable for the Freedom of Information Act to undermine these principles.
- 5.3.6 The Complainant has also argued that his purpose for wanting the information should be taken into account when determining whether its disclosure would contravene the Data Protection Act. However section 40(2) of the Freedom of Information Act explicitly states that when applying the exemption a public authority should not simply consider whether releasing the information to the particular applicant would breach the data protection principles. The proper test is whether disclosure to any member of the public would breach the data protection principles.
- 5.3.7 As well as requiring that the processing of personal data must be fair and lawful, the first data protection principle also states that sensitive personal data shall not be processed unless at least one condition in Schedule 2 and one condition in Schedule 3 of the Data Protection Act 1998 can be satisfied. The Commissioner considers that none of the conditions in either Schedule 2 or Schedule 3 can be met. For this reason alone disclosing the information would contravene the first data protection principle and so engage the exemption provided by section 40(2) of the Freedom of Information Act 2000.
- 5.3.8 The Commissioner's decision is that the information is exempt by virtue of section 40(2).
- 5.3.9 Neither section 40(3)(a) (i) or 40(3)(b), which have to be satisfied in order to engage the exemption provided by section 40(2), are subject to the public interest test. There is no requirement to consider the public interest in maintaining the exemption.

5.4 **Section 21 states that:**

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)-



- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

5.4.1 Transport for London's rationale for withholding the information under the exemption provided by section 21 was that some of the information would be available in court records which it believed were reasonably accessible to the Complainant. In considering the application of section 21 the Commissioner has had regard to the following factors:

5.4.2 Firstly it is not clear the degree to which the information contained in the prosecution files would be duplicated in court records. Therefore even if court records were reasonably accessible it is likely that the exemption would only apply to some of the information falling within the scope of the Complainant's request. It is noted that Transport for London never claimed the exemption applied to all the information requested.

5.4.3 Secondly the Commissioner has considered the actual number of records that the Complainant would need to locate in order to obtain the information he seeks. The Complainant has argued that it is unreasonable to expect him to retrieve a large number of court records from each of the individual magistrates' courts, especially when Transport for London holds the information he seeks in one location.

However when assessing whether information is reasonably accessible in this case the Commissioner considers the real issue is the degree of difficulty that someone would encounter accessing individual court records, rather than the effort involved in assembling a collection of all the records sought. The test of whether information is reasonably accessible is not determined by the volume of information sought. It is inevitable that it will require greater effort to access a large number of records, held in a number of different places, but this does not in itself mean that the information is not reasonably accessible.

5.4.4 The crux of the matter therefore is whether the Complainant could reasonably access the individual court records. The Complainant had only a limited amount

of information available to him with which to try and identify the actual court records that might contain the information he wanted. Even had the Complainant been able to identify which court records he was interested in, it is clear from the information provided by HMCS that he would not necessarily be able to access the actual records.

5.4.5 Therefore Transport for London could not rely on the exemption at section 21 of the Act as a basis for refusing to provide the information requested. It is noted however that Transport for London withdrew its reliance on this exemption during the course of the Commissioner's investigation.

5.4.6 The Commissioner's decision is that the exemption provided by section 21 is not engaged.

## **6. Action Required**

6.1 In light of the above the Commissioner does not require Transport for London to take any further action in this matter.

## **7. Right of Appeal**

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX  
Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

**Dated the 5<sup>th</sup> day of May 2006**

**Signed .....**

**Graham Smith**

Reference : FS50075171

**Deputy Commissioner**

**Information Commissioner  
Wycliffe House  
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SK9 5AF**