

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 January 2013

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

Decision (including any steps ordered)

1. The complainant has requested information relating to payments between CBS Outdoor (CBSO) and Transport for London (TfL), as represented by TfL's wholly owned subsidiary London Underground Limited (LUL). TfL refused to provide the requested information under section 41 and section 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that TfL has correctly applied section 43(2) FOIA to withhold the requested information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 30 August 2011 the complainant requested information of the following description:
 1. From 01 04 06 to the present all email correspondence between CBSO and LUL
 2. From 01 04 06 to the present the annual amount paid by CBSO in return for its ad sales contract
 3. Minimum yearly guarantees owed by CBSO to LUL
5. On 25 October 2011 TfL responded. In relation to point 1 of the request, TfL applied section 12 of FOIA as it said it would exceed the cost limit to comply. In relation to points 2 and 3 of the request, it refused to provide this information under section 41 and section 43 of FOIA.

6. On 15 November 2011 the complainant asked TfL to carry out an internal review. The complainant also asked TfL for advice and assistance as to how she might be able to resubmit part 1 of the request so that it came within the cost threshold.
7. On 11 January 2012 TfL wrote to the complainant with the result of the internal review. It provided advice and assistance in relation to part 1 of the request. It upheld the application of section 41 and section 43 in relation to points 2 and 3 of the request.
8. On 31 January 2012, the complainant made a refined request for the information relevant to part 1 of the request, however this is not being considered any further as part of this Notice.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The Commissioner has considered whether TfL were correct to apply section 41 or section 43(2) of FOIA to withhold the information requested at parts 2 and 3 of the request.

Reasons for decision

11. Section 43(2) provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
12. In this case TfL has stated that disclosure of the requested information would be likely to prejudice the commercial interests of TfL and CBSO.
13. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to TfL's and/or CBSO's commercial interests.
14. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services. "

15. The requested information relates to a contract between TfL and CBSO, for exclusive rights to advertise at particular locations on the London Underground. The Commissioner considers that the sale and purchase of advertising space is a commercial activity.
16. The Commissioner therefore considers that the withheld information falls within the scope of the exemption.
17. The Commissioner has therefore gone on to consider the nature of the prejudice claimed and the likelihood of the claimed prejudice occurring.
18. TfL has explained that disclosure of the information requested at parts 2 and 3 of the request would be likely to prejudice TfL's commercial interests with respect to future tenders for this contract. It said that it recognises that in many circumstances, the disclosure of contract prices assists in scrutinising the spending of public funds, and that prices obtained in one tender exercise are unlikely to accurately represent the likely bids when a contract next comes up to tender. However it provided submissions, which are contained in the confidential annex attached to this Notice, which demonstrate why disclosure of the figures in this case would be likely to have the prejudicial effect described.
19. Based upon the submissions provided by TfL the Commissioner accepts that disclosure of the requested information would be likely to prejudice its commercial interests.
20. As the Commissioner has accepted that disclosure would be likely to prejudice the commercial interests of TfL he has not considered the prejudicial effect on CBSO's commercial interests any further at this stage. The Commissioner has however gone on to consider the public interest in this case.

Public interest arguments in favour of disclosure

21. TfL recognised that there is an inherent public interest in openness and transparency.
22. The requested information relates to revenue that is paid to TfL following a competitive tender. It does not relate to money paid by TfL from public funds. If this was the case TfL accepts there would be an inherent public interest in disclosure, to ensure that it is obtaining good value for money. TfL considers that strong weight should be placed on the public interest in it maximising its income stream from the advertising concession, not least because this reduces its reliance on government funding and fare receipts.

Public interest arguments in favour of maintaining the exemption

23. As TfL's commercial position would be likely to be prejudiced in relation to future tendering for this advertising contract, it would be against the public interest to undermine TfL's ability to maximise the income generated via the advertising concession.

Balance of the public interest

24. The Commissioner considers that there is a public interest in openness and transparency and in particular in relation to the spending of public money. Whilst the Commissioner accepts that in this case the requested information related to TfL obtaining funds through the sale of advertising space rather than the spending of money, he still considers there is a public interest in ensuring TfL is maximising its revenue obtained through advertising sales. This is because, as TfL has explained, this reduces the amount of public funding it requires.
25. However the Commissioner does consider that disclosing the requested information would be likely to undermine TfL's position in relation to future bids for this contract and there is a strong public interest in TfL being able to supplement its income through this advertising concession, as it reduces its reliance on government funding and reduces the need to increase fares.
26. In this case the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
27. As the Commissioner has found that section 43(2) has been correctly applied he has not gone on to consider section 41.

Right of appeal

28. 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

29. 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.
30. 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

Pamela Clements
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