

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 June 2016

Public Authority: Transport for London
Address: 8th Floor
Windsor House
42-50 Victoria Street
London
SW1H 0TL

Decision (including any steps ordered)

1. The complainant has requested the Semperian Board Minutes from Transport for London (TfL). After investigation, the Information Commissioner has found that the information sought by the complainant is not held by TfL for the purposes of FOIA. The Commissioner's decision is that TfL is entitled to rely on section 3(2)(a) of FOIA.

Request and response

2. On 23 March 2015 the complainant requested 3 items of information but has only brought a complaint to the Commissioner about the following item:

'2. Board Minutes

Please can you provide the minutes of any Semperian Board meetings attended by Padmesh Shukla between the 1st July 2012 and the date on which this request is processed.'

3. On 21 April 2015 TfL responded and explained that TfL did not hold the information.

'TfL Trustee Company Limited as trustee of the TfL Pension Fund (the "Trustee") has the right to nominate a nonexecutive director to the board of Semperian as a nonexecutive director (the "NED"). However, although their nomination is made by the Trustee, the NED holds the

office of nonexecutive director in a personal capacity independent of the Trustee and has consequently has separate fiduciary duties to Semperian.

Consequently, the NED is sent Semperian board minutes as a board member in their individual capacity and they hold copies of those minutes in their capacity as director of Semperian, not on behalf of TfL Trustee Company Limited or TfL. Neither TfL Trustee Company Limited nor TfL have copies of these board minutes.

For information to be within the remit of the Act, it must be held by a public authority or by another person on behalf of a public authority. As you are aware, Semperian is private limited company registered in Jersey.'

4. The complainant requested an internal review on 29 May 2015. TfL sent him the outcome of its internal review on 5 August 2015 upholding its position.

'The nonexecutive director receives these copies in order to fulfil his separate fiduciary duties to Semperian and holds them in his capacity as director of Semperian.

The Panel established that the Board minutes are not copied or shared with any officers or employees of TfL (or any of its subsidiaries) and there is no internal written reporting of information contained in the minutes – though a selection of relevant figures relating to Semperian investments may be reported verbally from time to time. Consequently it does not seem that the minutes are used to inform or influence the actions of TfL, or any of its subsidiaries.

In these circumstances, the Panel found that the information in these Board minutes is not held by TfL for the purposes of the FOI Act.'

5. On 1 February 2016 the complainant wrote to the Commissioner. The Commissioner asked the complainant the reasons for his delay in bringing his complaint to the Commissioner and decided, on this occasion, to use his discretion to proceed with the complaint.
6. The complainant was advised that the time limit for bringing complaints to the Commissioner has been 3 months for some time (<https://ico.org.uk/concerns/getting/>) and will be applied to all future complaints.

Scope of the case

7. The Commissioner considers that the scope of the case is to determine if the requested information is excluded from FOIA because the information requested was not held for TfL's own purposes and therefore falls outside the definition of information held for the purposes of FOIA under section 3(2).

Background

8. TfL provided the following background on the identity of the public authority and its relationship with Semperian.
9. The Pension Trustee is a subsidiary of TfL. The Pension Trustee is the sole corporate trustee of the Fund. The Fund is constituted as a trust and is legally separate from TfL. Its purpose is to provide retirement pensions and other benefits for employees and former employees of TfL. The Fund operates under its own governance arrangements, which are published here <https://tfl.gov.uk/pensions/>.
10. Trusteeship of the Fund is managed by 18 Trustee Directors, nine of whom are nominated by TfL in its capacity of "Principal Employer" of the Fund, five are nominated by the trades unions and four are nominated by Fund members. The Fund invests in a range of different investments, including an investment in Semperian.
11. Because of the amount of equity the Fund holds in Semperian, the Pension Trustee is entitled to nominate a non-executive director to the Semperian board.
12. Mr Padmesh Shukla is employed by TfL and is the Fund's (not TfL's) Head of Pensions Investment. He is not, as has been claimed, a Pension Fund Manager. Mr Shukla has no vote on the Board of the Pension Trustee and is not a Trustee Director of the Pension Trustee. Mr Shukla has been nominated as a non-executive director to the board of Semperian by the Pension Trustee.
13. The purpose of this nomination is to ensure good governance of the company that the Fund has invested in. The role of a non-executive director is summarised in a factsheet issued by the Institute of Directors https://www.iod.com/MainWebSite/Resources/Document/roleofnxdx_1006.pdf
14. As trustee of the Fund, the Pension Trustee has a duty under trust law to ensure that the Fund's investments are safeguarded for the benefit of

all members. Nominating a non-executive director is a way of the Pension Trustee having confidence that the Fund's investment is well governed. As the Pension Trustee has nominated Mr Shukla, it is appropriate that he is granted time to carry out his commitments as a non-executive director, both when attending meetings and reviewing board papers.

15. There is a formal agreement between the Pension Trustee and the nominated non-executive director on arrangements to avoid conflict of interest. Semperian Board minutes are shared with Mr Shukla in his capacity as a non-executive director. The Companies Act 2006 imposes duties on directors to:
 - Avoid conflicts of interest (s175)
 - Not to accept benefits from third parties (s176)
 - To declare interest in proposed transaction or arrangement (s177)
16. Conflicts of interest are also managed and documented by the Fund. Mr Shukla does not take decisions on the Semperian Board on behalf of the TfL Pension Fund and, as noted above, he has no vote on the Board of the Pension Trustee as he is not a Trustee Director.
17. The complainant also provided an explanation for his interest in the Semperian minutes.
 - This request forms part of my ongoing research into the Private Finance Initiative (PFI).
 - My hypothesis, which this request informs upon, is that the PFI industry is a danger to public health and exploits the public purse for private gain and political convenience.
 - This particular request revolves around the PFI 'infrastructure fund' Semperian. It is in control of £1.4bn of public assets spread over 70 PFI management contracts.
 - Semperian exists solely to manage public assets. All of its income comes from the public sector and public sector pension funds comprise just under 50% of its shareholders.
 - Furthermore, during the time period requested Semperian was engaged in a legal dispute with my local hospital concerning costs of repairs. There is the as yet unanswered question of how widespread these practices are across its portfolio of public buildings.

Reasons for decision

Section 3(2) – information held by a public authority

18. Section 1 of FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it.
19. Section 3(2) sets out the criteria for establishing if information is held for the purposes of FOIA:

“For the purposes of this Act, information is held by a public authority if

 - (a) it is held by the authority, otherwise than on behalf of another person, or*
 - (b) it is held by another person on behalf of the authority”*
20. The Commissioner’s guidance on “Information held by a public authority for the purposes of the FOIA”¹ states that when a public authority holds information solely on behalf of another person it is not held for the purposes of the FOIA and that each case needs to be considered according to the specific circumstances.
21. In correspondence to the Commissioner, the complainant has asserted that the information is held by TfL for the following reasons:
 - TfL is on one side, it then delegates its responsibility for the pension fund to the ‘TfL Trustee Company Limited’ which in turn nominates a director, Mr Shukla, to the Semperian Board as a nonexecutive director.
 - In this way, Mr Shukla ends up with two hats on, one as the Pension fund manager for TfL and a second, as director of Semperian. The Authority’s assertion is that one does not cross over to the other.
 - My problem with this comes down to the fact that Mr Shukla clearly does not hold his position as Semperian Director but for the fact that he is employed by one of its largest shareholders,

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx

TfL. If Mr Shukla were not TfL's pension fund manager he would not be a director.

- What exactly is it that Mr Shukla does at these Board meetings except for overseeing the company on behalf of TfL. You could argue that Mr Shukla has a fiduciary duty to Semperian because he is a director, but I think it would be bizarre for it to override the duty to his employer.
 - It is worth pointing out that the TfL Trustee Company Limited, which nominated Mr Shukla is wholly owned by TfL so it is still, in effect, TfL nominating Mr Shukla to Director position. TfL may argue that it has no role in Mr Shukla's work at Semperian, but its wholly owned subsidiary certainly does.
 - Ultimately, Mr Shukla receives the information because he is employed by TfL and therefore TfL holds it.
22. The Commissioner asked TfL to provide a detailed explanation why it has concluded that, although it may physically hold the information requested, it does not hold this information for the purposes of FOIA, bearing in mind the complainant's reasons why he believes the information is held for the purposes of the FOIA.

TfL's position

23. TfL confirmed that TfL and the Pension Trustee physically hold the requested information. The information is not, however, held by either TfL or the Pension Trustee for the purposes of the FOIA.
24. The requested information is held by the board of directors of Semperian – including Mr Shukla – who are not a public authority for the purposes of the FOIA. The information is held in an email account on the Fund's electronic information systems, accessible by Mr Shukla.
25. The information is held for the purpose of Mr Shukla performing his duties as a non-executive director of Semperian. It is not held for the purposes of a public authority. The information is not accessible to other TfL employees working for the Fund and the Fund is merely providing storage facilities. No significant costs are incurred by the Fund in providing this electronic storage facility.
26. TfL note that, were it to be suggested that the Pension Trustee holds the information to any extent for its own purposes, in TfL's view it would not be holding the information for the purposes of the FOIA because it would be holding it in its capacity as trustee of the Fund, not as a public authority in its own right.
27. TfL referred to the Commissioner's guidance at paragraphs 15 and 18:

- *Charity trustees – public authorities, usually local authorities, can be trustees of charitable trusts. For example, assets such as playing fields and community halls may be held by a local authority on trust for the benefit of local residents. As trustees must act only in the best interests of the charity, and not in their own interests, this means that any information held by an authority only in its capacity as a trustee is not held by it for the purposes of FOIA (in accordance with section 3(2)(a) it is held on behalf of the trust).*
 - *Non-official communications within a public authority are not held for the purposes of FOIA, if they are not created by a member of staff in the course of his or her official duties; for example, trade union communications. The public authority has neither created the information, nor does it retain the material for its own purposes, but simply holds it on behalf of, and as a service to, the trade union. Similarly, in most circumstances, private emails sent or received by staff in the workplace via the public authority's email system would not be held by the authority for the purposes of FOIA*
28. TfL state that there is a clear parallel between the role of a charitable trustee and the role of the Pension Trustee in its capacity as a pension scheme trustee. In these circumstances, TfL believe the information would be held on behalf of the members – i.e. the ultimate beneficiaries of the Fund – and would not be “held” for the purposes of the FOIA.
29. Although information is held on the Fund’s electronic system, it was not created by the Pension Trustee or held for the use of the Fund. It is held by a TfL employee in connection with his separate responsibilities as a non-executive director of a limited company.
30. In response to the complainant’s claim that Mr Shukla ‘receives the information because he is employed by TfL and therefore TfL holds it’, TfL state that Mr Shukla receives this information because he is a board member of Semperian, not because he is a TfL employee.
31. As a non-executive director, Mr Shukla has statutory duties under the Company Act 2006. He is also bound by a duty of confidentiality. There is no conflict between his duty to act in the interests of Semperian as a non-executive director, and his nomination to that role by the Pension Trustee to ensure that Semperian is well governed.
32. The complainant’s question about whether Mr Shukla takes time off work to attend Semperian Board Meetings is valid, but TfL have explained that the Pension Trustee has requested that he provide his expertise to the Semperian Board as a non-executive director. As the

Trustees have requested that Mr Shukla undertake this work it is appropriate that he is given the time to carry out this activity, in the same way that an employee may be released to carry out trade union duties or to act as a charitable trustee without expectation that all information received will be handed to the public authority.

33. The benefit to the Fund is assurance that Semperian has good governance, rather than any expectation that Mr Shukla would breach his obligation of confidence or his statutory duties under the Companies Act 2006.
34. TfL state that if the information held by Mr Shukla were to be shared with parts of TfL involved in business dealings with Semperian, or otherwise processed for TfL's own purposes then that information would be held by TfL and would fall under s3(2)(a) of the Act, but this is categorically not the case and there is no basis for such speculation by the complainant.
35. In conclusion, TfL consider that the focus of the request does not appear to be the performance of investments made by the Fund; rather it seems that the complainant is trying to use the FOIA as a means of obtaining confidential board papers from a limited company.
36. TfL do not consider that it was the intention of Parliament that the Freedom of Information Act would be extended to the board papers of any company in which a public sector pension scheme has invested. The extension of the Act to cover companies wholly owned by one or more publically owned bodies demonstrates the extent of Parliament's intentions. A large amount of information is already published about the activities of the TfL Pension Fund, including information about its governance and investments <https://tfl.gov.uk/pensions/>
37. TfL consider that the appropriate way to use the Act to scrutinise PFI contracts is by making requests to those public authorities that are parties to PFI contracts.

The Commissioner's view

38. The Commissioner has considered the factors in his guidance that would indicate that the Semperian Board minutes are held solely on behalf of another person (Mr Shukla) and concludes that:
 - TfL has no access to and does not use the information;
 - Access to the information is controlled by Mr Shukla
 - TfL does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or

- TfL is merely providing storage facilities, whether physical or electronic.
39. Having considered the factors in his guidance and the arguments presented by both parties the Commissioner is satisfied that the Semperian Board minutes are held by Mr Shukla in his capacity as a non-executive director of Semperian and consequently is not held by TfL for the purposes of FOIA.

Right of appeal

43. 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@hmcts.gsi.gov.uk

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

44. 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.
45. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF