

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 June 2019

Public Authority: Translink

Address: Adelaide Depot Building B
8 Falcon Road, Belfast
BT12 6PU

Decision (including any steps ordered)

1. The complainant has requested information from Translink in relation to the impact on Translink services of the UK's decision to leave the European Union ('Brexit'). Translink disclosed some information within the scope of the request to the complainant, however it withheld the remainder, citing the exemptions at sections 42(1) and 43(2) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that Translink has correctly applied sections 42(1) and 43(2) of the FOIA to the withheld information, therefore the Commissioner requires no steps to be taken.

Request and response

3. On 31 January 2018 the complainant wrote to Translink and requested information in the following terms:-

"Please provide all records held on considerations of the impact of the UK's decision to leave the EU (Brexit) on Translink services."

4. Translink responded to the complainant on 27 February 2018 stating that it was withholding the requested information under sections 42(1) and 43(2) of the FOIA.
5. The complainant requested an internal review of his request on 27 February 2018, the result of which was provided to him on 9 April 2018, upholding Translink's original application of the above exemptions to the requested information.

Scope of the case

6. The complainant contacted the Commissioner on 16 April 2018 to complain about the way Translink handled his request for information.
7. The Commissioner has considered Translink's handling of the complainant's request, in particular its application of the exemptions specified in paragraph 4 above.
8. On 21 August 2018, Translink responded to the Commissioner's request for its detailed submissions regarding the application of the above exemptions. As a result of the Commissioner's correspondence, Translink in part revised its position and disclosed some of the requested information to the complainant.
9. Translink stated that the withheld information could be divided into the following categories:
 - i. Brexit focus group agenda August 17
 - ii. DRD response to Assembly Question 905 16-21
 - iii. DRD response to Assembly Question 7552 16-21
 - iv. Lessons from ORR and Brexit meetings
 - v. Key themes - Brexit meeting with DFI (for Board Jan 17)
 - vi. Brexit Implications slides ('Brexit presentation')
 - vii. Brexit Risk Ranking Questionnaire Q3 2016
10. On 7 June 2019, Translink disclosed the documents at i-iii to the complainant, therefore the Commissioner has considered Translink's application of the above exemptions to the documents at iv-vii of Translink's list.

Reasons for decision

Section 42 – information subject to legal professional privilege

11. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.

12. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTI* (EA/2005/0023).

"... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation."

13. There are two categories of legal professional privilege (LPP) – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will therefore attract privilege.

14. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.

15. Translink states that it is relying on the fact that the withheld information listed at iv-vi above is subject to legal advice privilege. These communications were made between professional legal adviser and client, namely Translink's General Counsel and Translink's Board/Executive staff.
16. Translink states that it is aware that the UK's pending exit from the European Union ('Brexit') will affect a swathe of areas across finance, trade and movement of people, however, given that these effects stem from the major constitutional changes to be brought about by 'Brexit', Translink's Board and Executives specifically tasked its General Counsel with leading on the investigation and advice related to these matters so that they could be considered from a strategic, legal viewpoint.
17. The resulting documents were produced by or sent to Translink's General Counsel in a professional capacity as a legal adviser, with the dominant purpose of providing legal advice to the Board and Executive level so as to brief them on the potential legal and regulatory impacts of Brexit and, in particular, how these pose risks to Translink's operations.
18. Having considered the information listed at iv-vi by Translink, the Commissioner accepts that the withheld information is subject to legal professional privilege on the grounds of legal advice privilege as it consists of communications to and from a professional legal adviser for the purpose of seeking and providing legal advice. On this basis, the Commissioner finds that section 42(1) of the FOIA is engaged in relation to the information withheld under it by Translink.

Public interest test

19. The exemption provided in section 42(1) is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner has considered the factors in favour of maintaining the exemption and has balanced them against those in favour of disclosure of the information withheld under section 42(1) of the FOIA.

Factors in favour of disclosure of the information

20. Translink accepts that public authorities should be transparent and accountable for the quality of their decision making, and is aware that disclosure of the information would be in the general public interest, demonstrating that its Board and Executive level are suitably briefed on an issue of huge significance and can make decisions accordingly. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability and transparency.

Factors in favour of maintaining the exemption

21. Translink is aware that Section 42 of the FOIA recognises that there is a strong interest in legal advisers and public authorities being able to communicate freely and to seek and receive legal advice in confidence. A legal adviser must have confidence that the full facts of any matter can be presented without fear or favour, and a client will expect to know not just an adviser's conclusions but also the context in which they were reached, the arguments 'for and against' or any areas of risk to which they may be exposed. It is only with this comprehensive level of advice that effective decisions can be made, and so absolute candour is essential. Translink points out that clear examples of this candour can be seen in the 'Brexit Implications slides' at point vi of the list, where certain potential risks are referenced.
22. Similarly, Translink points out that the 'key themes' document at point v on the list references potential risks relating to the Irish border and the future workforce. If such information were to be disclosed out of context, this could easily lead to it being misinterpreted. The Commissioner is aware that there are well-known political sensitivities in Northern Ireland surrounding the future of the Irish border which would make disclosure of the information ripe for significant comment and sensationalism. Translink states that any such controversy would be most unhelpful and not in the public interest given the current climate, and disproportionately so considering its unique position in the UK as a cross-border operator.
23. Translink states that in its view, given the possibility of the above, there is a risk that the disclosure of legal advice would lead legal advisers to avoid making such open, permanent or complete records of their advice in future or would cause public authorities to choose not to seek such advice to avoid its possible disclosure into the public domain.

This would clearly reduce the quality of decisions which affect large numbers of people, which would not be in the public interest.

Balance of public interest factors

24. The Commissioner is aware that there is a strong element of public interest inbuilt into maintaining LPP. This position was endorsed in the case of *DBERR v Dermot O'Brien* ([2009] EWHC 164 (QB))

".....Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)....The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight"

25. In the case of *Calland v Information Commissioner & the Financial Services Authority* (EA/2007/0136) the Tribunal commented:

"What is quite plain, is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential."

26. The Commissioner and the Information Tribunal have both expressed the view, in a number of previous decisions, that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the *Bellamy* case, as mentioned in paragraph 12 above, the Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".

27. There will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept, and it is clear from previous decisions and from the Commissioner's guidance that, as was stated succinctly in the *Bellamy* case, :

"there is a strong element of public interest inbuilt into the privilege itself and that at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".

28. The Commissioner has considered the public interest arguments in favour of disclosure of the information withheld under section 42, and has concluded that, although significant weight can be attached to transparency and accountability in this case, also to the public interest in knowing the quality of legal advice received by Translink regarding such significant issues, the weight of all of these arguments when added together is not enough to outweigh the public interest arguments in favour of maintaining the exemption, such as the vital importance of the Translink being able to obtain free, frank and high quality legal advice about significant issues such as 'Brexit' without fear of premature disclosure, and the importance of not causing controversy or sensationalism which would risk putting public authorities off seeking legal advice, or deterring legal advisers from providing this. The arguments are also not sufficient to outweigh or override the inbuilt public interest in information remaining protected by LPP.
29. In view of the above, the Commissioner considers that, in all the circumstances of this case, the public interest in maintaining the exemption at section 42 of the FOIA outweighs the public interest in disclosing the information.

Section 43(2) – prejudice to commercial interests

30. The Council applied section 43(2) to the withheld information. Section 43(2) of the FOIA states that information is exempt if its disclosure 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.
31. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Any prejudice that results must also be real, actual or of substance.

- Thirdly, there is a need to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, whether disclosure would or would be likely to result in prejudice or there is a real and significant risk of the prejudice occurring.

Relevant applicable interests

32. The Commissioner states in her Section 43 – Commercial Interests Guidance¹:

"A commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent."

33. Translink stated that the withheld information is commercially sensitive, particularly where this relates to ongoing negotiations and projects. Translink confirmed that its refusal under section 43 was based on the commercial prejudice which it considers would occur to Translink as a result of disclosure.
34. The Commissioner is aware that Translink is a large commercial operation which generates an income from its transport services and regularly negotiates with thousands of contractors, suppliers and third-parties, seeking to achieve best-value in its use of funds.
35. The Commissioner considers that these constitute commercial activities within the definition of her guidance. The Commissioner agrees that the actual harm caused by disclosure would be to Translink's commercial interests. She is therefore satisfied that the first criterion is met.
36. Having determined that the information is commercial in nature and that any harm caused by disclosure would be to Translink's commercial

¹ <https://ico.org.uk/media/for-organisations/documents/1178-commercial-interests-section-43-foia-guidance.pdf>

interests, the Commissioner has gone on to consider whether there is a causal link between disclosure of the withheld information and the prejudice which disclosure would or would be likely to cause, also the relevant party or parties that would be affected.

The causal link between disclosure and prejudice

37. Translink states that the information withheld under this exemption is the document listed at vii in the list in paragraph 9 above and entitled 'Brexit Focus Group – Risk Ranking Questionnaire'. This document sets out the most significant risks identified by Translink in relation to Brexit.
38. Some of the risks identified are of particular commercial sensitivity, namely those listed under the Corporate and Projects business areas. Disclosure of these could cause harm to Translink's ability to negotiate contracts in relation to the services it provides.
39. The Commissioner also accepts that there is a causal relationship between the potential disclosure of the requested information and the prejudice that this exemption is designed to protect, therefore the second criterion is met.

Nature and likelihood of prejudice

40. Translink considers that disclosure of commercial information relating to its Corporate business area in terms of Brexit would be detrimental to Translink's ability to negotiate contracts. The reasons for this cannot be disclosed in this notice and are therefore set out in a Confidential Annex to this notice.
41. Translink has not explicitly claimed the higher threshold or the lower threshold of prejudice, however it is clear from its submissions that its arguments are set at the lower bar. The Commissioner considers that the disclosure of this information 'would be likely' to prejudice Translink's commercial interests for the reasons set out in the Confidential Annex to this notice. The third criterion has therefore been met and the exemption as set out in section 43(2) of the FOIA is engaged.
42. Although the Commissioner accepts that the exemption is engaged, it is necessary for her to go on to consider whether the public interest favours maintaining the exemption or disclosing the requested information.

Public interest test

Public interest arguments in favour of disclosing the withheld information

43. Translink states that it takes its accountability seriously and is aware that disclosure of information would be in the general public interest demonstrating that it has, at a time of uncertainty, taken action to identify significant risks. There is a general public interest in transparency and accountability of public authorities so that the public can be informed of and understand their decision-making processes, especially where they concern the expenditure of public funds and getting the best value for money.

Public interest arguments in favour of maintaining the exemption

44. As Translink has outlined, disclosure of the information would be likely to prejudice its commercial interests by alerting current and potential contracting partners to areas of vulnerability from which they might gain. This would have the effect of making Translink's contract negotiations and procurement exercises, which are designed to achieve best value for inherently public services and projects, much less effective, and this would be contrary to the public interest.
45. Translink also cites the additional risk that disclosure of the withheld information, with little surrounding context, could easily be misinterpreted or sensationalised, with a resulting loss of public confidence in Translink, which would not be in the public interest.

Balance of the public interest arguments

46. The Commissioner recognises that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. In particular, there will be a public interest in knowing more about commercial contracts and projects involving the expenditure of large amounts of public funds.
47. However, the Commissioner is also aware that it is necessary for public authorities like Translink, who negotiate with third parties on a regular basis, to be able to keep such information confidential so as not to cause prejudice to Translink's ability to achieve the best value possible for public money in its inherently public services and projects.

48. On balance and in particular because the withheld information relates to processes that are ongoing, also because Translink has already stated that the information will lose some of its sensitivity in the future and it will reconsider disclosure, the Commissioner considers that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, Translink correctly applied section 43(2) to the withheld information contained in Category vii of Translink's list.

Right of appeal

49. 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

50. 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.
51. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

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SK9 5AF