

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 June 2019

Public Authority: Transport for London (TfL)
Address: 55 Broadway
London
SW1H 0BD

Decision (including any steps ordered)

1. The complainant made a multi-part request relating to the contract for road maintenance between TfL and a named contractor. Ultimately TfL argued that it did not hold the information sought in requests 1, 2, 3, 4 and 10. It applied section 12 – the appropriate (cost) limit, to request 5, which it had previously refused under section 14 – vexatious, but later withdrew its application of section 12 to what the Commissioner found to be the objective interpretation of that request. TfL refused request 6, under section 43 – commercial interests.
2. The Commissioner's decision is that the public authority does not hold the information captured by requests 1, 2, 3 and 4. However, in respect of requests 1, 2 and 4, TfL did not clearly inform the complainant of this by the end of the internal review. This is a breach of section 1. TfL does hold information in respect of request 10, which, due to its interpretation of the request, it had originally said was not held. By not providing this information TfL breached section 1.
3. The Commissioner finds that the information sought in request 6 is exempt from disclosure under section 43(2).
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide a fresh response to request 5 that does not rely on section 12.

- In respect of the information sought by request 10, which the Commissioner finds is held by the public authority, TfL is required to disclose that information.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 4 May 2018 the complainant requested information of the following description:

"I believe I can condense my request(s) regarding [named contractor]. I wish to be provided:

1. The rates that you, TfL would be charged for the following operatives:

- a. AIW – Asset Inspection watchmen
- b. TM – Traffic Management
- c. Barrier Rig crews

2. The rates that you, TfL would be charged for the following vehicles:

- a. AIW
- b. TM (18T)
- c. Barrier Rig (18T)

3. The hours TfL have contracted for the following to work

- a. AIW – Asset Inspection watchmen
- b. TM – Traffic Management
- c. Barrier Rig crews which may well be reflected in:

4. Any uplifts TfL have pay for the following working outside of hours or in non-standard (other than flat rate) circumstances:

- a. AIW – Asset Inspection watchmen

b. TM – Traffic Management

c. Barrier Rig crews

5. A copy of the investigation information; the report and all information following my allegations, meeting and subsequent activity that was curtailed unexpectedly, suddenly.

The meeting was with [named employee], fraud manager at TfL who wrote that the enquiry was concluded 28/10/2016.

At **Appendix 1**, I have included comment I have recently made. This arose from information provided in response to an FoIA request an extract of which appears at **Appendix 2**. To expand upon this, I am seeking the following information:

6. The contract price list – which will overlap with 1 to 4 (above)

7. If you do possess the rates [the named contractor] are to charge or claim to be charging Third Parties, I would like to be provided these

8. All information relating to the way [the named contractor] are to charge Third Parties

If TfL do not, as I have been informed, possess the rates, it would concern me. This would suggest [the named contractor] could charge 'whatever they can get away with' and Third Parties were not considered or protected when the contract was drawn up. Additionally:

9. If TfL do not possess the rate / process information, I anticipate these could be obtained from [the named contractor] but if not, I ask to be provided the information that relates to [the named contractor]'s ability to keep these from you.

10. All information that pertains to [the named contractor]'s responsibilities when requests for information are made by a Third Party, TfL and that relates to the application of FoIA to [the named contractor], for example, whether FoIA extends to the contractor.

11. a copy of any confidentiality agreement between [the named contractor] and TfL

I am concerned the use of sub-contractors gives rise to dilution of the FoIA.

Lastly:

12. I wish to be provided a copy of all internal and external exchanges / information between TfL, [the named contractor], The Mayor of London's Office and others, relating to the issue I have raised about contractor charging."

7. On 8 May 2018 TfL wrote and asked the complainant to clarify a number of the requests.

- In respect of request 5 TfL asked him to clarify what information he was actually seeking, for example was he seeking minutes, written reports emails/letters etc. It also asked him to identify a time frame for when it should begin searching for the information and asked him to provide the date on which the investigation began.
- In respect of requests 9 to 11 TfL explained that it was not required to create new information in order to answer a request. It did however suggest to the complainant it could consider a request for any confidentiality agreement that may exist between TfL and [the named contractor] and asked him to confirm if this was the information he wanted.
- In respect of request 12 TfL explained that responding to this request alone would be likely to exceed the appropriate cost limit, which would provide grounds for refusing all the requests in their entirety.

8. On the same day, 8 May 2018, the complainant provided some clarification.

- In respect of request 5 the complainant said that he had met with the named employee in 2016 and that he wanted all information generated since that meeting.
- In respect of question 11 the complainant confirmed that he wanted a copy of the confidentiality agreement.
- He withdrew request 12.

9. On 6 June 2018 TfL responded to the clarified request under the reference FOI -0311-1819.

- Request 1 – TfL said that it did not recognise the terms used in the request, it went on to set out the trades that were described in the contract and explained that in any event it considered the rates of those tradesmen would be exempt under section 43(2) – commercial interests.

- Request 2 – TfL said it did not recognise the terms used in request 2, but explained that in any event the rates negotiated for plant and machinery would be exempt under section 43(2).
 - Request 3 – TfL said that it did not recognise the terms used and that it did not have set contracted hours.
 - Requests 4 and 6 – TfL again said that it did not recognise the terms used, but that in any event information on uplifts and price lists would be exempt under section 43(2).
 - Request 5 – was refused under section 14 – vexatious request, on grounds that compliance would place an unreasonable burden on the authority.
 - Request 7 and 8 – TfL said the information was not held.
 - Requests 9 and 10 – TfL said the information was not held.
 - Request 11 – TfL provided some information on confidentiality clauses.
10. The complainant requested an internal review the same day, 6 June 2018. When doing so he,
- Challenged what he understood to be TfL’s application of section 43(2) commercial interests to his requests. That exemption had been referred to in respect of requests 1, 2, 4, and 6.
 - In respect of requests 1, 2, 3, 4 and 6 where TfL had said they did not recognise the terms used, he suggested TfL seek clarification from him, but he made the point that the TfL had seemed to have identified the relevant operatives he was referring to as Tradesperson/Craftsperson, Specialist Operative/Labourer and, Driver.
 - He also challenged TfL’s application of section 14 to request 5.
 - Finally, the complainant commented on KHL’s obligations to respond to requests made under the FOIA in the following manner,

“It appears your contracts are written such that your contractor, KHL is not obliged to answer an FoIA request - please confirm. I understood model contracts included such a requirement.”

11. The Commissioner understand from later correspondence that by this comment the complainant was seeking access to any provision within the model contract with KHL, which dealt with its responsibilities to deal with such requests. In effect he was arguing that, if such a clause exists, it should have been provided in response to request 10.
12. TfL provided the outcome of the internal review on 29 June 2018.
 - TfL said that it was upholding its application of section 43(2). The Commissioner understand that this relates to requests 1, 2, 4 and 6.
 - TfL upheld its application of section 14 to request 5. TfL went on to explain that it considered section 12 - cost of compliance exceeds the appropriate (cost) limit, could also have been applied to this part of the request 5. However it chose not apply section 12, as this could have meant the entire multi-part, request was refused. Therefore TfL had used section 14(1) on the basis that complying with the request 5 would place an unreasonable burden on TfL when account was taken, not just of locating the information, but the need of specialist and limited resources to consider whether any of the information was exempt.
 - In respect of request 10 TfL simply restated TfL's previous explanation that KHL was not subject to the FOIA.
13. As it was not clear to the Commissioner exactly what TfL's position was in respect to some elements of the request TfL was asked to clarify its position as part of the investigation.
14. TfL clarified that in respect of requests 1, 2, 3 and 4, which all related to rates charged and hours worked under the contract, it did not hold the requested information.
15. At the start of the investigation TfL clarified that it was refusing to comply with request 5 under section 12 on the basis that compliance would exceed the appropriate (cost) limit. Later in the investigation however the Commissioner advised TfL of her objective interpretation of request 5, which was narrower than that which TfL had taken it to be. As a consequence TfL withdrew its application of section 12.
16. In respect of request 6, TfL also explained that although the contract with KHL did not hold any information entitled 'The contract price list', the contract did contain a schedule of rates, but that this information would be exempt under section 43(2) – prejudice to commercial interests.

Scope of the case

17. The complainant contacted the Commissioner on 11 July 2018 to complain about the way his request for information had been handled. When doing so he explained that there was, in his opinion, a serious purpose behind his request. The information he was seeking related to a contract between TfL (and London Boroughs) and the named contractor for the maintenance and improvement of London roads. Under that contract the costs for repairing damage to a highway following a traffic accident are recovered from the third party that was at fault. Where the overall claim is less than £10,000 the contractor recovers that cost directly from the driver, where it is above £10,000, TfL (or the relevant London borough) are billed for the work and they then recover it from the at fault driver. The complainant is concerned that where the costs are recovered by the contractor directly from the at fault driver, the charges are inflated.
18. In an exchange of correspondence between the complainant and the Commissioner she set out the parameters of her investigation as follows,
- Request 1 – whether TfL is entitled to withhold the requested information under section 43(2) – commercial interests.
 - Requests 2, 3, 4 and 6 - whether TfL holds the information described in those requests and, if so, whether TfL is entitled to withhold that information under section 43(2).
 - Request 5 – the investigation will consider whether TfL can rely on section 14 to refuse this element of the request.
 - Request 10 – whether the contract with KHL contains any provisions which oblige KHL to deal with information requests and, if so, whether that information should be disclosed in response to the request.
19. The scope of the investigation has however changed following TfL clarifying its position. The Commissioner will now consider whether TfL holds the information captured by requests 1 to 4, and only if she finds it does shall she go on to consider whether that information can be withheld under section 43. The Commissioner will consider how TfL handled request 5 in light what she found to be the objective interpretation of that request. In respect of request 6, the Commissioner will consider whether TfL holds the requested information and, if so, whether it can be withheld under section 43. The Commissioner's investigation in respect of request 10 remains the same.

Reasons for decision

Requests 1, 2 and 4

20. The Commissioner will start by looking at whether TfL holds the information captured by these requests.

Section 1 – information held

21. Section 1(1)(a) of the FOIA provides that a public authority is obliged to inform an applicant whether or not it holds the requested information.
22. The original request as set out in the complainant's email of 4 May 2018 sought the information relating to the rates that TfL would be charged by the named contractor for three specified operatives, together with the hours that TfL has contracted these operatives to work and information relating to rates for using particular vehicles. Beginning with request 1 which sought the rates for the Asset Inspection Watchmen, Traffic Management and Barrier Rig crews, in its refusal notice of 6 June 2018 TfL informed the complainant that it did not recognise these terms. During the Commissioner's investigation TfL elaborated on this point and explained that its contract with the named contractor simply did not refer to such operatives and therefore it was unable to identify which of the contractor's employees the request was relating to. TfL has provided the Commissioner with a copy of the schedule of rates contained in the contract with KHL. Having viewed that information the Commissioner is satisfied that the operatives specified by the complainant in his original request (i.e. Asset Inspection Watchman etc) do not appear in the schedule of rates and the Commissioner accepts that these terms are not used in the contract. The Commissioner notes that such terms do appear in contracts which KHL have been awarded by Highways England in respect of the maintenance of the national road network. It also appears from the complainant's submission that KHL uses those terms in its correspondence with at fault drivers and their insurance companies when recovering the cost of repairs directly from the at fault driver. However this not mean that those terms are used by TfL.
23. When refusing the request on 6 June 2018, saying it did not recognise the terms, TfL also advised the complainant that the following trades were referred to in the contract, Tradesperson/Craftsperson, Specialist operative/Labourer and Driver.
24. When seeking an internal review the complainant said,

“If you do not recognise terms, I would suggest it would be prudent to return to me. However, you appear to recognise the relevant operatives as you have referred to them as:

- Tradesperson/Craftsperson
 - Specialist operative/Labourer
 - Driver”
25. This exchange between the complainant and TfL creates some ambiguity as to the scope of the complainant’s request. It is not clear whether the complainant wishes to have further dialogue with TfL to clarify what rates he actually wants, or whether he is in effect making a fresh request for the rates of Tradesperson/Craftsperson, Specialist operative/labourer and Driver.
26. TfL has focussed on the request as originally phrased and the Commissioner is satisfied that it does not hold information relating to the roles specified in that request. TfL has also stressed to the Commissioner that it has received a number of requests from the complainant in the past and has often had difficulty in identifying requests for information contained in lengthy pieces of correspondence, often posed as questions, as there can be confusion as to what is an actual request and what is a line of argument pursued by the complainant. Even after it has identified where correspondence is seeking recorded information, TfL argues that it has often been unclear precisely what information is being sought. To alleviate these problems TfL emailed the complainant on 3 May 2018, the day before he submitted this request, and offered advice on how to make best use of his rights under the FOIA by making clear, succinct and unambiguous requests.
27. Although the terms used in the original request are not contained in the contract, TfL considers they appear to relate to quite specific roles. In contrast, the operatives it referred to in its refusal notice have a wide range of responsibilities. TfL does not believe the terms used in its contract with KHL are interchangeable with the terms used by the complainant in his request. Therefore TfL cannot assume the complainant is in fact wanting information on Tradesperson/Craftsperson etc. It has explained that on occasions TfL feels it has tried to interpret requests sensibly, only for the complainant to later argue that information has been misidentified. As a consequence TfL is very cautious about applying anything other than a literal interpretation of his requests.
28. Having considered TfL’s representations the Commissioner is satisfied that TfL does not hold the information as requested in the original request of 4 May 2018.
29. However the Commissioner also finds TfL’s position, both at the refusal notice stage and at the internal review stage, was ambiguous. In its initial refusal TfL advises the complainant that it does not recognise the

terms used, from which it can be deduced that the information is not held, but then appears to say the information is exempt under section 43 – commercial prejudice, which would suggest the information was held but was exempt. At the internal review stage TfL upheld its application of section 43, again suggesting that the information was held but was exempt. It was only during the Commissioner's investigation that TfL clarified that the information was not held. Therefore the Commissioner finds that TfL did not comply with its duty to inform the complainant whether the requested information was held in accordance with section 1(1)(a).

30. TfL has also explained that by citing section 43 – commercial interests, in respect of this request, its intention was to advise the complainant that should he wish to ask for information relating to the three operatives it referred to in its refusal notice (i.e. Tradesperson/Craftsperson etc), it considered such information would be exempt on the basis of commercial sensitivity.
31. Having found that the requested information is not held the Commissioner has not gone on to look at TfL's application of section 43. She has however considered whether TfL responded appropriately to the comments contained in the complainant's correspondence seeking an internal review. These are set out in paragraph 24 above. The Commissioner finds that the complainant's request for internal review on 6 June 2018 does not on its own constitute a fresh request for information relating to Tradesperson/Craftsperson etc. It appears to be more of a request for further dialogue with TfL in order to identify the information he was seeking. The Commissioner has considered whether this would have triggered a duty to provide advice and assistance under section 16 of the FOIA. That duty is to provide advice and assistance so far as it is reasonable to do so. Given that any information regarding rates, uplifts and vehicles (including those Tradesperson/Craftsperson etc,) would be captured by request 6 – the request for the price list, the Commissioner does not consider it is necessary for TfL to assist the complainant to make a fresh request for information that was already captured by another request. Although TfL could have been clearer as to its position in respect of what information was held and explained the overlap between possible alternatives to the information originally requested and that captured by request 6, the Commissioner is satisfied that the complainant has not been disadvantaged in any meaningful way.
32. The arguments considered in respect of request 1 apply equally to the information sought in requests 2 and 4. The Commissioner is satisfied that, for the same reasons, TfL does not hold the information described in those requests. However as with request 1, the Commissioner finds that TfL failed to comply with section 1(1)(a). However since this notice informs the complainant of TfL's clarified position, the Commissioner

does not require it to take any further action in respect of these requests.

Request 3

33. The Commissioner notes that in respect of request 3, which asked for the hours that TfL had contracted for specified operatives, TfL advised the complainant in its original refusal notice that, not only did it not recognise the operatives referred to in the request, the contract,

“... does not have a set contracted hours, each service provider operates the network 24 hours a day 7 days a week.”

34. Furthermore TfL did not refer to the application of section 43 to this information. The Commissioner therefore considers that TfL's initial response to request 3 effectively advised the complainant that the requested information was not held. Therefore there is no breach of section 1(1)(a) in respect to request 3.

Request 5

35. Request 5 sought information relating to an investigation carried out by TfL. It initially applied section 14 – vexatious, to this element of the request. TfL explained that this was on the basis of the burden that responding to the request would cause due to the difficulties of searching for all the requested information. It chose to apply section 14 in preference to section 12 as it considered that the application of section 12 could potentially mean that all elements of the multi-part request could be refused under section 12. However at the outset of the investigation TfL has clarified that it was now refusing just this part of the request under section 12 of the FOIA.

Section 12 – the appropriate limit

36. Section 12 of FOIA states that a public authority is not obliged to comply with a request if it estimates that the cost of complying with the request would exceed the appropriate limit.
37. The appropriate limit is a cost limit established by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 SI 2004 No 3244, commonly known as the Fees Regulations. For public authorities such as TfL the appropriate limit is set at £450. Where the costs of compliance relate to staff time, a public authority is only allowed to charge £25 per hour. Therefore an appropriate limit of £450 equates to 18 hours of staff time.
38. Furthermore a public authority is limited in respect of the activities it can take into account when estimating whether the appropriate limit would

be exceeded. Under regulation 4(3) of the fees Regulations a public authority is only allowed to take account of the following activities:

- determining whether the information is held,
- locating the information, or a document containing it,
- retrieving information, or a document containing it, and
- extracting the information from a document.

39. The request as original phrased was,

“5. A copy of the investigation information; the report and all information following my allegations, meeting and subsequent activity that was curtailed unexpectedly, suddenly.

The meeting was with [named employee], fraud manager at TfL who wrote that the enquiry was concluded 28/10/2016.

40. TfL's considers that the first part of the request describes the information that the complainant was seeking and that the second paragraph is provided as an aid to identifying the specific investigation in question. Therefore it did not consider the request was limited to information generated up to the date on which the complainant believes the investigation was concluded, i.e. 28 October 2016. This interpretation was partly shaped by TfL's knowledge that the actual report setting out the findings of the investigation was not actually written until December 2016. TfL has confirmed that the named employee informed the complainant that the investigation had been concluded on 19 October 2016 and this was confirmed by another official on 28 October 2016.

41. Furthermore TfL explained that after the complainant was advised the investigation had been concluded, which, in broad terms, found the allegations were not supported by the evidence, he continued to correspond with TfL on the subject. Therefore TfL was aware information relating to the investigation had been generated post October 2016. As a consequence TfL considered the period covered by the request was potentially very wide. TfL also considered that it was unclear as to precisely what information the request covered. Therefore TfL considered it sensible to clarify the intended scope of the request, which it did within a few days of receiving the request.

42. TfL sought clarification in the following terms,

“You ask for “all information following my allegations, meeting and subsequent activity”. It isn't clear exactly what information you are seeking. Could you please confirm whether you are asking for

documents such as meeting minutes, written reports, emails/letters or any other information. Whilst you have stated the enquiry was concluded on 28 October 2016 you have not provided a timeframe for when we should begin searching for this information – i.e. from [DATE] to 28 October 2016. Could you please clarify the above two points to allow us to fully process this”

43. In response the complainant wrote,

“I met with [named employee] in 2016. I wish all information post that meeting. By all, I mean ‘all’ - meeting minutes, written reports, emails/letters or any other information. I cannot begin to guess the process employed by TfL but the information will extend to all that you mention and any other information encompassed by the Act.”

44. TfL initially considered that the complainant’s response did not provide the timeframe it requested. The Commissioner has considered this point carefully. Although TfL did ask for a ‘timeframe’, it went on to set out the missing detail which it appeared to require in order to identify that timeframe, that is, it was seeking the date after which any information should be included. The request for clarification appears to take the end of the timeframe as being 28 October 2016. In light of this the Commissioner considers that, taken in isolation, the most natural interpretation of the complainant’s response is that he was seeking information about the investigation generated between the start of the investigation, as initiated by his meeting with the [named employee] and its reported conclusion on 28 October 2016. TfL has confirmed that it is able to identify when that meeting took place.

45. The Commissioner has discussed with the complainant what his intended interpretation of the request was following the clarification he provided and he confirmed that he was seeking information generated following his initial meeting with [the named employee] and the 28 October 2016. However he went on to advise the Commissioner that when providing this clarification he was not aware that the report of the investigation had only been produced in December 2016 and therefore when he provided that timeframe it was on the very reasonable assumption that it would have captured the final report.

46. Despite the clarification provided by the complainant, TfL still believed that he had failed to identify a clear end date for the information captured by the request. This was because it knew that a request limited to only the information generated up to 28 October 2016 would not capture any information generated after that date due to the complainant continuing to pursue the matter, nor the final report which he had specifically identified in his request. Furthermore, when providing clarification, he stressed that “By all I mean ‘all’ ...” . TfL therefore considered it correct to interpret the request widely. It therefore took

the request to be seeking all information, in any recorded form, relating to the investigation, including that submitted by the complainant following the 28 October 2016, up to the date of the request, i.e. 4 May 2018. It is on that interpretation that TfL applied section 12.

47. In order to identify all the information captured by its interpretation of the request TfL argues that it would need to conduct a number of searches. TfL has identified that it has located almost 400 emails in one repository within its Legal department relating to the LoHAC contracts (as explained later in paragraph 61, the contract to which the request relates is one of four which make up the London Highways Alliance Contract – LoHAC). Only some of these would relate to the matters that were investigated. These 400 emails would therefore need to be checked to determine their relevance. However TfL considers it unlikely that this single repository would hold all the information covered by its wide interpretation of the request. It would also have to search the email accounts of all those staff who were likely to have been involved in the investigation. TfL archives emails after 15 days following their receipt. The archived emails are then stored in the Enterprise Vault. This can be searched by use of a search tool called Discovery Accelerator. This allows any number of email accounts to be searched across the organisation using key words. TfL carried out a sample search of [the named employee]'s email account using the key word 'claim'. This was on the basis that the investigation which was initiated by the complainant related to concerns that claims were being inflated by the contractor. This search returned 4,000 results. Clearly not all of these would have been relevant to the request. TfL tested how many returns would be produced by a more refined search for 'inflated claims', but this returned a nil response. TfL has contemplated whether searches using the name of the contractor or the complainant would be sufficient, but has explained that staff within the departments most likely to deal with the issues the complainant is concerned about can be circumspect over using names because of the nature of the issues they are dealing with, therefore the contractor may simply be referred to as a 'the contractor' rather than by name. Clearly searching by a key word such as 'contractor' would produce an unmanageable number of returns, as would other general terms such as 'LoHAC'.
48. TfL acknowledges that many of the returns produced by the use of such key terms could be easily discounted during the subsequent manual sift of the emails that would be required. However it has also pointed out that some of the returns would be email chains which would need to be read in more detail in order to determine their relevance. It estimates that to scan each email could take a minute. This would mean that to check the 4,000 emails which the search of [the named employee]'s email account returned would take 66 hours. Even if this was reduce to 15 seconds per email, it would take TfL nearly 17 hours to check all the emails from just the one account. On this basis the Commissioner is

satisfied that to locate all the information captured by TfL's interpretation of the request, i.e. all information from the start of the investigation in 2016 to May 2018, would exceed the appropriate limit of 18 hours or £450.

49. TfL has explained that given the difficulty of searching by key words based on the nature of the investigation, it considers it would need to narrow the scope of the search down by reference to a particular time period and this is why it pressed the complainant to specify a timeframe. If that timeframe was reasonably narrow, it considers it could search email accounts of [the named employee] for that period and identify relevant emails, from those emails it could determine who else within the organisation had been involved in the investigation and go on to search their emails too. It considers such an approach is likely to allow it to search for all the information captured by the request in a manageable way.
50. For the reasons explained below the Commissioner does not consider it was appropriate for TfL to adopt the wide interpretation of the request which led to it being refused under section 12.
51. The Commissioner is satisfied that the complainant's intention when providing his clarification of the request was that it should cover a far narrower timeframe than that adopted by TfL, i.e. the request was clarified as being for information generated following the initial meeting with [the named employee] and 28 October 2016. However when providing his clarification the complainant was unaware that the final investigation report would not be captured by such a request.
52. Therefore the Commissioner finds that, in this case, the clarification has to be read together with the wording of the original request, which specified that he was seeking the report of the investigation, and the context in which the clarification was provided, i.e. the fact that complainant would not have known the final report was not produced until December 2016. Taking these factors into account the Commissioner finds that the objective interpretation of the request is that he was seeking,

All recorded information held for the purposes of the investigation from the date on which the complainant had his initial meeting with [the named employee], up until the final report being produced in December 2016, including the final report itself.

53. The Commissioner has discussed this interpretation with the complainant and he has confirmed that it would capture the information he intended to request.

54. The Commissioner has also discussed her interpretation of the request with TfL. In light of these developments TfL chose to withdraw its application of section 12.
55. The Commissioner therefore finds that having withdrawn its application of section 12, TfL are required to issue a fresh response to the request, as interpreted in paragraph 52 above.
56. The complainant should note that when issuing a fresh response the public authority will of course have the opportunity to consider the application of exemptions to the requested information.

Request 6

57. Request 6 was for the "contract price list". Initially TfL advised the complainant that it did not recognise the term, but went on to say that any information it held relating to the price list or any uplifts would be exempt under section 43.
58. During the Commissioner's investigation TfL clarified that although it did not hold any document entitled 'price list' the contract did contain a 'schedule of rates'. This has been provided to the Commissioner and she notes that it lists the cost charged for the deployment of the contractor's operatives, cost of tasks and materials used. The Commissioner is satisfied that this schedule of rates can objectively be described as a price list and is the information sought by the complainant's request. TfL is relying on section 43(2) to withhold this information.

Section 43(2) – prejudice to commercial interests

59. Section 43(2) provides that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person, including those of the public authority holding the information.
60. The exemption can be engaged on the basis that the prejudice either 'would' occur if the information was released, or that the prejudice would only be 'likely' to occur. As it is not absolutely clear which threshold TfL has applied, the Commissioner will consider the lower test, ie, whether disclosing the schedule of rates would be likely to prejudice the commercial interests of any person. The term 'would be likely' is taken to mean that there has to be a real and significant risk of the prejudice occurring.
61. The contract to which the request relates forms one part of London Highways Alliance Contract ('LoHAC'). LoHAC is a joint initiative between TfL and London's boroughs. Work under the LoHAC contract is divided between four area-based highways contractors. Each contractor holds a separate contract. The agreement includes maintenance and improvement works for London roads controlled either by local

authorities or TfL. Each of the four contracts relates to essentially the same range of maintenance and improvement tasks, but each one is tendered and negotiated for separately. Currently the four contracts are held by four different companies or consortia. The information requested by the complainant is contained in one of these four contracts. TfL received a request for information from all four contacts in June 2016. That 2016 request captured the same schedule of rates that is sought by request 6. The 2016 request was refused under section 43(2) and following the subsequent complaint, the Commissioner upheld TfL's use of the exemption in decision notice FS50693918 served on 13 March 2018. TfL has advised the Commissioner that its position remains that the schedule of rates is exempt under section 43(2) for the same reasons as contained that decision notice. That notice was appealed to the First Tier Tribunal. The Tribunal upheld the notice in its decision, case reference EA/2018/0081, promulgated on 28 September 2018.

62. The Commissioner recognises that both the notice FS50693918 and the Tribunal's decision in EA/2018/0081 considered the circumstances that existed in June 2016. The Commissioner has therefore considered whether those circumstances had altered by the time of the current request, i.e. 4 May 2018, nearly two years later.
63. The arguments presented in respect of the earlier request concerned prejudice to the commercial interests of both TfL and those of the four contractors involved. In broad terms, the arguments related to the impact disclosing the information would have on TfL's ability to obtain value for money when retendering for the these contracts and how the contractors would be disadvantaged when participating in those retendering exercises. TfL has explained that the schedule of rates is a highly detailed breakdown of the rates for the work carried out under the contracts. Those maintenance tasks are unlikely to change when the contracts are retendered. To release information on the process charged by one contractor would be likely to undermine the negotiating position of TfL and place the incumbent contractor at a disadvantage when that contract was retendered.
64. At the time the Commissioner made her decision in respect of the earlier request TfL explained that each of the four contracts would be retendered within three to four years. In light of this although the requested information has aged since the earlier request, the Commissioner does not consider that, in the particular circumstances of this case, the sensitivity of the information has waned. This is because TfL is still trying to protect the same, future, retendering exercise from being prejudiced. If anything, there is an argument that as the retendering exercises draw nearer, the sensitivity of the information increases. The requested information can certainly still be regarded as current, or live. Therefore in line with the reason set out in the earlier

decision notice the Commissioner is satisfied that the exemption is engaged.

Public interest test

65. Section 43(2) is subject to the public interest test. This means that although the exemption is engaged the information can only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
66. The earlier decision notice and Tribunal case obviously found that public interest favoured maintaining section 43(2). However it is quite possible that the public interest in disclosure has grown since the earlier request for this information was considered.
67. The Commissioner recognises the public interest in openness, transparency and accountability. Such arguments are particularly strong in respect of the information relating to commercial contracts entered into by public authorities. There is a public interest in understanding whether the public authority has obtained value for money and whether the public are being well served by a contract.
68. As explained in paragraph 17, the complainant is concerned that where the contractor recovers the costs of repairs to the highway following an accident directly from the at fault driver, i.e. where the overall cost is less than £10,000, those costs are unfairly inflated. However the Commissioner is not persuaded by this argument.
69. TfL argues that the public interest favours maintaining the exemption as disclosing the schedule of rates would be likely to harm the commercial interests of both the contractor and TfL itself and their ability to compete fairly and competitively when the contract is retendered. This could lead to increased costs for the public. It has stated that the four contracts forming the LoHAC are estimated to save £450m over the life of those contracts. There is therefore clearly a public interest in preserving the competitive environment in which such contracts are negotiated.
70. TfL has also directed the Commissioner to the public interest arguments in favour of maintaining the exemption that it presented in respect of the earlier request. The Commissioner does not consider it necessary to repeat those arguments here, but accepts that they remain relevant.
71. In light of the above the Commissioner is satisfied that the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosing the schedule of rates.

Request 10

72. Request 10 originally sought information relating to the contractor's responsibilities in respect of requests made by third parties for the information it holds. From the complainant's request for an internal review it transpired that he believed the model contract between TfL and its contractors would contain a provision relating to the contractor's responsibilities for dealing with requests under the FOIA or requests received by TfL for information held by the contractor.
73. TfL originally said that it did not hold information captured by this element of the request.

Section 1 – information held

74. Section 1 provides that a public authority is obliged to confirm or deny whether it holds information of the type described in the request and, if it is held, subject to the application of any exemption, to communicate that information to the applicant.
75. The Commissioner accepts that, as maintained by TfL, the contractor is not itself subject to the provisions of the FOIA. However the contract does contain clauses which inform the contractor of TfL's obligations under the FOIA and which set out the contractor's involvement in such requests. TfL has provided the Commissioner with a copy of those clauses.
76. Having read the relevant clauses the Commissioner finds that although they do not bring contractors within the scope of the FOIA, the clauses do set out the contractor's obligations to assist TfL in dealing with requests TfL receives, and the contractor's obligation to pass any requests it receives directly, to TfL. The Commissioner is therefore satisfied that these clauses are captured by request 10.
77. TfL has clarified that it is prepared to disclose this information.
78. In light of the above the Commissioner finds that although TfL is correct to state that the contractor is not directly subject to the FOIA, that due to the wide scope of request 10, it does hold information of relevance to the request and this should have been disclosed at the time of the request. By not confirming such information was held and by not providing this information TfL breached section 1(1) of the FOIA.

Right of appeal

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

80. 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.

81. 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

Rob Mechan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF