

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 31 October 2018

**Public Authority:** Merseytravel

**Address:** Mann Island  
PO Box 1976  
Liverpool  
L69 3HN

#### **Decision (including any steps ordered)**

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1. In a two part request, the complainant has requested information about loans and interest rates associated with the Mersey Tunnels. Merseytravel has confirmed that it does not hold information related to part 1 of the request and has released some information related to part 2. The complainant disputes that Merseytravel has released to him all the information it holds that is relevant to part 2 of the request.
2. The Commissioner's decision is as follows:
  - On the balance of probabilities, Merseytravel has released to the complainant all the information it holds that falls within the scope of part 2 of the request. Merseytravel complied with section 1(1) of the FOIA as, in its response and internal review, it confirmed that it holds some broadly relevant information which it then communicated to the complainant, and that it holds no further relevant information.
3. The Commissioner does not require Merseytravel to take any steps to ensure compliance with the legislation.

## Request and response

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4. On 27 June 2016 the complainant had submitted the following request for information to Merseytravel, under the FOIA:

*"1. The auditors have said (paragraph 2 on page 3 of KPMG letter of 22 December 2015) that the Tunnels losses of £28m "were financed by loans taken out by Merseyside Integrated Transport Authority from the Public Works Loan Board". I do not believe that there were any such loans but assuming that your auditor is correct and such loans do exist then can you supply us with whatever information you have on these loans.*

*2. The auditors in another letter say that it was arranged that the 'debt' be repaid in instalments with interest and that this "arrangement was agreed with the Treasurers of the five District Councils" (third paragraph on page 8 of KPMG letter of 3 May 2016), and also say (in the last paragraph on the same page) when referring to the change in the 'fixed' rate of interest, to "the amount of interest agreed with the District Councils". I do not believe that there were any arrangements agreed with the Treasurers of the five District Councils nor do I believe that the interest and the changes to it were agreed by the District Councils, but assuming that your auditor is correct then can you supply us with whatever information you have on the agreement of the five Treasurers to the arrangement and on the agreement of the District Councils to the interest and the changes to the 'fixed' interest rate."*

5. Merseytravel categorised the request as vexatious and the matter was referred to the Commissioner, reference FS50651262<sup>1</sup>. The Commissioner decided that the request was vexatious under section 14(1) of the FOIA. However, the complainant appealed the decision and his appeal was allowed. The First Tier Tribunal (Information Rights) ('the FTT') ordered Merseytravel to comply with the request.
6. On 22 December 2017, Merseytravel issued the complainant with a response to his request of 27 June 2016. With regard to part 1 of the request, Merseytravel advised the complainant about particular losses and explained that it holds no recorded information with regard to

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014018/fs50651262.pdf>

borrowing from the Public Works Loan Board to cover £28m losses incurred between 1988 and 1992, because no such borrowing took place. With regard to part 2 of the request, Merseytravel released some relevant information, withholding some under section 40(2) of the FOIA as it said this was the personal data of third persons.

7. The complainant requested an internal review on 17 February 2018. He indicated that Merseytravel had not released to him information that fully addressed his request. In addition he queried whether Merseytravel could rely on section 40(2) to withhold particular information.
8. Merseytravel provided an internal review on 18 March 2018. It confirmed that it holds no other relevant information and explained why it had applied the section 40(2) exemption to some of the information.
9. The complainant remained dissatisfied and the matter was referred to the Commissioner as a fresh complaint.

### **Scope of the case**

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10. The complainant first contacted the Commissioner on 3 January 2018 to complain about the way his request for information had been handled. When his complaint had been accepted for further consideration, following the internal review process, the complainant confirmed, on 21 August 2018, that he wanted the Commissioner to consider:
  - a) whether it was reasonable for Merseytravel to have wasted his, the Commissioner's and the FTT's time with regard to a particular element of his request; and
  - b) whether it was reasonable for Merseytravel to have implied to him that he could not publish the information it had released to him on 22 December 2017 because it contained personal data, when the personal data had been redacted. The complainant has confirmed that whether or not section 40(2) had been correctly applied to this information can be withdrawn from the scope of his complaint.
  - c) Finally, the complainant confirmed that he remains dissatisfied that Merseytravel has still not given him information directly relevant to part 2 of his request.
11. With regard to point a), the complainant has referred to Merseytravel's response to him of 22 December 2017. In that response Merseytravel had explained that the information he has requested in part 1 of his request has never existed and that a statement that had been made to

the complainant by its auditors – that had suggested particular information would exist – had been incorrect. The complainant appears to accept that this information is not held but considers Merseytravel could have explained this to him when it first received his request of 27 June 2016, and thereby saved his and other bodies' time.

12. The Commissioner cannot consider this matter – whether time has been wasted - as part of her investigation. Her focus is on public authorities' compliance, or otherwise, with the FOIA. Merseytravel's initial position was that the complainant's request was vexatious under the FOIA and that, as such, it was not obliged to comply with it (even if that meant simply not confirming whether or not information was held, under section 1(1) of the FOIA). Merseytravel was entitled to respond in this way and the matter progressed to the Commissioner's earlier decision and the FTT decision.
13. For the above reason – ie the scope of her role - the Commissioner cannot include point b) in her investigation either; that is, the matter of advice given to the complainant by Merseytravel about publishing particular information.
14. The Commissioner's investigation has focussed on point c): that is, whether Merseytravel has complied with section 1(1) of the FOIA. She has considered whether, on the balance of probabilities, Merseytravel holds further information within the scope of part 2 of the complainant's request of 27 June 2016.

## Reasons for decision

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### **Section 1 – general right of access to information held by public authorities**

15. Under section 1(1) of the FOIA, anyone who requests information from a public authority is entitled a) to be told if the authority holds the information and b) to have the information communicated to him or her if it is held and is not exempt information.
16. In his correspondence to the Commissioner of 21 August 2018 the complainant acknowledges that the information he has requested in part 2 of his request may not exist and may never have existed. He considers, however, that Merseytravel has not confirmed whether or not the information is held. Instead, he says, it first refused to provide the information and then released information that the complainant considers is not relevant to his request. The complainant considers that Merseytravel should be able to establish with its auditor whether the

auditor had ever seen anything to support what the auditor had told him and, if so, what those documents were.

17. Part 2 of the complainant's request is for "... *information* [Merseytravel has] *on the agreement of the five Treasurers to the arrangement* [that a debt could be repaid in instalments with interest] *and on the agreement of the District Councils to the interest and the changes to the 'fixed' interest rate.*"
18. The Commissioner considers that a reasonable interpretation of the information being requested would include any recorded information associated with the decision-making behind the five Treasurers' agreement and the District Councils' agreement – such as, for example, meeting minutes.
19. Merseytravel has acknowledged to the Commissioner that the information it has released to the complainant does not provide a complete picture of how particular loans and interest rates were agreed and varied ie it does not fully address the complainant's request. Merseytravel has explained that due to the passage of time and the changeover in staff over the past thirty years or so, the information it identified and released is all it was able to discover through its searches. Merseytravel has explained that the loans in question related to borrowing between 1988 and 1992.
20. Merseytravel has described to the Commissioner the searches it carried out for relevant information. With regard to electronic searches, Merseytravel explained that it searched the email accounts of the two employees who worked with the auditors involved - KPMG - for any correspondence to or from KPMG. Both those individuals have since left Merseytravel. Merseytravel explained that the complainant's request followed directly on from KPMG's findings. It has referred to an email from the complainant of 29 July 2016 in which he said '*the context of my request which was clearly in relation to whatever information there was to back up two of the claims made by your auditors in their letters to me on 22 December 2015 and 21 June 2016*'. Merseytravel therefore considered that searching the email accounts above would capture any relevant information that was provided to KPMG to enable a decision to be reached.
21. Merseytravel says that all the emails identified were then manually checked by its Financial Accountant, but no relevant information was found. It then carried out further searches of the same email accounts to as far back as January 2012 (the oldest archived data it holds), but these searches also did not identify any relevant information.

22. Merseytravel used the search term '@kpmg.com' as it considers this would have captured anything provided to the auditor when they were considering the complainant's substantive objection (which is behind the current request). Merseytravel has explained that due to the age of the loans in question, it was very unlikely that any records would be held electronically elsewhere.
23. As electronic searches had been unsuccessful, Merseytravel has told the Commissioner that, interpreting the request in its broadest sense, its Finance and Democratic Services team requested all relevant boxes from its external file store facility in order to see if any relevant paper records were held, even if it could not say with certainty that information in any records was provided to KPMG. This is where Merseytravel had found the information it released to the complainant.
24. Merseytravel has noted that the records would be around 30 years old by this stage. In this time it has had at least three different Heads of Finance, all of whom it says would have overseen the regular review and destruction of documents.
25. Manual searches were also carried out of records left by the officers who assisted KPMG in dealing with the complainant's substantive objection that is behind the current request, who have since left Merseytravel. No information was identified. The KPMG auditor who handled the complainant's objection has also since moved on.
26. Merseytravel has confirmed that additional manual searches were carried out of the personal drives of the former employees, as well as team storage areas, and no further relevant records were identified.
27. It says that records relating to any interest rate changes would be destroyed six years after the financial reporting year they relate to. Exact destruction dates are not known as current staff have been unable to determine the complete history of amendments to the interest rates. Merseytravel has explained that it does not have a record of any relevant documents' destruction because, although it receives destruction certificates when boxes of records are securely disposed of by its file storage contractor, its Finance department has been unable to pair those certificates with box contents lists. It says that this is likely due to the turnover of staff over such a long period of time.
28. The Commissioner has considered Merseytravel's submission and all the circumstances of this case. She has decided that, on the balance of probabilities, Merseytravel does not hold any further information that falls within the scope of part 2 of the complainant's request. She considers that the searches that Merseytravel carried out were appropriate and thorough. In addition she notes the request concerns

events that happened approximately 30 years ago. As she has explained in a previous decision (FS50731297) staff turnover, the loss of 'corporate memory', changes to processes can all contribute to a public authority being unable to locate information relevant to a request, if indeed it is held. In its response of 22 December 2017 Merseytravel confirmed that it holds information that is broadly relevant to part 2 of the complainant's request and it released this. In its internal review Merseytravel confirmed that it holds no further information. The Commissioner is satisfied that this is the case and she finds that Merseytravel complied with section 1(1) of the FOIA.

## Right of appeal

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29. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. 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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**Information Commissioner's Office**  
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