

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 29 June 2011**

**Public Authority:** Department for Transport  
**Address:** Great Minster House  
76 Marsham Street  
London  
SW1P 4DR

### **Summary**

---

The complainant requested the Department for Transport ("DfT") to disclose information relating to the implementation of the Delay/Repay scheme which compensates rail passengers for delays to their journeys. The DfT responded to the complainant's request and disclosed some of the requested information, however it refused to disclose the remainder ("the withheld information") citing sections 35(1)(a) and 43(2) of the Act. As the complainant remained dissatisfied, he referred the matter to the Commissioner for consideration. The Commissioner considered the withheld information and the DfT's application of the exemptions cited and concluded in this case that the exemption under section 35(1)(a) was engaged, however the public interest in maintaining the exemption was not outweighed by the public interest in disclosure of the information. In respect of the remaining withheld information he did not consider that the exemption under section 43(2) was engaged. The Commissioner has ordered disclosure of the withheld information. He has also identified some procedural breaches on the part of the DfT.

### **The Commissioner's Role**

---

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## Background

---

2. "Delay Repay" is a scheme which provides compensation based on individual claims for compensation for delays incurred in train journeys. This replaced the former policy of providing automatic discounts on season tickets if average punctuality and reliability of trains had fallen below trigger levels. The compensation under the Delay Repay scheme is calculated as a percentage of the fare based on the length of the delay.

## The Request

---

3. On 22 December 2009 the complainant submitted the following request to the DfT: -

I understand that new rail franchises are being specified with the "Delay Repay" scheme for compensating passengers for specific delays, replacing the old scheme where season ticket holders were automatically compensated according to the performance statistics for the entire line.

I am interested in how and why you decided to adopt the new scheme, and how it has turned out in practice. Please could you therefore provide copies of:

- Any analysis you did comparing the advantages and disadvantages of the old scheme, Delay Repay and any other possibilities you considered. This might include things like the impact on passengers and on the train company, for example in financial terms and convenience.

- Any analysis of how Delay Repay has turned out in practice, for example the actual costs of providing compensation, the level of takeup by passengers of compensation they are entitled to, how it has been perceived."

4. On 12 February 2010 the DfT advised the complainant that it did hold some of the requested information and disclosed some of that information to the complainant. It advised that it was withholding the remainder of the requested information. The DfT cited the exemptions as set out in sections 35(1)(a) and 43(2) as a basis for non-disclosure of that information ("the withheld information").
5. The complainant requested an internal review of the DfT's decision on 27 February 2010.

6. On 15 April 2010 the DfT advised the complainant that the result of the internal review was to uphold the DfT's original decision.

## **The Investigation**

---

### **Scope of the case**

7. On 23 May 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The DfT's application of the exemption under section 43(2) of the Act.
  - The way in which the DfT carried out the public interest test as set out in section 2(2) of the Act, specifically in relation to section 35(1)(a) of the Act.

### **Chronology**

8. The Commissioner wrote to the DfT on 28 June 2010 to request copies of the withheld information. The DfT replied providing the Commissioner with copies of the withheld information and some submissions in relation to its application of the specified exemptions.
9. On 26 November 2010 the Commissioner wrote to the complainant to inform him that his complaint had been allocated to a specific caseworker. The Commissioner also wrote to the DfT to request further information from the DfT as to its application of the specified exemptions and the way in which it carried out the public interest test.
10. The Commissioner contacted the DfT, a response to his letter not having been forthcoming within 20 working days. The DfT confirmed that it had no further submissions to add to those sent under cover of its previous letter to the Commissioner enclosing copies of the withheld information.
11. The Commissioner has since contacted the DfT in order to clarify a few points in relation to its application of the exemptions. The DfT has responded to the Commissioner's queries.

## Analysis

---

### Substantive Procedural Matters

#### Exemptions

#### **Section 35(1)(a) – the formulation or development of government policy**

12. Section 35(1)(a) provides that information that relates to the formulation or development of government policy is exempt information. The task in determining whether this exemption is engaged is to consider whether the information in question can be accurately characterised as relating to the formulation or development of government policy.
13. The Commissioner's view is that the term 'relates to' as it is used in the wording of this exemption can safely be interpreted broadly. At paragraph 58 of *DfES v the Commissioner & Evening Standard*<sup>1</sup> the Information Tribunal suggested that whether an item of information can be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of that information, rather than on a line by line dissection.
14. The DfT applied the exemption at section 35(1)(a) to some of the withheld information. Therefore the Commissioner has looked at section 35(1)(a) first, and will move on to consider section 43(2) in relation to the remainder of the information.

#### **Is the exemption under section 35(1)(a) engaged?**

15. The Commissioner notes that the information being withheld under section 35(1)(a) in this case consists of papers containing discussions, analyses and advice to Ministers regarding the implementation of the Delay/Repay scheme. The Commissioner accepts that, whilst discussions are still taking place prior to finalising the implementation of the policy, the formulation and development of the policy is still ongoing. According to the information, the Delay/Repay scheme had already been finalised. However, the DfT's argument is that the information is currently being used in the development of franchising policy and in particular in consultation with stakeholders regarding

---

<sup>1</sup> EA/2006/0006; 19/02/07

that policy. The Commissioner has considered that argument in relation to the withheld information.

16. The formulation and development of policy, in the simplest terms, is the government deciding to make changes in the real world and discussing how best to make and implement those changes. The Commissioner accepts that the discussions, analyses and advice to Ministers mentioned in paragraph 15 above relate to government policy process, however whether or not the exemption under section 35(1)(a) is engaged depends upon what stage the policy process has reached. In situations where the information relates to the implementation stage of the policy process as opposed to its formulation and development, the Commissioner will not consider the exemption under section 35(1)(a) to be engaged.
17. The Commissioner, having perused the information being withheld under section 35(1)(a) notes that the Delay Repay scheme had already been formulated and that all the discussions, analyses and advice to Ministers relate to the strengths and weaknesses of implementing the scheme. However, he accepts that the information is being used to inform current franchising policy, which is ongoing, as set out in paragraphs 18 and 19 below.
18. The decision to introduce Delay/Repay involved the use of information on the advantages and disadvantages of the discount system, risk of introduction, cost of compensation provided, including the cost compared to discounts and the impact on passengers. The Delay/Repay policy has not been subject to review and has therefore not been confirmed. The information formed a key part of the decision to introduce Delay/Repay and, in the absence of any review of the policy which would include current information from the TOCs operating Delay/Repay, continues to inform the current policy which is used in franchise replacements.
19. The specification for each franchise replacement includes the specification of the compensation arrangements on that franchise. The information on Delay/Repay provides the evidence as to why Delay/Repay has previously been applied in franchise replacements, and why it is included in the specification for that franchise replacement, in the absence of any review of compensation policy and confirmation of policy. Therefore, the Commissioner is satisfied that the information withheld under section 35(1)(a) relates to the formulation and development of government policy and that therefore exemption under section 35(1)(a) is engaged in relation to the information being withheld under that section.

**Public interest test**

20. Section 2(2)(b) of the Act states that a public authority may refuse to disclose information requested if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
21. Section 35(1)(a) is a qualified exemption and is therefore subject to a public interest test. This requires the Commissioner to determine whether the public interest is best served by maintaining the exemption or by releasing the information sought.
22. In *DFES* the Tribunal set out 11 guiding principles for considering the public interest in relation to section 35(1)(a) of the Act. The Commissioner has been mindful of these principles when considering the public interest in this case.

**Public interest arguments in favour of disclosing the withheld information**

23. The Commissioner recognises the general public interest in promoting openness, transparency, public understanding and accountability in relation to the activities of public authorities. This is particularly relevant in relation to a government department such as the DfT which oversees public transport and whose policies could potentially have a significant impact on large numbers of public transport users.
24. The Commissioner has considered the content and nature of the information being withheld under section 35(1)(a), which comprises of papers containing discussions, analyses and advice to Ministers regarding the implementation of the Delay/Repay scheme.
25. The Commissioner considers that there is a strong public interest in the disclosure of the information being withheld under section 35(1)(a) in order that the public might have a better understanding of the process by which the policy was formulated. There is a strong public interest in understanding the practical operation of a public service such as transport, the decisions to introduce certain policies to facilitate that operation and the thinking behind those decisions. The Delay/Repay measure was one which had the potential to significantly impact on the travelling public. The Commissioner accepts that disclosure of the information withheld under section 35(1)(a) would inform the public as to the way the DfT explored different policy options and reached its conclusions.

## Public interest arguments in favour of maintaining the exemption

26. The Commissioner recognises that it may be argued that it is in the public interest for government to have a private, “safe space” in which to formulate policy, and that such arguments carry particular weight where policy formulation was ongoing at the time of the request.
27. It is arguable that government, with input from others, should be given sufficient space away from public scrutiny to carry out the policy making process effectively. This includes protecting the government’s ability to gather free and frank input from others to inform its decisions. There is a public interest in ensuring that options are fully debated and that people are not deterred from providing full and frank suggestions and input to ensure that the best options are put forward.
28. The DfT argued that the views being expressed by individuals such as stakeholders, other franchise holders and industry representatives during discussions and advice to Ministers related to ongoing franchising policy development and therefore it would be damaging to disclose the discussions before decisions had been taken and policy agreed. In respect of this process, those making their representations need to be able to give their opinions in a free and frank manner. Disclosure of the information might result in the risk of damage or inhibition to the ongoing discussions with a view to final franchising policy formulation in this case and may pose a risk to the quality of the formulation and development of future government policy in this area.

## Balance of the public interest arguments

29. In considering the balance of the public interest arguments the Commissioner has taken into account the underlying principles involved in balancing the public interest test under section 35(1)(a) which were set out by the Tribunal in the *DFES* case. The Commissioner has focused on two of these principles in particular, the first being the timing of the request:

*“The timing of a request is of paramount importance...Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the...threat of lurid headlines depicting that which has been merely broached as agreed policy.”*

30. The second principle relates to the content of the information itself, on which the Tribunal commented:



*"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."*

31. In relation to the question of timing, the DfT has argued that the information withheld under section 35(1)(a) is being used to inform current franchising policy and that its premature disclosure could have a "chilling effect" on future expressions of opinion by relevant individuals, leading to the risk of inhibition of or damage to future decision-making.
32. The Commissioner has considered the content of the information and the timing of the request and how they affect the weight of the chilling effect argument. At the time of the request, the Delay/Repay Scheme had been finalised, therefore the policy was clearly within the public domain at the time of the request. However, the DfT explained that the information was still being used to inform current franchising policy. The Commissioner considers that this argument is of some significance in this instance.
33. Whilst the Commissioner has attributed some significance to the chilling effect argument primarily in view of the timing of the request, he notes that the DfT's submissions did not include specific evidence linked to the circumstances of this case to further support this argument. Nor has the DfT identified specific parts of the information withheld under section 35(1)(a) which are particularly free and frank and more likely to result in a loss of candour.
34. As mentioned above the DfT has also argued that stakeholders including other franchise holders and industry representatives would be discouraged from providing frank and candid advice and input in the future if they thought that their views may be disclosed. The Commissioner considers that as experts in their field who are contributing to policy debate the same courage and independence should be expected of them as of the civil servants mentioned by the Tribunal in the case of the Foreign and Commonwealth Office v The Information Commissioner<sup>2</sup>. In relation to industry representatives the Commissioner does not consider that they would be easily discouraged from providing input given that they seek to shape and influence policy to meet their own aims and interests.

---

<sup>2</sup> EA/2007/0047.



35. The Commissioner has taken into account the fact that the DfT has released the total figure of compensation payments made by train operators who have implemented the Delay/Repay scheme. The DfT argues that this is sufficient to inform public debate on the issue and to assure the public that funds are being spent appropriately and that people are being properly compensated for delays. However, the Commissioner notes that the scheme was due for review in autumn of this year. As such, he believes that there is a strong public interest in the public being in possession of all information relevant to the thinking behind the scheme, the advantages and disadvantages of the scheme, any alternatives considered and the deciding factor or factors in the ultimate implementation of the scheme. This would enable the public to contribute to the review through questioning or challenging the scheme itself and the process behind the decision to implement the scheme, which could lead to significant improvements to the scheme, something which the Commissioner believes would be very much in the public interest.
36. The Commissioner has considered all public interest arguments and concludes, on balance, that, in all the circumstances of the case, the public interest in disclosing the withheld information outweighs the public interest in maintaining the exemption under section 35(1)(a).

### **Section 43(2) – prejudice to commercial interests**

37. Section 43(2) provides that information is exempt if its disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
38. When considering the application of a prejudice-based exemption, the Commissioner adopts the three step process laid out in the Information Tribunal case of *Hogan v the ICO and Oxford City Council* (Appeal nos EA/2005/0026 and EA/2005/0030). In that case the Tribunal stated that:

*"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of 'prejudice' being claimed must be considered .....A third step for the decision-maker concerns the likelihood of occurrence of prejudice."*  
(para 28 to 34).

## Relevant applicable interest

### Does the information relate to, or could it impact on, a commercial activity?

39. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his Guidance on the application of section 43. This states that:

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

40. The Commissioner has considered the wording of the exemption under section 43(2) which refers to "commercial interests". The DfT has informed the Commissioner that it believes disclosure of the relevant information would cause prejudice to the commercial interests of the train operators. The Commissioner accepts that the DfT has demonstrated that any prejudice occurring would be to the train operators' ability to participate competitively in a commercial activity, i.e. the sale of rail tickets and the provision of transport services.
41. The Commissioner is satisfied that the DfT has demonstrated that any such prejudice would occur to the commercial interests of the train operators, which are obviously relevant and applicable to the exemption in question.
42. When considering the nature of the prejudice, the Commissioner has noted the Tribunal's comments in *Hogan v the ICO and Oxford City Council* (paragraph 30):
- "An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thornton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met."*
43. Therefore, the Commissioner takes the view that, for the exemption to be engaged, the disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must be more than insignificant or trivial.

## **Nature of the prejudice**

44. The DfT has argued that disclosure of the withheld information in this case would prejudice the commercial interests of the train operators as it would reveal details of their costs to their competitors, i.e. coach, bus and airline operators and prospective purchasers of the properties and this would adversely affect their competitive positions.
45. Having considered the arguments above, the content of the withheld information and the context in which the material was created the Commissioner is satisfied that any such harm would not be trivial or insignificant, the Commissioner has gone on to consider the likelihood of such harm arising.

## **Likelihood of prejudice**

46. In the Hogan case mentioned above, the Tribunal found that the prejudice test is not restricted to "would be likely to prejudice." It provides an alternative limb of "would prejudice". In this case the DfT has indicated that it considers that the 'would prejudice' limb of the test is relevant. This obviously places a much greater evidential burden on any public authority. The Commissioner takes the view that, whilst it would not be possible for a public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.
47. An evidential burden rests with the public authority to be able to show that some causal relationship exists between the potential disclosure and the prejudice. Although unsupported speculation or opinion will not be taken as evidence of the nature or likelihood of prejudice, neither can it be expected that public authorities must prove that something definitely will happen if the information in question is disclosed. Whilst there will always be some extrapolation from the evidence available, the public authority must be able to provide some evidence (not just unsupported opinion) to extrapolate from.
48. In these circumstances, the DfT believes that, if the relevant information were disclosed, the operators of buses, coaches and airlines, also other private transport operators could use the information in order to alter their prices and possibly to undercut the train operators, which could cause significant harm to the commercial interests of the train operators.
49. Where a public authority has cited this exemption on the basis of prejudice that it believes would be likely to occur to the commercial

interests of a third party, the Commissioner usually requires the public authority to have consulted the third party for its views on disclosure.

50. The Commissioner notes that the DfT works closely with the train operators and provides strategic direction in the provision of rail services, although the responsibility for the day-to-day delivery of rail services rests with the train operators. The Commissioner accepts that there is a close relationship between the DfT and the train operators, however he does not consider that this is sufficient for the DfT's arguments to constitute a genuine reflection of the concerns of the train operators in the absence of independent evidence of those concerns.
51. Towards the end of the investigation the DfT provided the Commissioner limited submissions from some of the train operating companies. Apart from one set of submissions the submissions do not provide any further convincing evidence about how the prejudice would occur. The most convincing argument is that certain companies who are subject to Delay/Repay would want to use this data to competitive advantage in future bids if this compensation framework is introduced for further franchises. Most of the submissions simply objected to the disclosure and insisted the information was "commercially confidential". However, none of the submissions adequately explain why disclosure of the information at the time of the request would be prejudicial, given the information was only current up to 2007.
52. The DfT has stated that the information in question is "*commercially sensitive*". Whilst the commercial sensitivity of information is relevant to the issue of whether the exemption provided by section 43(2) is engaged, this is not in itself sufficient for the exemption to be engaged. The possibility of prejudice must be more probable than not to satisfy the "would" test or should be real and significant to satisfy "likely to prejudice". In this case, the view of the Commissioner is that the public authority has not convincingly set out how prejudice to commercial interests would or would be likely to occur to the train operators. The Commissioner's conclusion is, therefore, that the exemption provided by section 43(2) is not engaged.

## **Procedural Requirements**

### **Sections 1 and 10 of the Act**

53. In failing to disclose the information withheld under section 43(2), which the Commissioner finds is not engaged, and the information withheld under section 35(1)(a), in respect of which the Commissioner finds that the public interest in maintaining the exemption is outweighed by the public interest in disclosure, within 20 working

days of receipt of the request, the DfT did not comply with the requirements of sections 1(1)(b) and 10(1) of the Act.

## The Decision

---

54. The Commissioner's decision is that the DfT did not deal with the request in accordance with the Act in the following respects:
- it incorrectly applied section 43(2) to some of the withheld information
  - it incorrectly concluded that the public interest in maintaining the exemption under section 35(1)(a) outweighed that in disclosure of the information withheld under that section.
  - it breached section 1(1)(b) of the Act
  - it breached section 10(1) of the Act.

## Steps Required

---

55. The Commissioner requires the DfT to take the following steps to ensure compliance with the Act:
- To disclose the withheld information to the complainant.
56. The DfT must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

---

57. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

---

58. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 29<sup>th</sup> day of June 2011**

**Signed .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Legal Annex

### General Right of Access

#### **Section 1(1) provides that -**

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

### Public interest test

#### **Section 2(2) provides that -**

- (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
  - (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
  - (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### **Section 2(3) provides that –**

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and



(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(iii) section 41, and

(iv) section 44"

**Time for compliance with request –**

**Section 10(1) provides that -**

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

**Formulation of government policy, etc.**

**Section 35 (1) – provides that –**

Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

(a) the formulation or development of government policy,

**Commercial interests**

**Section 43(2) provides that –**

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."