

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 November 2022

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested from the Department for Transport (DfT) the background analysis undertaken in terms of price elasticity that informed the announcements on rail fare increases on two specific dates. The DfT refused to provide the information citing section 41(1) FOIA – information provided in confidence.
2. The Commissioner's decision is that the DfT was correct in relying on section 41(1) FOIA.
3. The Commissioner does not require the DfT to take any steps.

Request and response

4. On 17 February 2022, the complainant wrote to the DfT and requested information in the following terms:

“I would like to see the background analysis undertaken in terms of price elasticity that informed the announcements on rail fare increases on (a) 16 December 2020 (b) 17 December 2021. I would like to receive this electronically (eg as a PDF document)...”
5. The DfT responded on 17 March 2022 and refused to provide the requested information, citing section 41(1) FOIA.

6. On 18 March 2022 the complainant asked for an internal review.
7. The DfT provided an internal review on 19 April 2022 in which it maintained its original position.

Background

8. The DfT explained to the Commissioner that the requested information is contained in the Passenger Demand Forecasting Handbook (PDFH) and that it is the intellectual property of the Passenger Demand Forecasting Council (PDFC). The latter is an independent body of which the DfT is a participant member. It has scheme rules that only participant members and associate members are granted a license that enables them to access the handbook.

Scope of the case

9. The complainant contacted the Commissioner on 12 May 2022 to complain about the way their request for information had been handled. They disagreed with the DfT's view that there was little public interest in detailed information about fares elasticity.
10. After the Commissioner began his investigation, the DfT wrote to the complainant and provided information that was already published but of which they might not have been aware, in an attempt to resolve the complaint informally.
11. The complainant was not content with this response as it did not provide the information they required.
12. The Commissioner considers the scope of this case to be the DfT's citing of section 41(1) FOIA.

Reasons for decision

Section 41 – information provided in confidence

13. Section 41(1) of FOIA provides that –

“(a) Information is exempt information if it was obtained by the public authority from any other person (including another public authority); and, (b) the disclosure of the information to the public

(otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person”.

14. The DfT has provided the Commissioner with the withheld information.

15. The Commissioner’s advice on section 41 states that

“information will be covered by Section 41 if –

- it was obtained by the authority from any other person,
- its disclosure would constitute a breach of confidence.
- a legal person could bring a court action for that breach of confidence, and
- that court action would be likely to succeed.”¹

Was the information obtained from any other person?

16. Section 41(1)(a) states that the information must have been obtained from “any other person”.

17. The requested information was obtained from the PDFC.

Would disclosure constitute an actionable claim for breach of confidence

18. The usual test for section 41 cases is set out in the case of *Coco v Clark* [1969] RPC 41 which sets out three elements which must be present in order that a claim can be made. According to the decision in this case a breach of confidence will be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider.

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

Does the information have the necessary quality of confidence?

19. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible.
20. The DfT believes that the requested information has the necessary quality of confidence and engages section 41(1). It explained that the information is not publicly accessible and is non-trivial as "the calculation of fares elasticities is a complex econometric problem which requires access to railway industry revenue data (which is itself commercially confidential)".

Was the information imparted in circumstances importing an obligation of confidence?

21. The DfT argues that the information was communicated in circumstances importing an explicit obligation of confidence. The Passenger Demand Forecasting Scheme rules include the following:

"Each Participant or Associate Member must treat any information that it, or any of its employees, delegates or agents receives as a result of or in the course of performing the activities contemplated by this Scheme as confidential. Accordingly, no Participant or Associate Member may, and must ensure that its employees, delegates and agents do not, disclose such information to any other person."

The DfT has directly contacted the PDFC and they said:

"Under the PDF Scheme Rules, the elasticities and evidence in PDFH are confidential and should not be published to the public."

Would disclosure be detrimental to the confider?

22. The DfT contends that unauthorised disclosure would be likely to cause specific detriment to both the PDFC (the provider) and other parties. Specifically, it says that knowledge of fare elasticities is a commercially sensitive subject the disclosure of which risks disadvantaging other members. It gives the example of train operating companies where it would allow "competitors from other transport modes to gain commercial advantage in setting prices". There is also the risk of financial detriment to the confider as it is wholly funded by members'

fees. If "sections of the PDFH could be publicly released there would be little reason for many members to continue paying".

Is there a public interest defence for disclosure?

23. The complainant needed to know how many of the recommendations made it into the PDFH or what weight it placed on demand impact. At the very least, they argued, the PDFH would be needed "to understand that basis upon which the DfT considers setting fares". However, without the actual analysis and calculations the complainant is unable to say "how much consideration was given to the impact on passenger numbers when deciding on the fare increases".
24. The DfT's view is that there is a clear public interest in changes to rail fares but not in "detailed fare elasticities". "Conversely there is a strong public interest in preserving the principle of confidentiality and the impact of disclosure on the confider and other parties."
25. Such a disclosure would be likely to set a precedent which might see the DfT excluded from similar bodies if commercial entities are concerned that information shared with it may be published without their consent "under clear non-disclosure agreements". Access to valuable research would be lost which is not in the public interest. The DfT does not accept that any public interest argument for disclosure in this instance outweighs the actionable breach of confidence.

The Commissioner's view

26. There should always be some weight given to the general public interest in ensuring that public authorities are transparent and accountable where disclosure would do the following:
 - further public understanding of, and participation in the debate of issues of the day;
 - enable individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions; or
 - facilitate accountability and transparency in the spending of public money.

The disclosure of the requested information could aid the complainant in both understanding “what weight it placed on demand impact” and the basis on which the fares are set. However, there is information in the public domain² that includes fare elasticities regarding fare increases (highlighted by the DfT as in the public domain) that part meets the public interest in transparency around fare increases without needing to provide the detailed analysis required by the complainant.

27. The Commissioner does not fully accept the DfT’s argument that release may set a precedent where it might be excluded from access to research, given the DfT’s importance. However, in making his decision the Commissioner has considered (in line with his guidance) the wider public interest in favour of maintaining the confidence and the impact of disclosure on the confider. The Commissioner accepts that the PDFC would suffer detriment if the information was disclosed because it is likely to lose revenue if members could obtain information without paying fees.
28. The Commissioner is satisfied that section 41 is engaged and that the DfT was entitled to rely on it to withhold the information.

² [Rail Demand Forecasting Estimation study: phase reports - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

[TAG unit M4 forecasting and uncertainty - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

Right of appeal

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@justice.gov.uk
Website: 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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF