

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 May 2016

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

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Department for Transport (DfT) for a copy of the Appeals Criteria Document used by the Independent Appeals Service when assessing appeals against penalty fares issued by Train Operating Companies. The DfT refused the request under the exemptions in section 31(1)(c) (law enforcement), section 41 (information provided in confidence), section 43(2) (commercial interests) and section 44 (prohibitions on disclosure).
2. The Commissioner's decision is that the requested information is exempt from disclosure under section 44 of FOIA. The Commissioner requires no steps to be taken.

Request and response

3. On 31 December 2015 the complainant made a freedom of information request to the DfT about the penalty fare appeals process. The request referred to the Independent Penalty Appeals Service (IAS) and read as follows:

"Thank you for your helpful response. I note from the attached code of practise:

'The Independent Appeals Service aims to treat all appeals fairly and consistently. To make sure that there is consistency in the way appeals

are decided, the Strategic Rail Authority has approved a set of specific criteria against which the Independent Appeals Service will assess each appeal.'

I gather that DfT is, essentially, the Strategic Rail Authority now. Therefore please could you provide an electronic copy of (a) the criteria referred to, and (b) the letter by which you approved them."

4. The DfT responded to the request on 26 January 2016 when it explained that it held the information in part (a) of the request only but that this information was being withheld under the exemption in section 41 of FOIA (information provided in confidence).
5. The complainant subsequently asked the DfT to carry out an internal review of its handling of the request and it presented its findings on 7 March 2016. The review upheld the application of section 41 but also found that the information was additionally exempt under section 31(1)(c) (prejudice to administration of justice) and section 43(2) (commercial interests). For both qualified exemptions the DfT found that the public interest in maintaining the exemption outweighed the public interest in disclosure.

Scope of the case

6. On 7 March 2016 the complainant contacted the Commissioner to complain about the DfT's decision to refuse his request. The Commissioner considers the scope of his investigation to be to consider whether the information in part (a) of the request should be withheld under any of the exemptions relied on by the DfT.
7. During the course of the Commissioner's investigation the DfT said that it was also seeking to rely on the section 44 exemption to refuse to disclose the requested information.

Reasons for decision

8. The basis of the DfT's decision to withhold the information is that disclosure would encourage fare evasion. As explained above, the DfT contends that a number of exemptions could be applied. In the Commissioner's view it is appropriate to consider the section 44 exemption in the first instance since this provides for an absolute exemption from disclosure. That is to say, if the exemption is engaged, there is no public interest test to apply.

Section 44 – prohibitions on disclosure

9. Section 44(1)(a) of FOIA provides that information is exempt if disclosure is prohibited by or under any enactment. In this case the DfT have said that the relevant statutory prohibition is section 145 of the Railways Act 1993 ("the 1993 Act") which provides that:

(1) ...no information with respect to any particular business which—

(a) has been obtained under or by virtue of any of the provisions of this Act; and

(b) relates to the affairs of any individual or to any particular business,

shall, during the lifetime of that individual or so long as that business continues to be carried on, be disclosed without the consent of that individual or the person for the time being carrying on that business.

10. The withheld information in this case is a document used by the IAS to determine appeals against penalty fares. It details the different reasons which might be given by an appellant when challenging an appeal and in which circumstances an appeal might be accepted or rejected. The document formed part of the IAS code of practice which it had to produce in order to gain approval for processing appeals.
11. The DfT has explained that the relevant provision under which the information was obtained is section 130 of the 1993 Act which permits the Secretary of State to create a penalty fares regime for the railways. It said that using this power the Secretary of State created a regime under which penalty fares appeals bodies must obtain approval for their code of practice before they are permitted to process appeals. The regime also requires individual Train Operating Companies (TOCs) to obtain approval of the penalty fares scheme they intend to operate, including the arrangement they have for processing appeals.
12. The DfT has said that it has been unable to confirm definitively the source of the document. However, it said that it believed that that the document was provided to the Strategic Rail Authority (now subsumed within the DfT) when the IAS sought approval for its code of practice. Alternatively, the other potential source would have been one of the TOCs as they could have provided the document to the Strategic Rail Authority or subsequently the DfT when seeking approval of their penalty fair scheme. Either way, it said that the information would have been provided by virtue of provisions in the 1993 Act.
13. The Commissioner has considered the arguments made by the DfT and is satisfied that the information would have been obtained under the

1993 Act and that therefore the statutory prohibition applies. Whilst the DfT could not say with absolute certainty where the information was obtained from the explanations of their likely source are entirely reasonable and plausible. The Commissioner accepts that the information will have been obtained either from the IAS itself or one of the TOCs and in either event the statutory prohibition applies given that the information also relates to the affairs of the IAS and consent for disclosure has been refused.

14. The Commissioner is satisfied that the withheld information is exempt under section 44(1)(a) of FOIA by virtue of section 145 of the 1993 Act. Section 44 is an absolute exemption and therefore there is no public interest test to apply.
15. The Commissioner has decided that all of the withheld information is exempt under section 44 and so he has not gone on to consider whether any of the other exemption relied on by the DfT might also apply.

Right of appeal

16. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

17. 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.
18. 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

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