

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2017

Public Authority: Transport for London (TfL)
Address: Windsor House
42-50 Victoria Street
London
SW1H 0TL

Decision (including any steps ordered)

1. The complainant has requested information on the assurances about customer safety provided to TfL by the operator of UberPOOL. TfL applied the exemptions provided by regulation 31, that disclosing the information would prejudice its regulatory functions, and section 41, information provided in confidence. It later withdrew the application of these exemptions from one piece of information, the fourteenth document it identified as falling within the scope of the request.
2. The Commissioner's decision is that TfL is required to disclose the fourteenth document it identified as falling within the scope of the request.
3. However TfL is entitled to rely on section 31 to withhold the remaining information.
4. The public authority must disclose the fourteenth document within 35 calendar days of the date of this decision notice, if it has not already done so. 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

5. On 15 December 2015 the complainant emailed TfL regarding an article in the Telegraph about UberPOOL which quoted a senior member of TfL's staff as saying that it had sought assurances about customer safety from Uber. The complainant went on to request information of the following description:

"Please forward to me a copy of exactly what assurances TfL sought and what assurances TfL received as released to the Telegraph by Mr [named individual]."
6. On 18 January TfL responded. It refused to provide the requested information. It cited the exemption provided by section 31(1)(g) as its basis for doing so. Section 31(1)(g) provides that information is exempt if its disclosure would prejudice one of the functions listed in section 31(2). One of which is that of ascertaining whether circumstances exist that would justify regulatory action. This is listed at 31(2)(c).
7. The complainant requested an internal review on 6 May 2016. TfL sent him the outcome of its internal review on 23 August 2016. TfL revised its position slightly in that not only did it confirm the information was exempt under section 31(1)(g), it now also suggested that some of it was likely to be exempt under section 41, information provided in confidence.
8. During the course of the Commissioner's investigation TfL confirmed it had applied section 41 to five of the documents it had identified as being captured by the request.

Scope of the case

9. The complainant contacted the Commissioner 8 August 2016 to complain about the way his request for information had been handled. However it was only after the complainant confirmed to the Commissioner that TfL had completed its internal review that the complaint became eligible for investigation
10. TfL identified fourteen pieces of information that fell within the scope of the request. Some of these were individual pieces of correspondence, others were short email chains. During the Commissioner's investigation TfL advised the Commissioner that it no longer wished to apply any exemptions to the fourteenth of those documents. Out of the remaining thirteen documents it has claimed that they are all exempt under section 31 and five of them are also exempt under section 41.

11. The Commissioner considers that the matter to be decided is whether any of the thirteen pieces of information are exempt under section 31. In respect of the information also being withheld under section 41, the Commissioner will only consider its application if she finds that the information cannot be withheld under section 31.

Reasons for decision

12. Section 31(1)(g) of the FOIA says that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice a public authority's ability to exercise its functions for any of the purposes specified under subsection (2).
13. The purpose under subsection (2) specified by TfL is:
- 31(2)(c) – the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
14. To engage the exemption a public authority must:
- demonstrate that it has been entrusted with a function to fulfil this regulatory purpose;
 - confirm that the function has been specifically designed to fulfil that purpose; and
 - explain how the disclosure would or would be likely to prejudice that function.
15. TfL has informed the Commissioner that it has statutory powers relating to the regulation of private hire vehicles under the Private Hire Vehicles (London) Act 1998. There are also regulations which prescribe additional licence conditions including the Private Hire Vehicles (London) (Operators' Licences) Regulations 2000, the Private Hire Vehicles (London PHV Driver's Licences) Regulations 2003 and Private Hire Vehicles (London PHV Licences) Regulations 2004.
16. The Commissioner is satisfied these pieces of legislation provide TfL with a range of functions in respect of the regulation of the drivers and operators of private hire vehicles and taxi services.
17. The requested information captures correspondence between TfL and Uber over the period running up to the launch of UberPOOL. The Commissioner has studied the withheld information and is satisfied that it covers exchanges between the two parties in which TfL are exploring

how UberPOOL would operate in practise in order to satisfy itself that the service will comply with the appropriate regulatory framework for which it is responsible. This includes queries regarding particular elements of the service and whether these will comply with specific provisions within the legislation referred to above. The Commissioner is therefore satisfied that the first two conditions set out in paragraph 14 are met. She will now go on to consider whether the disclosure would prejudice TfL's regulatory functions.

18. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice TfL's regulatory functions, or that disclosure would only be 'likely' to prejudice those functions. From its submission to the Commissioner it is understood that TfL applied the exemption on the basis of the lower threshold of prejudice, ie that disclosure would be likely to prejudice its regulatory functions. Nevertheless this still means that TfL is of the opinion that there is a real and significant risk that the prejudice would occur if the requested information was released.
19. In explaining how that prejudice would be likely to occur TfL has expanded a little on the explanation it provided to the complainant at the internal review stage. TfL argues that effective working between its self as regulator and the taxi and private hire trade requires safe space in order to allow the trade to share information with it. TfL considers that disclosing the withheld information would be likely to hinder its ability to engage with the taxi and private hire trade as it would inhibit the free flow of information from these parties to TfL. This inhibition, it argues, would be particularly acute where it was discussing new and innovative services with the trade. It has emphasised its need to obtain the commercially sensitive information quickly in order that it can make timely assessments of whether new proposals for delivering private hire services comply with the relevant legislation.
20. TfL's arguments are therefore focussed more on the extent that disclosing the information will have on future regulatory activity rather than on its ability to gather information on UberPOOL prior to its launch.
21. The Commissioner recognises the logic in TfL's rationale for applying the exemption. Even if TfL had powers to compel an operator to provide it with information, it is likely to obtain higher quality information, and to obtain that information more quickly, where an operator is prepared to cooperate with the regulator. However the extent to which disclosing the information it gathered about the launch of UberPOOL would have on the trade's willingness to cooperate with TfL in the future will depend on how sensitive the withheld information was at the time of the request. If TfL only disclosed fairly neutral information then it is unlikely to have the chilling effect on future cooperation that TfL fears.

22. The sensitivity of the information is dependent on the information and the timing of the request. The request was made on 15 December 2015. From press reports available on the internet the Commissioner understands that UberPOOL was launched around the 4 December 2015, just over a week earlier. It was therefore made at a sensitive time in the life of the new service; a time when the service was under increased press and public scrutiny. The timing of the request also means that some of the information captured by the request had only very recently been shared with TfL and this itself could increase the sense of intrusion into its business practices felt by the operator if it was disclosed.
23. However the fact that the new service had already been launched at the time of the request also reduces some of the information's sensitivity. This is due to some of the sensitivity being concerned with confidentiality around specific issues to do with the launch, for example the timing of that launch. The need to protect such information would be significantly reduced once the service went live.
24. The Commissioner also recognises that the operator had an incentive to cooperate with TfL. As is clear from the press article referred to by the complainant in his request, concerns had been raised regarding the safety of passengers using the new service which allows passengers to share a ride with strangers and so reduce the cost of their journey. Clearly there is a commercial value in being seen to cooperate with TfL over such matters and a very real value in ensuring that the proposals are fully compliant with the regulatory framework and taking the opportunity to iron out any problems.
25. Nevertheless having viewed all the withheld information the Commissioner is satisfied that it records the process by which TfL challenged the operator on its approach to certain aspects of its new service as a means of gathering information the information it required and the provision of that information by the operator. This took place at an important time for the operator when preparations to launch its new service meant the operator was working in a demanding business environment. If discussions between the operator and TfL were disclosed while the operator was still managing the launch of UberPOOL it is reasonable to consider that the operator is likely to be more guarded when working with TfL in the future. It is also possible that disclosing the information could also signal to other operators that they could not rely on TfL to respect the commercial sensitivity of their information in the future. Therefore the Commissioner finds that disclosing the information would inhibit the trade sharing information with TfL and this would be likely to prejudice the TfL's functions in respect of ascertaining whether circumstances exist that may give rise to regulatory action. The exemption is engaged.

Public interest test

26. Section 31 is subject to the public interest test as set out in section 2 of the Act. This means that even though the exemption is engaged the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.
27. The complainant has argued that there is a value in the public as a whole understanding how safe it is for them to share rides with strangers when using the UberPOOL service and that this would be informed by having access to the information on the assurances provided to TfL by Uber. The Commissioner accepts the premise of the complainant's argument. However regard has to be had for the extent to which the actual information captured by the request addresses this specific issue. The news article referred to in the request quoted the TfL spokesperson as saying that assurances had been obtained on a number of issues. The withheld information reflects that and therefore not all of the information concerns the risks associated with sharing rides.
28. Having said that, some of the information does concern these potential risks. Having viewed the withheld information the Commissioner accepts that the disclosure of some of the information would raise awareness of the risks involved and the steps that passengers could take to minimise those risks. It would also inform the public in respect of how well prepared the drivers are to deal with such problems when they arise. However the Commissioner considers that many of the issues addressed in the withheld information would be readily apparent to any user of the service and that therefore the public would already be able to decide whether they felt comfortable using the service. This limits the weight that can be attributed to this factor in favour of disclosing the information.
29. The complainant also argues that there is a particular interest in Uber drivers having access to information on how Uber intended to manage risks relating to shared rides as he considers that ultimately it is the driver who has to bear any liability for that risk. The Commissioner recognises that there are a significant number of Uber drivers and therefore she accepts this argument represents more than a purely private interest.
30. In addition to these arguments in favour of disclosure the Commissioner finds that disclosing the withheld information would increase the public's understanding of how TfL performs its functions in respect to the regulation of the private hire care trade. This is particularly important when the operator involved is a large multinational business. It is

important that the public has confidence in TfL's ability to regulate the private hire industry.

31. The Commissioner is aware of press reports of at least one attack on a passenger by two other passengers who had booked a shared ride. In that incident the driver was also attacked when he tried to intervene. It should be noted however that this attack took place sometime after the request was made and after the service had been in operation for some months. Nevertheless it is indicative that at the time of the request, the concerns that existed regarding the risks of sharing a ride were not fanciful. Indeed TfL would not have been seeking assurances from Uber on how such risks were to be managed if it too did not recognise the potential risks.
32. Therefore there is a real value in disclosing information that would allow people to scrutinise what assurances TfL sought and the quality and level of detail of the assurances provided. The Commissioner notes that when responding to both the complainant and herself, TfL has emphasised the value in relying on the voluntary cooperation of those it regulates. Clearly there is a value in disclosing information that would reveal how effective such cooperation is and the relative strengths in the relationship between the regulator and a major private hire operator. The Commissioner gives some weight to this factor in favour of disclosure.
33. The collective weight of these factors in favour of disclosure now has to be balanced against the public interest in maintaining the exemption and withholding the information. The factors in favour of withholding the information relate to the extent and severity of the prejudice that disclosure would cause to TfL's regulatory functions.
34. Some of the correspondence from the operator clearly asks TfL to treat the information as confidential. To disclose information in the face of such an explicit request for confidentiality would normally have a very marked effect on not only Uber's willingness to volunteer information in the future, but other operators too. However the Commissioner notes that with the launch of the UberPOOL service some of the need for confidentiality would have lapsed. Commissioner would expect the operator to recognise the potential for information to lose its quality of confidence over time. However in this particular case the disclosure would have coincided with the period immediately following the launch of the service when the operator would have been trying to manage the publicity its new service was receiving. Therefore in the immediate aftermath of the launch the information could still have remained sensitive and its disclosure would have discouraged cooperation in the future.

35. This effect is not limited to Uber but could also be felt by other operators or parties regulated by TfL. However the impact would be most acute on Uber. TfL has advised the Commissioner that in 2017 Uber's operator's licence is up for renewal and the relicensing process would be more efficient if Uber were still content to provide information on a voluntary basis. Furthermore TfL has referred to new regulations being introduced, the application of which would benefit from having the cooperation of operators.
36. In light of the above the Commissioner is satisfied that disclosing this information would still have a marked impact on the willingness of operators and Uber in particular to continue to share information with TfL on a voluntary basis. If TfL was unable to maintain the cooperation of those it regulates the whole regulatory system would become more bureaucratic and costly. This would not serve the public interest.
37. TfL has also emphasised the value in voluntary cooperation when dealing with introduction of new and innovative means of providing private hire services. In such circumstances voluntary cooperation allows TfL to gather the information it needs as swiftly as possible so that it can make timely assessments of any compliance issues. It also encourages an operator to share information at a sufficiently early stage in the development of a new service so that any potential problems are avoided. In such situations TfL will often require information when it is at its most commercially sensitive. The Commissioner is satisfied that if this willingness to share information with TfL was interrupted the effective regulation of private hire car services would be significantly prejudiced.
38. The Commissioner finds that the public interest in favour of maintaining the exemption does outweigh the public interest in favour of disclosure. TfL are therefore entitled to rely on section 31 to withhold the thirteen pieces of information. As the Commissioner has found that all the information can be withheld under section 31 she will not go on to consider TfL's application of section 41 – information provided in confidence.

Section 1 – Disclosure of the fourteenth piece of information

39. Section 1 of FOIA requires a public authority to communicate the information it holds falling within the scope of the request, subject, of course, to the application of any exemptions.
40. As TfL is no longer applying any exemption to the fourteenth piece of information it is obliged to disclose this document. TfL has signalled that it is prepared to do so. In the event that it has not already done so, the

Reference: FS50641222



Commissioner requires TfL to now disclose the fourteenth piece of information.

Right of appeal

41. 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

42. 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.

43. 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 Mehan
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