

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 October 2019

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 the Department for Transport (DfT) to disclose the correspondence it holds relating to Crossrail Ltd between, Mr Chris Grayling, and Ms Bernadette Kelly and Transport for London (TfL) between 1 February 2018 and 1 November 2018. The DfT advised the complainant that it does not hold any recorded information of the nature specified between the Secretary of State and TfL. It confirmed that it does hold correspondence between Ms Kelly and TfL. The DfT released some of this information to the complainant but withheld the remainder, citing sections 40, 41 and 43 of the FOIA.
2. The Commissioner's decision is that the DfT is entitled to rely on sections 40, 41 and 43 of the FOIA in this case. She therefore does not require any further action to be taken.

Request and response

3. On 8 November 2018, the complainant wrote to the DfT and requested information in the following terms:

"Please may I request, under the freedom of information act, details of correspondence [about Crossrail Ltd] between, Mr Chris Grayling, and Ms Bernadette Kelly and Transport for London between 01 February 2018 and 01 November 2018."

4. The DfT responded on 12 December 2018. It stated that there was no correspondence regarding Crossrail Ltd between the Secretary of State and Transport for London (TfL) between the dates specified. However, it does hold correspondence about Crossrail Ltd between Ms Kelly and TfL. It disclosed some of this information but withheld the remainder, citing sections 40, 41 and 43 of the FOIA.
5. The complainant requested an internal review on 12 December 2018.
6. The DfT carried out an internal review and notified the complainant of its findings on 11 January 2019. It upheld the initial handling of the request.

Scope of the case

7. The complainant contacted the Commissioner on 11 January 2019 to complain about the way his request for information had been handled.
8. The complainant confirmed at the outset of the Commissioner's investigation that he requires the Commissioner to consider the application of section 41 and 43 of the FOIA. He made no complaint about the application of section 40 of the FOIA to the third party personal data redacted from the disclosures he received. The complainant also confirmed that he would like the Commissioner to consider the DfT's response that it does not hold any correspondence regarding Crossrail Ltd between the Secretary of State and TfL.
9. The above matters have therefore been the focus of the Commissioner's investigation. During the investigation, TfL confirmed that it would like to rely on section 40 of the FOIA, in addition to section 43, for the non-disclosure of the remuneration of the TfL nominated directors. Although the complainant confirmed that he had no complaint about the application of section 40, the Commissioner understands that this was only in relation to the redaction of third party names and contact details in the disclosures made. She will therefore proceed to consider the application section 40 in relation to the remuneration of the TfL nominated directors.

Reasons for decision

Does DfT hold any correspondence relating to Crossrail Ltd between the Secretary of State and TfL?

10. The Commissioner asked the DfT to explain in detail exactly what searches had been undertaken to determine whether or not information relating to this element of the complainant's request is held.
11. The DfT explained that the request was discussed with the Secretary of State's private secretaries who were initially asked to search for the information. It stated that the Secretary of State's office confirmed that all correspondence would have been logged on the DfT's correspondence system, called Chapter.
12. It confirmed that a member of staff from the DfT's Crossrail Sponsorship Team conducted a thorough search of all correspondence that has been sent to or from the Secretary of State and TfL in the time frame of the request. It argued that this approach was deemed reasonable in the circumstances as the DfT had covered all locations where this correspondence may have been saved or filed.
13. As a result of these searches it was concluded that no correspondence had been sent between the Secretary of State and TfL in the timeframe of the request. It argued that this approach was deemed reasonable in the circumstances as the DfT had covered all locations where this correspondence may have been saved or filed.
14. The Commissioner is satisfied that the DfT has carried out appropriate searches of the locations where this information would be held if it was. Without any evidence to the contrary, the Commissioner is satisfied that on the balance of probabilities no correspondence between the Secretary of State and TfL relating to Crossrail Ltd between the dates specified in the request is held.

Section 40 – third party personal data

15. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

16. In this case the relevant condition is contained in section 40(3A)(a)1. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

19. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
22. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
23. The DfT has confirmed that the withheld information is the exact salary for the TfL nominated directors referred to in the email communication. The salaries are individually negotiated and therefore vary from one director to the next. The Commissioner is satisfied that the information relates to the TfL nominated directors referred to in the email communication. It is information that both relates to and identifies the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

24. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. Article 5(1)(a) of the GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

27. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

29. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.

30. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”².

² Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

31. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
 - Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

32. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
33. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. The DfT confirmed that it recognised the legitimate interests in the disclosure of the remuneration of senior officials engaged in a public capacity on a large infrastructure project for the purposes of scrutinising its proportionality. It stated that it also recognised that information of this nature is regularly made available by government in a proactive way, particularly when the level of remuneration passes a set threshold. For example, it stated that the salaries of Crossrail Ltd executives

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

earning over £150,000 are published annually in the [TfL's Annual Report](#). However, it stated that this is rarely the case for remuneration that is open to negotiation.

35. The Commissioner agrees that there is a legitimate interest in knowing what senior officials are being paid, particularly in relation to large, costly schemes such as this.

Is disclosure necessary?

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
37. The DfT has said that it does not consider disclosure is necessary in this case. It referred to the email communication in question and the information that has been disclosed to the complainant. It confirmed that this indicates the range of remuneration received by the TfL Board members and the email clearly states that there is little disparity between those figures and the remuneration being paid to the TfL non-executive directors in question. Therefore DfT considers disclosure is not necessary as the emails that have been disclosed already give an indication of the remuneration and it is not necessary to provide the specific amount. It argued that the legitimate interests have already been met as a result of this.
38. The Commissioner would agree with the DfT's position. The entire email has been disclosed except the exact salaries offered. The email confirms the remuneration range for this role so the complainant and the world at large has a clear idea of the level of remuneration that will be offered for this position. Where an individual actually sits within the range is individually negotiated and will vary. The Commissioner agrees that the disclosure of the range (range being £4000 between minimum and maximum) provides the necessary accountability and transparency. It confirms within a sort range what they will earn and this enables the public to scrutinise the salary level against the role the individual will undertake. The legitimate interests have therefore been met.
39. What has already been disclosed is also in line with the Commissioner's general approach and guidance on the salaries of staff. Generally speaking the Commissioner would consider the disclosure of salary bands to be fair and proportionate.

40. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
41. The Commissioner has therefore decided that the DfT was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 43 – commercial interests

42. This exemption has been applied to all remaining withheld information except what the DfT refers to as pages 1 – 2 of the withheld information bundle presented to the Commissioner on 20 August 2019 and emails concerning the position of the Crossrail Ltd Chair. This part of the withheld information is subject to the DfT's application of section 41 and will be considered later on in this notice.
43. Section 43 of the FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of the public authority or a third party. It is a qualified exemption. It is therefore also subject to the public interest test.
44. The DfT argued that the withheld information would be likely to prejudice the commercial interests of Crossrail Ltd. Due to the contents of the withheld information it is not possible to say in the main body of this notice (which is served to the complainant and also placed on the Commissioner's website) why the DfT are of that view.
45. For the same reason, it is also not possible to explain in any detail what the Commissioner's decision is other than she is satisfied that disclosure would be likely to prejudice the commercial interests of Crossrail Ltd and so the exemption is engaged.
46. The DfT's arguments and the Commissioner's analysis are contained in a confidential annex, which can only be served to the DfT for obvious reasons.
47. In terms of the public interest test, again it is not possible to detail the arguments presented for and against disclosure or why the Commissioner has reached her decision. It can only be said in the main body of the notice that the Commissioner is satisfied that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Section 41 – information provided in confidence

48. Section 41 states that information is exempt from disclosure if –
- (a) 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.

Was the information obtained from any other person?

49. The DfT advised that although some of the emails are technically *from* the DfT, they contain information obtained by the DfT (in particular Ms Kelly) via private oral conversations from two non-executive directors of the Crossrail Board. They all stem directly from, and as a consequence, are reflective of those private discussions between Ms Kelly and two non-executive directors. It argued that the emails form part of a continuous conversation and all originally stem from information obtain by Ms Kelly from the two non-executive directors who are external third parties.
50. The DfT referred to the Commissioner's guidance on section 41 which can be accessed via the following link and advised that this approach is in line with that guidance (in particular paragraph 13):
- <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>
51. The Commissioner has reviewed the contents of the relevant emails in question and she is satisfied that the information was obtained by the DfT from external third parties (two non-executive directors of Crossrail Ltd) and therefore this element is met. The emails either document the specific information obtained from the external parties or refer to it and discuss it in such a way that such references and discussions are very specific to the information it received. Disclosure of any elements of the withheld information which could be argued to have been created by the DfT would reveal the content of the information it obtained from the external third parties. The Commissioner's guidance (specifically paragraph 15) highlights that material fitting this description will be covered by the exemption.

Would disclosure constitute an actionable claim for breach of confidence?

52. 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.

However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the 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?

53. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible. The DfT argued that the emails contain sensitive material and therefore by its very nature it has the necessary quality of confidence. It is not trivial as it relates to personal matters and personal reputations could be at stake and the contents are not otherwise accessible. The emails document and reference the private conversations that took place between Ms Kelly and the non executive directors; what was discussed and what information was provided to Ms Kelly is not more widely known.
54. The Commissioner is satisfied that the withheld information is not trivial and otherwise more widely known. It therefore has the necessary quality of confidence.

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

55. The DfT commented that the information was obtained from third parties through private oral discussions. The third parties involved would not have expected the information they supplied orally to be included in email correspondence and/or made public. It therefore considers the obligation of confidence is implicit from the circumstances. It stated that this is particularly the case given the sensitive nature of the information discussed relating to private individuals and personal opinions. The DfT believes the third parties would hold a reasonable expectation of confidence.

56. The Commissioner is satisfied that the information was imparted in circumstances giving rise to an obligation of confidence. Given the contents of the withheld information, the fact that it records discussions relating to private individuals and personal opinions, it is reasonable to say that the third parties involved will have expected the information they shared to be treated as confidential and certainly not for public disclosure.

Would disclosure be detrimental to the confider?

57. The DfT said that the information was obtained from external third parties and they would not have expected that the information they shared may be included in email correspondence and/or made public. They were private discussions relating to the functioning of Crossrail Ltd and quote the personal opinions of at least one of those third parties. It argued that disclosure would be likely to compromise that individual professionally and potentially damage the reputations of the individuals concerned. Is it therefore very likely that disclosure would cause personal detriment to the confider(s).
58. Again the Commissioner is satisfied that the withheld information references private oral discussions held between Ms Kelly and two non executive directors. The withheld information documents the personal opinions of those involved and the Commissioner is satisfied that disclosure could cause personal detriment to the confider(s) and those referenced. It would also constitute an invasion of privacy.
59. Although section 41 is an absolute exemption and is not subject to the consideration of the public interest test under the FOIA, there exists a recognised defence to an actionable breach of confidence if there is an overriding public interest in the information being disclosed. The Commissioner has therefore gone on to consider this below.

Is there a public interest defence for disclosure?

60. The DfT confirmed that it has considered whether there is a public interest defence to disclosure of these emails, in particular at whether disclosure would further public understanding of the management of the Crossrail project and/or facilitate accountability and transparency about the spending of public money.
61. With regards to the arguments in favour of maintaining the confidence, the DfT considered the significant negative impact disclosure would be likely to have on the interests of the confider(s). Disclosure would also undoubtedly undermine the principle of confidentiality and the trust held between the the DfT and the non executive directors, one of which is still a member of the Crossrail Board. It stated that the DfT's

sponsorship of the Crossrail project relies on trust held between the DfT and members of the Crossrail Board to ensure sensitive information can be shared between parties. It confirmed that it is in the public interest that the DfT is able to successfully carry out its role as a sponsor of the Crossrail project and disclosure would make it more difficult for the DfT to carry out its functions in this role effectively.

62. Turning to the arguments in favour of disclosure, it confirmed that it recognises the significant degree of public interest around the management of the Crossrail project, given recent media headlines. It also recognises that the public has a right to be kept informed as to how major infrastructure projects are managed. However, the DfT considers that it has provided full transparency regarding the management of the project – the [Crossrail website](#) details the membership of the Crossrail Board, including the Chair and Deputy Chair, and TfL publish both [Crossrail Sponsor Board minutes](#) and [Crossrail Limited's Board minutes](#) on a monthly basis. It said that the new Crossrail Board and Executive have made a number of public commitments to transparency including making regular public statements on the progress of the project. It therefore considers the withheld information would not add materially to the public's understanding of the project if information already in the public domain is digested.
63. The DfT confirmed that it considers the factors for disclosure are significantly outweighed by the factors for maintaining the exemption. It does not consider there is a strong public interest defence that would override the duty of confidence.
64. The Commissioner considers that some weight must be afforded to the public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny. Disclosure would further public understanding of the Crossrail project and its management, which the Commissioner considers carries some importance considering the reported delays and public funding issues there has been with the project.
65. However, the contents of the withheld information relate to private oral discussions between Ms Kelly and two non executive directors of Crossrail Ltd relating to the management of Crossrail. It contains the personal opinions of those individuals and the Commissioner is of the opinion that such information affords similar protection to cases where the private interests of the confider are being considered. There would have to be significant public interest factors (in addition to those outlined above) to override the public interest in maintaining the duty of confidence that is owed in this case. For example evidence of misconduct, illegality, maladministration or negligence. But there has been no such evidence in this case.

66. In this case the Commissioner considers the public interest in preserving the principle of confidentiality and the impact disclosure would have on the confider(s) carries more weight. She is therefore satisfied that the information has been correctly withheld under section 41 of the FOIA.

Right of appeal

67. 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

68. 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.
69. 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

Samantha Coward
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