

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2023

Public Authority: Transport for London
Address: 5 Endeavour Square
London
E20 1JN

Decision (including any steps ordered)

1. The complainant has requested from Transport for London (TfL) information about employee reasonable adjustments. TfL initially applied section 40(2) of FOIA (personal information) to withhold the information. However, during the course of the Commissioner's investigation, TfL revised its position and denied holding any information within the scope of the request.
2. The Commissioner's decision is that, on the balance of probabilities, it is unlikely that TfL holds any information within the scope of the request.
3. The Commissioner does not require any steps to be taken as a result of this decision.

Request and response

4. On 24 July 2023, the complainant wrote to TfL referring to its response to his previous request for information (dated 18 January 2022), in which it confirmed that it had verbally agreed reasonable adjustments (reduced hours) in relation to two members of staff in the HR department. The complainant requested information of the following description:

"How long did those adjustments last till they went back to working full time?"

5. On 26 July 2023, TfL responded to the request. It denied holding the requested information but simultaneously cited section 40(2) to withhold the information. It said that the individuals concerned would have a reasonable expectation that the information would not be disclosed and that it would be unfair to do so.
6. On 2 August 2023, the complainant wrote to TfL and said he would like to appeal its decision.
7. On 11 August 2023, TfL carried out a review of the request and wrote to the complainant upholding its original decision. TfL said that to answer the request would result in disclosure of personal data. It said the information relates to reasonable adjustments put in place for a small number of employees in the HR team. If it were to be disclosed there is a 'very real risk' the individuals concerned could be identified (by colleagues) and this would be unfair. It said that there is a presumption of confidentiality concerning 'employment and health information'.

Scope of the case

8. On 11 August 2023, the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner's investigation initially set out to determine whether or not TfL was entitled to rely on section 40(2) to withhold the requested information. However, during the course of the Commissioner's investigation, TfL revised its position and denied holding any information within the scope of the request.
10. The Commissioner has considered whether TfL is correct when it says it does not hold any information within the scope of the request.

Reasons for decision

11. Section 1(1) of FOIA states 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.”
12. When a public authority receives a request for information it has two obligations under section 1(1) of FOIA. Firstly it must explicitly confirm or deny whether it holds the information in question. Secondly, if it does hold that information, it must either provide a copy to the requester or issue a refusal notice. If it receives a request that contains multiple elements, its response must be clear about which information it holds and which it does not.
 13. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
 14. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

The complainant's position

15. The complainant said that he does not understand how TfL cannot answer the request relating to temporary adjustments made in 2021.
16. The complainant believes TfL does not wish to disclose the information even though in response to his previous request it had confirmed / disclosed that the reasonable adjustments (relating to working hours) were made concerning two members of staff in the HR department. If TfL does not wish to disclose the duration of the adjustments on the basis that the individuals concerned could be identified from this information, then it should have taken a similar position in response to his previous request and not disclosed that the adjustments were made and in relation to two individuals in the HR team.

TfL's position

17. TfL said that the information is not held because agreement about the reasonable adjustments were made verbally between managers and

staff. Because of this it does not hold any recorded information about the adjustments (including the length of adjustments).

18. TfL explained that upon receipt of the complainant's previous request (18 January 2022) the FOI case officer was advised by its 'HR Business Partner' that whilst there was no information about the adjustments held on its central recording system, information about such temporary adjustments may have only been held at local level between individual managers and staff.
19. TfL confirmed that it made enquiries with the relevant managers, who said that through discussions via email at the time, informal verbal agreements (concerning adjustments) were made in respect of two individuals. A review of emails between individuals managers and staff had not been carried out at the time of it responding to the request but formed part of its later enquiries with managers. It ascertained that the initial answer (setting out that adjustments were made in respect of two individuals) was not actually information that was held by TfL at the time of the request, but came from enquiries with the manager based on knowledge they had at the time of the request.
20. TfL said that whilst its HR business partner's intention was to be helpful, in providing an answer based on information that is 'known' but not 'held', they provided an incorrect impression to the FOI case officer and a wrongful belief that the information was held. It said that in an attempt to minimise disruption to its 'limited and specialist functions', the approach it took through the appeals process focused on the principle of the argument that disclosure of the information regarding adjustments for two specific individuals relating to health conditions would be unfair.
21. TfL said "whilst we maintain that the principled position we took was appropriate in the context of the belief that information was held, we obviously accept that the response provided to [redacted] was incorrect and he should have been advised from the outset that the information he sought was not recorded information held by TfL". It said that 'this miscommunication' had resulted in an incorrect response to the complainant's request and said it will introduce additional steps within its processes and remind staff of the need to focus its responses only on information held by TfL at the time of the request to ensure compliance with FOIA.

The Commissioner's view

22. The Commissioner notes that the requested information relates to agreements that were made verbally concerning temporary reasonable

adjustments and therefore it's unlikely that this information would be held in recorded form.

23. The Commissioner also notes that, in its response to the complainant's previous request, TfL said that "for two members of staff a verbal agreement was made for a reasonable adjustment". He also notes that it provided the complainant with similar rationale as to why the information is not held, e.g., the information is not held on its central reporting system and may only be held at local level by individual managers. It had also made enquiries with managers / staff and no recorded information was found to be held, only knowledge that verbal agreements were made.
24. The Commissioner notes the enquiries / searches (with the HR business partner of its central recording system and individual managers of emails) conducted by TfL during the course of his investigation, and is satisfied that they would identify any relevant information within the scope of the request. He also notes TfL's explanation that its confirmation that reasonable adjustments were made in respect of two individuals was based on enquiries made with and knowledge of the relevant managers at the time of the request, and not recorded information that was held.
25. The Commissioner acknowledges TfL's position that its business partner's intention was to be helpful, but ultimately provided an answer based on what is 'known' and not recorded information held. He is however concerned that the FOI case officer then took the approach to focus on the principle that disclosing information about adjustments relating to health conditions would be unfair, rather than determine whether the requested information is actually held in the first instance and thereafter until the Commissioner had asked twice for searches to be conducted. He is also concerned that TfL said it maintains this position but accepts that the response is incorrect.
26. The Commissioner acknowledges that the complainant says he cannot understand how TfL cannot answer the question. The Commissioner is disappointed that TfL did not take the opportunity during its initial response, internal review or indeed during the initial stages of his investigation to carry out the required searches for the information and deny holding the information at these earlier stages. The complainant could have also been directed to TfL's previous response and explained that under section 1(1) of FOIA no recorded information about the verbal agreements is held and it is not required to create any information to respond to the request. Had this action been taken the complainant would have been provided with the necessary rationale, which, could possibly have prevented the matter being escalated.

27. The Commissioner would like to remind TfL that, in line with its obligation under section 1(1) of FOIA, when a request for information is received, it is first required to identify whether any information within the scope of the request is held before applying an exemption to withhold the information / refuse the request. He however acknowledges that a failure to take such action is not evidence that requested information is held by TfL in this case.
28. The Commissioner also notes TfL's response to the complainant's previous request and that it did in fact confirm and disclose to him that reasonable adjustments were made in relation to two individuals in the HR department. He is concerned that TfL would disclose this information and then retrospectively argue that information relating to a small number of individuals could be used to identify them and this would be unfair. It maintained this position with the Commissioner until no information within the scope of the request was found to be held. He does not however consider that this is evidence that requested information is held by TfL.
29. It is the Commissioner's view that the initial response was provided on the basis of knowledge of the adjustments but not actual recorded information that was searched for and found to be held, and taking into consideration the further enquiries now made by TfL with the managers concerned, on the balance of probabilities, it is unlikely that TfL holds information within the scope of the request. The Commissioner does not require TfL to take any further steps in this case.

Right of appeal

30. 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

31. 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.
32. 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

**Pamela Clements
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