

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2024

Public Authority: London North Eastern Railway Ltd
Address: West Offices
Station Rise
York
YO1 6GA

Decision (including any steps ordered)

1. The complainant has requested information about train designs. The above public authority ("the public authority") initially provided some information before relying on section 14(1) of FOIA (vexatious) to refuse the request.
2. The Commissioner's decision is that the request was not vexatious.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response, to the request, that does not rely on section 14(1) of FOIA.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. 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 6 February 2024, the complainant wrote to the public authority and, referring to a [recent press release](#) it had issued, requested a series of information about the process and costs of decorating a train in Pride colours. She also asked about the processes for selecting train designs more generally and about plans for future designs.

6. The public authority responded on 8 April 2024. It provided some general information about its decision, but stated that it did not hold most of the specific information the complainant had requested.
7. The complainant sought an internal review 12 April 2024. She contested the amount of information that the public authority held. She argued that a significant sum of money had been spent and it was therefore odd that there appeared to be no paper trail explaining how the decision had been made. She also argued that, as part of its duty to provide advice and assistance, if the public authority was aware that the requested information was held by others, it should have directed her to where it could be found. Following an internal review the public authority wrote to the complainant on 9 May 2024. It now refused the request as vexatious, setting out a detailed justification for this decision.

Reasons for decision

8. Section 14 allows a public authority to refuse a request it considers to be vexatious. A vexatious request is one that would require a disproportionate effort to respond to, one without reasonable foundation or one which is an abuse of the process. The [Commissioner's decision notice support materials page](#) contains more on the relevant case law.

The public authority's position

9. At the outset of his investigation the Commissioner wrote to the public authority noting that it had set out, at some length, in its internal review, why the request was vexatious. He explained to the public authority that it was not necessary to repeat what it had already said, but that, if there was anything it wished to add, it should do so promptly. The public authority acknowledged this correspondence and said that it was happy to facilitate a phone conversation if the Commissioner wished to understand its position in more detail.
10. The Commissioner is satisfied that the public authority has had an opportunity to provide additional submissions, so he has taken the public authority's final position to be that set out in its internal review. That position is set out below.
11. The public authority stated that the complainant's social media posts "have demonstrated views that indicate a bias against transgender individuals." It stated that, if it were to comply with the request it could lead to "harmful discourse and cause distress to our transgender employees and the people that the Pride train represents."

12. The complainant's social media posts, indicated, the public authority argued, that her "focused questions on binary sex divisions and the specific targeting of a Pride-themed train...indicates a shift toward a disruptive agenda rather than an informational one."
13. The public authority drew attention to one tweet the complainant had published prior to making her request and three tweets published after. It stated that these tweets "consistently" focus on issues related to transgender individuals. It stated that the focus on these topic:

"coupled with the use of transphobic language and alignment with anti-trans figures, suggests a potential motive beyond simply seeking information. It indicates a possible intent to challenge or disrupt initiatives related to transgender inclusion and to promote a binary view of sex and gender.

"The language and views expressed in the tweets align with broader societal discourse that seeks to marginalise and invalidate transgender identities. This type of rhetoric can have a significant negative consequences for all transgender individuals contributing to a hostile and discriminatory environment. Studies have shown that exposure to transphobic language and attitudes can lead to increased anxiety, depression and even suicidal ideation among transgender people. Furthermore it can create a climate of fear and insecurity, potentially impacting their ability to full participate in the workplace and society...engaging with requests that perpetuate harmful stereotypes and contribute to a hostile environment would directly contradict that."

14. The public authority suggested that the complainant's tone suggested that continued engagement with her could become "unnecessarily burdensome", that her motivation was "disrupting or challenging transgender inclusion" and that, whilst her tweets might not currently harass or distress staff, they had the potential to "contribute to harmful discourse and distress."

The complainant's position

15. The complainant argued that the public authority's position was offensive, unfair and a misrepresentation of her actual views.
16. The complainant accepted that she had a binary view of sex, but she argued that this was a protected belief – as determined by the Employment Appeal Tribunal in the [Forstater case](#). The public authority had therefore, in her view, unlawfully discriminated against her because it had refused to provide information, that she would otherwise have been entitled to receive, due to her beliefs.

17. She was unhappy that the public authority had conducted a trawl of her social media postings before completing its review. She argued that it was unfair for the public authority to restrict her right to access information simply because she had used her social media accounts to promote her own beliefs – beliefs which she is entitled to hold. More generally she considered it unreasonably restrictive for a public authority to grant or withhold information based on its opinion of the requester's social media postings. Nor was it reasonable for the public authority to expect her to shift her entire system of beliefs in order to access information.
18. The complainant also noted that the public authority had failed to consider whether there was a serious purpose to her request.
19. The public authority's original [press release](#) had highlighted its "commitment to diversity, equality and inclusion initiatives for colleagues, customers and communities throughout the year." There was, she argued, a public interest in understanding why the public authority had chosen this particular cause ahead of other worthy causes, what the decision-making process was and what plans it had to celebrate other causes in future.
20. The complainant was concerned that the information the public authority originally provided in response to her request did not indicate that it had any plans to replicate its Pride livery for any other cause – despite, in her view, there being many causes of equal or higher worth that could also have been chosen.

The Commissioner's view

21. In the Commissioner's view, the public authority has failed to meet the high hurdle to show that this request is vexatious.
22. Before beginning his analysis, there are two preliminary points for the Commissioner to deal with.
23. Firstly, the public authority is entitled to take a holistic view of the request. That means placing the request in context and looking at it against a backdrop of the requester's interactions with that public authority and with others. Whilst the Commissioner would not recommend that public authorities routinely trawl the accounts of requesters, there is nothing in principle to prevent them from using social media postings as evidence that a request is vexatious.
24. However, social media postings will only be relevant to the extent they shed light on the requester's motivation for making that particular request, any serious purpose they may have had in making it, or any evidence they have previously, or would, harass the public authority's

employees. Social media content should not merely be used to impugn the requester's character.

25. Secondly, the question of vexatiousness does not turn on what the complainant's beliefs are, or are not. Nor whether she is, or is not, entitled to those beliefs. The question is whether the request had a serious purpose and value and, if it did, whether that was outweighed by any improper motivation in making the request, any burden complying with the request was likely to cause and whether the complainant had or was likely to engage in the harassment of the public authority's staff.
26. Viewed objectively, the request has a serious purpose and the requested information would be of public value. The request seeks to understand why the public authority decided to decorate a train with the colours of the Pride flag, the costs of doing so, the decision-making process behind it and the opportunities to propose similar schemes in the future.
27. The information the public authority disclosed to the complainant in its original response to this request indicated that its approach to this process was fairly unstructured. It described itself as taking a "dynamic" approach stated that it "did not employ a decision matrix" for determining livery designs but instead its selections were "guided by what is timely and relevant to the communities we serve." It aimed to create liveries that were "not just visually striking, but culturally and socially resonant."
28. The Commissioner wishes to note that the public authority is entirely within its rights to decorate its trains in any way it wishes. The design it chose is likely to have been welcomed by a significant portion of its staff, its customers and wider society.
29. However, just because a public authority has the power to make a particular decision doesn't mean that the process it follows to make that decision should be beyond question. The public may well wish to know how a train operator determines whether a particular design is "culturally or socially resonant." The communities the public authority serves may want to contribute their own ideas of the designs they consider "timely and relevant" and may wish to know how to do so.
30. The public authority has highlighted a particular tweet the complainant published a few hours before making her request. This tweet, sent in response to the public authority's press release outlining its decision, quoted some of the press release and then went on to say:

"DIVERSE? But only LGBRQ [sic] etc? Wot [sic] – No LNER staff ID as carer? Disabled? Cancer Survivor?"

31. This tweet juxtaposes a decision to support the Pride flag with a decision not to celebrate other causes and this goes to the heart of the debate about what the complainant's motivation was in making her request.
32. There are a number of worthy causes out there deserving of celebration. The complainant, for example, argued that she would like to see designs celebrating the contribution of women to society – particularly in engineering – the role of cancer survivors or the contributions of people with disabilities. The public authority may well have its own reasons why it did not choose to celebrate these causes at this time, but others may wish to challenge those decisions in future.
33. In respect of the other tweets the public authority has highlighted, the Commissioner notes that all of them were published after the request was made. The public authority argues that this shows the complainant "consistently" focus on transgender people, but the evidence does not support this. No tweets have been shown to the Commissioner that would indicate that this was a particular focus for the complainant prior to making her request. Nor is it clear that the three tweets selected are a fair representative of the entire period they covered. They may be the only tweets she published, or they may be three out of dozens.
34. The Commissioner is mindful that the complainant's tweets may be interpreted or seen as offensive by many people. They were not, however, directed at the public authority, or any of its individual staff.
35. The public authority has accepted that the complainant has not targeted any individual member of staff, but argues that the tweets contribute to a general hostile environment that could lead to some of its staff feeling distressed.
36. Where there is no direct threat to its own staff, a public authority cannot remove a person's right to seek recorded information, simply because it does not like some of the opinions they may publish online.
37. To the extent that the request was motivated by a belief that the public authority should not have decorated a train using the Pride flag at all, or should have celebrated other causes first, or should have plans to celebrate causes other than Pride in future, these are reasonable motivations for requesting information. The public authority may find it inconvenient or uncomfortable to have to justify its decision, but this does not make such requests disruptive.
38. The requested has a serious purpose and the information is of public value. The complainant's motivation may well have a grounding in her beliefs, but the public authority has not demonstrated that she has made the request just to be disruptive, or just to target individual

members of staff. Nor has it demonstrated that it would be subject to an unjustified burden if it were to respond to the present request.

39. The Commissioner is therefore satisfied that the request was not vexatious and the public authority must now issue a fresh response.

Right of appeal

40. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

41. 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.
42. 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

Roger Cawthorne
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