

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 September 2018

Public Authority: Translink

Address: FOI@Translink.co.uk

Decision (including any steps ordered)

1. The complainant requested various items of information in respect of Translink's spending on its bus and train week campaign for 2017. Translink provided some information but withheld the amount of money paid to one media organisation and two named celebrities by virtue of section 43(2) of the FOIA. It disclosed further information during the course of the Commissioner's investigation and informed the Commissioner that it was also relying on section 40(2) in respect of the two named individuals. The Commissioner's decision is that Translink was entitled to rely on section 43 of the FOIA in respect of the remaining withheld information. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 12 June 2017, the complainant wrote to Translink and requested the following information in respect of its spending on its most recent 'bus and train week' campaign:
 1. *The overall cost of the campaign.*
 2. *A full itemised breakdown of the costs involved.*
 3. *Within this breakdown, I would specifically like details of the following:*

- *The amount paid to UTV presenter Frank Mitchell...*
- *The amount paid to Cool FM's Rebecca McKinney...*
- *The amount paid to U105, and the amount paid to Cool FM*
- *The names and amount paid to any other sportspeople or celebrities...*
- *The amount paid to each model agency used (e.g. spending on ACA Models)*
- *The number of promotional packs sent out, and the overall amount spent on these*

(The packs included a flag, phone charge, cooler bag, cap, journal, calculator, etc...

If it is not possible to provide an entire itemised spending breakdown within the time and cost constraints of the FOI Act, please limit this to the amount paid to Frank Mitchell; Rebecca McKinney; U105; and Cool FM."

3. Translink responded on 7 July 2017. It provided information in respect of item 1, confirmed that no other sportspeople or celebrities took part, gave details of the number of promotional packs sent out, however, withheld the remaining information by virtue of section 43(2) of the FOIA.
4. Following an internal review Translink wrote to the complainant on 8 August 2017. It informed the complainant that it was upholding its original decision to refuse the withheld information by virtue of section 43(2) FOIA. It did however provide other information including details of all media outlets that benefited or took part in the advertising for the campaign and provided the overall cost of the promotional packs.

Scope of the case

5. The complainant contacted the Commissioner on 14 August 2017 to complain about the way his request for information had been handled. He was not satisfied with Translink's reliance on section 43 of the FOIA and informed the Commissioner that many public bodies across the UK have openly disclosed the amount paid to celebrities for their services, including celebrities paid to switch on Christmas lights.
6. During the course of the Commissioner's investigation, Translink provided information to the complainant in respect of the amount paid

to U105 and the amount paid to each model agency, therefore these are not within the scope of this notice. It also altered its position in respect of the information in relation to Frank Mitchell and Rebecca McKinney citing section 40(2) of the FOIA in addition to section 43.

7. The scope of the Commissioner's investigation is therefore to consider whether Translink were correct to rely on section 43(2) of the FOIA in respect of one media outlet and two named celebrities.

Reasons for decision

Section 43 – prejudice to commercial interests

8. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
9. In order for a prejudice based exemption such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
10. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case the withheld information relates to the amounts paid to two named celebrities, and

Cool FM in respect of Translink's bus and train week marketing campaign for 2017. The Commissioner is satisfied that the information relates to the purchase and sale of services and is therefore commercial.

11. Translink considers that disclosure would be likely to harm not only its own commercial interests, but those of the named third parties.
12. When a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, the Commissioner expects that arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.
13. In terms of the commercial interests of Cool FM, Translink has argued that if the figure was disclosed, this would have the potential to limit the ability of the company to negotiate an elevated commercial rate with other parties appraised of the rates agreed with Translink.
14. It has further argued that disclosure would make Cool FM vulnerable to its competitors as they would be able to undercut it for similar commissions, whereas Cool FM would have no such advantage over its competitors. It has added that there is a relatively small pool of media outlets that can be drawn on for the purposes of this sort of promotional activity in Northern Ireland.
15. The Commissioner notes that Translink considers that disclosure of the figure paid to the two presenters would present an even greater risk or likelihood of prejudice to their commercial interests. It has further stated that they work on a freelance basis and disclosure of their negotiated rates would undoubtedly be likely to prejudice them in terms of placing them at a commercial disadvantage in negotiation of a fee for a comparable service in the future.
16. It also considers that should these figures be disclosed, that it would clearly open opportunities for rival presenters to undercut those rates in any future negotiations for similar work either with Translink or other organisations.
17. It has added that there would be a harmful imbalance whereby a rival presenter would know what both individuals had charged for their services, whilst these individuals would have no counter information which they could use to inform their negotiating strategy against a rival. It has further stated that there is a relatively small pool of presenters

that can be drawn on for the purposes of this sort of promotional activity in Northern Ireland

18. The Commissioner notes that Translink has provided some background information, confirming that as part of its campaign strategy, it engaged a named dedicated PR agency to deliver elements of the wider campaign. As part of its engagement, the PR agency worked on behalf of Translink to secure competitive rates with suppliers of promotional activities, and that it negotiated the rates paid to the named third parties.
19. Translink approached the PR agency directly in respect of the withheld information, which stated:
20. *"...it would be our understanding that any paid partnerships secured ...would be treated as commercially sensitive...we work on your behalf to secure competitive rates ...and we have a duty of care to protect their privacy. With regard to Frank Mitchell and Rebecca McKinney, verbal conversations with both parties in advance of their work with Translink took place where assurances were given that their rates would be considered confidential."*
21. The agency also contacted the two individuals and Translink has provided emails from both individuals stating that it was their expectation that their rate of pay would not be made public.
22. Translink has also argued that disclosure of the withheld information would be likely to prejudice its own commercial interests on the basis that it has the potential to restrict its ability to negotiate more favourable rates for comparable services with other commercial persons. It considers that disclosure would have detrimental consequences in terms of its reputation and how it conducts its commercial interests with not only the specified third parties, but also with other individuals and companies. As a result, it considers that it would find it difficult to engage with, and secure the services of relevant third parties in the future.
23. It has added that it remains a respected principle of commercial deals in a competitive market that the payments for services and the negotiated rates/fees must attract confidential protection.

24. In terms of the likelihood of the above prejudice to the specified commercial interests, Translink considers that the harm/prejudice would be likely.
25. The Commissioner has considered the arguments put forward by Translink and the various third parties and accepts that disclosure of the information would be likely to prejudice each of the specified interests.

Public interest test arguments in favour of disclosing the requested information

26. Translink has acknowledged the general public interest in transparency and accountability in terms of decisions taken by public authorities and the expenditure of public money.
27. Translink further considers that its disclosure of much of the withheld information demonstrates its commitment in this respect, and has stated that it can find no additional public interest arguments in favour of disclosure of the remainder of the information.
28. The complainant has not identified any specific public interest arguments in favour of disclosure, other than he has argued that different public authorities have disclosed information in respect of fees paid to much more high profile celebrities, than the two named celebrities in this particular case.

Public interest arguments in favour of maintaining the exemption

29. Translink considers that it would not be in the public interest to disclose the remaining information as it would be likely to reduce both its own, and the specified third parties ability to negotiate or compete in a commercial environment.
30. It has further informed the Commissioner that the Primary objective of bus and train week (and thus the engagement of media outlets and individuals to take part in the campaign), is to promote the availability of public transport services and generate income (a statutory duty of Translink as a public corporation and its agreement with government).
31. Translink has calculated that the event generated a return of £7 for every £1 spent, based on its calculations of an overall cost of the campaign totalling approximately £69,500, compared to 376,000 additional passengers and £482,000 in additional revenue.
32. Translink therefore considers that the public interest would not be served by the disclosure of the withheld information as the likely impediments to its ability to engage with media outlets and individuals

in future campaigns would be likely to prejudice its ability to generate income and increase passenger patronage, as demonstrated by its calculations outlined above.

Balance of public interest arguments

33. The Commissioner has considered both the factors in favour of disclosure and those in favour of maintaining the exemption and she fully acknowledges the general public interest in transparency and accountability. Additionally, in this case, disclosing the rates paid to the media outlet and the two individuals would give an insight into the spending of Translink in respect of its bus and train week campaign. That being said, the Commissioner notes that Translink has provided the total cost of the campaign itself along with much of the requested information.
34. Beyond increasing transparency, the Commissioner cannot think of any other compelling public interest argument in favour of disclosing the information.
35. Balanced against this, the Commissioner has accepted that there would be prejudice to Translink's commercial interests through disclosure of this information and she considers that any arguments in favour of disclosure are somewhat diminished by the information Translink has provided in respect of the cost of the whole campaign. The Commissioner considers that there is significant public interest in not prejudicing the commercial interests of Translink, not only in securing value for money, but in ensuring it can operate efficiently in its duty to promote public transport in Northern Ireland and generate income.
36. The Commissioner therefore finds that section 43(2) has been properly engaged and that in all the circumstances of the case, the public interest test favours maintaining the exemption. As the Commissioner has found that section 43(2) is engaged, she has not gone on to consider Translink's subsequent additional reliance on section 40(2) in respect of the two named individuals.

Right of appeal

37. 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

38. 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.
39. 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

Catherine Dickenson
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