

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 September 2019

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence between Uber taxis and Sheffield City Council (the "Council"). The Council disclosed some information but withheld the remainder citing the exemptions at sections 41(1) (information provided in confidence) and 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that section 43(2) is properly engaged and the public interest in maintaining the exemption exceeds that in disclosure of the requested information. The Council was therefore correct to rely on section 43(2) to withhold the remaining information. No steps are required.

Request and response

3. On 12 October 2018 the complainant wrote to the Council, via the "*What do they know?*" website, and requested information in the following terms:

"I would like to see all correspondence between Sheffield Licensing Department and Uber Britannia Limited between and inclusive of the dates 01/04/2018 to 10/12/2018"

Any information contained that has an explanation of events or time stamped logs would not be classed as business sensitive because it

would not show the exact formula, merely time stamps and descriptions.

An example of this would be how Hovis produce a loaf of bread, none sensitive would be that they mix flour and water into dough, place the dough in a tin and then cook in an oven.

However, if they stated the exact measurements and water temperature, then explained the make and model of the oven including what temperature it was set to and how long the dough was in the oven and then rested to cool and at what temperature it cooled, this could be then classed as business sensitive.

this is no different for how Ubers system works, I am only wish to see any timings of the process, not the code or algorithm involved".

4. The Council responded on 9 November 2018. It provided some information but refused to provide the remainder, citing the exemptions at sections 40(2) (personal information), 41(1) (information provided in confidence) and 43(2) (commercial interests) of the FOIA.
5. Following an internal review the Council wrote to the complainant on 16 January 2019. It maintained its position.

Scope of the case

6. The complainant contacted the Commissioner on 26 February 2019 to complain about the way his request for information had been handled. He said he was happy for any personal information to be redacted and he wanted her to consider the application of sections 41 and 43 to the request. He stated:

"... I wish to draw your attention to the reason of 'commercial interest between Sheffield City Council and Uber' which I can not see any reason for such an interest. Uber are simply a licensed operator as per the Local Government (Miscellaneous) Act 1976 and not a commercial entity with the authority.

Please note, I asked that all personal information be redacted and that I specified that only a time stamp of data was required and not the actual programme or algorithm and can not therefore see why this information would be declined".

7. The Council has previously stated to the complainant

"I have spoken to you on several occasions during this review and the first thing that was apparent is that we do not have the detailed journey time data you specifically requested. I understand why you

thought it was held because our correspondence with Uber includes a request for such data; however, what we actually hold is the journey data for two journeys, which show what data is collected via the Uber App. You have asked for a copy of that and we have in turn contacted Uber to see if they are prepared to release a redacted version of the document. Uber has confirmed they will consider our request and let us know".

8. Uber subsequently declined to disclose any information depicting its bespoke systems.
9. However, during the Commissioner's investigation the Council revisited the request and disclosed some further information. This included transcripts of the information from the two booking logs that it holds.
10. The remaining withheld information under consideration in this case consists of:
 - (1) An Enforcement Intelligence Report produced by Uber which was given to the Council in relation to some work being done on the Clean Air Zone (at pages 21 – 26 of disclosed information).
 - (2) A letter from Uber which includes screenshots of the actual time logs referred to above (at pages 28 - 30 of disclosed information).
 - (3) A letter from Uber explaining how the Uber application works as well as screenshots of the application (pages at 32 – 37 of disclosed information)
 - (4) A picture taken from the Enforcement Intelligence Report (on page 71 of disclosed information).
11. The Commissioner has viewed the withheld information in full.
12. The Commissioner will consider the citing of exemptions below.

Reasons for decision

Section 43 – commercial interests

13. Section 43 of the FOIA provides that if the disclosure of information would prejudice the commercial interests of any person including the public authority that holds the information, then the information is exempt from disclosure. This is a prejudice-based exemption and is subject to the public interest test.
14. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met.

15. First, the actual harm that 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.
16. Second, 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 that is alleged must be real, actual or of substance.
17. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
18. In relation to the lower threshold of 'would be likely to', the Commissioner considers 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 of 'would', in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
19. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her awareness guidance on the application of Section 43¹. This comments 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".
20. The Commissioner considers that in order for the exemption to be engaged it must be shown that the disclosure of specific information will result in specific prejudice to one of the parties. In demonstrating prejudice, an explicit link needs to be made between specific elements of the withheld information and specific prejudice which disclosure of these elements would cause.
21. It is the Council's position that disclosure of this information would be likely to prejudice Uber's commercial interests as well as, to a lesser extent, its own.
22. The Council has advised:

¹ <https://ico.org.uk/media/fororganisations/documents/1178/commercial-interests-section-43-foiaguidance.pdf>

"The Council considers that a range of materials redacted or considered exempt from disclosure are commercially sensitive to Uber and to a lesser extent Sheffield City Council... The disclosure of this information is likely to prejudice Uber's commercial interests because such details are likely to be of benefit to another organisation / competitor or inhibit their individual commercial performance and position. We also believe were Sheffield City Council sued for breach of confidence we would face harm in the cost of defending or settling a claim of this nature".

And:

"To release the redacted information could impact on Uber's ability to compete for business in a competitive market because the specific information refused may benefit a rival company. This could also adversely affect the relationship that the Council has with Uber due to making information, which is expected to be kept confidential, public. This could potentially lead to action against the Council or a breakdown in the working relationship between the Council and Uber which may affect the Council, Sheffield citizens and other individuals that support the Uber business model.

In the commercial interests of Uber and the Council we consider that the application of this exemption is protecting a legitimate economic interest of both parties".

23. The Council contacted Uber about possible disclosure of the remaining withheld information and Uber responded saying:

"... the screenshots from our system logs and the nomenclature we use are proprietary information which we would not want our competitors to receive as this might provide insight into how our systems are designed. In addition, the transparency into the timings involved in our systems reveal the efficiency of our systems which is information which would be of real use to a competitor.'

This was in reference to our system logs, of which there are screenshots ... This information relates to Uber's internal business operations and systems and clearly likely to prejudice its commercial interests and is therefore exempt under section 43 (commercial interests) of the Freedom of Information Act 2000. This information cannot be found published on any part of our website".

24. The Commissioner accepts that the withheld information is relevant to the applicable interests within the commercial interests exemption and therefore the first part of the test above is met, although she notes that the timings on the two logs have been transcribed and disclosed.

25. In respect of its own commercial interests, the Commissioner is not convinced that the Council has evidenced how these would realistically be affected. Whilst there is a chance that disclosure could mean that Uber may sue for breach of confidence she does not consider that this relates to the Council's ability to participate competitively in a commercial activity. Furthermore, she does not see how *"a breakdown in the working relationship between the Council and Uber"* would affect the Council's commercial interests.
26. However, having viewed the withheld information, the Commissioner is satisfied that it would be of use to a competitor by providing insight into how Uber conducts its business. She accepts that the Council has provided reasonable arguments to suggest that there is a causal relationship between disclosure of the withheld information and the prejudice envisioned which is real, actual or of substance in respect of Uber's own commercial interests.
27. The Commissioner is therefore satisfied that the Council has demonstrated sufficient support for the lower level of prejudice. As she is satisfied that disclosure would be likely to prejudice the commercial interests of Uber, and that section 43 of the FOIA applies, she will now go on to consider the public interest test.

Public interest test

Arguments in favour of disclosing the information

28. The Council has provided the following arguments on favour of disclosing the requested information:

"The Council does, wherever lawful and possible, disclose information about the money it spends, the decisions it makes and the activities it carries out because it helps to:

- *Improve public awareness and allow members of the public to engage in public debate about decisions and initiatives affecting the locality*
- *Promote accountability and transparency in the way public money is spent and the management of licensing decisions or engagement*
- *Encourage other competitors to review and follow the Uber business model possibly decreasing the cost to private hire vehicle users*
- *Allow for public review the specific correspondence between the Council and Uber in regard to their licensed activity within*

Sheffield. This will support specific public debate on the subject and allow review of the licensing function with consideration of the full contract between the parties”.

Arguments in favour of maintaining the exemption

29. The Council has advised that whilst it understands the need for transparency and openness it must also weigh up the impact of disclosing information, on both itself and other organisations. In respect of this exemption it provided the following arguments, saying that disclosure could:

- *"Cause difficulties in the future working relationship with Uber where the Council's Licensing Team have to be able to manage licensing issues this organisation [sic], to ensure the appropriate running of the licensing function*
- *Impact on Uber's ability to compete in a competitive market because the information redacted may benefit a rival company. Were this to affect [sic] their operation this may result in the loss of business or the ability of the organisation to function successfully*
- *Discourage companies to engage with the Council amid concerns that information will be disclosed despite their wishes, which may result in fewer choices and higher costs to residents of the City and against the economic goals of the Council*
- *Uber may suffer commercial damage through lack of competitive advantage, possibly leading to the severe consequences noted above”.*

Balance of the public interest arguments

30. The Commissioner initially notes that the Council has disclosed the majority of the information which it holds in this case. The remaining information has been withheld on the expressed wishes of Uber itself, which liaised directly with the Council regarding this request. She further notes that the Council provided transcribed details of the two time logs it holds in an effort to assist the complainant and to demonstrate to him the type of information it holds in respect of time logs, which seem to be of particular importance to him.

31. The complainant has provided his reasons for requiring the requested information, outlining concerns that Uber is not complying with the legislation which governs the taxi trade. He has said:

"Basically, Transport for London found that Ubers model (in London) was deemed illegal because the booking was not accepted unless the driver accepted and then Uber back filled the booking to the operator that was licensed by the same authority as the driver.

In order to be relicensed in London, Uber defended Lindon [sic] to TfL licensed drivers only which enabled Uber to then accept the booking before driver intervention.

The rest of Uber in the UK was not changed and is still dependant on the driver accepting the booking before Uber can back fill to the appropriate operators license [sic] that matches the driver who accepted.

This is the reason i [sic] asked Sheffield licensing to ask for data logs from two different times, one before and one after Uber changed their system in London to be compliant and to show evidence that this compliance is now happening in Sheffield".

32. The Commissioner put these concerns to the Council who advised as follows:

"The Licensing Sub-Committee granted Uber Britannia Limited a license to operate taxis in Sheffield on March 13th 2018. The Council does not consider Uber to be operating unlawfully and as far as we are aware there has not been any legal action taken against them in this regard. The legislation governing Uber in London is the Private Hire Vehicles (London) Act 1998; the legislation governing Uber outside of London is the Local Government (Miscellaneous Provisions) Act 1976. These are similar regimes, but not identical. Therefore, licensing of Uber in London is slightly different to that in other parts of England."

33. The Council has therefore evidenced that the legislation covering taxi licensing in London is different to the legislation governing it elsewhere in the country. Furthermore, Uber has advised that there was no change to its booking system in March 2018 for riders and drivers using the application in Sheffield.
34. The Commissioner has viewed the logs, which have been accurately transcribed for disclosure, and there is no evidence to suggest that either the Council or Uber has tried to prevent their disclosure in order to hide any 'illegal' practice.
35. The Commissioner has given the arguments for and against disclosure detailed consideration. She accepts that there is a public interest in transparency and accountability, in this case with the licensing of taxi service providers. However, she considers this has largely been met by

the disclosure which has already been made with the Council having provided much of the information it holds. She is also satisfied that the Council has explained that there is no contravention of the licensing legislation by Uber in its own area.

36. Disclosure of the remaining information would be of clear detriment to Uber in what is a very competitive market as it would reveal details of its bespoke systems and results of work it has undertaken for the Council.
37. On balance the Commissioner finds that the public interest in avoiding prejudice to the commercial interests of Uber overrides the public interest in disclosure.
38. As she finds that section 43(2) has been properly cited the Commissioner has not found it necessary to go on to consider the application of section 41(1).

Other matters

39. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Internal review

40. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
41. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases. Whilst there was a reasonable amount of information caught by the request which required liaison with a third party, the Commissioner is nevertheless concerned that it took the Council over 40 working days to conduct an internal review in this case.

42. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy² to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy³.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

43. 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

44. 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.
45. 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

Carolyn Howes
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