



Decision Notice 130/2022

Transport contracts: penalty points and quality checks

Applicant:

Authority: Highland Council

Case Ref: 202101246

Summary

The Authority was asked about its Public Transport and School Transport contracts. It disclosed some information about penalty points, but withheld commercially sensitive information. It also claimed it would cost too much to comply with the request about quality checks. The Commissioner agreed with the approach taken by the Authority, but found that it had not responded to the request or requirement for review on time.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1) (Time for compliance); 12(1) (Excessive cost of compliance); 21(1) (Review by Scottish public authority); 33(1)(b) (Commercial interests and the economy); 47(1) and (2) (Application for decision by Commissioner)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost - prescribed amount)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 24 March 2021, the Applicant made a request for information to the Authority. The Applicant requested:
 - a. detailed information on all penalty points and fines issued, by operator and by contract, for all Public Transport and School Transport contracts within the Authority's remit for

the whole period of the current operating contracts i.e. from January 2017 (to the date of the request).

- b. detailed information on all quality checks carried out on the same contracts for the same period.
2. The Authority responded on 31 May 2021. For part (a) of the request, the Authority provided information on the number of times the default scheme had been applied since 2017 and the total of number of routes and operators. For part (b), the Authority stated that it did not hold a collated record of the quality checks carried out.
 3. On 1 June 2021, the Applicant wrote to the Authority requesting a review of its decision.
 4. Following an application to the Commissioner (19 July 2021), the Authority notified the Applicant of the outcome of its review on 1 September 2021. The Authority apologised that its response had not been as clear as it should have been.
 5. For part (a), the Authority disclosed an anonymised and summarised table of the data. This table – *Summary of penalties and fines for school bus routes June 2017 to May 2021* – showed the operators (anonymised) and a breakdown of the number of separate penalty fines for each operator, with a total of the number of fines and the total fine cost (again per operator). The Authority told the Applicant which part of the information in the table related to it, but withheld the remainder of the information as it considered that disclosure under FOISA would substantially prejudice the commercial interests of the operators and was therefore exempt from disclosure under section 33(1)(b) of FOISA.
 6. For part (b) of the request, the Authority explained that it collates data on checks which lead to penalties and fines, and was therefore able to disclose information for part (a) of the request. However, information on other quality checks was filed in contract files and to provide information for part (b) would require the Authority to review each file to extract and collate information on the quality checks for those contracts. To do so would, the Authority said, exceed the £600 threshold in section 12(1) of FOISA.
 7. On 4 October 2021, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated that it was dissatisfied with the outcome of the Authority's review because:
 - it did not consider that section 33(1)(b) of FOISA applied to the information falling within part (a) of the request
 - it believed the information requested for part (b) would be held in the same way as the part (a) information and therefore could be extracted from a spreadsheet (i.e. section 12(1) would not apply; and
 - it was dissatisfied with the time taken by the Authority to respond to the initial request and to the requirement for review.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

9. On 4 October 2021, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 15 March 2022, the Authority was invited to comment on this application and to answer specific questions. These focussed on its reasons for withholding some of the information falling within part (a), and for a breakdown of the estimated costs for complying with part (b) of the request.
11. The Applicant provided submissions on the public interest favouring disclosure of the information that was withheld in part (a). The Applicant also explained why it considered information on quality checks (part (b) of the request) should be easily accessible to the Authority – and therefore why the cost provision in section 12 would not apply.
12. The Authority explained why the remaining information in part (a) of the request should be withheld. It also supplied copies of relevant contracts to demonstrate how penalty points and fines were administered. The Authority provided several submissions on the costs that would be incurred in responding to part (b) of the request. It estimated the number of documents falling within scope and the time to search these documents.

Commissioner's analysis and findings

13. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.

Part (a) of request - Section 33(1)(b) of FOISA - Commercial interests and the economy

14. The Authority submitted that the information withheld for part (a) of the request – penalty points and fines issued to operators – was exempt from disclosure under section 33(1)(b) of FOISA. This provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
15. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to indicate:
 - (i) whose commercial interests would (or would be likely to) be prejudiced by disclosure;
 - (ii) the nature of those commercial interests, and
 - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
16. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear.
17. The information provided (at review) to the Applicant was a table of data entitled *Summary of penalties and fines for school bus routes June 2017 to May 2021*. This data showed for anonymised operators the number of separate penalty fines for each penalty (i.e. a number) and the total fine cost (again per operator). The Authority indicated to the Applicant which line of data in the table related to the Applicant.

18. It is clear that, although the Authority shared the Applicant's information with the Applicant, this was not a disclosure under FOISA. The disclosure was to the Applicant alone and did not have the effect of disclosing the information into the public domain, which is the effect of disclosing information under FOISA. The Authority still considers the information to be exempt from disclosure under section 33(1)(b) of FOISA.

Submissions from the Authority

19. The Authority provided the Commissioner with a copy of its standard contract with transport operators. The contract includes a section on the penalty points that can be issued for defaulting on the contract, i.e. a non-compliant operation. (In the correspondence in this case, both the Applicant and the Authority refer to penalty points, but the contract uses the term "default points".)
20. The Authority also provided a copy of a bus survey, a letter to an Operator about the failure to meet the conditions of the contract, and weblinks to published contracts for transport routes.
21. The Authority explained that default conditions are applied where the Authority has identified failings that have not been satisfactorily addressed. The Authority considered that publicising this information would prejudice its working relationship with the contractors, and would give rival operators material which they could use, for example by publicly alleging unsafe or unreliable operation (which may well be misrepresented).
22. The Authority stated that, were a contract to be terminated for unsatisfactory operation, then information would become "publicly visible": that is, when a contract is terminated for unsatisfactory operation.
23. In this, the Authority submitted that its process was similar to that of the Driver and Vehicle Standards Agency (DVSA). Vehicle inspections and [Operator Compliance Risk Score \(OCRS\)](#)¹ (DVSA system for monitoring) scores are not made publicly available unless the failings of the operator reach a level where the [Traffic Commissioner](#)² decides to call a Public Inquiry.
24. The Authority said that it had not consulted the operators concerned (about disclosure of their information), but considered that they would expect the Authority to follow its standard practice in applying default points. The Authority said that the operators would be unhappy about the publication of information relating to poor services performance or reliability, as this would have a negative impact on the image and reputation of the respective operators, which in turn would be prejudicial to their commercial interests.

Submissions from the Applicant

25. The Applicant expressed its dissatisfaction in its requirement for review. It also made clear that, as a Transport Operator, it was content for information about any penalty points it had received to be published.

The Commissioner's views

26. The Commissioner has carefully considered the arguments put forward by the Authority and the Applicant, along with the withheld information.

¹ <https://www.gov.uk/operator-compliance-risk-score>

² <https://www.gov.uk/government/organisations/traffic-commissioners>

27. He notes that the Authority has published its [current contracts register](#)³. Having considered the published information, he notes that the transport contracts range from small independent taxi firms with contracts of £10,000 to large national companies with contracts worth over £3 million.
28. The number of penalty points that can apply for any infringement is specified in the contract. The withheld information links the default points (and the nature of the failure) to each specified operator. The Authority's review explained that disclosing the penalty data of transport operators would have detrimental consequences to future commercial interests of those operators as a direct result of the Authority releasing this information into the public domain (which, as noted above, would be the effect of the information being disclosed under FOISA).
29. The Commissioner is satisfied the interests of the respective operators (whose identities were anonymised in the disclosed table) are commercial interests for the purposes of this exemption. The Commissioner, obviously, cannot disclose or comment on their identities, but he is satisfied that they are entities (or persons) operating in a commercial context in providing their services as part of a contract, and that they have a commercial interest in respect of their respective businesses.
30. The Commissioner considers that disclosing the detail of the actual penalties and points awarded per operator per route would be disadvantageous and likely to prejudice substantially the operators' commercial interests. The Commissioner accepts that linking a named person, entity or organisation that is an operator with a penalty or penalties will have an effect on how that operator is perceived in a commercial context.
31. In conclusion, the Commissioner is satisfied that the information withheld for part (a) of the request is of such commercial relevance as to engage the exemption in section 33(1)(b) of FOISA, and that the exemption was correctly applied by the Authority on that basis. He notes that the Applicant is willing to publish information about any penalty points it has received. Clearly, this is an option to the Applicant. However, in the whole circumstances of this case (including the fact that it is the Applicant which has requested the information, including about other operators, and the wider effects on the Authority should the information be disclosed), the Commissioner does not consider the Applicant's willingness to publish its information to be relevant as to whether the information is exempt from disclosure under FOISA.

Public interest test

32. As the Commissioner has found that the exemption in section 33(1)(b) of FOISA was correctly applied to the withheld information, he is now required to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).

The Applicant's submissions about the public interest

33. The Applicant suggested that the information on penalty points and fines issued should be disclosed as all operators, large or small, need to be held to the same standard, and this needs to be transparent.

³ https://www.highland.gov.uk/downloads/file/16902/highland_council_current_contracts_register

The Authority's submissions about the public interest

34. The Authority accepted that the public would want evidence to show that the Authority monitors the contracts to ensure safety and reliability. The Authority noted that some information on penalty points was accessible and that it had published a summary of points issued to each (anonymised) operator.
35. The Authority considered that it was essential that it work cooperatively with contractors to help them achieve a good level of service. Penalty notices systems can help to ensure that contractors comply in order to avoid fines, and the aim of the system was to ensure best practice, not to "name and shame" operators and potentially put them out of business. The Authority stated that it needs competition to ensure best value, and it would not want to put the commercial viability of operators at risk. Maintaining the confidentiality of the system, the Authority suggested, ensured that the system was effective without harming business reputations.

The Commissioner's view on the public interest

36. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to the scrutiny of public finances. The Commissioner also recognises a public interest in ensuring that value for money is achieved, and seen to be achieved, by Scottish public authorities, such as the Authority. He also notes that, where services provided cover remote and geographically dispersed populations, sourcing an alternative operator could be challenging and expensive to the Authority. Clearly, that would not be in the public interest.
37. The Commissioner accepts that, where a public authority is engaged in contracting for transport services and administering the contract (including the issue of penalty points and fines), there is a public interest in allowing it to administer the contract that it can do so without impacting on an operator's willingness to be open and honest in the default system. There is clearly a public interest in the maintenance of a safe transport service.
38. The Commissioner agrees with the Authority that the summary information already disclosed to the Applicant goes some way to satisfying the public interest in disclosure of the withheld information. Understandably, the Applicant considers that all operators should be treated equally – the disclosure of the summary information goes some way to satisfying that interest.
39. The Commissioner has also taken account of the submissions made by the Authority in favour of maintaining the exemption. He has already acknowledged the risk of substantial prejudice to commercial interests in this case, and accepts that there is a public interest in avoiding such prejudice.
40. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice may result, the Commissioner does not consider that this would be justified on public interest grounds in this case. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b) outweighs the public interest in disclosure of the information under consideration.
41. The Commissioner therefore finds that the information was correctly withheld by the Authority under section 33(1)(b) of FOISA.

Part (b) of request - Section 12(1) – Excessive cost of compliance

42. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed in the Fees Regulations. This amount is currently set at £600 (regulation 5). Consequently, the Commissioner cannot require an Authority to comply with a request if the cost of responding to a request would exceed that sum.
43. The projected costs an authority can take in to account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA.
44. The authority may not charge for the cost of determining whether it:
- actually holds the information requested or
 - should provide the information.
45. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.

Information requested

46. The Applicant believed that the quality check information would be held centrally by the Authority, and that such checks were carried out every time a penalty was issued. The Applicant explained to the Commissioner that the “quality checks” it referred to were what the Authority called “surveys”, and were referred to in the contract. The Applicant referred to the part of the contract which states:

If no faults are found during a survey by the Authority covering at least 50% of a service journey, any default points previously incurred shall be reduced by 5.

47. The Applicant submitted that, if the Authority cannot provide evidence of any such checks taking place, then there would be no possibility of having any sanctions reduced.
48. The Commissioner notes that the contract states:

The Authority may conduct surveys on board the Vehicles at any time during the Contract operation (subject, in the case of closed school transport Contract Route, to a seat being available on the day of the survey) and monitor compliance with any aspect of the Contract requirements.

49. The Authority explained that the information requested was a record of checks undertaken where no default points or financial deductions had been applied. This would require searching the diaries and emails of all members of the transport team, and correlating them to identify when they may have carried out inspections. Inspections where faults are found result in information being added to the spreadsheet of penalties.
50. The Authority explained that quality checks are more ad-hoc, and sometimes a quality check can result in points; at other times, points may result from complaints received from third parties and confirmed with the operator. Limited staff time and the physical size of the area constrain the ability of the Authority to carry out regular, scheduled checks. The Authority confirmed that some information will be held, but that it will take time to search and collate the information from disparate sources.

51. Having considered the submissions provided by both parties, the Commissioner is satisfied that the requested information is not held in a single location, as the Applicant believed, but in multiple locations. The Commissioner cannot comment on the interpretation of any contract and whether quality checks should be undertaken following the issue of penalty points.
52. The Commissioner will now consider the Authority's submissions as to its estimation of costs to search for the requested information.

Calculation of costs to search

53. The Authority was asked several times by the Commissioner for its estimate of how many records would fall within the request, and of the time that it would take the Authority to search these records for the requested information.
54. The Authority told the Commissioner that it had contacted the majority of staff within its transport team and asked them to search their email records using the terms "survey", and "penalty". This resulted in a range of records from 42 to more than 1,000 records per staff member. In total, a search on the basis of the word "survey" identified over 4,000 emails held by all staff questioned. This information would have to be searched for the requested information.
55. The Authority estimated that it would take a person approximately one minute to consider each record, and this equated to over 40 hours of staff time to search for the requested information. The Authority also said that it would need to review personal and network drives for the requested information.
56. In relation to the hourly rate that would be charged for reviewing the identified information, the Authority submitted that the only relevant staff that could review the information would equate to a cost of £15 per hour.

The Commissioner's findings on section 12(1) of FOISA

57. The Commissioner notes the explanations provided by the Authority as to how the information is held (and therefore what need be searched) and the estimated time it would take to search the information. He notes that the estimates provided by the Authority do not include the costs of providing the information, which the Authority is entitled to charge for.
58. The Commissioner also notes that the information requested spans a number of year (January 2017 to March 2021) and that the request, by asking for "detailed information on all quality checks carried out the contracts," is broad.
59. Having considered the nature of the work involved, the Commissioner is satisfied (on the balance of probabilities) that the Authority could not have complied with the Applicant's request within the £600 cost limit. Consequently, he finds that the Authority was entitled to rely on section 12(1) of FOISA in relation to part (b) of the request and was therefore under no obligation to comply with the request.

Time to respond

60. The Applicant expressed dissatisfaction with the Authority's failure to respond within the statutory timescales to both its request and requirement for review.
61. The Authority was invited to comment on this and did so (19 April 2022). It apologised for the delays and advised that the information was not forthcoming from its service team and

that it was only when this was escalated under the review procedure that the information was provided.

62. The Commissioner is satisfied that the request was received by the Authority, as was the Applicant's requirement for review.
63. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
64. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. This is subject to qualifications which are not relevant in this case.
65. It is a matter of fact that the Authority did not provide a response to the Applicant's request for information, or the Applicant's requirement for review, within 20 working days in each case, so the Commissioner finds that it failed to comply with sections 10(1) and 21(1) of FOISA.
66. As the Authority has apologised to the Applicant for this failure, the Commissioner requires no action by the authority in respect of this part of the Applicant's application.

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that the exemption in section 33(1)(b) of FOISA applied to the information withheld in relation to part (a) of the request. He is also satisfied that, in line with section 12(1) of FOISA, the Authority was not obliged to comply with part (b) of the request.

However, by failing to respond to the request and requirement for review in line with the timescales specified in sections 10(1) and 21(1) of FOISA, the Authority failed to comply with Part 1. The Commissioner does not require the Authority to take any action in respect of these failures.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

21 November 2022

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- ...
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.
- ...

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.
- ...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -

- (a) a notice under section 21(5) or (9); or
(b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
(b) state the name of the applicant and an address for correspondence; and
(c) specify –
(i) the request for information to which the requirement for review relates;
(ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
(iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.