

# Decision Notice

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## **Decision 256/2014: Mr Paris Gourtsoyannis and Transport for Edinburgh Limited**

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### **Passenger numbers and income for Edinburgh Trams**

Reference No: 201402423

Decision Date: 15 December 2014



Scottish Information  
Commissioner

## Summary

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On 7 July 2014, Mr Gourtsoyannis asked Transport for Edinburgh Limited (TFE) for information on passenger numbers and income for the first month of operation of the Edinburgh tram service.

TFE withheld the information under the exemption in section 33(1)(b) of FOISA because it considered disclosure would cause substantial prejudice to its commercial interests.

The Commissioner investigated and found that TFE was entitled to withhold the information under the exemption in section 33(1)(b) of FOISA.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

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

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1. On 7 July 2014, Mr Gourtsoyannis made a request for information to TFE. The request concerned the first month of operation of the Edinburgh tram service. Mr Gourtsoyannis asked for a breakdown of passenger numbers by fee category, including concessionary fees and the total amount raised in fees from each category. Mr Gourtsoyannis also requested other information which is not the subject of this decision notice.
2. TFE responded on 1 August 2014. TFE withheld the information on the basis that it was exempt from disclosure under section 33(1)(b) of FOISA because its disclosure would, or would be likely to, prejudice substantially TFE's commercial interests.
3. On 1 August 2014, Mr Gourtsoyannis emailed TFE requesting a review of its decision. Mr Gourtsoyannis considered the public interest in disclosure outweighed the commercial considerations cited by TFE.
4. TFE notified Mr Gourtsoyannis of the outcome of its review on 27 August 2014, upholding its original decision without modification.
5. On 14 October 2014, Mr Gourtsoyannis applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of TFE's review because he considered the public interest favoured disclosing the information.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Gourtsoyannis made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 27 October 2014, TFE was notified in writing that Mr Gourtsoyannis had made a valid application. TFE was asked to send the Commissioner the information withheld from him. TFE provided the information and the case was allocated to an investigating officer.

8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. TFE was invited to comment on this application and to answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.

## **Commissioner's analysis and findings**

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9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Gourtsoyannis and TFE. She is satisfied that no matter of relevance has been overlooked.

### **Section 33(1)(b) – Commercial interests and the economy**

10. TFE submitted that the information sought by Mr Gourtsoyannis was exempt from disclosure in terms of 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). In this case, TFE submitted that disclosure would damage its own commercial interests.
11. Section 33(1)(b) of FOISA is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b).
12. There are certain elements which an authority must demonstrate are present when relying on this exemption. In particular, it must indicate whose commercial interests would (or would be likely to) be harmed by disclosure, the nature of those commercial interests and how those interests would (or would be likely to) be prejudiced substantially by disclosure. The prejudice must be substantial: in other words, of real and demonstrable significance.
13. Having considered TFE's submissions, the Commissioner is satisfied that the interests that have been identified are commercial interests for the purposes of this exemption. The withheld information concerns the provision of passenger services in a commercial environment and the demand for these services. It comprises a breakdown of the various types of tickets sold by TFE, the numbers of passengers using the tram service by ticket type and the revenue raised from the sale of each ticket type.
14. The Commissioner must now go on to consider whether the commercial interests identified would, or would be likely to, be prejudiced substantially by the disclosure of the information withheld. As described above, such prejudice must be at least likely before the exemption can apply.
15. In its submissions, TFE stated that the withheld information represented, over the time period requested, the whole of the operational income for the tram service. It explained that the information comprised a detailed breakdown of revenue by ticket type and quantity sold and issued.
16. TFE explained that Edinburgh Trams and Lothian Buses operated together under the umbrella of TFE. The two transport modes had common policies across fares, customer services and conditions of carriage and operated, as far as is reasonably practicable, as an integrated service. TFE submitted that the tram service was essentially an extension of the Lothian Buses network.
17. TFE submitted that, in the deregulated market for local bus services, the withheld information provided a clear indication to a competitor of the kind of patronage a competitor could

receive at a set value of fares by registering a competitive service along the same route, or in the case of the tram service, as close to it as the road network allows.

18. Mr Gourtsoyannis pointed out that TFE had voluntarily disclosed bulk passenger statistics concerning the tram service into the public domain. In his view, this undermined TFE's argument that slightly more detailed passenger statistics were commercially sensitive.
19. Mr Gourtsoyannis also contended that there was no level playing field between TFE and privately held competitors when the majority shareholder of TFE was the City of Edinburgh Council and there was no other commercial tram operator in Scotland. In his view, in the absence of meaningful competition for the tram service, any commercial considerations should be dismissed.
20. The Commissioner has considered all of the arguments put forward by TFE and Mr Gourtsoyannis. As in any case, the Commissioner must consider the position as it stood at the point when TFE notified Mr Gourtsoyannis of the outcome of its review on 27 August 2014.
21. In this case, the Commissioner accepts that the disclosure of the withheld information would allow significant insight into the types of patronage, volume of ticket types sold and revenue generated by the tram service.
22. The Commissioner is aware that TFE has disclosed some headline information on passenger numbers, but notes that this was not the detailed breakdown of ticket types and usage sought by Mr Gourtsoyannis.
23. Whilst the Commissioner is aware that there is no competitor tram service, she accepts that a competitor bus service could align itself as closely as practicable with the tram route. The Commissioner accepts TFE's submissions that this would be likely to prejudice its commercial interests substantially by enabling competitors to tailor ticket types and prices on a similar route. In the Commissioner's view, disclosure of the detailed passenger, ticket and revenue information would have a prejudicial effect on TFE's ability to provide an economically viable service in a competitive market.
24. The Commissioner is satisfied that, at the time TFE dealt with Mr Gourtsoyannis's requirement for review, the withheld information was of sufficient commercial relevance to engage the exemption in section 33(1)(b) of FOISA and the exemption was correctly applied on that basis.

#### *The public interest test*

25. As the Commissioner has found that the exemption in section 33(1)(b) was correctly applied to the withheld information, she has gone on 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).
26. TFE acknowledged that there was a public interest in providing information about the performance of the tram service given the well-publicised issues that arose in the construction phase of the project. It was for that reason that TFE had disclosed some performance information such as general information on passenger numbers. However, TFE stated that the numbers disclosed were carefully considered so as not to damage its commercial interests, by covering a broader time period and by not breaking down into individual ticket types and fare categories.

27. TFE stated that it was an arms-length publicly owned business charged with operating as a private company in a market which is open to entry from private competitors. In TFE's view, it would be unable to compete effectively or equally with those competitors if (unlike its competitors) it was obliged to disclose commercially sensitive revenue information; in its view, that was the primary reason why the information should not be disclosed.
28. TFE stated that, unlike the transport provision in London or in other European cities, the combined bus and tram services in Edinburgh were operated commercially without subsidy from public funding, except for those few services deemed socially necessary, but not commercially viable, which were supported by local authorities.
29. TFE stated that any profits that it generated were either reinvested in its services or were returned to its shareholding local authorities by way of a dividend. Consequently, it could be viewed as a net contributor to, rather than a drain on, public finances and its ongoing commercial good health benefited everyone who lived and worked in Edinburgh and the surrounding area. As a result, it considered the greater public interest lay in the continued success of the business and its ability to compete fairly with its competitors.
30. In Mr Gourtsoyannis's view, given the exceptional level of public investment in the tram system, the public interest case for disclosing the information outweighed the commercial considerations cited by TFE.
31. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to a service which has involved considerable start-up costs from public funds.
32. On the other hand, the Commissioner accepts that there is a public interest in ensuring that there is fair competition in the commercial environment in which TFE operates. She has already acknowledged the submissions made by TFE in support of maintain the exemption and has acknowledged the likelihood of substantial commercial prejudice to TFE in this case.
33. In the Commissioner's view, it is in the public interest for TFE to be able to trade fairly and provide a viable service in a competitive market. The Commissioner also considers it is in the public interest that TFE is able to do so without its status as a public authority (for the purposes of FOISA) impacting significantly on its ability to participate effectively in a competitive market.
34. Having already concluded that disclosure in this case would cause substantial harm to TFE's commercial interests, the Commissioner recognises that it would be contrary to the public interest to place TFE in a disadvantageous position with respect to its competitors.
35. The Commissioner has considered all of the factors set out above. 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 believe it would be justified in this case.
36. 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 that in disclosure of the information under consideration. The Commissioner therefore finds that TFE was entitled to withhold the information under section 33(1)(b) of FOISA.

## **Decision**

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The Commissioner finds that Transport for Edinburgh Limited complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Gourtsoyannis.

## **Appeal**

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Should either Mr Gourtsoyannis or Transport for Edinburgh Limited 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**

**15 December 2014**

### 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.

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- (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.

...

#### 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).

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