

Mr Jonathan Raper

Via e-mail to:
request-95021-
xxxxxxxx@xxxxxxxxxxxxxxxxxxx

Dear Mr. Raper,

Freedom of Information Act Complaint - F0008377

Thank you for your e-mail requesting an internal review of the original decision not to release advice provided by ATOC to the Department in 2011 on 'the impact of fare-splitting on rail ticket revenues'. You requested "a copy of the advice given to the Department in full, with any appendices or additional parts."

As an independent senior civil servant who was not involved in the handling of the original request, I have undertaken a review of the original decision not to release the information sought.

After giving the case careful consideration, I have reached the conclusion that the original decision to withhold the information you requested was correct. I consider that the exemptions available in Section 35(1)(a) (Formulation and Development of Government Policy), Section 41 (Information provided in Confidence) and Section 43(2) (Commercial Interest) of the Freedom of Information Act 2000 (FOIA) were applied correctly.

The attached Annex sets out the exemptions in full.

In applying exemptions available in Sections 35(1)(a), 41 and 43(2) I have re-examined the balance to be struck between the public interest in withholding the information and that of the public interest of disclosure. In doing so, I have considered the Information Commissioner's Office Awareness Guidance on the application of the relevant Sections' exemptions.

The key public interest factors for and against disclosure are attached at Annex A.

My review has, in accordance with your wishes, considered a number of points which you have raised.

With respect to the consideration of information already being in the public domain, the Department has previously acknowledged that the information exists. There is no evidence that the information has been discussed at a meeting in such detail to suggest that the Department is thereby relieved of considering an actionable duty of confidentiality under which the information was received.

I also consider that there are sufficient grounds for not releasing the information on the basis of:

- i) the likely deterrent effect on the future provision of information in confidence and
- ii) the maintenance 'of private thinking space' during policy development during which premature disclosure would be likely to preclude the exploration of options and therefore the risk of undermining the quality of policy formulation.

No case has been made that there has been misconduct or wrongdoing in train operators' conforming to the ticket retailing requirements to justify, in the public interest, an over-riding case for disclosure.

It is to be noted that the rail fares and ticketing review consultation launched on March 8 2012 incorporates the subject of fares data transparency to which your concerns are specifically related. The consultation provides a specific opportunity for concerns that you and others may have to be received and considered by the Department in deciding on future policy.

The information you have sought was provided to the Department by the Association of Train Operating Companies (ATOC) in confidence. The advice in question is inextricably linked to the provider's interpretation and judgement, based, in part, on data that is publically available through the National Fares Manual. The disclosure of the advice would, in my view, and taking into account arguments provided by ATOC itself, be likely to prejudice the commercial interests of train operating companies. ATOC provided these arguments at the time of the original request and have subsequently confirmed their position for the purposes of this review.

The public interest test of ensuring that departments achieve value for money in the purchasing of goods and services is tested, under competitive pressure, at the time of letting the franchise in the department's consideration of bids that conform to the terms of the contract. There is no evidence that train operating companies are retailing fares in breach of those terms. There are therefore insufficient grounds for applying this public interest test as an over-riding reason for disclosure.

In conclusion I consider that the exemptions cited do apply to this information and that, on balance, the public interest in withholding the requested information outweighs the arguments in favour of its disclosure.

If you are dissatisfied with the way the Department has handled your request or with the outcome of this internal review, you have the right to apply directly to the Information Commission for a decision. The Information Commission can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'J A Gilbert', is written over a light pink rectangular background.

J A Gilbert
Deputy Director

ANNEX A

Section 35: Formulation of government policy

(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy

<i>Public interest test factors for disclosure</i>	<i>Public interest test factors against disclosure</i>
<ul style="list-style-type: none">• Open policy making may lead to increased trust and engagement between citizens and government;• The desirability of citizens being confident that decisions are taken on the basis of the best available information;	<ul style="list-style-type: none">• The disclosure of the information relating to the formulation or development of Government policy will inhibit discussion within Government.• Participation by the public in policy making is particularly facilitated by the current rail fares and ticketing review consultation.• It is in the public interest that decision making is based on the best advice available and a full consideration of all the options. The information supplied by ATOC is being assessed to inform officials' preparation of advice in the formulation of policy. If such information was to be divulged there is likely to be a deterrent effect on such third parties providing such information. This would weaken the quality of information available to officials and Ministers, and therefore that of the policy decision.• Divulgence of the information would likely put officials under political or public pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision making.• There is no evidence of train operators failing to retail in accordance with their contractual responsibilities.• In this case, the area of public policy to which the information refers at present remains under consultation and consideration.• Disclosure of analysis and advice would inhibit discussion within Government and future provision of such analysis and advice. This is not outweighed by the public interest in disclosure.

Overall conclusion: That the arguments in favour of withholding this information under this exemption outweigh the arguments in favour of its release.

- **Section 41 - Information provided in confidence**

Information is exempt information if:

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

- I have considered carefully whether the revelation that the information exists and your assertion as to the extent of the information revealed, is sufficient to negate the application of this exemption.
- I do not consider that the information that has been asserted as being revealed by another party is sufficient to remove the obligation of the Department to observe its duty of confidentiality under which the information was provided.
- While Section 41 is an absolute exemption (and therefore not subject to a Public Interest Test in the same way that the qualified s35 and s43 exemptions are), guidance from the ICO recognises that there can be circumstances under which confidential information may fall to be disclosed. It would not be an actionable breach of confidence to release information where there is an overriding public interest in disclosure. According to the ICO guidance, the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong. Having considered the application of the relevant public interest tests (requirement by Law; evidence of misconduct, immorality or illegality; openness and transparency), I do not consider there to be an overriding public interest in the disclosure of the information covered by your request, such as would override the duty of confidence.

Decision

- All the information withheld is on the basis that it was provided in confidence.

Section 43(2) Commercial interests.

Information is exempted from disclosure if such disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

Public interest test factors for disclosure

- open policy making may lead to increased trust and engagement between citizens and government;
- the desirability of citizens being confident that decisions are taken on the basis of the best available information;

Public interest test factors against disclosure

- Disclosure of the information would prejudice the commercial interests of the train operators.

Decision

- Overall conclusion: That the arguments in favour of withholding this information under this exemption outweigh the arguments in favour of its release.