

Decision Notice 063/2020

Lost mileage

Applicant: The Applicant

Public authority: Lothian Buses Limited

Case Ref: 201902049



Scottish Information
Commissioner

Summary

Lothian Buses was asked to provide a monthly breakdown of lost mileage caused by specific issues, together with routes with the highest lost mileage.

Lothian Buses withheld this information, arguing that disclosure would prejudice its commercial interests substantially. During the investigation, Lothian Buses originally argued that it did not hold lost mileage broken down by route, but later acknowledged that this information was held while continuing to argue that disclosure would substantially prejudice its commercial interests.

The Commissioner investigated and found that Lothian Buses had wrongly withheld the information and required Lothian Buses to disclose it.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held); 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

1. On 17 September 2019, the Applicant made a request for information to Lothian Buses Limited (Lothian Buses). The Applicant asked for a monthly breakdown of:
 - a. lost mileage caused by driver shortages or shift cancellations
 - b. lost mileage caused by mechanical faults to buses
 - c. lost mileage caused by congestion or roadworks
 - d. the routes with the highest lost mileage, e.g. No 15, 200 lost miles

For each of these requests, the Applicant specified that he wanted the information for each month of 2018 and 2019 including September to the date of his request (e.g. for requests a. to c. "January, 200 miles" and for request d. "No. 15, 200 lost miles).

2. Lothian Buses provided a response to the Applicant on 15 October 2019. It refused to disclose information which would fulfil all parts of the Applicant's request. Lothian Buses relied on the exemption in section 33(1)(b) of FOISA as it considered disclosure of the information would prejudice its commercial interests substantially. Having considered the application of the public interest test, Lothian Buses concluded that the public interest in safeguarding its ability to compete effectively with its privately owned competitors outweighed the public interest in providing the requested information.
3. On 15 October 2019, the Applicant wrote to Lothian Buses, requesting a review of its decision. He acknowledged that Lothian Buses is a commercially operating publicly-owned company which operates primarily in Edinburgh and the Lothians, but noted that it has no single major commercial rival in the City of Edinburgh. Therefore, the Applicant considered

there to be only slight commercial damage possible if the requested information were disclosed. The Applicant argued that there was a clear and overriding public interest in disclosure of this information, where Lothian Buses had refused to release lost mileage on the back of significant complaints in the summer by consumers and drivers. He was also of the view that refusing to disclose the requested information ignored clear arguments in favour of openness and transparency as to Lothian Buses' performance.

4. Lothian Buses notified the Applicant of the outcome of its review on 6 November 2019. In its response, Lothian Buses upheld its reliance on the exemption in section 33(1)(b) of FOISA, as it contended that disclosure of the information would provide a competitor or potential competitor with an insight into operational decisions it had taken in response to a number of external and internal factors, thereby enabling the competitor to adjust its own commercial strategy to take business away from Lothian Buses.
5. On 7 November 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Lothian Buses' review as he did not believe the exemption in section 33(1)(b) of FOISA had been applied correctly. The Applicant asserted that the public interest test had not been undertaken with the correct balance of transparency, accountability and openness and the potential for commercial harm.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 12 November 2019, Lothian Buses was notified in writing that the Applicant had made a valid application. Lothian Buses was asked to send the Commissioner the information withheld from the Applicant.
8. Lothian Buses provided the withheld information covering parts a., b., and c. of the Applicant's request, but explained that it did not record lost mileage broken down by route as requested at part d. It also noted its intention to publish on its website the percentage losses of mileage attributable to each category covered by parts a., b. and c. of the request in each reporting period, by 29 November 2019. The Commissioner understands that this information is now available on Lothian Buses' website, broken down by quarter for the first three quarters of 2019.
9. 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. Lothian Buses was invited to comment on this application and to answer specific questions. These related to the exemption in section 33(1)(b) of FOISA for parts a. to c. of the request and, for part d., Lothian Buses' claim that it did not hold the information.
11. During the investigation, Lothian Buses provided the Applicant with a link to the information published on its website, together with a breakdown of lost mileage caused by factors specified in parts a. to c. of the request broken down by depot.

Commissioner's analysis and findings

12. 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 him by both the Applicant and Lothian Buses. He is satisfied that no matter of relevance has been overlooked.

Section 17(1) – Information not held

13. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
14. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.
15. During the investigation, Lothian Buses confirmed that it wished to rely on section 17(1) of FOISA in relation to information which would fulfil part d. of the Applicant's request, as it did not hold relevant recorded information.

Submissions from the Applicant

16. In part d. of his request, the Applicant asked for information held by Lothian Buses which provided a monthly breakdown of the routes with the highest lost mileage for each month of 2018 and 2019 (including September to the date of the request).
17. The Applicant submitted that, as part of Lothian Buses' operation, he had seen evidence of it recording lost mileage by route through its control room operations. The Applicant asserted that, as part of Lothian Buses' remit as a bus operator, it must record lost mileage which will, as and when necessary, be linked to routes. It is the Applicant's view that if Lothian Buses does not do that, it will be unable to respond to questions from the Traffic Commissioner about servicing its various routes.

Submissions from Lothian Buses

18. Lothian Buses explained that searches carried out when it received the Applicant's request revealed that it did not collect this level of information and it did not have a duty to do so.
19. Further submissions from Lothian Buses revealed that it has a duty to record overall loss of mileage for the purposes of receiving reimbursement through the Bus Service Operator Grant (BSOG). Following research carried out by the Commissioner, it was noted that, as part of the conditions of receiving reimbursement through the BSOG, Lothian Buses is required to record and submit lost mileage by route. As a consequence of this, Lothian Buses was asked to carry out further searches to determine if information was held which would fulfil part d. of the Applicant's request.

20. Following further searches, Lothian Buses acknowledged that it held the relevant lost mileage information, broken down by route. Lothian Buses provided a copy of this information to the Commissioner and explained that it was seeking to rely on the exemption in section 33(1)(b) of FOISA for withholding this from the Applicant.

Commissioner's conclusions

21. Where an authority receives a request for information, it is important that it carries out thorough, adequate and proportionate searches prior to responding to the request, to ascertain what information it actually holds at the time the request is received.
22. In its response to the Applicant's request and requirement for review, Lothian Buses relied solely on the exemption in section 33(1)(b) of FOISA for information which would fulfil part d. of the request. It was not until the Commissioner commenced his investigation and asked Lothian Buses to provide copies of the withheld information that it submitted that recorded information which would fulfil part d. of this request was not held.
23. Following research by the Commissioner and the completion of further searches by Lothian Buses, it became clear that the information requested by the Applicant in part d. was in fact held by Lothian Buses.
24. The Commissioner is unable to accept that thorough, adequate and proportionate searches were carried out by Lothian Buses when it received the Applicant's information request. That said, it became evident, as a consequence of the further searches undertaken during this investigation, that Lothian Buses did hold recorded information which would fulfil part d. of the Applicant's request.
25. The Commissioner therefore finds that Lothian Buses breached section 1(1) of FOISA in handling part d. of the Applicant's request.
26. As Lothian Buses is seeking to argue that this information is exempt in line with section 33(1)(b) of FOISA, the Commissioner will go on to consider this.

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

27. Lothian Buses confirmed that it was withholding all of the information requested by the Applicant 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, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
28. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - i. whose commercial interests would (or would be likely to) be harmed 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.
29. As prejudice must be substantial, it must be of real and demonstrable significance.

The Applicant's submissions

30. In both his request for review and application to the Commissioner, the Applicant commented that he did not believe Lothian Buses had applied the exemption in section 33(1)(b) of FOISA correctly. The Applicant submitted that Lothian Buses is a commercially operating, publicly-owned company which operates primarily (more than 90% of its business) in Edinburgh and the Lothians, with no single major commercial rival in the City of Edinburgh. As such, the Applicant is of the view that there is only slight commercial damage possible if the requested information is released. The Applicant argued that Lothian Buses does not operate on a level playing field with other bus operators, so it is disingenuous to claim that disclosure of the information would stop there being a competitive level playing field.

Lothian Buses submissions

Commercial interests

31. In its submissions to the Commissioner, Lothian Buses argued that disclosure of the withheld information would, or would be likely to, prejudice substantially its own commercial interests.
32. Lothian Buses explained that it is a publicly owned business which operates in the competitive and deregulated market for local bus services. It submitted that it is the only publicly owned bus operator in Scotland which operates in this competitive market, and its continued success and ability to generate income and sustain a high level of investment in vehicles, infrastructure and staff is critically dependent on its competitive position not being undermined by disclosure of this information.
33. Having considered Lothian Buses submissions on this point, the Commissioner is satisfied that the interests identified are commercial interests for the purposes of the exemption in section 33(1)(b) of FOISA. These concern the continued provision of a public bus service in a competitive market.

How would disclosure prejudice these commercial interests

34. Lothian Buses asserted that providing a breakdown of lost mileage by 4-week period would highlight to its competitors seasonality in relation to driver recruitment. It also submitted that this would afford competitors an unfair advantage in terms of driver retention or recruitment. This, Lothian Buses argued, could be used by competitors to increase competition with it in areas it knew there to be lost mileage, while at the same time hampering Lothian Buses' ability to retain or recruit in response to increased competition.
35. Lothian Buses is of the view that disclosure of a breakdown of lost mileage by 4-week period would also highlight to its competitors areas of its network where demand may not be met, or areas which could be considered to be weak and susceptible to enhanced existing or new competition. It also submits that disclosure could highlight areas of its network it is keen to safeguard, which could be considered to be strong and financially attractive and therefore susceptible to enhanced existing or new competition.
36. It is Lothian Buses' view that any competitor could add new or alter existing routes, review timetable frequencies or alter ticket pricing to more aggressively compete with it in areas where it suspects there is demand, as a consequence of lost mileage.
37. While Lothian Buses acknowledged that it has no single commercial rival in the City of Edinburgh, it noted that actual competition and the threat of competition are two different threats to Lothian Buses in a fully de-regulated bus market.

38. Lothian Buses argued that any competitor – existing or new – could enhance or start competition within Edinburgh and the Lothians with as little as 70 days' notice. In some cases, however, it would be possible to review existing timetable frequencies and/or alterations to ticket prices to gain an advantage over Lothian Buses immediately.
39. In seeking to evidence the likelihood of such harm occurring, Lothian Buses explained that in 2019 a rival operator entered the open top bus tour market by setting up a new business at short notice: up to that point, Lothian Buses had no single major commercial rival in that market.
40. Submissions were also provided by Lothian Buses in relation to other commercial activity it is currently undertaking which it considers would be substantially prejudiced by disclosure.

The Commissioner's views – section 33(1)(b)

41. The Commissioner has carefully considered the arguments put forward, along with the withheld information.
42. The specific information requested by the Applicant in parts a. to c. of his request is the amount of lost mileage, caused by specific issues, broken down by month, while the information requested at part d. is a monthly breakdown of routes with the highest lost mileage. The Commissioner is unable to accept that disclosure of this information would enable a competitor to identify areas of Lothian Buses network where there may be unmet demand or which may be considered weak or susceptible to new competition. It is the Commissioner's view that more factors would need to come into play before competitors could ascertain which parts of the network had unmet demand. Whilst information which would fulfil part d. of the request (routes with highest level of lost mileage) might identify specific routes where mileage was lost, the Commissioner is not satisfied that this data (in association with the total mileage lost in relation to the other factors) would enable a competitor to identify unmet demand or susceptible routes.
43. Similarly, the Commissioner cannot see how disclosure of the withheld information would assist a competitor in relation to the recruitment and retention of drivers. Factors such as the amount of salary paid and working conditions offered by bus companies, rather than the amount of mileage lost over a specific period, is more likely to influence recruitment and retention. Furthermore, it would not be difficult for any individual (particularly a rival bus company) to anticipate that there is likely to be greater demand for public transport in Edinburgh at certain times of the year (Festival, Fringe, Christmas, Hogmanay and New Year) and equally at some other times demand may be less (so staffing levels and requirements will fluctuate). In any case, it is not clear how a rival would be better placed than Lothian Buses in recruiting (from a presumably finite pool) to meet seasonal peaks in demand.
44. The Commissioner appreciates that it may be possible to extrapolate the lost mileage figures to reveal how many bus drivers were unavailable for work, or where too few were employed, but having considered the withheld information he is not satisfied that any pattern could be observed which would offer a rival competitor useful intelligence to assist in driver recruitment and retention.
45. In terms of competitors having the ability to add new routes or alter existing routes, Lothian Buses has already explained that a competitor could gain an advantage over it by reviewing existing timetable frequencies and/or altering ticketing pricing immediately. The Commissioner does not accept that it would be necessary for a competitor to be aware of lost mileage statistics if they wanted to undertake such an exercise. Having considered the

withheld information in this case, the Commissioner is also not convinced that it is possible for a rival competitor to identify consistent strengths/weaknesses or capacity for a new route.

46. In conclusion, the Commissioner is not satisfied that disclosure of the withheld information (which would fulfil parts a. to d. of the request) relating to the amount of lost mileage incurred by Lothian Buses would, or would be likely to, prejudice substantially the commercial interests of Lothian Buses. The Commissioner therefore finds that Lothian Buses was wrong to withhold the information which would fulfil parts a. to d. of the Applicant's request under section 33(1)(b) of FOISA. Given that he has found that the information has been wrongly withheld, he is not required to go on to consider the public interest test.

Decision

The Commissioner finds that Lothian Buses Limited (Lothian Buses) failed to comply 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 Lothian Buses failed to comply with section 1(1) of FOISA in the steps taken to identify and locate information which would fulfil part d. of the request. The Commissioner also finds that Lothian Buses was not entitled to rely on the exemption in section 33(1)(b) of FOISA for withholding the information which would fulfil all parts of the Applicant's request.

The Commissioner therefore requires Lothian Buses to disclose the information which would fulfil all parts of the Applicant's request, by 24 July 2020.

Appeal

Should either the Applicant or Lothian Buses 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.

Enforcement

If Lothian Buses fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that Lothian Buses has failed to comply. The Court has the right to inquire into the matter and may deal with Lothian Buses as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

8 June 2020

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.
- ...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),
- if it held the information to which the request relates; but
- (b) the authority does not hold that information,
- it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.
- ...

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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