



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**Appeal No: EA/2014/0048**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS 50512944  
Dated: 19 February 2014**

**Appellant: William Horslen**

**Respondent: The Information Commissioner**

**Heard on the papers: Fox Court London**

**Date of Hearing: 1 August 2014**

**Before**

**Chris Hughes**

**Judge**

**and**

**Rosalind Tatam and Pieter De Waal**

**Tribunal Members**

**Date of Decision: 7 September 2014**

**Date of Promulgation: 9 September 2014**

**Subject matter:**

**Freedom of Information Act 2000**

## **REASONS FOR DECISION**

### **Introduction**

1. Mr Horslen was dissatisfied with the performance of his local bus company. On 27 February 2013 he wrote to the Vehicle and Operator Services Agency (VOSA) – the relevant regulatory body – to complain about the service. At VOSA’s request he subsequently sent them more information and VOSA informed him that his concerns were *“being addressed in a proper manner, however due to restrictions imposed by the Freedom of Information and Data Protection Acts. It may not be possible to notify you of the outcome of the investigation”*. This comment shows little understanding of either piece of legislation.
2. On 17 June Mr Horslen wrote commenting on the time since he had sent the complaint and stating *“I would appreciate it if you could update me of your investigation and what action if any has been taken in regards to our complaint and what improvements the passengers of the above bus service can expect from Essex First Buses in the future. I await your response.”* He received no reply and on 8 July 2013 he wrote again *“I would appreciate an update of the enquiry and any conclusions you may have drawn from your investigation... I would appreciate a response to this letter and should our letters cross in the post then I do apologise for being a little impatient in this matter”*. This received a response apologising and stating that it had been passed to VOSA’s information access team who wrote stating that they were *“dealing with this under the terms of the Freedom of Information Act”*. It may be noted that, the 8 July letter was asking the same thing as the letter of 17 June, but the June letter was not identified as a request within FOIA by VOSA (which is understandable, as Mr Horslen was not asking for information per se but for an update of what VOSA was doing about his complaint) whereas the July letter was so designated. The parties are content to proceed on this basis, that the July letter is interpreted as a FOIA request, and the Panel saw no reason to disturb this consensus.
3. VOSA made a substantive reply on 5 August. It confirmed that it held information relevant to the request and refused to supply that information (although what that information is has never been defined) relying on FOIA section 31(1) that the

information was exempt because disclosure would prejudice its function of determining whether regulatory action should be taken against any person. On review it maintained this position. Mr Horslen complained to the Information Commissioner (“the ICO”) challenging the decision of VOSA “*not to provide me with the outcome/result of an enquiry conducted by the above Agency into First Essex Buses failure to operate the 45 Bus Service*”. He repeated his complaint about the quality of service passengers received and that the results of the inquiry into the failure of the bus company to operate in accordance with the licence should be published in the interests of accountability.

4. During the course of the ICO’s investigation of the complaint VOSA wrote a detailed letter (bundle pages 41, 42 dated 9 January 2014) to Mr Horslen explaining the working of the regulatory framework under which VOSA investigated an issue and if appropriate made a report to the Traffic Commissioner (the tribunal deciding regulatory complaints against bus companies). It explained the existence of rules of procedure with respect to evidence applying to cases referred to the Traffic Commissioner. The letter explained “*At this stage I am unable to let you know what decision has been taken as that might jeopardise any action that might be taken. Once the case is complete then we will let you know if we have decided not to refer it to the Traffic Commissioner. If the case goes to Public Inquiry then the information will be in the public domain as described above. If it does go to the Traffic Commissioner and they take action other than calling the operator to public inquiry then you will need to request the information from them.*” It seems to the Tribunal that it would have been appropriate for VOSA to have sent such a letter as a routine step in receiving and handling complaints against operators. If it had been sent at an earlier stage, when Mr Horslen sent in his complaint dossier, he would have had an understanding of the process which would be followed and why VOSA might feel unable to inform him of progress or outcome of the complaint.
5. In his decision notice the ICO accepted that S31 applied to this case and considered whether the disclosure would be likely to prejudice the discharge of VOSA’s functions. He noted that since investigation was ongoing at the time of the request disclosure would make it harder in future for VOSA to gather information from the regulated companies and therefore prejudice to VOSA’s regulatory functions would arise.

6. In weighing where the public interest lay between the public benefit of disclosure and the need to maintain the regulatory process he noted that VOSA considered *"that it is in the greater public interest to withhold any details of its proceedings until or if a public inquiry is called"*. This was because VOSA needed to be a trusted recipient of information and there was a need to avoid any steps which could compromise any action of the Traffic Commissioner, whether in the short or long term (the Commissioner may consider issues up to five years old in his regulatory determinations). The ICO commented that *"the public interest arguments presented by both sides are sparse"* and concluded that the balance lay in favour of not disclosing the information and concluded that *"the public interest is likely to be addressed by the publication of any inquiry, if this was to take place, and any action subsequently taken."*
7. In his appeal Mr Horslen accepted that S31 applied but felt that these provisions did not negate *"the public interest test and that full disclosure of the decisions taken by VOSA should be placed in the public domain."*
8. In his reply the ICO re-stated the position he had taken. At Mr Horslen's request the case was listed for an oral hearing, however shortly before the hearing was due to take place the Traffic Commissioner held a public inquiry which resulted in regulatory action against the bus company. Mr Horslen then indicated that he wished the appeal to proceed but would not attend.

#### The questions for the Tribunal

9. The learned registrar of this Tribunal in a case management note of 8 April helpfully set out the issues before the Tribunal as whether the decision notice should remain or be amended and in particular whether the s31 exemption applied (which appeared not to be disputed by Mr Horslen) and if so where the balance of public interest lay in maintaining the exemption.
10. Mr Horslen has not at any stage disputed the applicability of S31 and the Tribunal is satisfied that it is engaged. Given the arguments put forward by VOSA to the ICO and adopted by him in his reasoning it is clear that VOSA in handling Mr Horslen's request for an update could also have considered whether to rely on s31(3) and adopted a "neither confirm nor deny" approach to the request – particularly if they had sent an appropriately informative letter to him at the outset.

11. Within the framework of a FOIA request the sole question is whether the balance of public interest, in July 2013, lay with disclosure or non-disclosure. Mr Horslen has stated in general terms that accountability is important and the public should know what has happened to a complaint about a sub-standard bus service. The ICO in his decision notice set out ways in which prejudice could arise to the ability of VOSA to conduct investigations and through the possible prejudice to the adjudicative process of the Traffic Commissioner. The Tribunal considers that these are real and credible risks to the functioning of VOSA and weigh heavily in favour of not disclosing the progress of a particular investigation. The Tribunal is satisfied that the ICO correctly concluded that the balance lay in non-disclosure. The ICO also noted that the need for accountability was likely to be addressed by any public inquiry which subsequently took place. He was correct in this conclusion.

Conclusion and remedy

12. The Tribunal is therefore satisfied that the decision notice is in accordance with the law and dismisses the appeal.

13. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 7 September 2014