



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2020/0226 P

**Decided without a hearing
On 4 January & 26 February 2021**

Before

**JUDGE HAZEL OLIVER
PAUL TAYLOR
PIETER DE WAAL**

Between

PHIL ANSLOW

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

BLAUENAU GWENT COUNTY BOROUGH COUNCIL

Second Respondent

DECISION

The appeal is dismissed.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 29 June 2020 (FS50910405, the “Decision Notice”). It concerns information sought from Blaenau Gwent Council (the “Council”) about subsidies paid to Stagecoach in respect of concessionary bus travel.

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. There is a concessionary fare scheme in Wales. This provides that people over 60 and those with certain disabilities can travel for free on local bus services. Transport operators are reimbursed for the cost of these travel concessions. The rules for reimbursement are set out in the Mandatory Travel Concessions (Reimbursement Arrangements) (Wales) Regulations 2001 (the "Regulations"). Regulation 3 sets out an objective that travel operators should be financially no better or worse off as a result of providing these mandatory travel concessions.

4. Guidance has been issued by the Welsh Government on the operation of the concessionary travel scheme, dated April 2017 – "*Concessionary Travel Scheme: A Common Approach for Reimbursement Arrangements for Participating Operators*". This sets out a standard reimbursement model. The calculation for each depot or participating operator is: **Concessionary journeys made x Representative concessionary fare x Reimbursement rate.**

5. The **representative concessionary fare** (RCF) is the average adult single fare. This is calculated by dividing the **total revenue from adult ticket sales** by the corresponding **number of adult tickets issued**. The **reimbursement rate** covers various costs borne by the operator as a result of the scheme.

6. The reimbursement rate is also referred to as the "generation factor" or "modifying index factor". This is set for all operators across Wales. At the time of the Request this was 69.18%. This information was provided to the appellant in response to the Request. Operators were paid 69.18% of their RCF for each concessionary journey. Put simply, the RCF is an average full price fare. Operators are then paid a certain percentage of this full price fare for each concessionary journey. This is designed to reimburse them for the costs of each concessionary journey in a way that leaves them no better and no worse off.

7. On 3 September 2018 the appellant made a request for information to the Council under the Freedom of Information Act 2000 ("FOIA") about concessionary pass reimbursement. This resulted in a complaint to the Commissioner. An issue about the wording and interpretation of the request arose during the investigation. The appellant sent a revised request to the Council on 18 December 2019 for the following information (the "Request"):

"The Representative Concessionary Fare ("RCF") paid to Stagecoach depot-by-depot (South East Wales) by your authority (Blaenau Gwent)

The gross RCF (i.e. the total RCF);

The net RCF (i.e. the total RCF minus the so-called "generation factor"); plus

Confirmation of the "generation factor" used by the authorities on each occasion."

8. The Council responded on 20 January 2020. It provided the generation factor (also known as the reimbursement rate or modifying index factor). It refused to provide the gross RCF and the net RCF (the "withheld information"). The Council relied on the FOIA exemptions in

sections 41(1) FOIA (information provided in confidence) and 43(2) FOIA (prejudice to commercial interests).

9. The appellant complained to the Commissioner on 20 January 2020. The Commissioner decided:

- a. The section 41 exemption (information provided in confidence) was engaged, and the Council was entitled to refuse to provide the withheld information.
- b. The RCF was provided to the Council by the Welsh Government, and a letter to another public authority dated August 2012 showed that this was provided on a “commercial in confidence” basis.
- c. The information does have the quality of confidence as it is not otherwise publicly available and is not trivial.
- d. The Welsh Government set an express expectation that the information should be treated confidentially.
- e. Disclosure would cause detriment to the relationship between the Welsh Government and the Council, to both parties’ relationship with the travel operators, and to the operation of the travel scheme.
- f. There is some public interest in disclosure, but this is not sufficient to override the duty of confidentiality and so the Council could not maintain a defence of overriding public interest if it were to be subject to an action for breach of confidence.

The Appeal and Responses

10. The appellant appealed on 17 July 2020. The grounds of appeal can be summarised as follows:

- a. The Commissioner was misinformed about the RCF being provided to the Council by the Welsh Government in confidence, and her decision is based on incorrect facts.
- b. The appellant has correspondence from the Welsh Government which has confirmed on multiple occasions that it plays no substantive role in setting the RCF. This is done by local authorities. The letter relied on by the Commissioner does not reflect current practice.
- c. The appellant had not requested disclosure of information used to calculate the RCF, but merely the amount of Stagecoach’s RCF.

11. The Commissioner’s response explains that she had understood that the Welsh Government communicates the RCF to each local authority. There now appears to be disagreement or confusion between the Council and the Welsh Government as to how the reimbursement scheme operated. This is important to a key issue in the appeal – whether information was obtained by the Council from another person. The Council may also want to rely on other exemptions. The Commissioner proposed that the Council and Welsh Government should be joined to the appeal, or alternatively invited or directed to make submissions only under Rule 5(3)(d) of the 2009 Rules of Procedure.

12. The appellant has provided a reply which agrees that additional facts are required.

13. The Tribunal originally met to discuss its decision on 4 January 2021. We agreed that it was not possible to make a fair decision without obtaining further information from the Council, and the best way to do this was to join the Council to the appeal as the second respondent.

The Council was made a party to the appeal by directions made on 7 January 2021. The Council's response resists the appeal and can be summarised as follows:

- a. The Welsh Government does provide the RCF and has instructed the Council to keep this information confidential.
- b. If the RCF were to be disclosed it would be possible to reverse engineer its value to obtain passenger numbers for a particular service, and disclosure under FOIA means disclosure to the world at large.
- c. The Council relies on sections 41 and 43(2) FOIA to withhold the information.

14. Neither the appellant nor the Commissioner have provided a reply to the Council's response.

Applicable law

15. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) *Any person making a request for information to a public authority is entitled—*
- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*

.....

2 Effect of the exemptions in Part II.

.....

- (2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
- (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

.....

41 Information provided in confidence

- (1) *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.*

.....

58 Determination of appeals

- (1) *If on an appeal under section 57 the Tribunal considers—*
- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
 - (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

16. For the section 41 exemption (information provided in confidence), the basic requirements for establishing a breach of confidence are as set out in ***Coco v A N Clark (Engineers) Ltd*** [1969] RPC 41:

- a. The information must have the necessary quality of confidence about it. The Commissioner's guidance on section 41 states that, in order to have the necessary quality of confidence, information must be more than trivial and not otherwise accessible in the public domain.
- b. The information must have been imparted in circumstances conferring an obligation of confidence. This can be explicit, or can be implied from the circumstances in which the information is imparted.
- c. There must be an unauthorised use of that information to the detriment of the person communicating it. Separate detriment may not be necessary where the confidential information is personal in nature. But, in a case where the information is commercial in nature, it is necessary to show that there would be detriment to the person who communicated the information.

17. Section 41 requires the information to have been obtained by the public authority from another person. The exemption is not designed to cover information that the public authority has generated itself (***Derry City Council v Information Commissioner***, EA/2006/0014, 11 December 2006).

18. Section 41 is an absolute exemption. However, the public interest must still be taken into account in determining whether disclosure would constitute an actionable breach of confidence. The public interest may constitute a defence to an action at common law for breach of confidence. There is an assumption that the information should be withheld unless the public interest in disclosure outweighs the public interest in upholding the duty of confidence.

Issues and material before the Tribunal

19. The issues are as follows.

20. Can the Council refuse to disclose the withheld information under section 41 FOIA?

- a. Does the withheld information have the necessary quality of confidence – is it more than trivial and not otherwise accessible in the public domain?
- b. Was the withheld information imparted in circumstances conferring an obligation of confidence?
- c. Would disclosure be an unauthorised use of that information to the detriment of the Welsh Government? This involves consideration of whether the public interest in disclosure outweighs the public interest in upholding the duty of confidence.

21. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents. This includes the grounds of appeal with supporting documents, the Commissioner's response, and the appellant's reply.
- b. A witness statement from Mr Steve Berry, Data Protection & Governance Officer at the Council, together with one exhibit.

Evidence from Mr Berry

22. The witness statement from Mr Berry on behalf of the Council provides evidence about who provides the RCF, the confidential nature of this information, how reverse engineering could be carried out if the RCF were to be disclosed, and why the exemptions relied on should be applied in this case.

23. Mr Berry says that the Welsh Government is the controller of the budget for the RCF scheme, and instructs local authorities as to the rates for each individual operator what they may use in each year. Councils are told the rate in April each year for the following year.

24. The Welsh Government uses the average adult single fare information to establish each operator's RCF. This information is collected from each operator by the local authority and sent to the Welsh Government. The Welsh Government calculates the RCF. The RCF is then sent to an independent local authority Concessionary Fare Sub Group, to check the routes and calculations are correct. The Concessionary Fare Sub Group approves the calculations and sends them back to the Welsh Government with the appropriate recommendation. The Welsh Government confirms the RCF with each local authority. The local authorities then confirm the RCF to each operator.

25. Mr Berry says that the Welsh Government has instructed the Council to keep the RCF confidential. He says that all information is shared with the Concessionary Fare Sub Group and local authorities on a confidential basis, and correspondence is marked "confidential" and "commercially sensitive". He also explains that Regulation 10 of the Regulations expressly states, "*Any information supplied by an operator to an authority pursuant to arrangements giving effect to this regulation and regulations 11 to 17 may only be used for and in connection with the calculation of reimbursement payments and such information must not be disclosed by the authority except- (a) With the consent of the operator; or (b) To the extent to which the information in question has become public knowledge otherwise than by the act or omission of the authority.*"

26. Mr Berry says that the Welsh Government has reminded local authorities of the confidential nature of the rates when information has been inadvertently disclosed, and refers to an advisory note to all Councils in Wales from 2012 which requires them to ensure that commercially sensitive information about the RCF for operators was not made available (page D91 in the bundle). The exhibit to the statement is an email from the Chair of the Concessionary Fare Sub Group dated 27 April 2020 which attaches the master list of RCFs and states "**REMEMBER THE DOCUMENT IS HIGHLY CONFIDENTIAL AND MUST NOT BE SHARED WITH THE OPERATORS**".

27. In relation to reverse engineering from the RCF, Mr Berry says that disclosure of the RCF would make it possible to obtain the level of passenger numbers for a particular service. This is because fare/ticket prices are widely available. The RCF is calculated using total revenue from adult ticket sales divided by adult single tickets issued. The RCF could therefore be used to establish the confidential figures that had been provided by the operator, in particular the revenue generated on a particular service through ticket sales. This is commercially sensitive

information that is not within the public domain. This may encourage a competing operator to register competing services on lucrative routes, and provide an advantage when tendering for local authority subsidised routes.

Discussion and Conclusions

28. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

29. The appellant's underlying complaint is that Stagecoach appears to receive more per passenger by way of subsidy than smaller transport operators, such as his own business (Phil Anslow coaches). He believes they are paid more for providing the same public service. This enables the dominant high price/high cost business to create a monopoly, and penalises low price/low cost providers.

30. The main issue is - whether the Council can refuse to disclose the withheld information under section 41 FOIA.

31. ***Does the withheld information have the necessary quality of confidence?*** We have considered whether the information is more than trivial and not otherwise accessible in the public domain. We find that it is. It is clear from the evidence of Mr Berry that the RCF is considered by the Welsh Government to be confidential and commercially sensitive, and this is also shown by Regulation 10 of the Regulations which expressly limits how information disclosed by an operator may be used. We are also satisfied on the evidence that the RCF for each operator is not otherwise accessible to the public.

32. ***Was the withheld information imparted in circumstances conferring an obligation of confidence?*** The appellant disputes that the information was provided to the Council by the Welsh Government, based on the correspondence attached to his appeal document. A letter from the Welsh Government dated 20 December 2018 states, "*The Welsh Ministers do not set the level of reimbursement provided to bus operators under the scheme. Local authorities and bus operators have chosen collectively to agree the details of the applicable reimbursement arrangements.*" The same information is provided in a letter dated 8 January 2019. A further letter dated 24 February 2019 states, "*...the Welsh Government does not set the reimbursement paid to bus operators by local authorities.*" The appellant says that this shows the Commissioner was incorrect in her understanding that the Welsh Government "communicates" the RCF to each local authority, and also incorrect in saying that it is calculated from commercially sensitive information provided to the Welsh Government. He says that the Commissioner was misinformed, and the Welsh Government has confirmed on multiple occasions that it plays no substantive role in setting the RCF.

33. Mr Berry's evidence is that local authorities are duty bound to ensure that the agreed formula is properly implemented. He says that the letters from the Welsh Government are correct to state that it does not set the reimbursement paid to bus operators. The actual amount is calculated by local authorities, using the reimbursement rate. Mr Berry maintains that it is the Welsh Government which provides the RCF, and the reimbursement rate is agreed nationally between local authorities and the Welsh Government. His witness statement

provides a detailed explanation of how the RCF is calculated by the Welsh Government and provided to each local authority after verification by the Concessionary Fare Sub Group.

34. Having considered the evidence, we accept that there is a difference between providing the RCF and providing the final outcome of the calculations to each bus operator. We find that the correspondence from the Welsh Government is referring to the final calculation of the reimbursement paid to each bus operator, rather than the RCF. The inconsistency in the correspondence is unfortunate and has caused some confusion. It would also have been helpful if the relevant arrangements had been set out clearly in a document which explains the process. However, having taken into account both the correspondence provided by the appellant and the detailed explanations provided by Mr Berry, we find that the RCF is provided to the Council by the Welsh Government.

35. The issue of whether the RCF was provided to the Council by the Welsh Government was the basis of the appellant's appeal. For completeness, we have gone on to consider the remainder of the test.

36. We are also satisfied that the RCF was imparted in circumstances conferring an obligation of confidence. We note the evidence that all information is shared with the Concessionary Fare Sub Group and local authorities on a confidential basis, and correspondence is marked "confidential" and "commercially sensitive". We have seen an advisory note to all Councils in Wales from 2012 which requires them to ensure that commercially sensitive information about the RCF for operators was not made available (page D91 in the bundle). We have also seen the email from the Chair of the Concessionary Fare Sub Group dated 27 April 2020 which attaches the master list of RCFs and states "**REMEMBER THE DOCUMENT IS HIGHLY CONFIDENTIAL AND MUST NOT BE SHARED WITH THE OPERATORS**". We find on the evidence that the RCF was provided to the Council by the Welsh Government expressly on the basis that this information is to be kept confidential.

37. ***Would disclosure be an unauthorised use of that information to the detriment of the Welsh Government?*** This involves consideration of whether the public interest in disclosure outweighs the public interest in upholding the duty of confidence. The public interest in disclosure must be strong enough to provide a defence to the Council in an action for breach of confidence. The appellant's appeal refers to his suspicions that its largest competitor is paid more RCF per passenger than his own company, which creates significant adverse effects for him in what is meant to be an open competitive transportation market. This appears to be a personal rather than a public interest. However, we accept that there may also be a public interest in anti-competitive practices. We also accept that there is a general public interest in transparency and understanding of how the concessionary fare scheme works. As noted by the Commissioner, we have not been provided with any evidence of wrongdoing to support the appellant's suspicions. The appellant has also not explained why the RCF itself is needed to expose alleged anti-competitive practices. It appears from the underlying formula itself that bus companies which charge higher adult fares will receive a higher level of reimbursement per concessionary passenger. The appellant has also been provided with the total sum reimbursed to Stagecoach in 2018-19, which goes some way to satisfying the public interest in transparency.

38. There is a general public interest in upholding the duty of confidence. Any disclosure of confidential information under FOIA will undermine the trust between public authorities and those who provide them with information. In this case, we are also satisfied that disclosure of

the RCF to the world at large would jeopardise the concessionary fare scheme. We accept that the information provided to the Welsh Government by operators about fares, ticket sales and passengers is regarded as commercially sensitive. We also accept the evidence from Mr Berry that disclosure of the RCF may allow reverse engineering of the formula, so that competitors could calculate commercially sensitive information about individual bus operators. We note that the appellant has asked for a detailed depot-by-depot breakdown of the RCF. Although the appellant says he has no interest in calculating this information, disclosure under FOIA is disclosure to the world at large. This would damage the relationship between bus operators and the Welsh Government. Operators may be less willing to tender for certain routes and participate in the concessionary fare scheme. It may also give competitors an unfair advantage in future tendering exercises, which would undermine competition and damage the public interest in obtaining best value for money.

39. Taking all of the above matters into account, we find that the public interest in disclosure does not outweigh the public interest in upholding the duty of confidence. The public interest in upholding the duty of confidence in this case is strong, and the public interest in disclosure is limited.

40. In light of these findings there is no need for us to consider section 43(2) FOIA.

41. We dismiss the appeal and uphold the decision of the Commissioner.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 12 March 2021

Date promulgated: 15 March 2021