

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 June 2017

**Public Authority:** Department for Transport  
**Address:** Great Minster House  
33 Horseferry Road  
London  
SW1P 4DR

### Decision (including any steps ordered)

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1. The complainant has requested information on overcrowding forecasts for the West Coast Main Line in the HS2 Strategic Case. For some of the requested information the Department for Transport ("DfT") relied on section 21 of the FOIA as it considered the information reasonably accessible to the applicant. The DfT withheld the information used for its calculation of demand and revenue on the basis of section 41 of the FOIA.
2. The Commissioner's decision is that the DfT has correctly applied section 41 to refuse to provide the information used in its calculations. For the information refused under section 21 the Commissioner finds that the information on trains, capacities and service patterns was correctly refused. However, for information on growth scenarios and assessments of likelihood the Commissioner finds section 21 was incorrectly applied. She requires no steps to be taken as the information has either been provided or the DfT has confirmed the information is not held.

### Request and response

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3. On 22 September 2016, the complainant wrote to the Department for Transport ("DfT") and requested information in the following terms:  
  
*"In the November 2015 update to the HS2 Strategic Case, West Coast Main Line capacity was discussed, along with overcrowding forecasts for 'Reference' and 'Higher Growth' scenarios.*

*However, it is not clear whether other growth scenarios were considered, and the assessed likelihood of the scenarios was not set out.*

*The overcrowding forecasts seemed to be given in terms of percentages of the capacity of a particular type of train (generally 12-car Class 350, and 11-car Reconfigured Pendolino). As a result, it is unclear what the 'cardinal' overcrowding forecasts are.*

*For example, since the evening 'busiest hour' intercity overcrowding forecasts seem to be based on running the current number of trains (which is lower than line capacity), presumably the assessments would be different, if the full line capacity were used.*

*London Midland overcrowding forecasts depend on, for example, whether 3+2 or 2+2 Class 350 trains are used, and how many paths on the slow line were used. However, the data and assumptions are not given.*

*Accordingly, I would like the Department to provide the information held on these topics."*

4. The DfT responded on 19 October 2016. It summarised the request as being for information on growth scenarios considered, an assessment of the likelihood of each scenario, the train capacities, lengths and service patterns that were used as the basis for future crowding assessments. The DfT went on to state that information was held but under section 21 of the FOIA it was exempt from disclosure as it was reasonably accessible. The DfT had the following points to make:

- Growth scenarios: Two scenarios of demand growth exist to understand future crowding on West Coast Main Line operations – the 'reference case' and the 'higher growth case'. The DfT explained these in more detail in its response to the complaint.
- Assessment of likelihood of each scenario: The 'Reference Case' growth rate is derived from the Planet Framework Model (PFM) which is the forecasting model used to forecast demand, benefit and revenues for the HS2 economic case. The DfT stated there was no specific quantified likelihood associated with the reference case growth rates and pointed to a series of forecasting assumptions on pages 3-15 of a published assumptions report<sup>1</sup>.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/498234/assumptions\\_report\\_PFM\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/498234/assumptions_report_PFM_2016.pdf)

Similarly, the DfT stated no specific quantified likelihoods were associated with the 'Higher Growth Case' where the growth rates are closer to the actual growth in demand since privatisation.

- Capacities, lengths of trains, service patterns: The DfT pointed to page 82 of the technical annex<sup>2</sup> that explained that two capacity scenarios had been assumed. The DfT offered some further explanation to the complainant around the capacity scenarios.
5. The complainant requested an internal review on 20 October 2016. He stated that he had already read the documents that the DfT linked to in its response and did not consider they contained the information he requested. The complainant stated he wanted to obtain the basis and calculations for the demand and overcrowding forecasts and to know whether other growth scenarios were considered.
  6. Following an internal review the DfT wrote to the complainant on 2 December 2016. The DfT reconsidered its response to the request and specifically whether it had provided sufficient information on the basis and calculations of the demand and overcrowding forecasts and whether it had answered the question of whether other growth scenarios were considered.
  7. With regard to the basis and calculations for the overcrowding forecasts the DfT explained that the starting point for the forecasts was the growth rates which had already been explained to the complainant. The DfT further explained the growth rates were applied to passenger counts data to calculate projected passenger usage and these counts are undertaken and provided to the DfT twice a year<sup>3</sup>. The DfT pointed to a further document (notes and definitions report<sup>4</sup>) which contains a detailed explanation of the methodology.
  8. For the question of whether other growth scenarios were considered; the DfT clarified that no further scenarios were considered except the

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2

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/480647/annex-demand-and-capacity-pressures.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480647/annex-demand-and-capacity-pressures.pdf)

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/466412/rail-passengers-crowding-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/466412/rail-passengers-crowding-2014.pdf)

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/540952/rail-notes-definitions.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/540952/rail-notes-definitions.pdf)

reference case and higher growth case which had already been explained to the complainant.

9. The DfT did confirm it held information on the calculations underlying the technical annex which was linked to in its previous response. An excel document in which the analysis was undertaken was held but the DfT considered the information exempt under sections 41 and 43 of the FOIA.

## Scope of the case

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10. The complainant contacted the Commissioner on 5 December 2016 to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider the decision by the DfT to withhold the information on the calculations as well as to consider the use of section 21 in stating that some of the requested information was reasonably accessible.
11. During the course of the Commissioner's investigation the DfT in addition to applying the sections 41 and 43 exemptions, also sought to rely on section 44 to withhold information on the calculations.
12. The original wording of the request from the complainant was somewhat ambiguous in that it listed a number of areas of concern with the HS2 Strategic Case and the overcrowding forecasts and then asked for information held on these topics. In the refusal notice the DfT summarised the request as being for information on growth scenarios considered, an assessment of likelihood of each scenario, and the train capacities, lengths and service patterns used as the basis for future crowding assessments. This seems to have been accepted as the scope of the request and has not been disputed by the complainant and the Commissioner will continue her investigation on this basis.
13. The Commissioner considers the scope of her investigation to be to determine if the DfT correctly applied the section 21 exemption to refuse to provide information on growth scenarios considered and assessments of likelihood and whether the DfT correctly applied any of sections 41, 43 or 44 to withhold information on the calculations.

## Reasons for decision

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### Section 21 – information reasonably accessible to the applicant

14. Section 21 of the FOIA says that information is exempt from disclosure under section 21 if it is already reasonably accessible to the applicant. It is an absolute exemption and is not subject to a public interest test.
15. In its response to the complainant, the DfT cited section 21 but did not specify what particular information that had been requested this was being applied to. The Commissioner understands this was in relation to the information on the assessment of likelihood of each scenario for which the DfT was able to point to specific sections of an assumptions report that it considered provided information on forecasting assumptions. Similarly, the DfT applied section 21 to information on capacities, lengths of trains and service patterns by pointing to the technical annex.
16. The complainant argued that the documents did not contain the information he requested and what he wanted was the basis and calculations of the demand and overcrowding forecasts and whether other growth scenarios were considered. The information on the calculations is the information that the DfT later acknowledged was held but was being withheld under sections 41, 43 and 44 of the FOIA.
17. Therefore, the Commissioner's concern is to determine if information on other growth scenarios and the basis of the forecasts considered by the DfT is information that is reasonably accessible to the complainant via any of the links provided.
18. The DfT explained in its internal review response that the starting point of the demand and overcrowding forecasts is the growth rates and these are applied to passenger counts data to calculate projected passenger usage in future years. Passenger counts are carried out by franchised operators during a typical weekday and provide data on passenger numbers and capacity provision to the DfT to permit the monitoring of train crowding levels. The DfT provided a link to the publication of the more recent counts data as well as a link to a rail notes and definitions report which provided a detailed explanation of the methodology. The DfT also explained the analysis in the technical annex was from counts data from autumn 2014 for the InterCity West Coast franchise and spring 2015 for the West Midlands franchise. Finally, the DfT stated that to understand future crowding levels projected passenger usage needs to be compared to a level of capacity and for the purpose of the analysis the level of capacity on both rail franchises was assumed to be consistent with the December 2014 timetable. A link was provided to this timetable.
19. The Commissioner accepts that this does demonstrate that there is information available online on the overcrowding forecasts – it is clear there is information available on counts data, explanations of

methodology and the timetables that were used for consistency. From this information the Commissioner understands it can be used to get a picture of how the forecasts were made. This would be information on the basis of the forecasts which was requested by the complainant in his internal review request. The Commissioner notes that this was not explicitly requested originally but it does seem to be information on capacities and service patterns which was established as being part of the original scope of the request.

20. Consequently, the Commissioner considers that for the part of the request relating to trains, capacities and service patterns the requested information is exempt from disclosure under section 21 of the FOIA as the information is already reasonably accessible to the complainant through the various links provided.
21. However, for the information requested on growth scenarios the Commissioner does not accept that section 21 was correctly engaged. The DfT explained the different growth scenarios considered – the reference case and the higher growth case – information which the complainant was already aware of as it was mentioned in this information. The complainant specifically asked for information on whether other growth scenarios were considered and information on the assessment of likelihood for each scenario.
22. The DfT did state that there were no specific quantified likelihoods for either the reference case or the higher growth case but then provided links to documents which contained forecasting assumptions. The internal review response reiterated that the DfT had already explained the two growth scenarios considered and no further scenarios had been considered.
23. The Commissioner is of the view that refusing to provide information on growth scenarios and the likelihood assessments was misleading as it does not appear that information on these subjects was publicly available, although the links may have held information on the broader subject. In fact, the DfT should have clarified that information on likelihood assessments was not held and information on growth scenarios considered was provided in the response when the DfT explained the scenarios to the complainant.
24. On this basis the Commissioner finds that section 21 was incorrectly cited as a basis for refusing to provide information on growth scenarios and likelihoods as the information was either not held or was provided to the complainant in the explanations given in the DfT's responses. The information was therefore not reasonably accessible to the complainant. However, the Commissioner does not require the DfT to take any steps.

## **Section 41 – information provided in confidence**

25. Section 41 applies to information obtained from a third party whose disclosure would constitute an actionable breach of confidence. This exemption is absolute and is therefore not subject to a public interest test.

26. Section 41(1) states:

*“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.”*

27. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- Whether the information has the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether disclosure would be an unauthorised use of the information and to the detriment of the confider.

28. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. In this case the information being withheld by the DfT is information which constitutes the calculations underpinning the technical annex. This information consists of and is based on passenger loading/count data provided to the DfT by Train Operating Companies (TOC's). This information is clearly obtained from a third party and as such the requirement of section 41(1)(a) is met. The Commissioner has next considered whether the information can be said to otherwise accessible.

29. The DfT has explained that TOC's are required to provide passenger counts under the terms of their Franchise Agreements. Passenger loading/count data are provided for individual train services based on passenger counts carried out by the TOC's and the counts are provided for all services on arrival at and departure from particular stations specified by the DfT. This information is provided to the DfT at two periods in a year. The DfT states that this information is information that

the TOC's are asked to prepare for the DfT and it is not otherwise published by the TOC's. The Commissioner accepts that this shows the information is not otherwise accessible.

30. The Commissioner has next gone on to consider whether the information is more than trivial and therefore has the necessary quality of confidence. The DfT has stated the information is important to the TOC's as it provides an indication of the successful delivery of its train services and the information would be of interest to the wider market as it could be advantageous to competitors. The Commissioner does not consider the information to be trivial as it does show how well particular TOC's are operating and she can understand how this information could be used to place a TOC in a disadvantageous position in bidding for future franchises. She therefore accepts the information has the necessary quality of confidence.
31. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence. On this point the DfT has specified that the information is provided under the contractual Rail Franchise Terms<sup>5</sup> which impose confidentiality obligation on the DfT. Schedule 17 of these Terms expressly provides that the passenger loading/count data information for individual train services is to be held by the DfT under a duty of confidentiality. The Commissioner notes Schedule 17 is explicit in this and states:

*" ... each party shall hold in confidence all documents, materials and other information, whether technical or commercial, supplied by or on behalf of the other party and shall not, except with the other party's written authority, publish or otherwise disclose the same"*
32. The DfT has confirmed that it does not have the written authority of the TOC's to release the information.
33. In addition to this, the DfT explained there is a written agreement in place with each individual TOC whereby passenger loading/count data provided to the DfT is to be regarded as confidential and should not be published or passed to third parties. The TOC's have each provided the DfT with a statement confirming that this information should remain confidential and this covers not only the data provided to the TOCs for

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5

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the individual train services but also the aggregate totals which are calculated from them by the DfT.

34. Based on this the Commissioner accepts the information was imparted in circumstances importing an obligation of confidence. There is a clear expectation of confidence when the TOCs provide data to the DfT, this is not just implicit but is explicitly stated in the Rail Franchise Terms and reiterated in the individual agreements, of which a sample agreement has been viewed by the Commissioner.
35. The Commissioner has next considered whether disclosure of the information would be to the detriment of the confider. The DfT argues that releasing this information would make it possible to analyse TOC demand and, in combination with fares information already in the public domain, revenue and the growth in revenue by route, time of day and year. This data would be of use to any potential open access operator or any company considering a future bid for a rail franchise. The DfT further states that loading data is a key input to commercial decisions about fares and the availability of advance purchase products and this is information that would be of value to competitors.
36. The DfT states that even aggregations of this data would be of value to TOC's competitors as it would still allow analysis of peak and off peak demand and revenue over time on individual routes. Aggregations by service group or the origins/destinations of services would allow analysis by route and higher aggregations by TOC at each station would, in combination with the same information for other stations, allow analysis of demand and revenue on individual routes. For example, knowing the number of TOC passengers arriving and departing at a specific station would not identify the number of passengers on each of that TOC's routes but in combination with the same data for stations in other cities it would be possible to make a reasonable estimate of the number of passengers that travel between these stations. Currently the DfT only publishes the total number of passengers arriving at or departing from particular stations but does not break this down by TOC to avoid competitors being able to analyse the passenger demand on particular routes.
37. The Commissioner accepts that disclosing this information would be of detriment to the TOC's. She notes that the DfT has provided clear examples as to how this information in both its raw form and aggregated forms could be used to analyse demand and revenue and be of use to other TOC's in future bids for franchises. Putting the TOC's in a potentially commercially disadvantageous position would clearly be of detriment to the confider.

38. The Commissioner must now consider whether disclosing this information could result in an actionable breach of confidence. The Commissioner has already accepted the information is provided under a duty of confidence and there could be a commercial impact on the TOC's if it disclosed. The DfT believes this is enough for the TOC's to be able to bring an action for breach of confidence. The Commissioner recognises the DfT takes confidentiality seriously and the fact that individual TOC's have written agreements with the DfT regarding the confidentiality of information they share with the DfT in addition to the confidentiality clauses in the Rail Franchise Terms supports this. The fact that the DfT also has statements from TOC's expressly stating that the information should not be disclosed also adds to this and the Commissioner accepts there is the potential for an actionable breach of confidence and as such it would be improper to disclose the information unless there is a public interest defence for a breach of confidence.
39. In the Commissioner's view disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential.
40. The Commissioner recognises that the courts have taken a view that the grounds for breaching confidentiality must be valid and strong since the duty of confidence is not one which should be overridden lightly. As the decisions taken by courts have shown, serious public interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct or illegality.
41. The Commissioner recognises that there is always some public interest in the disclosure of information and the DfT advises that some TOC's receive public subsidies so there is a public interest in the disclosing information which ensures accountability of public expenditure. The Commissioner also recognises that there is interest to other TOC's in this information as it would provide important information on the demands and potential revenues in franchises. The DfT also notes that there is a public interest in rail services not being excessively crowded so that passengers can travel in comfort and disclosing this information would allow participation in the debate on whether available rolling stock capacity is being utilised effectively.

42. At this stage the Commissioner has referred to a decision of the Information Tribunal<sup>6</sup> relating to a request to the DfT for statistics for peak and off peak loading of rail passenger on the West Coast Main Line. In that case the DfT refused the information under section 41 for many of the same reasons as in this case. Whilst the requested information is slightly different there are clear parallels with the passenger loading/counts data which form the basis of the calculations in this case. The Tribunal found that the information was the result of a very precise exercise carried out in the course of a commercial undertaking and unanimously agreed with the Commissioner that the information was not accessible by other means and given its level of detail was confidential.
43. The Tribunal also commented that the DfT had demonstrated how releasing such detailed and disaggregated data could be used by competing TOC's together with information in the public domain to assess actual and potential revenues on specific routes and at specific stations at different times of the day, week or year. The Tribunal also noted that the DfT had shown that disclosing the information would affect the DfT's relationship with the TOC's and the Tribunal concluded that it would not be in the public interest to disclose the information.
44. Given the close nature of the request considered by the Tribunal and the information in question here the Commissioner considers she can take the views of the Tribunal into account in this case and agrees that disclosing the information in breach of the clear duty of confidentiality would have a prejudicial impact on the TOC's and on the relationship between the TOC's and the DfT. She does not accept that the public interest arguments in favour of disclosure are significant and that disclosing the information would meet any wider public interest in increasing transparency or accountability as the information is only likely to be of value to other TOC's or a small number of individuals with the knowledge and interest to use the disaggregated data to analyse the demand.
45. On this basis, and taking into account the strong public interest in preserving the principle of confidentiality, the Commissioner considers the DfT would not have a public interest defence for breaching its duty of confidence. Therefore, the Commissioner finds that the information which forms the basis of the calculations is exempt under section 41 and the DfT has correctly withheld it.

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1352/Green,%20Andrew%20EA.2014.0014%20\(11.08.2014\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1352/Green,%20Andrew%20EA.2014.0014%20(11.08.2014).pdf)

## Right of appeal

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46. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed .....

**Jill Hulley**  
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**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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