

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 July 2017

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

### Decision (including any steps ordered)

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1. The complainant made a freedom of information request to the Department for Transport (DfT) for communications between DfT Ministers and officials, and Govia and Southern Railway. The DfT disclosed some information but withheld other information under the exemptions in sections 36 (prejudice to effective conduct of public affairs), 41 (information provided in confidence) and 43 (commercial interests).
2. The Commissioner's decision is that section 36 is engaged in respect of the withheld information and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

### Request and response

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3. On 22 June 2016 the complainant made a freedom of information request about Govia Thameslink and Southern Rail to the DfT. The request read as follows:

*1) Please provide all communications between ministers of the Department for Transport and*

- a) Govia*
- b) Southern Railway Ltd*

*from January 1st 2015 to date regarding the performance of Southern train services.*

*2) Please provide all communications between the offices of*

- i) Director General, Rail Group*
- ii) Director, Major Projects*
- iii) Director, Rail Strategy and Security*
- iv) Director, Network Services*
- v) Director, Passenger Services*

*of the Department for Transport and*

- a) Govia*
- b) Southern Railway Ltd*

*from January 1st 2015 to date regarding the performance of Southern train services.*

4. The DfT responded initially on 20 July 2016 to confirm that it held information falling within the scope of the request but that it needed further time to consider the public interest test.
5. The DfT contacted the complainant again on 17 August and 8 September 2016 to advise that it needed to extend the response time again.
6. On 6 October 2016 the DfT contacted the complainant and provided a partial response. It now disclosed some information falling within the scope of the request but explained that personal information was being redacted under the section 40(2) exemption and that it was still considering the public interest test under the section 36(2)(b)(i) and (ii), section 41 and section 43 exemptions for some additional information.
7. The DfT sent the final response on 31 October 2016 when it confirmed that the remaining information was being withheld under the exemptions in section 41 and section 43(2).
8. The complainant subsequently asked the DfT to carry out an internal review and it presented its findings on 30 November 2016. The review upheld the decision to refuse to disclose information in part 1 of the request under the section 41 (information provided in confidence) and section 43 (commercial interests) exemptions. It also found that this information was additionally exempt under the section 36(2)(b)(i) and (ii) (free and frank exchange of views/provision of advice). For information falling within the second part of the request, the review

found that section 41 and section 43 did not apply but that in any event the information was exempt under section 36(2)(b)(i) and (ii).

## Scope of the case

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9. On 9 December 2016 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The Commissioner considers that the scope of her investigation is to consider whether any of the section 36, section 41 or section 43 exemptions apply to the withheld information. The Commissioner has not considered the application of the section 40(2) exemption to redact the names of junior officials from the information that was disclosed as this was not raised by the complainant at the internal review stage or when he submitted his complaint.

## Background

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11. Govia Thameslink Railways Ltd (GTR) operate the Southern, Thameslink and Great Northern rail franchise. The Southern routes of the franchise operate under the "Southern" brand name and include many of the commuter routes in and out of London. Southern has faced criticism for the operation of its services and in 2016 its services were severely disrupted by strike action by rail unions concerning the proposed introduction of driver only trains. The Quadrant Task Force was set up in June 2015 with the intention of improving performance across the rail network in the South East. Its meetings consist of Department for Transport (DfT), Network Rail, Transport Focus, Govia Thameslink Railway (GTR) and Southeastern.

## Reasons for decision

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12. For part 1 of the request the DfT explained that the previous Rail Minister Claire Perry MP chaired Quadrant Task Force meetings and that it holds Task Force meeting papers. For the second part of the request the DfT holds communications between the Managing Director of Passenger Services (MDPS) and senior staff of GTR regarding Southern rail services. The Commissioner has first considered whether this information is exempt from disclosure under section 36(2)(b)(i) and (ii).

13. Section 36(2) provides that information is exempt if in the reasonable opinion of the qualified person, disclosure-
- (b) would, or would be likely to inhibit-*
    - (i) the free and frank provision of advice, or*
    - (ii) the free and frank exchange of views for the purposes of deliberation, or*
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*
14. For the exemption to be engaged the proper qualified person for the public authority must have given their opinion on the application of the exemption. In this case the DfT has provided the Commissioner with a copy of a submission that was sent to the qualified person, the Rail Minister Paul Maynard MP, on 25 November 2016. Following receipt of the complaint the DfT also sought the qualified person's opinion again, asking him to reaffirm his opinion. This was given on 19 January 2017.
15. The Commissioner is satisfied that DfT has obtained the opinion of the proper qualified person and so this element of the exemption is met.
16. In order to determine whether the exemption is engaged the Commissioner must then go on to consider whether the opinion was reasonable with regard to the following:
- whether the prejudice claimed relates to the specific subsection of section 36(2) that the DfT is relying upon;
  - the nature of the information and the timing of the request; and
  - the qualified person's knowledge of or involvement in the issue.
17. The Commissioner has recently issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:
- "The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."*
18. It is important to note that when considering whether section 36 is engaged the Commissioner is making a decision not on whether she

agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.

19. Having reviewed all of the information placed before the qualified person the Commissioner is satisfied that the information included the relevant arguments. The qualified person was provided with a detailed submission outlining the possible consequences of disclosure as well as the counter arguments in favour of disclosure. The qualified person had access to the withheld information as well as correspondence with the third parties who would be affected by disclosure. In light of this the Commissioner is satisfied that the qualified person was provided with sufficient information to allow him to arrive at a reasonable opinion on the application of the exemption.
20. The qualified person has given his opinion that disclosing this information would inhibit the free and frank provision of advice and would inhibit the free and frank exchange of views for the purpose of deliberation. Specifically, the DfT and the qualified person are of the opinion that disclosure would inhibit the free and frank exchange of confidential information in discussions for the benefit of ministers and the effective delivery of public services.
21. The Commissioner has reviewed the withheld information and is satisfied that it was reasonable for the qualified person to reach the view that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views. The Commissioner has found that the withheld information includes a frank discussion of the issues affecting Southern Rail and the challenges it faced at that time. In the Commissioner's view it is reasonable to conclude that GTR would be discouraged from providing this information if it expected that it would be disclosed. The Commissioner is also aware that GTR have objected to disclosure and are themselves of the view that their discussions with the DfT would be inhibited if the information was made public. For these reasons, the Commissioner has concluded that the qualified person's opinion was a reasonable one and that therefore the section 36(2)(b)(i) and (ii) exemptions are engaged.
22. The Commissioner has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

## Public interest test

### Public interest arguments in favour of disclosure

23. The complainant has argued that the public has suffered as a result of serious problems with Southern Rail services and that therefore there is a strong public interest in understanding what has been going on in order to hold the government to account.
24. The complainant also suggested that since many commuters do not have an alternative travel option to Southern, it is not possible for it to be held to account through market mechanisms. The only way to hold it to account, he argues, is by way of lobbying the government that regulates Southern, and ultimately, by holding it to account at the ballot box if it fails to act.
25. For its part, the DfT said that it had taken the following factors in favour of disclosure into account when considering the public interest test
  - *Disclosure of Quadrant Task Force meeting papers (which includes meeting agendas, minutes, action points) and the communications between MDPS and senior staff in GTR about Southern performance would demonstrate the seriousness with which Government regards rail issues that have an impact on the public and the efficacy with which it seeks to address those issues.*
  - *It is in the public interest to know what actions have been considered to tackle issues in Southern such as engineering works and industrial dispute. Disclosure would be likely to help the public understand if optimum level of action is been taken.*
  - *Disclosure of the information would be likely to help the fee paying public and the tax payer consider whether they are getting value for money from the Southern service and from Government intervention respectively.*
  - *There has also been a significant media interest in the performance of Southern. This would underline significant media interest in disclosure.*
  - *Disclosure would also contribute to the Government's wider transparency agenda, increase trust and allow the public to scrutinise discussions and decisions the Government and stakeholders make.*

## Public interest arguments in favour of maintaining the exemption

26. The DfT advanced the following arguments in favour of maintaining the exemption.

- *There is a public interest in maintaining the ability of companies to engage with government to assist in the development and evaluation of policy aimed at a particular industry. If companies consider there is a material risk of the details of their discussions being disclosed, including potentially commercially sensitive information, their willingness to engage with government - at both Ministerial and Senior Civil Servant level - is likely to be inhibited.*
- *Disclosure of the information is already inhibiting our ability to carry out free and frank discussions with companies that are active in this policy area. This and any future such requests would further inhibit the provision of advice and exchange of views with these companies as to this complex emerging policy area, and prejudice of the conduct of public affairs.*
- *There is a real risk that disclosure would make it more difficult to obtain appropriate expert advice, because of the reluctance of those who might supply it to engage in a debate where their contribution might be disclosable.*
- *Disclosure of premature preliminary thinking may end up closing off better options because of adverse public reaction(s).*
- *Disclosure would be likely to prejudice future bidding processes by undermining confidence that current and future franchise partners have in the Department maintaining necessary confidentiality, e.g. they would stop supplying any information that they are not obliged to under the terms of their Franchise Agreements with the Department.*
- *This would damage the Department's ability to carry out its policy and planning functions, and limit the information available to the Department when franchises are being let. Loss of confidence in the Department may also discourage companies from bidding altogether. Clearly this would not be in the public interest.*
- *Correspondence between Ministers and/or Senior Civil Servants (including Managing Director Passenger Services) to stakeholders can and does include sensitive and occasionally personal matters regarding the performance of their contractual obligations and*

*operating performance, which neither we nor they would expect to be placed in the public domain.*

## **Balance of the public interest arguments**

27. In balancing the public interest, the Commissioner has taken into account the opinion of the qualified person. In accepting that the qualified person has given a reasonable opinion that disclosure would cause the inhibition described, this carries through a certain amount of weight to the public interest test. In particular the fact that the opinion was that disclosure 'would' rather than 'would be likely to' cause inhibition means that the public interest in maintaining the exemption is necessarily greater. That said, the Commissioner must still go on to consider the severity, extent and frequency of that inhibition in reaching her decision. In doing so she has taken into account the content of the withheld information and the timing of the request.
28. As regards the public interest in disclosure the Commissioner accepts that the performance of GTR and Southern rail is a legitimate cause of public concern. Delays and cancellations to its services have caused severe disruption on some of the most important and busiest routes in and out of London. As such, there is a clear public interest in transparency and accountability by demonstrating the role played by the DfT and what action it was taking with GTR to try and address these problems.
29. However, these arguments have to be balanced against the public interest in allowing the DfT and GTR to freely and frankly exchange information in order to manage the Southern rail network effectively.
30. The DfT's reasons for maintaining the exemption are essentially the 'chilling effect' argument which is concerned with the argued loss of frankness and candour in debate / advice which, it is said, would lead to poorer quality advice and less well formulated policy and decisions. Chilling effect arguments will carry most weight when an issue is live.
31. The Commissioner finds that this argument does carry some weight in this case given that the information is sensitive and relates to issues that were still live and very much ongoing at the time the request was received. The performance of the Southern network was a major news story at the time of the request due to the industrial action taking place at that time. Disclosure of any of the withheld information would increase the severity of any loss of frankness and candour with which government officials and Ministers and GTR contributed to discussions. This would not be in the public interest and the Commissioner accepts that it is important for Government to be able to discuss levels of



service and any problems with train operating companies. This enables it to perform its functions of managing the performance of rail franchises effectively.

32. The Commissioner also finds that at the time the request was received there was a separate public interest in allowing the DfT and GTR a safe space in which to seek to resolve the issues affecting the Southern rail network without it being the subject of increased media attention and speculation which both it and GTR would then need to spend time responding to. Disclosure would make it harder for both the DfT and GTR to manage the franchise effectively because it would place additional scrutiny on the DfT and GTR at a time when there was already significant external pressure on both organisations.
33. In reaching her decision and considering the weight to be afforded to the DfT's arguments the Commissioner is mindful that The Quadrant Task Force meetings and the correspondence between GTR and the Managing Director of Passenger Services at the DfT were, regardless of whether or not the section 41 exemption applies, conducted under the expectation they would remain confidential. In the Commissioner's view disclosure would undermine the trust between the DfT and the GTR and this would in turn impact significantly on the frankness and candour of discussions.
34. The Commissioner has reviewed the withheld information and finds that for The Quadrant Task Force Meetings the issues discussed are especially sensitive. The DfT has explained that the information includes planning and risk management discussions, contractual obligations dates and costs, industrial relations advice, commercial project advice, procurement implications, forecast information and internal personnel matters. GTR consider this information to be commercially sensitive and also potentially prejudicial to their negotiating position in relation to the ongoing industrial disputes. Moreover the DfT has explained that some of the information shared at these meetings was provisional and that if train operators believed that this information might be disclosed they would refuse to share it. In light of this the Commissioner is satisfied that disclosure of this type of information would be particularly damaging and that therefore the public interest clearly favours maintaining the exemption.
35. For at least some of the communications between the Managing Director of Passenger Services at the DfT and GTR the public interest is balanced slightly differently. Some of this information is noticeably less sensitive as it essentially records updates from GTR about issues affecting the network such as delays and cancellations and what action it was taking to address the problems.

36. The Commissioner would accept that for some of this information the chilling effect arguments carry less weight and so the public interest test is more finely balanced. However, the Commissioner cannot ignore the fact that the qualified person has given their reasonable opinion that disclosure would inhibit future discussions with GTR and the Commissioner also notes that GTR have themselves objected to its disclosure. Whilst less sensitive the information still addresses matters of contractual performance and the DfT has confirmed that train operators are not obliged to share this kind of information, or indeed any of the information falling within the scope of the request, with the DfT as part of their Franchise Agreements.
37. The Commissioner is also of the view that whilst some of the information is less sensitive, the public interest in disclosure of this information is also reduced. This is because the information, as explained above, only really provides a snapshot of some of the delays and problems experienced on the network at a given time. It reveals very little about what steps the DfT were taking to manage the performance of the franchise.
38. For all these reasons and having given due weight to the opinion of the qualified person, the Commissioner has decided that the public interest in maintaining the section 36(2)(b)(i) and (ii) exemptions outweighs the public interest in disclosure.

## Right of appeal

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39. 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)

40. 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.
41. 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** .....

**Paul Warbrick**  
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