

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 May 2019

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

Decision (including any steps ordered)

1. The complainant has requested information relating to bids to operate the East Coast rail franchise. The Department for Transport (DfT) refused the request under the exemptions provided by section 21 – information accessible by other means, section 43(2) – commercial interests and section 44 – statutory prohibition. The complainant has not contested the application of section 21.
2. The Commissioner's decision is that the DfT is entitled to rely on sections 43(2) and 44 to withhold the requested information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 19 February 2018 the complainant requested information of the following description:

“Please provide:

1a: The premium payment profile bid by all bidders for the current East Coast franchise (the one awarded to Stagecoach/Virgin in 2014). I am happy for these details to be anonymised.

- 1b: The (anonymised) aggregate premiums bid by all bidders for the period until the end of the 2017/18 financial year. N.B. Under a previous FOI request, DfT has released the aggregate premiums bid for all years of contract by all bidders, so it should be simple to approve release of this 'fall back' information.
2. DfT's financial risk assessment of Stagecoach/Virgin's winning bid and premium payment profile, and any DfT validation or assessment of the financial forecasts/underlying assumptions.
3. Information made available to bidders by the DfT on the assumptions they should make regarding infrastructure enhancements and completion dates on the route (both East Coast Connectivity Fund enhancements and others)
4. Any DfT base or shadow premium profile supplied to bidders and an explanation of what any base or shadow premium profile means."
5. On 19 March 2018 the DfT responded. It refused to provide the requested information and cited the following exemptions as the basis for doing so:
- Section 21 - information accessible to the applicant by other means
 - Section 43(2) – prejudice to the commercial interests
 - Section 44(1)(a) – statutory prohibition.
6. More specifically, it withheld the information requested at part 1a on the basis that it was exempt under section 44 apart from the information on the successful bidder, Stagecoach/Virgin, which was withheld under section 21. All the information requested at part 1b was withheld under section 44. In respect of part 2 the DfT signposted the complainant to where it thought information that would be of interest to him could be found via a link, but withheld the detailed information under section 43(2). The information requested at part 3 was withheld under a combination of section 21 and section 44. Finally, in respect of part 4 the DfT withheld the requested information under section 21 and provided the complainant with a link to where the information could be accessed.
7. The complainant requested an internal review on 20 March 2018 in respect of the application of sections 43(2) and 44(1)(a) to parts 1 to 3 of the request. He also clarified that in respect to part 2 of his request, he was not seeking a detailed description of how the risk assessment was carried out but that he was simply asking for the results of that analysis. The complainant did not challenge the application of section 21 to information that was already accessible to him.

8. The DfT sent the complainant the outcome of the internal review on 2 May 2018. DfT upheld its original application of sections 43(2) and 44(1)(a).

Scope of the case

9. The complainant contacted the Commissioner on 2 May 2018 to complain about the way his request for information had been handled. When doing so he presented detailed arguments as to why he believed the DfT's application of the statutory prohibition it was relying on to apply section 44 was flawed.
10. The Commissioner considers that the matter to be determined is whether the DfT can rely on section 43(2) and section 44 to withhold the information to which they have been applied.

Reasons for decision

Section 43(2) – commercial interests

11. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person including those of the public authority itself.
12. As can be seen the exemption can be applied on the basis that the alleged prejudice either 'would' occur, or, the lower threshold, that the prejudice would be 'likely to' occur. In this case the DfT has argued that the prejudice 'would' occur. This means that the DfT is confident that it is more likely than not that the alleged prejudice would occur. If the Commissioner is not satisfied that the DfT can demonstrate this high threshold is met, she will consider whether the exemption is engaged on the basis that the prejudice would be 'likely' to occur. This still requires there to be a real and significant likelihood of the prejudice occurring, even if that likelihood falls short of being more probable than not.
13. The information which has been withheld under this exemption is that requested in part 2 of the request. This sought:

"DfT's financial risk assessment of Stagecoach/Virgin's winning bid and premium payment profile, and any DfT validation or assessment of the financial forecasts/underlying assumptions"
14. When seeking an internal review the complainant explained that he did not expect the DfT to provide a detailed technical description of how the risk assessment was carried out. He was more interested in the results

of the financial risk assessment of the winning bid showing its conclusions validating the winning bidders' premium profiles and growth forecasts.

15. The DfT has identified a number of documents which it considers to be caught by this element of the request and has provided copies of these to the Commissioner. It has indicated that there are also several hundred supporting documents. However the Commissioner considers that following the complainant's clarification of the scope of this element of his request, the information provided meets the terms of the clarified request.
16. The DfT has argued that disclosing the information would prejudice the commercial interests of itself, the winning bidder- Stagecoach/Virgin, other training operating companies and the consultants who prepared the risk assessment. The Commissioner will start by considering the DfT's argument that disclosing the risk assessments would prejudice its own commercial interests.
17. From the information provided by the DfT the Commissioner understands that there is no separate headline conclusion, setting out DfT's assessment of the financial risk associated with the winning bid. Rather there are a series of documents which collectively inform the DfT's decision. The DfT has explained that the financial risk assessment of the winning bid is carried out using a series of complex financial models. In its initial refusal notice, DfT states that the same process is used in all competitions (the Commissioner notes however that in its submission to her the position appears to change slightly, in that the DfT refers to it being likely that it would adopt the same approach in future franchising exercises). Its concern is that were the details of these financial models made public it would allow future bidders to tailor their bids to, what the DfT described as, "game" the process. The Commissioner understands this means that bidders would present bids in a way that they best matched the factors applied in the financial models, rather than submitting bids which were a true and accurate reflection of the offer they were making. This would undermine DfT's ability to accurately assess the bids and so prejudice its ability to obtain best value for money when letting franchises in the future.
18. Although the complainant has said that he was only seeking the conclusion of the risk assessment, the information identified by the DfT as being captured by part 2 of the request is still detailed and complex. Having viewed that information, the Commissioner accepts DfT's argument that its disclosure would reveal, to those with expertise in this area, the factors assessed by the financial models when carrying out the financial risk assessments. The Commissioner recognises that those competing in the rail franchise market would have access to the

necessary expertise and be highly motivated to scrutinise the financial models and details of the risk assessment, if they considered this information would be of use when submitting future bids.

19. The complainant, who has some knowledge of the rail industry, has presented counter arguments to the DfT's position. He does not appear to dispute the contention that complying with his request would reveal some detail of the process used when conducting financial risk assessments. Rather he argues that the process used for the financial risk assessment in 2014 is no longer used, that bidders already have a detailed knowledge of the risk assessment process but choose not to try and 'game' the system as to do so is inherently risky and that each franchise is unique and therefore the risk considerations in one bidding exercise will not necessarily be relevant to others.
20. The complainant has provided documents to support his position. The first of these documents is a new, draft invitation to tender for South Eastern Franchise, published November 2017. As one would expect, this is a very lengthy document and the Commissioner has considered only those sections which the complainant has drawn to her attention, i.e. the tables contained in paragraphs 2.2.3 and 2.3 of that document. It is clear from those sections that in any future tendering exercise for that franchise, a greater proportion of the financial risk would be transferred from the winning train operator to the government. It also appears that the bid evaluation process will be amended. However from the Commissioner's reading of that section it seems that this does not mean that processes detailed in the withheld information would be obsolete, rather additional tests and checks would be introduced.
21. The second document provided by the complainant is the 'Intercity East Coast Franchise: Government Response to Committee's Fifth Report' published 23 November 2018. This document sets out the government's response to recommendations of the Transport Committees. Although this postdates the request the Commissioner considers it is likely to reflect the government's thinking around the time of the request and therefore is still relevant. This again makes it clear that the government has changed how financial risks are shared between itself and the train operator when franchises are let in future. However the Commissioner again notes the responses talk about 'strengthening' the way bids are assessed rather than changing the approach completely.
22. When seeking an internal review the complainant directed the DfT to a webcast by the Go-Ahead Group, one of the UK's major passenger transport providers. The complainant argues that this webcast demonstrates that those competing for rail franchises have already developed an understanding of how bids are evaluated but choose not to attempt to 'game' the system. Despite this the DfT maintained that

there was a risk that train operating companies would submit bids designed more to pass the financial tests than to reflect an accurate picture of financial strength of the bid and the risks involved.

23. The Commissioner has not viewed the webcast, but is cautious of accepting the premise that the behaviour of one potential operator in the market can be taken as being representative of how all other bidders would react to the disclosure of the requested information.
24. Given the above the Commissioner recognises that the complainant has some grounds for challenging the DfT's position. However in light of the DfT's statements to the effect that the process for assessing financial risk detailed in the withheld information is, or, at the very least, is likely to be the same as that used for future franchises, the Commissioner is satisfied that the withheld information is not obsolete. There may be changes to the process, but this appears to be the inclusion of additional tests, not a rejection of those detailed in the withheld information. Nor is it possible for the Commissioner to rule out the possibility that some train operating companies would use the information to present their bids in a more favourable way so as to undermine the effectiveness of the evaluation process. The Commissioner considers that the DfT may have overstated its position, but that there is still a real and significant risk that disclosing the withheld information could prejudice its own commercial interests, i.e. the Commissioner finds that the exemption is engaged on the basis that the prejudice is 'likely' to occur.
25. The DfT has also argued that disclosing the withheld information would prejudice the train operating companies including Virgin/Stagecoach, whose bid is the subject of the evaluation in question, together with their parents and affiliates currently active in the British rail market. The DfT position is that disclosing the information contained in the financial risk assessment would inevitably involve the disclosure of sensitive commercial information about the Virgin/Stagecoach's bid strategy and their appetite for risk. Having looked at the withheld information the Commissioner is prepared to accept that the assessments do contain detailed information on the financial aspects of Virgin/Stagecoach's bid. The Commissioner understands that when bidding to operate a particular rail franchise certain criteria in respect of the level of service provided has to be met. This effectively limits the factors one company can use to differentiate their bid from those of their competitors. DfT argues that to disclose information from the assessment of the financial risk they are prepared to accept, would reduce those factors further. This, the DfT contends, would reduce the viability of the franchising system.
26. Where a public authority is claiming a disclosure would prejudice the interests of a third party it is required to demonstrate that alleged

prejudice is a genuine concern of that party. It is not sufficient for the public authority to simply speculate as to what those concerns would be. In most cases the Commissioner would expect the public authority to have consulted with the third party or parties, however in some cases she would accept that the public authority has sufficient knowledge of the issues surrounding the third party's alleged concern to give them some weight. In this case the Commissioner recognises that the DfT has experience of letting rail franchises and dealing with the train operating companies.

27. The DfT has also provided the Commissioner with a selection of emails from different train operating companies which all express concern that disclosing information on what is referred to as 'parent company support' and contracted franchise payments which submitted in bids for different franchises would prejudice their commercial interests. In broad terms parent company support relates to the extent to which the parent companies of a bidder (often a consortium) will guarantee the performance of the bidder and cover any shortfall in the train operator's revenue so that it can meet its obligations to pay the DfT the premium for operating the franchise. These emails were provided by the train operators as part of a consultation exercise carried out in respect of a request for different, but similar information. The Commissioner recognises that these are issues related to those considered in a financial risk assessment such as the one that is the subject of this request.
28. Importantly, the Commissioner notes that there are no emails from either Virgin or Stagecoach. It is also clear that the train operators that were involved in the consultation were expressing concern about the disclosure of their own information i.e. information that they had provided to the DfT about their own financial position. There is no indication they would have concerns about disclosing information relating to other operators.
29. Therefore despite the fact that the emails strongly suggest that at least some train operators would object to the disclosure of information in a financial risk assessment about their own bids, the Commissioner still considers the DfT's argument in respect of Virgin/Stagecoach's concerns to be rather speculative. Certainly the Commissioner is not persuaded that the emails are evidence that one train operator would have concerns about their own commercial interests being prejudiced if the DfT released information about one of its competitors.
30. In light of the above the Commissioner finds that the DfT has failed to demonstrate how disclosing the actual information captured by part 2 of the request would prejudice the commercial interests of either

Virgin/Stagecoach or any of the other training operating companies running or bidding for rail franchises in the UK.

31. Finally the DfT has argued that disclosing the documents that comprise financial risk assessment would prejudice the commercial interests of the third party technical advisers who produced these reports. It considers that disclosing the information would allow rival consultants access to the methodologies that had been adopted. It has asserted that it is clear to the DfT that the information is commercially sensitive and when engaging the services of a technical adviser it agrees to their reports being treated as confidential and to only disclose their contents with the advisor's express permission. Having looked at the withheld information the Commissioner notes that reports do include reference to the DfT only being allowed to disclose information with the express written permissions of their authors and asks the DfT to consult with the authors in the event of an information request being received.
32. The Commissioner reminds the DfT that it cannot contract out of its obligations under either the FOIA or the Environmental Information Regulations. The existence of confidentiality clauses may alert a public authority to the fact that a contractor considers some of its information is commercially sensitive and so trigger a consultation. However blanket confidentiality clauses alone are not sufficient to persuade the Commissioner that the technical advisors' commercial interests would be prejudiced. The DfT has provided no evidence that it has consulted with the advisors. Therefore the Commissioner is not prepared to accept the DfT's argument in respect of the alleged prejudice to their interests.
33. In summary the Commissioner is satisfied that the documents which comprise the financial risk assessment engage the exemption provided by section 43(2), but only in respect of a commercial prejudice to the interests of the DfT itself and then only on the lower threshold that the prejudice is 'likely' to occur. The Commissioner is not persuaded by the DfT's arguments in respect of the prejudice to the commercial interests of third parties, whether these be those of Virgin/Stagecoach, other train operating companies, their parent companies, or the interests of the technical advisers who produced the risk assessments.

Public interest

34. Section 43 is subject to the public interest test. This means that even though the exemption is engaged, the information can only be withheld,

if in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

35. The DfT has provided a number of public interest arguments in favour of maintaining the exemption. However some of these relate to its assertion that disclosing the information would prejudice the interests of third parties. Having found that the exemption is only engaged on the basis of the prejudice to the DfT's commercial interests, the Commissioner will discount the public interest arguments in respect of protecting third parties' interests.
36. The DfT argues that it has used the same process to undertake risk adjustment on all franchise competitions since the Intercity East Coast competition, and according to its submission continues to use it, albeit with some refinements. It therefore believes that to disclose the requested information would reveal to bidders exactly what tests the DfT subjects the bids to in order to determine the financial robustness of those bids.
37. Disclosing the information would allow bidders to repeat these tests on future bids and, as discussed earlier, game the system and produce bids tailored to passing the tests rather than delivering innovative proposals that ultimately offer the potential of driving up the benefits for passengers. This, the DfT argues, would undermine the value for money secured for passengers. This would greatly prejudice the DfT's ability to run effective competitions in the future.
38. The Commissioner recognises the significant impact the awarding of such franchises has on the public purse, rail users and therefore the UK economy. Although the DfT has not explained which franchising exercises were imminent at the time of the request, or how frequent such exercises are, the Commissioner is prepared to accept that the letting and re-letting of such franchises is an ongoing process. She therefore finds this to be a weighty public interest factor in favour of maintaining the exemption.
39. The DfT also argues that the public interest in disclosing the requested information is reduced due to the information that it already published in respect of franchising exercises. In support of this argument it states that it has published guidance on how bids are evaluated and that further details are contained within the invitations to tender themselves. This, it believes, goes some way to meeting the public interest in understanding the thoroughness of the process without compromising any commercial interests. The Commissioner accepts that the availability of such information does increase the transparency of the process. However it does not allow the public to scrutinise the tests that are actually applied in real detail in order to properly understand the

robustness of the bids, or the competence with which the DfT manages the awarding of such franchises. Therefore the Commissioner does not give this argument a great deal of weight.

40. The remaining, relevant, public interest argument in favour of maintaining the exemption, presented by the DfT, is that the information would not be understood by the public. DfT claims that without the detailed knowledge and expertise required to interpret the financial risk assessment the information would be misconstrued and simply add to the misinformation about franchise competitions. The Commissioner does not accept this argument. Whilst the information captured by part 2 of the request is very complex and the lay person may struggle to understand it, the Commissioner considers that there are very likely to be commentators and journalists who could make sense of it and that their analysis would be of some use and interest to the wider public.
41. Turning to the public interest arguments in favour of disclosure, the DfT has recognised that full disclosure of the DfT's approach would demonstrate how it assessed bids for the Intercity East Coast franchise in accordance with its published documentation. That disclosure would allow the public and potential future bidders to scrutinise the decisions of the DfT. This in turn would contribute to, what the DfT has referred to, as the government's wider transparency agenda.
42. The complainant's main contention is that the exemption is not engaged in the first place because of the changes to the evaluation process that have occurred. However it is clear that he also considers that given the history of the East Coast franchise he believes there is a significant public interest in disclosing information which would allow the public to better understand the problems that have been encountered. Very briefly, the franchise agreement which is the focus of this request was tendered for in 2014 and won by Inter City Railways Ltd owned by Stagecoach and Virgin under the brand name Virgin Trains East Coast (VTEC). The franchise agreement was for eight years. VTEC began operating the franchise in March 2015 and it was expected that the franchise would earn £3 billion for the government. However by 2017 it had become clear that the franchise was not generating the income that VTEC had forecast and in order to pay the premiums agreed under the contract funds had to be drawn from the parent companies. The losses incurred by the operator were unsustainable and in February 2018 (the month of the request) the Secretary of State announced that the franchise would only be able to continue for a number of months. Ultimately this led to the franchise being taken back into public control in June 2018.

43. It is clear therefore that there are issues around the evaluation of passenger growth, profitability and the level of parent company support required, are of genuine public concern. There is a very strong public interest in understanding the decision making process that led to the franchise being awarded on the terms that it was and this in turn helps inform a wider public debate on the franchising process as a whole. Considering the impact rail services and franchise agreements have on the commuting public, the public purse, and the economy, this is a weighty public interest argument in favour of disclosure.
44. However, given that the DfT has stated that its financial risk assessment of franchise bids continues to include the approaches detailed in the requested information, the Commissioner finds that to disclose that information would be likely to undermine DfT's ability to evaluate future franchises. This has the potential to damage public finances and work against the interest of train users. Therefore the Commissioner finds that the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.

Section 44 – statutory prohibition on disclosure

45. So far as is relevant, section 44 provides that information is exempt if its disclosure is prohibited by or under any enactment.
46. The DfT has withheld the information captured by parts 1 and 3 of the request. In both cases the DfT has argued that disclosing the information is prohibited by section 145(1) of the Railways Act 1993 (RA). Section 145(1) states that:
 - ... no information with respect to any particular business which –
 - (a) has been obtained under or by virtue of any of the provisions of this act; and
 - (b) relates to the affairs of any individual or to any particular business,

shall, during the lifetime of that individual or so long as that business continues to be carried, be disclosed without the consent of that individual or the person for the time being carrying on that business.
47. The Commissioner will start by looking at the application of this statutory bar to the information requested in part 1 of the request. This information relates to the premium payment profile of all bidders for the East Coast line and aggregated premium bids of all bidders for the period up to the end of March 2018. The information therefore includes

details of the unsuccessful bids as well as Stagecoach/Virgin's winning bid.

48. The DfT has explained that sections 23 to 31 of the RA set out the legal basis on which the DfT can provide passenger services under a franchising system. Under section 26(3) of the RA, it is required to only entertain bids from entities which are in an appropriate financial position to be the franchisee. The financial information from bidders about their future payments to the DfT to run the East Coast franchise was obtained for this purpose.
49. It is not disputed that this information was obtained under the provisions of the RA. Nor is it disputed that the information relates to the affairs of those businesses. Furthermore it is clear that, certainly at the time of the request, the winning bidder, Inter City Railways Ltd (jointly owned by Stagecoach and Virgin) was still carrying on its business of running the East Coast franchise. However the complainant argues that the statutory prohibition cannot apply to the information relating to those bidders who were unsuccessful.
50. The unsuccessful bidders were Keolis/Eurostar East Coast Limited (a joint venture between Keolis (UK) Limited and Eurostar International Ltd) and East Coast Trains Ltd (a wholly owned subsidiary of First Group plc). The complainant argues that Keolis/Eurostar East Coast Limited was dissolved once the bidding process was completed and that East Coast Trains Ltd is a dormant company.
51. The complainant also argues that the only business these entities were ever involved in was the bidding for the East Coast franchise in 2014 and that that business is obviously no longer being carried on since the tendering exercise has been completed.
52. Even if it was accepted that the consortia put together to bid for the franchise are still carrying on a business, or that their parent companies are still involved in bidding for, or operating, rail franchises, the complainant argues that each rail franchise, and the tendering exercises for them, is so unique that they cannot be considered the same business. For example, even if it could be shown that one of the parent companies of an unsuccessful bidder was involved in the operation of another rail franchise, that rail franchise would be so different to the East Coast franchise that it could not be claimed to be the same business.
53. In light of the complainant's submissions, the Commissioner asked the DfT to clarify how it had addressed this element of the statutory prohibition. In response the DfT argues that East Coast Trains Ltd is still an active company and may be involved in future bids or other types of

operations by its parent companies. The Commissioner has checked the entry for East Coast Trains Ltd at Companies House and understands that on the face of the entry it is shown as an active company and therefore a recognised legal entity, but on other pages of the entry it is shown as a dormant company. In respect of Keolis/Eurostar East Coast Limited, the DfT has argued that even though it was dissolved in January 2016, its parent companies would have been deeply involved in the bidding process and disclosing the requested information would reveal a great deal about their bidding strategies and their appetite for risk. Therefore, DfT argues, the fact that the actual individual entities have, or have not, been wound up is not relevant. The statutory prohibition still applies because the information obtained under the RA relates to affairs of businesses that continue to be carried on, i.e. the businesses of the parent companies. In support of this position the DfT has directed the Commissioner to the following web page, <https://www.gov.uk/government/collections/rail-franchising>. This webpage lists all those who are currently cleared to operate in the British rail franchising market. The DfT has stated that all the parent companies of the consortia which bid for the East Coast franchise are included in that list.

54. DfT has also confirmed that no consent to disclosing the withheld information has been obtained. It is also satisfied that none of the 'gateways', which allow otherwise prohibited information to be disclosed, exist. DfT is therefore satisfied that the information requested at parts 1a and 1b is covered by the statutory prohibition created by section 145 of the RA and that therefore it cannot disclose the information.
55. The Commissioner has considered the DfT's submission. Although the unsuccessful consortia that had been used by their parent companies as vehicles to bid for the East Coast franchise have either been dissolved or are dormant, DfT considers the prohibition still applies because the parent companies of those consortia are all still active. The DfT's focus appears to be on whether those parent companies, whose business affairs the information relates to, still exist.
56. The Commissioner considers that such an interpretation would potentially allow too wide an application of the exemption. For example, Virgin Holdings, one of the parent companies of the winning consortia, has a very wide range of business interests in many different industries and it would be nonsensical for the statutory prohibition to prevent the disclosure of information about the East Coast franchise on the basis that Virgin Holdings was still active in a totally unconnected industry. Therefore when considering the prohibition created by section 145 of the RA the Commissioner has interpreted the term 'business' to mean some form of economic activity, as opposed to being synonymous with a legal entity or person. The Commissioner also considers that the particular

economic activity first referred to does not need to be the same economic activity that is referred to elsewhere in the prohibition.

57. This argument was put to the DfT. The DfT maintains its original rationale for applying the prohibition, but has said, without prejudice to its original position, that even on the Commissioner's interpretation, section 145 of the RA still applies. The DfT argues that information was obtained for the particular business activity of bidding for and operating the East Coast franchise. That it also relates more generally to the economic activity of bidding for franchises in the British rail market, which is an activity still being carried on, including by the parent companies linked to the bids for the East Coast franchise.
58. The Commissioner is satisfied that the prohibition is engaged on the basis that the information submitted by the bidders in respect of the East Coast franchise also relates to the economic activity of bidding for rail franchises more generally. That activity is one that is still being carried on, including by the parent companies of the consortia that bid for the East Coast franchise. The Commissioner is also satisfied that no consent has been given to the disclosure. It follows that the Commissioner is satisfied that the prohibition provided by section 145 of the RA is engaged and that therefore section 44 of the FOIA is engaged. Section 44 is an absolute exemption; there is no requirement to consider the public interest test.
59. Section 44 has also been relied on by the DfT to withhold the information requested in part 3 of the request. This sought the information bidders were provided with about enhancements to the infrastructure of the East Coast rail line. Again, the DfT has applied section 44 on the basis that section 145 of the RA prohibits the disclosure of the requested information.
60. The information captured by this element of the request is voluminous.
61. The DfT has explained that the information captured by the request is that which it obtained from Network Rail and the incumbent rail operator. It was obtained for the purposes of the RA, in particular section 32(1) which gives the Secretary of State the responsibility of designating future rail franchisees, section 26(1) which gives the Secretary of State the power to choose a franchisee and, again, section 26(3) which give the Secretary of State the duty to ensure future franchisees are in an appropriate financial position to operate franchise services. The Commissioner accepts that it would be impossible for the DfT to select a franchisee without bidders having a full understanding of proposed improvements to the line.

62. Having viewed a sample of the withheld information it appears to the Commissioner that the majority of it has been provided by Network Rail.
63. The Commissioner is satisfied that the information relates to the economic activity of maintaining and developing the rail infrastructure and that this economic activity continues to be carried on by Network Rail. Therefore the prohibition created by section 145 of the RA applies and that DfT cannot disclose the information. It follows that the Commissioner finds the DfT is entitled to rely on section 44 of the FOIA to withhold the information sought at part 3 of the request. As before, there is no requirement to consider any public interest test.

Right of appeal

64. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

65. 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.
66. 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

Rob Mechan
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