

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 August 2009

Public Authority: Department for Transport
Address: Zone 1/28
Great Minster House
76 Marsham Street
London
SW1P 4DR

Summary

The complainant asked the Department for Transport (the "DfT") to confirm whether it had provided financial support to the Silverlink Rail Franchise during industrial action in 2007. He also asked it to confirm whether, as a result of that dispute, any changes were made to the London Midland franchise agreement with Govia, or whether any extra financial support was offered. The DfT refused to provide this information, and cited section 43(2) of the Act. After investigating the case the Commissioner decided that section 43(2) is not engaged. Therefore the withheld information should be disclosed. The Commissioner also found that the DfT did not meet the requirements of sections 1(1)(b), 10(1), 17(1)(c) and 17(3).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant wrote to the DfT on 10 March 2008. He stated that prior to the former Silverlink rail franchise ending in November 2007 and the Silverlink County service being transferred to the new London Midland franchise there was an industrial dispute between train drivers and Silverlink. He requested the following information under the Act,

- (1) What advice of this dispute was given to the DfT by the Silverlink franchise holders?
- (2) If advice was given did the DfT pass it on to the new franchise holders?
- (3) Did the DfT support the Silverlink franchise financially on the days where industrial action was taken?
- (4) As a result of this dispute were any changes made to the London Midland franchise agreement with Govia or extra financial support offered?

For ease of reference these will be referred to as requests (1) to (4) throughout the rest of this Notice.

3. The DfT responded in an email dated 7 April 2008. It provided information in relation to requests (1) and (2). However, in relation to requests (3) and (4) it stated that,

“This information would be exempt from disclosure under Section 43(2) of the Freedom of Information Act as it would be likely to prejudice commercial interests.”

It went on to inform the complainant of his right to request an internal review, and his right to complain to the Commissioner. It did not provide any explanation as to why it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure.

4. The complainant wrote to the DfT on 8 May 2008 and requested an internal review of this decision.
5. The DfT conducted an internal review and informed the complainant of the result in an email dated 29 May 2008. This review upheld its decision to withhold the information under section 43(2). Again, it did not provide any explanation as to why it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure.

The Investigation

Scope of the case

6. On 10 July 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the DfT's response to requests (3) and (4).

Although the complainant did not refer to it, the Commissioner has also considered whether the DfT complied with the requirements of section 17.

Chronology

7. The DfT provided the Commissioner with preliminary submissions to support its use of section 43(2) in an email dated 8 August 2008.
8. The Commissioner wrote to the DfT on 1 May 2009 and asked it to provide further submissions to support its use of section 43(2), together with the withheld information.
9. Following an exchange of correspondence the DfT provided the Commissioner with submissions in a letter dated 12 June 2009.
10. The Commissioner emailed the DfT on 15 June 2009 and noted that it had not yet provided any arguments in relation to request (4). Therefore he asked for further submissions. In this email the Commissioner also drew the DfT's attention to his power to issue an Information Notice under section 51 of the Act.
11. The DfT responded in a letter dated 18 June 2009 and provided further arguments in relation to request (4).
12. The Commissioner emailed the DfT again on 29 June 2009 and asked it for further clarification. The DfT provided this clarification in a letter dated 10 July 2009.

Findings of fact

13. The Silverlink County rail franchise ran services between London Euston and Northampton. The franchise was operated by Silverlink Train Services Ltd.
14. Silverlink County services were merged with Central Trains to form the new West Midlands rail franchise. In June 2007 the DfT announced that London and Birmingham Railway Ltd (a subsidiary of Govia) had been awarded this franchise, which would be operated under the new name of London Midland.¹ Subsequently the Silverlink franchise ran until November 2007.
15. During the investigation of the case the DfT confirmed that clause 16A of Part III of the Silverlink Franchise Agreement provided that, "the Secretary of State, in his sole discretion, may decide to reimburse or ameliorate net losses of the Franchise Operator arising from industrial action (howsoever caused and of whatever nature)".²
16. The DfT went on to explain that section 6 of the Railways Act 2005 provided the Secretary of State with the power to provide financial assistance to any person for the purpose of securing the provision of railway services.³ This power may be used to provide financial assistance to a Franchise Operator providing railway services under a Franchise Agreement, in accordance with the terms of that Agreement.

¹ <http://www.dft.gov.uk/pgr/rail/passenger/franchises/wm/wmfranchise>

² <http://www.dft.gov.uk/pgr/rail/passenger/publicregister/obsolete/slink/slinkfagreement.pdf>

³ http://www.opsi.gov.uk/acts/acts2005/ukpga_20050014_en_3#pt2-pb1-l1g6

Analysis

Exemptions

Section 43(2)

17. Section 43(2) states that information is exempt information if its disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
18. The full text of section 43 can be found in the Legal Annex at the end of this Notice.
19. The DfT has provided the Commissioner with submissions to support its use of the exemption, but has stated that it believes that these submissions cannot be put into the public domain. Therefore these submissions and the Commissioner's detailed consideration of them are recorded in the Confidential Annex to this Notice.
20. In this case the DfT has argued that the disclosure of the withheld information would be likely to prejudice the commercial interests of certain parties (the 'identified parties'). Due to the confidential nature of the DfT's arguments to the Commissioner the details of the identities of the identified parties are not given in the main body of this Notice. However, they are detailed in paragraph 1 of the Confidential Annex.
21. The Commissioner has first considered whether the withheld information, and the potential prejudicial effects described by the DfT, would relate to the commercial interests of the identified parties.
22. The DfT has provided arguments as to why the withheld information relates to the commercial interests of the identified parties, and why the disclosure of this information would be likely to cause prejudice to those commercial interests. These arguments and the Commissioner's comments are detailed at paragraphs 2 to 8 of the Confidential Annex.
23. After considering the DfT's arguments, and for the reasons listed at paragraphs 2 to 9 of the Confidential Annex, the Commissioner is satisfied that the withheld information relates to the commercial interests of the identified parties. Therefore he believes that the withheld information falls within the scope of the exemption.
24. However, for this exemption to be engaged disclosure would have to prejudice, or be likely to prejudice, the commercial interests of any of these parties. In this case, the DfT has argued that prejudice would be likely.
25. In reaching a decision on the question of the likelihood of prejudice the Commissioner has been mindful of the test of 'likely to prejudice' as enunciated by Mr Justice Mundy in the case of R (on the application of Lord) V Secretary of

State for the Home Office [2003] EWHC 2073, and followed by the Tribunal in the case of *John Connor Press Associates Limited v ICO* [EA/2005/0005], where the Tribunal interpreted the expression 'likely to prejudice' within the context of the section 43 exemption as meaning that, "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."⁴

In reaching a decision on the likelihood of prejudice the Commissioner also believes that the public authority should be able show some causal link between the potential disclosure of the withheld information and the prejudice it has argued it likely to occur.

26. Because of the confidential nature of the DfT's submissions to the Commissioner, the details of his consideration of these submissions are listed at paragraphs 10 to 28 of the Confidential Annex.
27. After considering the facts of the case, the submissions of the DfT, and for the reasons given at paragraphs 10 to 28 of the Confidential Annex, the Commissioner does not find the DfT's arguments persuasive. Therefore he does not believe that the disclosure of the withheld information would be likely to prejudice the commercial interests of the identified parties.
28. Therefore the Commissioner believes that section 43(2) is not engaged in relation to the information requested in requests (3) and (4). Consequently he believes that the withheld information should be disclosed.
29. As the Commissioner believes that the exemption is not engaged, he has not gone on to consider the public interest test.

Procedural Requirements

30. Section 1(1) of the Act states that,

"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."

31. Section 10(1) of the Act states that,

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

⁴ EA/2005/0005, para 15.

32. As the Commissioner has decided that the withheld information is not exempt from disclosure on the basis of section 43(2) he believes that this information should have been provided in line with the duty at section 1(1)(b). The DfT's failure to do so therefore constitutes a breach of section 1(1)(b).
33. Further to this, the Commissioner believes that the DfT also breached section 10(1) in relation to the information covered by request (1) – in that this information was not provided to the complainant within 20 working days of the request.
34. As noted at paragraphs 3 and 5 above, apart from informing the complainant that it believed that the withheld information was exempt under section 43(2) as “it would be likely to prejudice commercial interests”, the DfT did not provide the complainant with any arguments as to why it believed the withheld information was exempt, whose commercial interests it believed were likely to be prejudiced, or any explanation as to why it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure.
35. Section 17(1) provides that,

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.”
36. Section 17(3) provides that,

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

 - (a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

37. In this case the DfT has relied upon the provisions of section 17(4) to exclude itself from the requirements of sections 17(1)(c) and 17(3), as it believes that complying with these requirements would involve the disclosure of information which would in itself be exempt information. Section 17(4) provides that,

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.”

38. In reaching a view on the DfT's reliance upon section 17(4) the Commissioner has been mindful of the contents of its arguments as set out in paragraphs 1 to 3, 6, 8, and 12 to 13 of the confidential annex. Given the nature and contents of the DfT's arguments as set out in those paragraphs, the Commissioner is not convinced that the DfT could not have provided some further information in regard to its use of the exemption. In particular the Commissioner believes that the DfT could have provided the complainant with an explanation as to whose commercial interests it believed would be likely to be prejudiced by disclosure, why the exemption applied, and why it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure.
39. Consequently the Commissioner believes that the DfT can not rely upon section 17(4), as he believes that it could have provided further explanation as to why it believed section 43(2) applied and how it had carried out the public interest test, without disclosing information which would itself be exempt information.
40. Therefore the Commissioner believes that the DfT did not meet the requirements of sections 17(1)(c) or 17(3).
41. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

The Decision

42. The Commissioner's decision is that the DfT did not deal with the request for information in accordance with section 1(1)(b) of the Act in that it inappropriately relied upon section 43(2) to withhold the requested information. In failing to comply with the requirements of section 1(1)(b) within 20 working days it also breached section 10(1). The DfT also failed to comply with the requirements of sections 17(1)(c) and 17(3).

Steps Required

43. The Commissioner requires the DfT to take the following steps to ensure compliance with the Act:
- disclose the information requested in requests (3) and (4).

44. The DfT must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

45. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

46. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 17th day of August 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 17

- (1)** A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -
- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2)** Where—
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
- the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

- (4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5)** A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6)** Subsection (5) does not apply where –

 - (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7)** A notice under section (1), (3) or (5) must –

 - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 43

- (1)** Information is exempt information if it constitutes a trade secret.
- (2)** Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3)** The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).