

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 8 August 2018

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 on rail franchise contracts including information on subsidies, premium payments and total parent company support set aside by each franchisee or bidder. The Department for Transport ("DfT") withheld this information on the basis of the exceptions at sections 44(1)(a), 41 and 21 of the FOIA.
2. The Commissioner's decision is that the DfT has correctly refused to disclose the majority of the information on the basis of section 44(1)(a) by virtue of section 145 of the Railways Act 1993. For the remaining information on past premium payments she finds the DfT has correctly refused to provide the information on the basis of section 21.

Request and response

3. On 6 October 2017 the complainant made two requests to the Department for Transport ("DfT") in the following terms:

"Please could you provide me with the premium payment/subsidy profile covering the entire contract term (both past and future years) for all Department of Transport rail franchises that are currently operating and also those that have been let but have not yet started operating (e.g. new West Midlands franchise).

Please provide the total sum of parent company support each rail franchise is contracted to have available.”

4. The DfT responded on 3 November 2017. It stated that it was withholding the premium/subsidy profile on the basis of section 43(2) of the FOIA. The total sum of parent company support each rail franchise is contracted to have was withheld on the basis of section 41.
5. Following an internal review the DfT wrote to the complainant on 28 January 2018. With regard to the past premium/subsidy figures the DfT now considered this information exempt from disclosure under section 21 as it was published annually. For future premium/subsidy profiles the DfT maintained that section 43 provided a basis for withholding this information but considered that section 44(1)(a) was in fact more relevant. Section 44(1)(a) was also being applied to withhold the details of the amount of parent company support committed to each franchise as well as still considering that section 41 applies to the total sum.

Scope of the case

6. The complainant contacted the Commissioner on 29 January 2018 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the DfT has correctly applied any of the cited exemptions to withhold the requested information. During the course of her investigation, the DfT stated it was no longer seeking to rely on section 43(2) and was instead solely relying on section 44(1) to withhold the information on premium/subsidy profiles.
8. The Commissioner will therefore be focusing on the decision to withhold the majority of the requested information on the basis of section 44 of the FOIA. The remaining information – the past information on premium/subsidy payments – has been withheld under section 21 and the Commissioner will determine if this is correct.

Background

9. Parent company support (“PCS”) are the funds which the DfT requires the parent companies of bidding entities to put aside as a guarantee so that the bidding entity, if successful in their bid to run a rail franchise, can draw on these funds should it run into financial difficulties during the life of the franchise and therefore keep passenger services running without the franchisee becoming insolvent and the DfT needing to step

in. The provision of PCS is an important part of keeping the railway franchising system functioning and affording taxpayer's value for money as it transfers some of the financial risk of running the railway onto the private sector.

10. When running a franchise competition with several bidding entities, the DfT does allow freedom in the amount of PCS pledged over and above a mandated fixed element. Further to a franchise being awarded some listed parent companies choose to disclose the amount of PCS they have committed themselves to in their publicly available annual reports after the franchise agreement has been signed. This is not the case with many of the unlisted entities.

Reasons for decision

Section 44 – prohibitions on disclosure

11. The DfT, during the internal review, revised its position and clarified to the Commissioner that it considered section 44(1)(a) provided an exemption for all of the information originally requested.
12. Section 44(1)(a) of FOIA provides that information is exempt if disclosure is prohibited by or under any enactment. In this case the DfT has said that the relevant statutory prohibition is section 145 of the Railways Act 1993 ("RA93") and specifically section 145(1) which provides that:

"(1) ...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 on, be disclosed without the consent of that individual or the person for the time being carrying on that business."
13. The withheld information in this case is all of the information requested on both premium payment/subsidy profiles and the total sum of parent company support each rail franchise has available.
14. The DfT has explained the "relevant provisions" of the RA93 that are referenced in section 145(1)(a) are sections 23 to 31 inclusive. These set out the legal basis for which the provision of passenger services by rail are subject to the franchising system and the Secretary of State for

Transport's powers and obligations in this regard. Of particular relevance is section 26 of the RA93 which sets out the parameters for which the DfT is to run the tendering process for potential franchisees. Section 26(3) obliges the DfT to only entertain bids from entities who are of an *"appropriate financial position ... to be the franchisee"*.

15. The obtaining of financial information from bidders such as PCS or the premium/subsidy bid proposal would be part of the DfT fulfilling its obligations under section 26 of the RA93.
16. The DfT therefore argues that both parts of the requested information (the PCS amounts and the premium/subsidy profiles) satisfy the criteria of section 145(1) RA93 as:
 - a) they pertain to "any particular business", that business being that of the train operating companies ("TOCs") themselves who made the information available to the DfT at the time of preparing their bids;
 - b) they have been obtained by virtue of "any of the provisions of" the RA93, those being sections 23 to 31 inclusive and specifically section 26(3) of the RA93;
 - c) they relate to the "affairs of any individual or to any particular business", that being the affairs of the TOCs themselves, as well as current bidding entities who are not as yet franchisees and TOC parent company owning groups; and
 - d) that business "continues to be carried on", as all of the entities involved are either still operating the specific franchises referred to or continue to operate more broadly in the franchising market, as the only entities to which the requested information pertains are either current franchisees operating as TOCs or are franchisees who are due to start running a franchise in the near future.
17. The Commissioner has considered the arguments made by the DfT and is satisfied that the information would have been obtained under the RA93 and that therefore the statutory prohibition applies. The information was clearly obtained from the TOCs either as current franchisees or those bidding to become franchisees.
18. The information also relates to the affairs of the TOCs and franchisees and the TOCs have expressed their concerns regarding the disclosure of this information to the DfT. The Commissioner has viewed this correspondence and accepts there are clear concerns made by the TOCs which can be seen a refusal of consent to disclose.

19. The Commissioner did ask the DfT to consider whether any of the gateways to disclosure or exceptions to the prohibition could be applied in this case. The DfT considered section 145(2)(a) which is the relevant gateway for this information. This states:

"(2) Subsection (1) above does not apply to any disclosure of information which is made –

(a) for the purpose of facilitating the carrying out by the Secretary of State, the Scottish Ministers, the Office of Rail and Road, or the Competition and Markets Authority of any of his or, as the case may be, their functions under this Act, the Transport Act 2000 or the Railways Act 2005"

20. The DfT states there is no basis, legislative or otherwise, that would require the Secretary of State to disclose either PCS or subsidy/premium profiles made by bidders into the public domain in order for the Secretary of State to continue to properly discharge his duties under the RA93 or any other enactments mentioned at section 145(2)(a).
21. The DfT further considered the other 15 exemptions outlined in sections 145(2)(aa) to (k) of the RA93. Each of these sets out scenarios in which disclosing information obtained under the RA93 would be necessary under very specific, narrow circumstances. For example, section 145(2)(d) allows the DfT to disclose obtained information without breaching section 145(1) "for the purpose of enabling or assisting an official receiver to carry out his functions under the enactments relating to insolvency". The DfT states this is not the case here and the same can be said for the other 14 exemptions which all involve very specific sets of circumstances not relevant in this case.
22. The complainant argues that withholding all of this information under section 44(1)(a) is inconsistent with actions the DfT has previously taken, namely in releasing information in press releases about rail franchise awards including total premium payments when contracts are awarded. The complainant also points to the Secretary of State's willingness to discuss information in public about the PCS contracted by the East Coast franchise.
23. The Commissioner notes that whilst it may be the case that some franchisees choose to make information, particularly on PCS sums, available once an agreement has been signed; this is not the case for all franchisees or bidders and the Commissioner has to accept there is no precedent for making routine disclosures without going against the prohibition in section 145(1) of the RA93.

24. The complainant emphasises that the collapse of the East Coast franchise for the third consecutive time demands that the DfT is more transparent in setting out the basis on which rail franchises are awarded. This should include telling the public how much money a bidder has at risk when awarding rail franchises rather than simply stating headline generating information on the total premium payments committed. Unfortunately there is no requirement to consider the public interest when assessing if section 44(1)(a) provides an exemption from disclosure and as such the Commissioner must conclude that the withheld information – that is the premium payment / subsidy profile information and the total sum of PCS – is exempt from disclosure under section 44(1)(a) of the FOIA by virtue of section 145 of the RA93.

Section 21 – information reasonably accessible to the applicant

25. Section 21 of the FOIA states that:

- (1) *Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.*
- (2) *For the purposes of subsection (1)—*
 - (a) *information may be reasonably accessible to the applicant even though it is accessible only on payment, and*
 - (b) *information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.*

26. The information withheld on this basis is the past years information on premium profiles/subsidies. The DfT considered that past information was reasonably accessible to the complainant as the Office of Rail and Road (ORR) release premium/subsidy figures for each franchise annually on their website as part of their Annual Statistical Release. The most recent release related to the Financial Year 2016-17¹.

27. The complainant asked the Commissioner to consider this point and stated that the basis on which the information is published can vary

¹ http://orr.gov.uk/_data/assets/pdf_file/0008/25757/rail-finance-statistical-release-2016-17.pdf

from year to year if the way the subsidy is channelled to the rail industry changes or due to contract variations. The complainant considered that the basis on which a contract is awarded would only be clear if the DfT released the premium profile it accepted when selecting the winning bidder for a franchise.

28. The request had asked for "*the premium payment/subsidy profile covering the entire contract term (both past and future years)*". The DfT consider it has answered the "past" part of the request by directing the complainant to the link it provided.
29. The Commissioner has reviewed the ORR Annual Release and has also considered new articles² written following these, and earlier releases by the ORR, which analyse the amount of Government subsidy payments received by each franchisee as well as the premiums paid to Government. Whilst the Commissioner notes that it might require some searching through the ORR Annual Releases to extract the information and generate these overall subsidy and premium payment figures for the year; it does seem the information is still "reasonably accessible" to the complainant.
30. The clarification from the complainant seems to imply that rather than being provided with the profile information which the Commissioner considers is accessible from the ORR Release; he is looking to find out the original sums agreed on commencement of the contract. The Commissioner does not agree that this is what was asked for initially and it is clear that the ORR Release does allow for analysis to generate average profile information for each franchise both in terms of subsidies received and premiums paid.
31. The Commissioner considers that the purpose of the section 21 exemption is to protect the scarce resources of public authorities by shielding them from replying to requests for information which the requestor could have found elsewhere. It also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes.
32. The Commissioner accepts that the term "reasonably" does qualify the term "accessible" in the legislation and therefore some consideration does have to be given as to what steps it is reasonable to expect a requestor to take to access information. However, for the reasons given

² <http://www.railtechnologymagazine.com/Rail-News/toc-payments-to-government-leap-from-40m-to-more-than-800m>

above, she concludes that the information *is* reasonably accessible to the complainant and therefore the DfT is entitled to withhold this information under section 21 of the FOIA.

Right of appeal

33. 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

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

34. 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.
35. 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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