

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 April 2025

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 related to the delivery of Arterio trains. The above public authority ("the public authority") relied on section 43(2) of FOIA (commercial interests) to withhold the information.
2. The Commissioner's decision is that the public authority has not demonstrated that section 43 is engaged and consequently is not entitled to rely on that information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information it has relied on section 43 of FOIA to withhold.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. In June 2017, South Western Railway signed a contract for the delivery of 90 new trains. These trains were to be purchased by a third party, Rock Rail, then subsequently leased to South Western Railway. The first trains were due to be phased in from mid-2019.
6. The introduction of these trains has been subject to numerous delays. Covid caused several delays to production. When trains were delivered, South Western Railway refused to accept a number of them as it did not consider that they performed to the agreed specification. Staff shortages at South Western Railway have made it difficult for the company to release staff for training on the new trains without causing harm to existing services. South Western Railway has also been in dispute with its unions as to who should open and close the doors on the trains.
7. As of March 2025, it was reported that only five, of the 90 trains that had been ordered, were actually being used, with the remainder sitting in sidings or rail yards.
8. The South Western rail franchise is due to come into public ownership in May 2025.

Request and response

9. On 9 October 2024 the complainant requested information of the following description:
 - "[1] How much money is being paid to Rock Rail, the owner of the Arterio trains (to be operated by SWR) that are not carrying any passengers.
 - [2] What is the cost of storing unused Arterio trains.
 - [3] What is the cost of retaining and maintaining other rolling stock where the leases have been extended to cover the absence of the new Arterio trains."
10. On 4 November 2024, the public authority responded. It refused to provide the requested information and relied upon section 43 of FOIA as its basis for doing so. It upheld this stance following an internal review.

Reasons for decision

11. Section 43 of FOIA allows a public authority to withhold information whose disclosure would harm its own commercial interests or those of a third party.
12. In this instance the public authority identified South Western Railway as being the third party whose commercial interests would be harmed. It supported this argument with an email from South Western Railway in which the company argued that its commercial interests would be harmed.
13. South Western Railway explained that:

"There is an ongoing and notable arbitration process between SWR and the manufacturer which could be impacted by the disclosure of commercially sensitive information which could impact the negotiation position.

"SWR and the Successor Operator will shortly be negotiating with Rock Rail on a number of lease issues relating to Arterio specifically, those negotiations, which are highly commercially sensitive, would be likely to be compromised if the information requested was published at this time.

"SWR and the Successor Operator will shortly be negotiating with other [Rolling Stock Operators] ROSCOs in relation to the legacy rolling stock mentioned in part 3 of the FOI request and those negotiations, which are highly commercially sensitive, would be likely to be compromised if the information requested was published at this time.

"The information requested in Part 2 of the question has been negotiated by SWR in a commercial process with relevant suppliers and disclosure of this information would be likely to prejudice future commercial negotiations between SWR and its suppliers.

"Disclosure of the information would be likely to damage the trust between the Department, SWR, their suppliers and potential suppliers. This would be likely to have an adverse effect on, in this case, the ROSCOs' and suppliers' willingness to bid for future supply contracts to the railway industry and on the value for money which can be achieved through future competitions which would have been prejudiced by the release of this information."

14. South Western Railway also noted that information within the scope of part 2 of the request was likely to be released into the public domain in future anyway.

The Commissioner's view

15. The Commissioner is not satisfied that the exemption is engaged.
16. This is because he is not satisfied that the evidence provided demonstrates exactly how any party's commercial interests would be harmed.
17. Whilst the existence of commercial negotiations clearly increases the risk of commercial harm occurring, it does not follow that any disclosure of information must self-evidently harm those negotiations, regardless of the information's connections to that process. In order to demonstrate harm, the public authority must be able to demonstrate how and why disclosure, of the particular information being requested, would harm those negotiations.
18. In relation to part 1, South Western Railway has claimed that disclosure would be harmful to negotiations, but has not explained why. Rock Rail will know how much it is currently charging South Western Railway and South Western Railway will know how much it is currently paying.
19. Negotiations on a new lease may well use the existing lease as a benchmark but, as both parties are aware of the terms of that lease, it is difficult to see how either would be put at a disadvantage if the total figure was released.
20. The public authority has not indicated that South Western Railway is intending to lease other new rolling stock instead of Arterio trains and, even if it did, without knowing the precise terms of the lease with Rock Rail, a competitor would struggle to gain any real competitive advantage.
21. In relation to part 2, South Western Railway has stated that disclosure would prejudice future commercial negotiations, but it hasn't explained what commercial negotiations it is likely to enter into, in the near future, that could be harmed. The Commissioner is unlikely to accept that disclosing information would affect negotiations that are far in the future or that relate to the procurement of different goods or services.
22. In relation to part 3, once again it is difficult to see why releasing this information would harm negotiations between two parties who are already aware of that information. As with part 1, there is no suggestion that South Western Railway is intending to enter into agreements with different companies and, even if it did, it is not clear why the information would undermine South Western Railway's negotiating position.

23. The Commissioner is not persuaded that potential suppliers will be put off applying for lucrative contracts simply because some information may subsequently be released into the public domain. Given the government's stated intentions around future rail ownership, suppliers will increasingly find that they are dealing directly with bodies subject to FOIA.
24. South Western Railway has also referred to its ongoing negotiations with the manufacturer. The Commissioner considers it likely that, in order to claim financial loss, South Western Railway would need to quantify any costs it incurred due to the late delivery of acceptably-produced goods. This is likely to include the cost of extending existing leases, in order to maintain services until the new trains are ready.
25. However, the Commissioner considers it unlikely that South Western Railway would be able to pursue any claim against the manufacturer without setting out the quantum of its claim. That would include itemising any costs it had incurred in leasing replacement rolling stock. It is not clear (and it has not been explained) why the information requested in part 1 or 2 of the request would have any bearing on any claim against the manufacturer for late delivery.
26. The Commissioner also notes that, subsequent to both the refusal notice and internal review being issued, the Government announced that the South Western franchise would be returned to public ownership. Whilst re-nationalisation was a manifesto promise, it is not clear whether, at the point the public authority refused the request, it had decided that this particular franchise was to be nationalised. The Commissioner has not therefore been able to assign any weight to this fact – had he done so though, he considers that the change of ownership, to an owner with different financial motivations, would have further undermined any claim of commercial harm.
27. As the Commissioner is not persuaded that the exemption is engaged, it follows that the information must be disclosed.

Right of appeal

28. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

29. 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.
30. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF