

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

28 July 2008

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

### Summary

---

The complainant requested the Net Present Value (“NPV”) figures offered by the unsuccessful bidders for the South Western rail franchise. This request was made to the Department for Transport (the “DfT”). The DfT confirmed that it held this information, but refused to disclose it, stating that it believed that this information was exempt from disclosure under section 43(2) of the Act. After investigating the case the Commissioner decided that section 43(2) was not engaged. Therefore he found that the DfT had acted in breach of section 1(1)(b) of the Act. He also found that it had acted in breach of section 17(1)(b) and (c) of the Act by seeking to rely upon an exemption not previously cited in its refusal notice. He also found that the DfT had breached section 10 of the Act. The Commissioner requires that the withheld information should be disclosed.

### 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 emailed the DfT on 4 October 2006 and requested the following information under the Act:

“Stagecoach has undertaken to pay DfT a premium of £1,191 million NPV over the life of the (South Western Trains) franchise. Please state the amount of premium offered by each of the unsuccessful bidders for the South Western Trains franchise.”

3. The DfT responded to this request in a letter dated 13 October 2006. It confirmed that it held information relevant to his request but refused to disclose it stating that the information was exempt under section 43(2) of the Act as disclosure would prejudice the commercial interests of all the bidders for the franchise (both winning and losing), as well as the Secretary of State as the franchise letting authority. It considered that disclosure could have serious financial market implications, both for the successful and unsuccessful bidders. It went on to state that the public interest in maintaining the exemption outweighed the public interest in disclosing the information as,

“Disclosure of information which may bring about the consequences set out above is not in the public interest. Moreover, the request you make is related to losing bids which, by definition, are not being taken forward.”

The DfT informed the complainant of his right to request an internal review, and his right to complain to the Commissioner.

4. In a letter dated 14 October 2006 the complainant requested an internal review.
5. In a letter dated 23 October 2006 the DfT informed the complainant of the outcome of the internal review. It upheld its earlier decision to withhold the information in question and argued that,

“...the [DfT’s] position as the franchising authority would likely be harmed by disclosure of the requested information. I consider the following factors militate against disclosure:

1. The information requested is financial in nature, which bidders, both successful and unsuccessful, would regard as sensitive and potentially prejudicial. The sensitivity is likely to be heightened because the award decision has only recently been made.

2. The [NPV] of each bidder’s premium is determined following a comprehensive evaluation process. The deliverability of a bidder’s proposal however is not a factor in assessing the NPV of a bid. Accordingly, NPV alone does not rank bidders and erroneous conclusions could be drawn were the NPV to be disclosed in isolation from any evaluation report. It is not proposed to disclose any evaluation information until after the expiry of the franchise in question; and

3. Disclosure of the difference in NPV amounts would enable financial comparisons to be drawn between the winning and losing bids. This may have serious financial market implications for the winning bidder, particularly if it leads to suggestions that the winning bidder paid too much, and this impacted on its share price. This would be damaging for the winning bidder (and, if it had consequences for the stability of the franchise, the Secretary of State). It may also encourage bidders to put in lower bids in subsequent competitions, perhaps producing less robust and less deliverable bids, representing poorer value for money as a result and thereby distorting those competitions. That may well be prejudicial to the

bidders concerned and it would undoubtedly be unhelpful and prejudicial to the overall procurement process.

I consider these to be significant risks and therefore there is a likelihood of prejudice to the commercial interests of the [DfT] and/or one or more of the bidders.”

The DfT provided arguments regarding the public interest test and informed the complainant that it believed that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. Finally, the DfT informed the complainant of his right to complain to the Commissioner.

## The Investigation

---

### Scope of the case

6. The complainant contacted the Commissioner on 24 October 2006 in order to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the DfT's decision to withhold the requested information was correct. The Commissioner has also considered the DfT's compliance with section 17(1) of the Act.

### Chronology

7. The Commissioner wrote to the DfT on 17 December 2007 and asked it to provide him with further submissions as to the use of section 43(2). In particular he asked it to provide clarification as to whose commercial interests it believed were likely to be prejudiced, further arguments as to how this prejudice would be caused, and further details as to how it had carried out the public interest test. He also asked it to provide him with a copy of the withheld information. He asked for a response within twenty working days.
8. On 10 January 2008 the DfT contacted the Commissioner by way of a telephone call and asked for a deadline extension of ten working days. The Commissioner agreed to this extension.
9. The DfT wrote to the Commissioner on 31 January 2008 and informed him that it was not in a position to respond at that time. It informed him that it was currently seeking the views of the companies who had been involved in bidding for the South Western franchise, and would be in a position to respond to him by the end of February.
10. The Commissioner did not receive a response and on 5 March 2008 he wrote to the DfT again, and asked for a response to his earlier letter. He also drew the DfT's attention to his power to issue an Information Notice under section 51 of the Act. He asked for a response by 20 March 2008.

11. The DfT provided a substantive response in a letter dated 20 March 2008. In this letter it confirmed that it had consulted with the unsuccessful bidders regarding the complaint, and it was of the view that the withheld information was commercially sensitive. It explained that the bidders believed there would be serious financial implications if the requested information was disclosed, and that there would be a potential harmful impact upon their share price. The losing bidders believed that the withheld information would give an indication (albeit misleading) of (a) the future profit margin that might be sought in future bids for rail franchises, and (b) the relative margin of success / failure between the various bidders. These indications would directly influence the stock market's view of, "the bidders' margin, each company's bidding behaviour and bid subsidy/premium relative to other bidders thereby very likely directly impacting upon the companies' share price."
12. The losing bidders had also informed the DfT that the disclosure of this information would allow their competitors to take a much more informed view of their likely profit margins, and that this, "would likely diminish bid differentials and so reduce competitiveness between bidders through engendering an increased level of caution in bids submitted in future." The DfT argued that this would have a negative impact on the overall value of rail franchise bids.
13. The Commissioner wrote to the DfT on 10 April 2008 and asked for further submissions as to its use of the s.43 (2) exemptions. In particular he asked the DfT to clarify whether it was arguing that the disclosure of this information would allow the future profit margins that might be sought in future bids to be ascertained, or whether it was arguing that this prediction of a future profit margin would be misleading. If it was the former, he asked the DfT to explain further how the withheld information would allow future profit margins to be calculated, and also how likely it was that the same profit margins would be applied by the bidders in future bids. He also asked what future transactions were likely to be affected and, in particular, whether there was any similar rail franchises coming up for tender at the time of the request. He also asked for further arguments as to how a misleading view of future profit margins sought by a company would have a direct influence on the stock market's view of that company. He also sought the DfT's view on whether it could take simple steps, such as issuing an accompanying statement, in order to ensure that it was clear that any assumptions drawn from the withheld information as to the future profit margins sought by the bidders for similar franchises would be misleading. He also asked whether the DfT was also arguing that the disclosure of the withheld information would prejudice the commercial interests of the successful bidder as this was not clear from its previous letter. Finally, he noted that the DfT had not provided him with a copy of the withheld information, and he again asked for a copy of this. He asked for a response within ten working days.
14. The DfT contacted the Commissioner on 29 April 2008 and informed him that it was unable to meet this deadline, and asked for an extension until 7 May 2008. It also informed the Commissioner that it was going to provide a copy of the withheld information, with the names of the losing bidders redacted, as this information was sensitive. The Commissioner agreed to the extension to the deadline. In regard to the provision of the withheld information the Commissioner

informed the DfT that it could disclose it to him in the format it had suggested, but he would consider further whether he needed to see the identities of the losing bidders as well.

15. The DfT provided a substantive response in a letter dated 5 May 2008 and provided the Commissioner with a copy of the withheld information. It informed the Commissioner that it believed that the disclosure of the withheld information would allow future profit margins sought by the losing bidders to be ascertained and predicted for future franchises, and that these predictions would be misleading. It confirmed that this was a strongly held view of the losing bidders, and that,

“Whilst the reasoning as to how such margins could be deduced was not detailed [by the losing bidders], it is reasonable to suppose that a view of such margins might be deduced by market and competitor’s analysts from their consideration of likely cost and revenue projections for the franchise and the NPV bid.”
16. The DfT also noted that the losing bidders had expressed a concern that the release of the withheld information would be likely to impact on their share price, “by views being taken as to the content and intent of their bid behaviour, including that of margin, which is necessarily not wholly informed as it is based on their bid NPV,” and that, “publication of the bid might also create a false or misleading market in the share price as it may be determined as being a guide to what margin a bidder might seek from UK franchises, which indication might be high or low.” It pointed out that such an analysis “would in any event be misleading as the [bid] is predicated on the operational, commercial and technical aspects of [the] bid.”
17. The DfT informed the Commissioner that it was a matter for the bidders whether they would seek to apply the same profit margins in future bids. However the strong concerns of the losing bidders about the potential disclosure of the withheld information were, “reflected in the comments that bidders regarded such information regarding their competitors to be of value in determining their own future behaviour, ‘particularly if we saw that one of our competitors was bidding a certain pattern’.” The DfT stated that it did not believe that it was appropriate for it to issue an accompanying statement advising that any assumption that might be drawn from the withheld information might be misleading.
18. The DfT confirmed that the winning bidder had also objected to the disclosure of the withheld information, and had informed the DfT that,

“...we would regard this information as share price sensitive if the market took the view on the relative margin of success for each franchise...Our bidding behaviour may also be affected by the additional information the market would have on everybody’s bidding patterns, which would also make this information share price sensitive.”
19. In response to the Commissioner’s query as to what future rail franchise competitions would be (or would be likely to be) affected by the disclosure of the

withheld information the DfT informed him that at the time of the request bidders were preparing bids for three rail franchises – East Midlands, West Midlands and New Cross Country – which were due to be received by the DfT in March 2007. The DfT further explained that as there are a significant number of repeat bidders, who are considered likely bidders for future rail franchises. It believed that if the withheld information was disclosed this would set a precedent for all future franchises, creating a risk to bidder's share prices on a continuing basis.

20. Finally the DfT repeated its argument that it was the bidders' views that the disclosure of the withheld information would lead to more conservative bids, and that this would add to the cost of provision of rail services and therefore give less value to the taxpayer.
21. After receiving this letter the Commissioner wrote to both the DfT and the complainant on 16 May 2008 and informed both parties that he would shortly begin drafting a Decision Notice on this case.
22. The DfT contacted the Commissioner by way of a telephone call on 21 May 2008 and informed him that it was considering making further submissions to support its arguments. Subsequently the DfT contacted the Commissioner again on 28 May 2008 and informed him that it wished to provide further submissions. The Commissioner agreed a final deadline of 16 June 2008.
23. The DfT wrote to the Commissioner again in a letter dated 16 June 2008. In relation to its earlier arguments the DfT informed the Commissioner that,

“The apparent inconsistency in the arguments of our letter of 20 March arises because that letter extensively quoted representations received from a number of losing bidders in addition to the DfT's own view. Some of the bidders raised concerns that disclosure of their bid totals would reveal information that could enable more informed comment about their profit margins which they consider commercially confidential. It is the DfT position that it could be difficult to derive a meaningful understanding of the margin inherent in a bid from the headline NPV.”

Nevertheless, the DfT still maintained that disclosure of the withheld information would be prejudicial to the commercial interests of the both the losing and the winning bidders, and would prejudice its ability to maximise value for money in future rail franchise competitions.

24. In order to support this view the DfT explained that the NPV, “is the discounted sum of the franchise payments in a bid: in the case of the South Western Franchise this is a premium i.e. the bidders are offering to make net payments to the DfT.” It went on to explain that the premium is the sum of three components:
  - the franchise revenue forecast by the bidder,
  - the franchise operating costs forecast by the bidder, and
  - the profit margin required by the bidder.

25. It stated that in its experience estimates of operating costs were broadly similar between bidders and that, “whilst across all competitions bidders’ margins have varied in the range of 3.0 to 6.0 per cent of revenue, in absolute terms the variation in profit has also been relatively small.” The DfT noted that variations between bidders arose in their revenue forecasts and that, “it is here that the majority of recent franchise competitions have been won or lost.”
26. The DfT stated that the forecasting of franchise revenue is an extremely complex process and informed the Commissioner that it believed that the withheld information would give a clear indication of the long term revenue forecast produced by each of the bidders. It went on to state that it considered that:
  - Disclosure of the withheld information would allow rival bidders to derive an understanding of how their competitors approach the forecasting of revenue and this would shape behaviour in future bids.
  - Over time this would be likely to cause bids to coalesce and discourage efforts to find innovative ways of maximising revenue, leading to bids which fail to extract maximum value from the franchise.
  - “This would be prejudicial to the achievement of maximum value for money for the public purse in future competitions.”
27. The DfT drew the Commissioner’s attention to three rail franchise competitions which were held in close proximity to the request and / or are of a significantly similar nature, and provided further information on these.
28. The DfT also provided arguments as to why it believed that the disclosure of the withheld information would be likely to prejudice the commercial interests of the winning bidder. It stated that the winning bidder was concerned that,

“...were the losing NPVs to indicate that the rest of the market made significantly lower revenue forecasts for the franchise than those implicit in its bid, this would lead to suggestions it had overpaid for the franchise which would very likely have a detrimental effect on its share price. The relative level of the Stagecoach bid attracted significant press and analyst attention when the franchise was awarded...but all comparison with losing bids was, of course, conjecture.”
29. The DfT stated that it concurred with the winning bidder’s view, and it felt that the disclosure of any substantial difference between the winning and losing bids could damage investor confidence, share price and ultimately the financial value of the company.
30. The DfT also argued that it considered that disclosure would be likely to reduce value for money obtained in future rail franchise competitions, and that this would be contrary to the public interest. In support of this argument it drew the Commissioner’s attention to the comments of the losing bidders referred to in its letter to him of 20 March 2008.
31. Further to this it also argued that it was of the view that disclosure of this information would discourage companies from bidding for future rail franchises in

the UK as bidders would be concerned about investor reaction when the winning and losing bids were compared.

32. The DfT also informed the Commissioner that after considering the case further it believed that section 41 of the Act also applied to the withheld information. It pointed out that the information was provided by third parties (i.e. the losing bidders) and was subject to a duty of confidence. It commented that bidders have a reasonable expectation that information relating to a losing bid would not be disclosed, and drew the Commissioner's attention to a confidentiality clause in the franchise letting process agreement between the DfT and the bidders.
33. In support of its use of section 41 the DfT referred the Commissioner to the points it had advanced in support of its use of section 43, and stated that as it considered that the disclosure of the withheld information would provide a clear indication of the long term revenue forecast by the bidders who provided them, this information was of "significant financial value" to the party which provided it. It also informed the Commissioner that it did not believe that there was a public interest override to the duty of confidentiality in this case. The DfT provided further arguments to support this view.

## Background

34. Invitations to tender for the South Western rail franchise were sent out in March 2006. This franchise combined two existing rail franchises, South West Trains and the Island Line.
35. On 22 September 2006 the DfT announced that the South Western rail franchise had been awarded to Stagecoach South Western Trains Ltd for a period of ten years. In a press statement the DfT stated,

"Stagecoach Group PLC has undertaken to pay the [DfT] a premium of £1,191m (NPV) over the life of the franchise. The franchise has been awarded for 10 years, with the final three dependent on service performance achieving preset targets, including further performance improvements."<sup>1</sup>

---

<sup>1</sup> <http://www.dft.gov.uk/press/speechesstatements/statements/railwayssouthwesternfranchise>



## Analysis

---

### Procedural

#### Section 17

36. The Commissioner has considered whether the DfT has complied with its obligations under section 17(1) of the Act.
37. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal 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.
38. During the course of the investigation the DfT informed the Commissioner that it believed that the withheld information was exempt from disclosure under section 41. This had not been previously referred to by the DfT when it issued a refusal notice to the complainant.
39. Therefore the Commissioner believes that the DfT has not complied with sections 17(1)(b) and (c).
40. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

### Exemptions cited

#### Section 43

41. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
42. The full text of section 43 can be found in the Legal Annex at the end of this Notice.
43. The Commissioner accepts that the withheld information relates to the commercial interests of the bidders (both winning and losing), and to the DfT. Therefore he believes that the information in question falls within the scope of the exemption.
44. 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.
45. The Commissioner notes that in the initial refusal notice the DfT informed the complainant that it believed that the disclosure of the withheld information would prejudice the commercial interests of all the bidders. However, in internal review it

stated that it believed that prejudice would, or would be likely. Further to this, in its correspondence with the Commissioner it did not clarify whether it believed that the disclosure of the withheld information would - or would be likely to - prejudice the commercial interests of the parties concerned. In line with the views of the Information Tribunal in *McIntyre V The Information Commissioner and the Ministry of Defence*<sup>2</sup> the Commissioner believes that where a public authority has failed to specify the level of prejudice at which an exemption has been engaged the lower threshold of "likely to prejudice" should be applied, unless there is clear evidence that it should be the higher level. Therefore the Commissioner has considered the application of this exemption on the basis that the DfT believes that prejudice would be likely to occur.

46. The DfT has argued that the disclosure of the withheld information would be likely to prejudice the commercial interests of the losing bidders, the winning bidder and the DfT. Therefore the Commissioner has considered the potential prejudice to the commercial interests of each of these parties in turn.
47. In reaching a decision on the question 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 Information Tribunal in the case of *John Connor Press Associates Limited V The Information Commissioner*, 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 hypothetical or a remote possibility, that there must have been a real and significant risk. The Tribunal in that case indicated that the degree of risk must be such that there 'may very well' be prejudice."<sup>3</sup>

### **Prejudice to losing bidders**

48. The Commissioner has first considered the DfT's arguments that the disclosure of the withheld information would be likely to prejudice the commercial interests of the losing bidders.
49. In the initial refusal notice the DfT informed the complainant that disclosure of the withheld information would prejudice the commercial interests of the losing bidders. After carrying out an internal review it informed him that the withheld information was sensitive and potentially prejudicial. However, it did not provide any further arguments to the complainant as to how this prejudice was likely to occur.
50. In its letter to the Commissioner of 20 March 2008 the DfT argued that after consulting with the losing bidders it believed that the disclosure of the withheld information would give an indication (albeit misleading) of both the future profit margin that might be sought in future bids for rail franchises, and the relative margin of success and failure between the winning and the losing bids for the South Western franchise, which in turn might affect the stock market's view of,

---

<sup>2</sup> EA/2007/0068, para 45.

<sup>3</sup> EA/2005/0005.

“the bidder’s margin, each company’s bidding behaviour and bid/subsidy/premium relative to other bidders...” This, it argued, would be likely to directly impact the companies’ share price, which would in turn be likely to prejudice their commercial interests.

51. The Commissioner notes in a later letter the DfT has stated that upon reflection it believes that it could be difficult to derive a meaningful understanding of the margin inherent in a bid from the headline NPV (see paragraph 23 above). Therefore he has not considered this element of the argument in the preceding paragraph any further. However, the Commissioner notes that the DfT is still relying upon its argument concerning the ‘relative margin of success and failure between the winning and losing bids’ and the potential damage to the losing bidders’ share prices. Therefore he has taken this into consideration whilst reaching a view on the likelihood of prejudice.
52. The DfT has also argued that the disclosure of this information would be of use to other companies in future franchise competitions, which would in turn be likely to prejudice the commercial interests of the losing bidders. It informed the Commissioner that after discussing the potential disclosure with the losing bidders, they had informed it that if they obtained the withheld information relating to a rival company this would allow them to gain an insight into their competitors bidding behaviour, particularly if they saw that one of their competitors “was bidding a certain pattern.”
53. After considering this statement the Commissioner believes that the DfT has argued that the disclosure of the withheld information might allow competitors of the losing bidders to predict their bidding behaviour for future franchise competitions, and use this to undermine their commercial position.
54. In its letter to the Commissioner dated 16 June 2008 the DfT explained that, “the headline NPV is the discounted sum of the franchise payments in a bid: in the case of the South Western franchise this is a premium, i.e. the bidders are offering to make net payments to the DfT.” This premium is the sum of three components:
  - the franchise revenue forecast by the bidder,
  - the franchise operating costs forecast by the bidder, and
  - the profit margin required by the bidder.

It stated that in its experience all bidders made similar estimates of operating costs and that, “whilst across all competitions bidders’ margins have varied in the range of 3.0 to 6.0 per cent of revenue, in absolute terms the variation in profit has also been relatively small.”

55. The DfT identified the franchise revenue forecast by the losing bidders as most sensitive, and stated that “it would be fair to say that it is here that the majority of recent franchise competitions have been won or lost.” It argued that it believed that the disclosure of the withheld information would allow competitors of the losing bidders to gain an insight into how the bidders approached the question of

forecasting the future revenue of rail franchises. This, it believed, would be likely to prejudice the commercial interests of the bidders.

56. The Commissioner has considered the DfT's arguments about the potential prejudice to the commercial interests of the losing bidders at length.
57. The bidding process for a rail franchise, and the method by which the bidders arrive at their headline NPV, is a complex one. The DfT has itself stated that "the forecasting of franchise revenue is an extremely complex process taking into account the bidder's planned initiatives for the franchise concerned and also a range of factors outside the bidder's control, for example, forecasts of economic and population growth and modal shift to rail." The withheld information does not contain any details of the methodologies or factors taken into account by the losing bidders in arriving at their NPV bid. Furthermore the Commissioner has not been provided with any compelling arguments as to how the withheld information by itself would allow a third party to gain any further insight into this complex process.
58. The withheld information relates to the bidding process for a single rail franchise and whilst the Commissioner accepts that this information would be of high sensitivity before the rail franchise had been awarded, in this case the franchise had been awarded prior to the request being made. Although the DfT has argued that other franchises were coming up for tender around the time of the request (see paragraphs 19 and 27 above) the Commissioner believes that each franchise would be unique and very different, especially in relation to operating costs and potential revenue. Therefore he is not persuaded that these future franchises would have been of a substantially similar nature to the one the withheld information relates to. Furthermore the Commissioner also believes that companies' priorities will change given the rapidly changing nature of the financial and economic climate, and that many other factors could influence their bidding behaviour for future franchises.
59. Given
- the fact that the withheld information is headline NPVs, which contain no detail of the complex process which would show how these figures were arrived at;
  - the differing nature of the railway franchises which were coming up for tender;
  - the fact that the South Western rail franchise had been awarded by the time the request was made; and
  - the many different factors which would influence the future bidding behaviour of the bidding companies,

the Commissioner is not persuaded that the release of the withheld information would allow the competitors of the losing bidders to predict their future bidding behaviour. Nor is the Commissioner persuaded by the DfT's argument that disclosure would lead to competitors of the bidders gaining an insight into how they approached forecasting the revenue of railway franchises which they were competing for.

60. In reaching this view the Commissioner has noted that the DfT does publish the NPV of the successful bidder. If the Commissioner were to accept the arguments of the DfT regarding the possible ramifications of the disclosure of the withheld information, as detailed in paragraphs 52 – 55 above, he would expect to see these ramifications affecting the successful bidder in the same way. However, the DfT has not provided any evidence that the disclosure of this information has led to Stagecoach's future bidding behaviour being predicted, or its approach to revenue forecasting being compromised.
61. Furthermore, the Commissioner is not persuaded by the DfT's argument that disclosure of this information would prejudice the losing bidders' share values by giving an indication of the "relative margin of success / failure between the various bidders," and affecting the stock market's view of their bidding behaviour. The Commissioner believes that the withheld information relates to a complex bidding process, with many variables affecting the outcome, for a franchise which had been awarded by the time of the request. The Commissioner believes that the stock market is sophisticated, and given the lack of any compelling evidence from the DfT, he is not persuaded that the disclosure of this information would damage the share values of the losing bidders in this way.
62. The DfT has also stated that it believes that the disclosure of this information would be likely to discourage bidders from competing for future rail franchises. Whilst it has not specified whose commercial interests it believes would be affected by this, the Commissioner believes that it could be argued that this would be likely to prejudice the commercial interests of the losing bidders by dissuading them from bidding for potentially lucrative rail franchises in the future.
63. The Commissioner is not persuaded by this argument. He considers that franchises of this nature are usually profitable for successful bidders, and it is therefore unlikely that they would willingly exclude themselves from tendering for rail franchises because of the provisions of the Act.
64. Further to this the Commissioner believes that the implementation of rights under the Act has already indicated to businesses the possibility that information they provide when bidding for a contract offered by a public authority could be disclosed as a result of a request under the Act. He has previously expressed the view that, "those who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about the details of those activities than had previously been the case prior to the Act coming into force."<sup>4</sup>
65. The Commissioner believes that this view is in line with the view expressed by the Information Tribunal in *Derry City Council V The Information Commissioner*. In this hearing the Tribunal discussed whether the disclosure of commercial information provided to a publicly owned Airport by a private company would be damaging to the commercial reputation of the Airport. The Tribunal stated, "We do not accept that...disclosure...would have caused the Airport to gain a reputation as an untrustworthy counterparty in commercial transactions; one that would disclose, or be forced to disclose, the contents of agreements in which it

---

<sup>4</sup> FS50063478

enters. Any person or organisation contracting with it would already know that it was publicly owned and that its commercial dealings would therefore be subjected to greater public scrutiny than those of a private company.”<sup>5</sup>

66. Taking into account the arguments provided by the DfT and all the circumstances of the case, the Commissioner does not believe that it has provided him with compelling arguments that the disclosure of the withheld information would be likely to prejudice the commercial interests of the losing bidders.

### **Prejudice to winning bidder**

67. The Commissioner has gone on to consider the DfT's arguments in regard to the potential prejudice to the commercial interests of the winning bidder.
68. In its letter to the Commissioner dated 16 June 2008 the DfT informed the Commissioner that after consulting with the successful bidder it was the opinion of both of them that, “were the losing NPVs to indicate the rest of the market made significantly lower revenue forecasts for the franchise than those implicit in its bid, this would lead to suggestions that it had overpaid for the franchise which would very likely have a detrimental effect on its share price.” This, it believed, would be damaging to investor confidence, share price and ultimately the financial value of the company.
69. In support of this argument the DfT noted that after it had announced the winning bidder's NPV, “...the relative level of the Stagecoach bid attracted significant press and analyst attention...but all comparison with losing bids was, of course, mere conjecture.”
70. The Commissioner is not persuaded by this argument. He believes that the bidding process for a rail franchise, and the process of awarding the franchise to a particular bidder, is a complex one with many variables, including the needs and priorities of the bidding companies at the time the bids are made. He does not believe that conclusions could be drawn solely from the NPVs alone. As he has stated above, he believes that the stock market is sophisticated and, given the lack of any compelling evidence from the DfT, he is not persuaded that the disclosure of this information would damage the share price of the winning bidder in this way
71. Further to this, given the level of speculation in the national press after the winning NPV had been published, the Commissioner is not persuaded that the disclosure of the withheld information would be likely in itself to cause damage to the reputation of the winning bidder.
72. The DfT has also argued that the winning bidders bidding behaviour might be altered in the future if the withheld information was disclosed, “by the additional information the market would have on everybody's bidding patterns.” The Commissioner believes that he has already addressed this argument at paragraphs 57 – 59 above. Therefore he has not addressed this point any further.

---

<sup>5</sup> EA/2006/0014, page 12.

73. Taking into account the arguments provided by the DfT and all the circumstances of the case, the Commissioner does not believe that it has provided him with compelling arguments that the disclosure of the withheld information would be likely to prejudice the commercial interests of the winning bidder.

#### **Prejudice to the DfT**

74. The DfT has argued that the disclosure of the withheld information would damage future rail franchise competitions by causing more conservative bids, which would add to the cost of the provision of rail services.

75. The DfT's argument is predicated on its belief that the disclosure of the withheld information would allow the bidders' competitors to take a much more informed view of the bidders' bidding behaviour – which would in turn alter their future bidding behaviour and lead to more conservative bids being made. In its letter to the Commissioner dated 16 June 2008 the DfT argued that,

“...publication of losing bid NPVs would allow bidders to derive an understanding of how their competitors approach the forecasting of revenue and this would shape behaviour in future bids. Over time this is likely to cause bids to coalesce and discourage efforts to find innovative ways of maximising revenue.”

76. However, as the Commissioner has previously noted, he is not persuaded that the withheld information would allow competitors of the bidders to take a more informed view of their future bidding behaviour (see paragraphs 57 – 59 above). In particular the Commissioner believes that:

- Each train franchise is unique, with different operating costs and potentials for future revenue;
- Companies' priorities will change over time, with many variable factors affecting the bidding behaviour of the companies, especially given the rapidly changing nature of the financial and economic climate.

Therefore the Commissioner is not persuaded that the disclosure of the withheld information will be likely to lead to more conservative bids in future rail franchise competitions.

77. The Commissioner also believes that it is arguable that the disclosure of this information might lead to a more open and competitive market for rail franchises.
78. The DfT has also argued that the disclosure of the withheld information would be likely to discourage potential bidders in future rail franchise competitions (see paragraph 31 above), and that this in turn would hinder the DfT from seeking best value for money in future rail procurement exercises, damaging its commercial interests. The DfT has not provided any further evidence to support these comments.

79. As noted above, the Commissioner is not persuaded by the argument that the disclosure of this information would dissuade private businesses from bidding for franchises of this nature (see paragraphs 62 – 66 above).
80. Taking into account the arguments provided by the DfT and all the circumstances of the case, the Commissioner does not believe that it has provided him with compelling arguments that the disclosure of the withheld information would be likely to prejudice the commercial interests of the DfT.
81. To sum up, the Commissioner does not believe that the disclosure of the withheld information would be likely to prejudice the commercial interests of the losing or winning bidders, or the DfT, and as such he does not believe that section 43(2) is engaged.
82. As the Commissioner has formed the view that the exemption is not engaged, he has not gone on to consider the public interest test.

#### **Section 41**

83. In its letter to the Commissioner dated 16 June 2008 the DfT informed the Commissioner that after considering the case further it believed that section 41 of the Act also applied to the withheld information, and provided further arguments to support its use of this exemption.
84. In considering whether to accept the late application of this exemption the Commissioner has been mindful of the Information Tribunal's position on the late application of exemptions, as expressed in *The Department for Business, Enterprise and Regulatory Reform v. The Information Commissioner and the Friends of the Earth*. In this hearing the Tribunal considered whether a new exemption can be claimed for the first time before the Commissioner. In considering this question the Tribunal stated that, "it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations."<sup>6</sup> The Commissioner has adopted a discretionary approach to the late application of exemptions, based on a case by case basis and considering the particular circumstances of each case, which he believes is in line with the Tribunal's position on this issue.
85. When assessing the circumstances of the case and the late application of exemptions the Commissioner must carefully consider his obligations as a public authority under the Human Rights Act 1998 (the "HRA"), which prevent him acting incompatibly with rights protected by the HRA. It will therefore be difficult for the Commissioner to refuse to consider any exemptions that relate to rights under the convention (e.g. articles 6 and 8). This would include sections 38 and 40 and in some cases 30, 31 and 41.

---

<sup>6</sup> EA/2007/0072, para 42.



86. Given the circumstances surrounding national security the Commissioner also believes that it would be difficult for him to refuse to consider sections 23 and 24 as late exemptions. The exemptions under sections 26 and 27 may also carry similar risks.
87. Factors which the Tribunal has accepted as being reasonable justifications for the application of exemptions before the Commissioner and/or the Tribunal for the first time include:
- where some of the disputed information is discovered for the first time during the Commissioner's investigation, and therefore the public authority has not considered whether it is exempt from disclosure;
  - where the authority has correctly identified the harm likely to arise from disclosure however applies these facts and reasoning to the wrong exemption;
  - where the public authority had previously failed to identify that a statutory bar prohibited disclosure of the requested information, and therefore ordering disclosure would put the public authority at risk of criminal prosecution; and
  - where the refusal notice was issued at an early stage of the implementation of the Act when experience was limited, although this factor is likely to become far less relevant in the future.
88. In considering the late application of section 41 in this case the Commissioner has been mindful of the factors listed above. After considering the circumstances of the case the Commissioner believes that it does not raise any issues under the HRA. Furthermore, in relation to the above bullet points, after considering the information provided by the DfT the Commissioner does not believe that the late application of section 41 in this case falls under any of the above criteria. In addition to this the Commissioner has noted that:
- The DfT did not previously refer to confidentiality in its correspondence with the complainant in this case.
  - In its previous two letters to the Commissioner during the investigation of this case the DfT had not referred to confidentiality. The DfT only referred to this exemption after being informed by the Commissioner that he was intending to draft a decision notice.
  - The DfT has not provided any explanation as to the late application of this exemption.
89. In light of these considerations and in all the circumstances of the case the Commissioner does not believe that it is appropriate for him to take this exemption into account when reaching a view on this case.

## The Decision

---

90. 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 twenty working days it also breached section 10.

91. The DfT also acted in breach of section 17(1)(b) and (c) in that it sought to rely upon an exemption not cited in its refusal notice.

### **Steps Required**

---

92. The Commissioner requires the DfT to take the following steps to ensure compliance with the Act:

The requested information should be disclosed to the complainant within 35 calendar days of receipt of this Notice.

### **Failure to comply**

---

93. 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

---

94. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

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 28<sup>th</sup> day of July 2008**

**Signed .....**

**Richard Thomas  
Information 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).