

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 December 2013

Public Authority: Department for Transport
Address: Great Minister House,
Zone 3/15,
33 Horseferry Road,
London SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested from the Department for Transport statistics for peak and off peak loadings of rail passengers on the West Coast Main line. The Department for Transport has withheld this information under the exemptions in sections 41, 43(2) and 21 the FOIA.
2. The Commissioner's decision is that the Department for Transport has successfully engaged the exemptions in section 41 and 21 of the FOIA.
3. The Commissioner therefore does not require the Department for Transport to take any steps.

Request and response

4. On 5 February 2012 the complainant wrote to the Department for Transport (DfT) and requested information in the following terms:

"Can you please supply me with the statistics for peak and off peak loadings of rail passengers on the west coast main line?"
5. The DfT responded on 2 March 2012. It stated that it held the requested information but was withholding it under section 43(2) of the FOIA.

6. On 9 March 2012 the complainant requested an internal review as he was dissatisfied with the DfT's decision to apply section 43(2).
7. Following an internal review the DfT wrote to the complainant on 19 April 2012. It stated that it was upholding its original decision to exempt the requested information under section 43(2) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 10 December 2012 to complain about the way his request for information had been handled. In particular, he complained about the DfT's decision to withhold the information he had requested under section 43(2) of the FOIA.
9. Subsequently, the complainant contacted the Commissioner on 21 June 2013 to complain about the DfT's decision to apply section 41 of the FOIA to the withheld information in addition to section 43(2).

Background

10. DfT has informed the Commissioner that it receives periodic requests under the FOIA for data on passenger loadings and train crowding, which train operators are required to provide to it as part of their franchise agreements. Passenger loading/count data are provided for individual train services based on passenger counts carried out by the train operating companies (TOC), and are typically provided as the average of a number of counts carried out over a period of time. The TOC currently provide DfT with passenger count data for two periods each year, one in the spring and one in the autumn.
11. The DfT Rail Statistics team took over responsibility for the co-ordinated management of the passenger count data during 2008. At that time data handling procedures were reviewed internally by DfT and the TOC consulted. That review concluded that DfT is only permitted to publish aggregated passenger counts data unless and to the extent that the TOC have provided their written authority for more detailed data to be made public. The DfT has informed the Commissioner that it has been consistent in refusing any request to release such disaggregated train service level information since late 2008. Until December 2012 it relied

primarily on the exemption in section 43(2) of the FOIA. Since then it has favoured the exemption in section 41.

12. The current operators for which DfT holds some passenger count information on the West Coast Main line are: Virgin Trains, London Midland, Arriva Trains Wales, Northern Rail, First TransPennine Express and East Coast.
13. In 2009, DfT consulted TOC on a range of issues relating to its proposed procurement of a centralised rail passenger counts database, including their views on data access and confidentiality. The review concluded that DfT is only permitted to publish aggregated passenger counts data unless the TOC gave their written authority that more detailed information could be made public.
14. Against that background, DfT has pointed out that it has two regular publications based on passenger count data. One publication consists of aggregate statistics showing passenger numbers and crowding on weekdays which can be found at the following link: <https://www.gov.uk/government/publications/rail-passenger-numbers-and-crowding-on-weekdays-in-major-cities-in-england-and-wales-2011>.
15. The other publication which DfT publishes is a list of the 'top 10' most crowded trains in the passenger count data. The latest publication can be found at the following link: <https://www.gov.uk/government/publications/top-10-overcrowded-train-services-england-and-wales>.
16. The National Rail Franchise Terms (the "Terms") in place between DfT and TOC include provisions on the confidentiality of information. These Terms form part of the legally binding contract between a TOC and the Secretary of State. These Terms as they relate to Virgin West Coast and to London Midland can be found at the following links:

Virgin West Coast National Rail Franchise Terms (see Schedule 17):
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/15186/vwc-terms-2012.pdf

London Midland National Rail Franchise Terms (see Schedule 17):
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/40455/lm-national-rail-franchise-terms.pdf

17. The terms for other TOC can be found via the following webpage, either as a separate document or as part of the franchise

agreement for each TOC:

<https://www.gov.uk/government/organisations/department-for-transport/series/public-register-of-rail-passenger-franchise-agreements>.

Chronology

18. On 27 March 2013 the Commissioner wrote to the DfE and requested copies of the withheld information together with any further arguments it wished to advance in support of its application of section 43(2) of the FOIA.
19. The DfT responded on 28 March 2013 and stated that it now intended to rely primarily upon section 41 of the FOIA to withhold the requested information with section 43(2) being the secondary exemption. It promised to provide the Commissioner with its further arguments in respect of section 41 in due course together with an extract of the requested information as it said the complete data set was quite voluminous.
20. The Commissioner acknowledged receipt of the DfT's communication and invited it to send a representative extract of the requested information together with its arguments in support of section 41 and any further arguments in respect of section 43(2) of the FOIA.
21. The DfE responded on 15 and 23 April 2013 and provided the Commissioner with an extract of the requested information (in view of the fact that complete data was too voluminous) together with its arguments in support of its application of sections 41 and 43(2) of the FOIA.
22. On 25 April 2013 the Commissioner (having requested and received the DfT's consent) sent the complainant details of its arguments in support of sections 41 and 43(2) of the FOIA.
23. The complainant responded on 3 May saying that he did not accept the DfT application of section 41 of the FOIA and on 21 June 2013 provided detailed reasons why not.

Reasons for decision

Which is the correct legislative regime?

24. The DfT has dealt with the complainant's request under the FOIA. However, the complainant has expressed his belief that the correct legislation for his request should be the Environmental Information Regulations 2004 (the EIR) as the information he has requested relates to the HS2 project.
25. The complainant has argued that if the HS2 project is embarked upon, the construction and operation of the High Speed rail project would generate emissions, including dust, noise, vibrations, light, radio waves and carbon dioxide. He therefore believes that the passenger loading data he has requested is information on 'emissions' thereby engaging Regulations 2(1)(b) and 12(9) of the EIR.
26. The complainant has further argued that the information he has requested on the passenger loading for the West Coast Main Line relates directly to the business, economic and environmental case put forward by the Government and HS2 Ltd¹ for developing a new high speed rail network to meet the challenge of an increasingly overcrowded rail network². The Strategic Case for HS2 is available on the GOV.UK website³.
27. The complainant has pointed out that in a previous Decision Notice issued by the Commissioner on 6 June 2013 under reference FER0467548⁴ he decided that information concerning the HS2 high speed rail project was 'environmental' within the meaning of the EIR as it was a 'measure' likely to affect elements and factors listed in Regulations 2(1)(a) and (b).
28. However, in this case the Commissioner having seen an extract of the withheld information believes it is too far removed from the HS2 project itself to qualify for consideration under the EIR. The

¹ HS2 Ltd is the company responsible for developing and promoting the UK's new high speed rail network and is wholly owned by the Department for Transport.

² <https://www.gov.uk/government/collections/the-strategic-case-for-hs2>
<https://www.gov.uk/government/publications/hs2-strategic-case>

³ <https://www.gov.uk/government/collections/the-strategic-case-for-hs2>
<https://www.gov.uk/government/publications/hs2-strategic-case>

⁴ http://www.ico.org.uk/~media/documents/decisionnotices/2013/fer_0467548.ashx

Commissioner has referred to the recent judicial review decision dated 15 March 2013 on the HS2 project and has noted that the passenger data provided by the TOC had not been used by HS2 in the justification for HS2, nor in its modelling of future demand, save in one very limited respect⁵.

29. The Commissioner has therefore concluded that the correct legislation under which to consider the complainant's request should be considered is the FOIA.

The FOIA exemptions

30. In this case the DfT has applied the exemptions in sections 41, 43(2) and 21 of the FOIA to the requested information.

Section 41 of the FOIA

31. Section 41 of FOIA provides that:-

- (1) Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

- (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

32. There are a number of elements to the application of section 41. These are;

a) That information was received by the DfT from another person or persons.

⁵ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/hs2-judgment.pdf> see paragraph 418

- b) That a disclosure of the information would be an actionable breach of that duty of confidence.

Was the information obtained from another person?

33. In this case the withheld information (namely the data on passenger loadings for the West Coast Main line) was obtained by the DfT from the TOC under the terms of their franchise agreements.
34. The Commissioner therefore satisfied that the information was obtained from third parties, namely the TOC.

Would disclosure constitute an actionable breach of confidence?

35. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following;
- Whether the information has the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

36. The withheld information consists of the detailed passenger count data provided by the TOC under the terms of their franchise agreements with the DfT.
37. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
38. The Commissioner is satisfied that the information is not trivial. He is also satisfied that the level of detail⁶ it contains is not accessible by other means.

⁶ 'Passenger numbers information' 1.1 of Schedule 1.5 of the Franchise Agreement

39. The Commissioner is therefore satisfied that the withheld information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

40. The DfT has drawn the Commissioner's attention to the terms of the franchise agreements with the various TOC under which they are contractually obliged to provide it with various information on passenger numbers under the schedule headed 'Information about Passengers'⁷.
41. The information which the TOC (or franchisees) are obliged to provide to the DfT ('when reasonably requested' in 'such format' and 'such level of disaggregation' required) includes the number of passengers travelling in each class of accommodation on each Passenger Service; on each Route; and/or at any station or between any stations and the times of the day, week or year at which passengers travel⁸.
42. The franchise agreements also provide under the heading of 'Confidentiality' that all documents, materials and information supplied by the other party shall not be published or disclosed except with the other party's written authority unless expressly provided by the agreement.
43. This 'confidentiality' clause which appears in the franchise agreements' schedule⁹ provides that;

'1. *CONFIDENTIALITY*

Subject to the provisions of the Act, the Transport Act, the Railways Act 2005 and paragraphs 2 to 8 inclusive, each party shall hold in confidence all documents, materials and other information, whether technical or commercial, supplied by or on behalf of the other party (including all documents and information supplied in the course of proceedings under the Dispute Resolution Rules or the rules of any other dispute resolution procedures to which a dispute is referred in

⁷ Schedule 1.5 'Information about Passengers'

⁸ 'Passenger numbers information' 1.1 of Schedule 1.5 of the Franchise Agreement

⁹ Schedule 17 for most of the agreements

accordance with the Franchise Agreement) and shall not, except with the other party's written authority, publish or otherwise disclose the same otherwise than as expressly provided for in the Franchise Agreement unless or until the recipient party can demonstrate that any such document, material or information is in the public domain through no fault of its own and through no contravention of the Franchise Agreement, whereupon to the extent that it is in the public domain this obligation shall cease'.

2. DISCLOSURE OF CONFIDENTIAL INFORMATION

44. The confidentiality clause goes on to provide that each party may disclose information acquired under or pursuant to the Franchise Agreement without the written consent of the other party in good faith to certain specific parties. For example, lenders from which a party is seeking or obtaining finance subject to an undertaking of confidentiality being given as indicated above.

3. PUBLICATION OF CERTAIN INFORMATION'

45. The confidentiality clause also provides that despite the above paragraph relating to confidentiality in the Franchise Agreement, the Secretary of State may publish certain specific information in such form and such times as he sees fit. For example, the results, on a Service Group, Route, station or other comparable basis, of any calculation of passenger numbers under the Schedule providing 'Information about Passengers'.
46. The DfT has argued that the 'Confidentiality' clause in the Franchise Agreements demonstrates that the information provided to it by the TOC was imparted in circumstances importing an obligation of confidence.
47. The DfT has also pointed out following a period of consultation in 2009 the TOC expressed the view in very strong and clear terms that they considered the information on passenger loading as being commercially confidential and not for disclosure to the public.
48. The complainant has argued that counting the number of individuals on a public railway carriage is not intrinsically confidential. He has pointed out that the information is collected in a public setting and could be gathered by any person or organisation that has sufficient interest and time to obtain it.

49. He has also suggested that the obligation of confidentiality is not an absolute one as it allows either party to disclose or otherwise publish information provided with or without the consent of the other party in certain defined circumstances or when the DfT deems it fit.
50. The complainant has pointed out that the DfT has disclosed detailed passenger count information for the West Coast Main line in the past in response to previous freedom of information requests in 2007 and 2008. The complainant has argued that as the franchise agreements have not changed significantly since this information was requested and disclosed it would be difficult for the DfT to argue that it was considered confidential and commercially sensitive.
51. The DfT has acknowledged that in the past (between 2006 and 2008 when responsibility for all franchises transferred to it from the Strategic Rail Authority) it has disclosed some passenger count data. However, it has pointed out to the Commissioner that this was disclosed in error without the current Rail Statistics team being aware of the situation until it was drawn to their attention by the complainant.
52. The complainant has drawn the Commissioner's attention to the recent judicial review decision dated 15 March 2013¹⁰ regarding the HS2 project. In particular, he has referred to the Judge's comments in relation to some of the passenger loading data produced by the TOC and supplied to the DfT under their franchise agreements. This information was requested by one of the claimants during the judicial review proceedings (see paragraphs 411 to 418)¹¹ and was initially withheld on the grounds of 'relevance and confidentiality'. However, the information was subsequently disclosed under an agreed Order when the 'Secretary of State for Transport (DfT) accepted, by the time of the claim was heard, that this claim for confidentiality on a proper reading of the agreements with the TOC had been overstated and, could not be sustained'.

¹⁰ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/hs2-judgment.pdf>

¹¹ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/hs2-judgment.pdf>

53. The complainant has argued that the comments made during the judicial review proceedings support his view that the passenger loading data was not protected by confidentiality.
54. The DfT has acknowledged that during the judicial review proceedings it disclosed some passenger loading data. However, it has pointed out that this was only a limited disclosure rather than a public data release to the world at large. It said that in keeping with its obligations under the Duty of Candour to the court, it disclosed some 2011 data to the claimant local authorities' legal advisors and rail consultant only on the basis that an undertaking not to share the data more widely was received. Prior to the hearing the DfT released those parties from this undertaking to allow the claimants' legal team to share the 2011 data with their clients for the purposes of the litigation only.
55. The DfT have informed the Commissioner that during the judicial review proceedings a small part of the 2011 data was referred to by the claimants in open court stating that the 2011 data indicated an average load factor in the evening peak at Euston of 52.2%¹². However, the DfT has pointed out that this figure relates to the services run by Virgin Trains, which is just one of the TOC that uses the West Coast main line.
56. The DfT has stated that to the extent that a small part of the 2011 data was read out in open court (and is referred to in the transcript of the judicial review hearing)¹³ means that this information is exempt from disclosure under section 21 of the

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http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.northwarks.gov.uk%2Fdownload%2Fdownloads%2Fid%2F4444%2Fhs2_judicial_review_transcripts_from_days_1_to_10&ei=ZCWCUq_1DY6o0wXy6IHgDQ&usq=AFQjCNEJvjaewXS4QnT1jUrLxv9UeHZXg

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http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.northwarks.gov.uk%2Fdownload%2Fdownloads%2Fid%2F4444%2Fhs2_judicial_review_transcripts_from_days_1_to_10&ei=ZCWCUq_1DY6o0wXy6IHgDQ&usq=AFQjCNEJvjaewXS4QnT1jUrLxv9UeHZXg

FOIA as it is reasonably accessible by other means. However, the DfT has added that to the extent that the 2011 data was not read out in open court but only released to the claimants for the purposes of the litigation, means that it remains confidential and exempt from disclosure to the world at large under section 41 of the FOIA.

57. With regard to the comments made by the DfT's barrister, Mr Mould, during the judicial review proceedings that the commercial confidentiality of the passenger loading data was 'overstated' (see above), the DfT has pointed out that these comments refer to the time when the claimants' request for disclosure was made during the course of the judicial review proceedings (but prior to the actual hearing in December 2012). The DfT has emphasised that Mr Mould was not offering his view as to the commercial confidentiality of the passenger loading data in the context of a request under the FOIA or to its wider commercial sensitivity or confidentiality.
58. The DfT has pointed out to the Commissioner that it has a duty to respond to requests for information in accordance with the FOIA including consideration as to whether the information is confidential. In respect of any litigation (like the judicial review proceedings) the DfT has stated that it owes a Duty of Candour to the court. In the context of the judicial review proceedings and in response to the request for the 2011 passenger loading data during the course of those proceedings the DfT has said that it did not consider that the terms under which this information was provided to it by the TOC did not preclude it making a disclosure under its Duty of Candour.
59. The Judge's 'conclusions on the passenger loadings data' and its relevance to the HS2 consultation process are summarised in the Judgement of the judicial review proceedings at paragraphs 433-443¹⁴.
60. The Commissioner has considered the contents of the franchise agreements and the views of the TOC expressed following the consultation in 2009 (and since) and believes that the clauses relating to confidentiality are sufficient for him to conclude that the detailed passenger loading data was provided to the DfT with the

¹⁴ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/hs2-judgment.pdf>

understanding that it would be confidential. Although the Commissioner accepts that the franchise agreements allow for the publication or disclosure of certain information (with or without consent) in certain circumstances and to certain people he does not believe that this prevents the information disclosed by the TOC from being confidential.

61. Although the Commissioner has noted that passenger loading data between 2006 and 2008 was disclosed in response to previous information requests he has accepted the DfT's comments that this was in error and made before its statistics team took over responsibility for the data since when no data has been released under the FOIA.
62. Although the Commissioner accepts that the number of passengers travelling on a particular train, at a particular time, on a particular route and in a particular class is not by itself inherently confidential, he considers that the level of detail in the data produced by the TOC is confidential.
63. The Commissioner recognises that there is a difference between the disclosure of the 2011 passenger loading data to a limited audience during the course of civil court proceedings under the DfT's Duty of Candour and a disclosure of this information to the world at large under the FOIA.
64. The Commissioner is therefore satisfied that the withheld information was passed to the DfT by the TOC in confidence with the expectation that it would remain confidential in view of the terms of the franchise agreements and comments by the TOC.
65. The Commissioner therefore considers that the information falls within the scope of the tests of confidentiality set out in the case of *Coco v AN Clark (Engineers) Ltd* ([1969] RPC 41). A duty of confidence therefore exists between the parties in respect of this information.

Would disclosure be an unauthorised use of the information to the detriment of the confider?

66. The DfT has argued that disclosure of the requested information would constitute an actionable breach of confidence by virtue of the 'Confidentiality' clause in the franchise agreements with the TOC.

67. The TOC have informed the DfT that the requested information is confidential and of commercial value to them. In particular, they believe that disclosure of the information would prejudice their commercial interests by giving competitors a commercial advantage in relation to running their services and the DfT's procurement of new rail vehicles and rail franchises.
68. Specifically the DfT has said that releasing the data would make possible the analysis of TOC demand and, in combination with fares information already in the public domain, revenue and the growth in revenue: For example by route; by time of day; by year. On the West Coast Main Line there is competition between TOC operating the same or part of the same routes, and according to the DfT the data would be of use to any potential open access operator or any company considering a future bid for a rail franchise.
69. The DfT has also pointed out that the TOC also compete with other modes of transport such as airlines, taxi and bus operators, and disclosure of the passenger loading data would allow them to identify the size of rail markets and could inform the targeting and content of their marketing campaigns. This loadings data is also a key input to commercial decisions about fares and the availability of advance purchase products. Like any commercial organisation, detailed revenue and patronage information is of high value to the TOC' competitors and the release of this information would in the DfT's opinion prejudice their ability to compete.
70. The DfT has also pointed out that while passenger count data for individual train services is particularly sensitive, peak and off peak aggregations of these data would also be of value to TOC' competitors and allow analysis of peak and off peak demand and revenue over time on individual routes. Aggregations by service group or the origins/destinations of services would clearly allow analysis by route, and higher aggregations by TOC at each station would, in combination with the same information for other stations, also allow such analysis to be made, even in cases where all of a TOC's services at a station are not on the same route. For example, while knowing the total number of Virgin Trains' passengers arriving and departing at London Euston would not in itself identify the number of passengers on each of their routes, in combination with the same data for stations in other cities it would be possible to make a reasonable estimate of the number of passengers that travel between these stations. In the statistics that DfT publishes it shows the total number of passengers arriving at or departing from particular stations or cities, but it

does not publish this information by TOC to avoid making possible the analysis of passenger demand on particular routes.

71. The DfT has pointed out that when it consulted with the TOC in 2009 on a range of issues, they expressed a very strong and clear view that their data on passenger counts was commercially confidential and not for publication in the public domain.
72. The DfT has informed the Commissioner that it is in the process of procuring a centralised passenger counts database. This database will be a DfT asset used for transport planning. It is being developed with the voluntary assistance of the TOC on the condition that the data they make available for the database is not made public in such a way that it could damage their financial position or reputation.
73. The DfT believes that if the TOC feel that it is not treating their commercial data with care, there is a risk that they will stop voluntarily supplying any information that they are not obliged to provide under the terms of their franchise agreements. The DfT argues that this would have an impact on its ability to carry out its policy and planning functions and would limit the information available to it when franchises are being let.
74. The DfT therefore believes that disclosure of the requested information would amount to an unauthorised use of it to the detriment of the TOC in view of the contractual obligations of confidence under the franchise agreements.
75. The complainant does not believe that disclosure of the requested information would be detrimental to the TOC that provide it to the DfT. He has pointed out that the franchise agreements already permit the publication of certain information regarding passenger loadings. Furthermore, he has argued that the DfT has not produced any evidence to demonstrate that disclosure of the requested information would cause substantial detriment to the TOC or indeed did cause detriment when it was disclosed between 2006 and 2008. For example, in respect of the passenger loading data that was disclosed between 2006 to 2008 (when the terms of the franchise agreements were not materially different to what they are now) he has pointed out that the DfT has not produced any evidence to demonstrate that the TOC suffered any detriment or indeed made any claims against the DfT for breach of confidence.

76. The Commissioner has considered the arguments put forward by the DfT and the complainant and finds that disclosure of the requested information would amount to an unauthorised use in view of the confidentiality clause in the franchise agreements. So far as any detriment to the confiders (the TOC) is concerned the Commissioner accepts the arguments put forward by the DfT and the comments made by the TOC. When the requested information on passenger loading data is linked with information in the public domain regarding fares, it would be possible for competitors to assess the actual and potential revenue available to the TOC with reference to specific routes, stations and times of day. The Commissioner accepts that the disclosure of this information on revenue and patronage would be detrimental to the TOC.

Public interest considerations

77. As section 41(1) of the FOIA is an absolute exemption there is no public interest test. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.

Public interest arguments in favour of disclosure

78. It is generally recognised that there is always some public interest in the disclosure of information held by public authorities to bring about more accountability in the spending of public money and transparency in relation to decisions made.
79. In this case the withheld information relates to passenger loading figures (mainly on the rail services run by Virgin Trains and London Midland) on the West Coast Main line which runs in or around the inter-city transport corridor that would be served by the proposed HS2 line.
80. The complaint has expressed the view that as the HS2 is the largest infrastructure project this country has seen, which will cost the tax payer billions of pounds and affect many communities, there is a very strong public interest in any information relating to it being disclosed.
81. In particular, the complaint believes that the passenger loading figures on the West Coast Main line are very relevant to the public

debate on the need for HS2¹⁵ which the Government has argued¹⁶ is necessary to address the issues relating to the country's current infrastructure, capacity and connectivity to meet the growing need for travel in the future.¹⁷

82. The complainant also believes that the passenger loading figures would allow a better understanding of the viability of alternative strategies to HS2 to create additional capacity on the existing network which he says have been acknowledged by rail industry experts to be more cost effective.

Public interest arguments against disclosure

83. The DfT believe there is a strong public interest in preserving the principal of confidentiality created by the franchise agreements it has signed with the TOC. It has argued that disclosure of the requested information would adversely affect its working relationship with the industry as well as constituting a breach of confidence actionable by the TOC.
84. The DfT notes that there is an increased public interest in the requested information because of the Government's plans for HS2. However, the DfT believes that this interest has been overstated as HS2 is designed to deal with future capacity constraints rather than existing ones. It has argued that the requested information, which relates to current and previous passenger loading, is only of limited relevance to HS2. The DfT has made the point that the passenger count data was not used to either justify HS2 or in the forecasting of future passenger demand, other than in a very limited respect to validate the 'models' used to forecast future demand¹⁸. However, it has added that the passenger count data from the TOC was not used to actually populate the models. The DfT has made reference to the Judge's conclusions in the judicial

¹⁵ <http://www.telegraph.co.uk/news/uknews/road-and-rail-transport/9731680/Passenger-numbers-blow-apart-case-for-HS2-train-line.html>

¹⁶ <http://www.hs2.org.uk/news-resources/strategic-case>

¹⁷ <https://www.gov.uk/government/speeches/the-strategic-case-for-hs2>

¹⁸ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/hs2-judgment.pdf>

review judgement relating to the passenger loading data produced by the TOC¹⁹.

85. The DfT believes that the disclosure of the requested information (on passenger count data for individual train services) would damage the commercial position of the TOC and adversely affect its working relationship with the industry.
86. The DfT also believes that any disclosure of the requested information would constitute an actionable breach of contract and the risk of having to pay damages as a result of this would not be in the public interest.
87. Furthermore, the DfT believes if the TOC feel that it is not handling their commercially confidential information with care, they may stop supplying with it certain information it has requested on a voluntarily basis. This would not be in the public interest as it would have an impact on the DfT's ability to carry out its policy and planning functions.
88. The DfT believes that the public interest is served to a large extent by the statistical information published on the internet by itself and the Office of Rail Regulation (ORR)²⁰ which give details of various matters including passenger numbers and station usage.
89. Specifically, the DfT has informed the Commissioner that it publishes two sets of information concerning passenger count data on its website. The first one consists of aggregate statistics showing passenger numbers and crowding on weekdays²¹. The second one is a list of the 'top 10' most crowded trains in the passenger count data²².
90. At a general level the DfT believes that there is a public interest in protecting the commercial interests of both the private sector

¹⁹ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/hs2-judgment.pdf>

²⁰ <http://dataportal.orr.gov.uk/browse/reports>

²¹ <https://www.gov.uk/government/publications/rail-passenger-numbers-and-crowding-on-weekdays-in-major-cities-in-england-and-wales-2011>

²² <https://www.gov.uk/government/publications/top-10-overcrowded-train-services-england-and-wales>

(which plays an important role in the general health of the economy) and the public sector (whose commercially-related functions need in any event to be exercised in the wider context of the public interest).

Conclusion

91. The Commissioner generally recognises there is always some public interest in the disclosure of information held by public authorities to bring about more accountability for the use of public money and transparency for decisions made.
92. However, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. It is in the public interest that the duty of confidentiality between confiders and confidants is preserved and the Commissioner considers that any information provided to a public body under a contractual obligation is generally accepted to be confidential. In this case the information was passed to the DfT by the TOC under the terms of a franchise agreement with a confidentiality clause.
93. The Commissioner considers that there is a strong public interest in preserving confidentiality and that disclosure of the requested information may result in the perception that the DfT does not treat information provided to it in confidence appropriately and this in turn may deter organisations from coming forward to provide such information in the future.
94. The Commissioner accepts that there is a public interest in knowing about information which may have some relevance to the HS2 project. However, in this case the requested information (which consist the present and past passenger loading on the West Coast Main line) is not as relevant to HS2 as the projected future growth figures.
95. In relation to general information on present and past passenger numbers and demand, the Commissioner believes that the public interest is served by the data published by both the ORR and the DfT on their websites.
96. The Commissioner is also mindful of the public interest in not putting the DfT at risk of having to pay damages arising out of civil claims for breach of confidence by the TOC by virtue of the contractual obligations of confidentiality under the franchise agreements.

97. The Commissioner has also taken into account the public interest of any actions which might adversely affect the DfT's ability to carry out its policy and planning functions if the TOC decided not to provide it with certain information on a voluntary basis if they considered it was not treating their commercially confidential information with care.
98. The Commissioner has carefully balanced the public interests for and against disclosure and has concluded that those in favour are outweighed by those against. He therefore finds that the requested information is exempt under section 41 and the DfT was correct to withhold this information.

Section 21 of the FOIA

99. Section 21 of the FOIA provides that information which is reasonably accessible to the complaint is exempt from disclosure.
100. In this case the DfT has pointed out that specific information regarding passenger loading on Virgin Trains departing from Euston station during evening peak of 52.2% from the 2011 data is exempt from disclosure under section 21 of the FOIA as it is referred to in the judicial proceedings' transcript dated December 2012 on page 122.²³
101. The Commissioner accepts that the specific information provided to the DfT by Virgin trains regarding passenger loadings in 2011 for evening peak departures from Euston station is exempt from disclosure under section 21 of the FOIA.
102. As the Commissioner is satisfied that sections 41 and 21 of the FOIA are engaged, he has not gone on to consider the DfT's application of section 43(2) to the requested information.

Right of appeal

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http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.northwarks.gov.uk%2Fdownload%2Fdownloads%2Fid%2F4444%2Fhs2_judicial_review_transcripts_from_days_1_to_10&ei=ZCWCUq_1DY6o0wXy6IHgDQ&usq=AFQjCNEJvjaewXS4QnT1jUrLxv9UeHZXg

103. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

104. 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.

105. 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

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