

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 February 2014

**Public Authority:** Department for Transport  
**Address:** Great Minster House  
33 Horseferry Road  
London  
SW1P 4DR

### **Decision (including any steps ordered)**

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1. The complainant has requested information on the requirements and deadlines imposed on London Midland during the franchise to introduce an ITSO Smartcard ticketing system. The Department for Transport ("DfT") refused to provide information on the basis that it was commercially confidential (section 43 of the FOIA). This information amounted to monetary figures in an equation which was otherwise provided to the complainant. Other information was considered reasonably accessible to the complainant (section 21 of the FOIA).
2. The Commissioner's decision is that the DfT has not sufficiently demonstrated that the exemption is engaged. The Commissioner therefore requires the public authority to disclose the withheld information.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### **Request and response**

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4. On 14 May 2013, the complainant wrote to the DfT and requested information in the following terms:

*"Please provide information on the obligations, requirements and timescales/deadlines on London Midland during the current Franchise to introduce an ITSO Compliant SmartCard Ticketing Sytem."*

5. The DfT responded on 6 June 2013 to explain that it considered some of the information within the scope of the request was exempt on the basis of section 43 of the FOIA and as this was a qualified exemption, it required additional time to consider the public interest test.
6. A further response was then sent on 2 July 2013. In this response the DfT explained that section 21 of the FOIA exempted information from disclosure where it is already reasonably accessible and provided a link<sup>1</sup> to access the London Midland Franchise Agreement. The DfT explained that this information had been amended and further information on the 2012 and 2014 requirements was also held.
7. The amendments were made to reflect the fact that the outcomes envisaged at the time the London Midland franchise was let in 2007 were not the same outcomes being sought by Government. It was this information on the revised requirements that the DfT considered exempt on the basis of section 43(2).
8. Following an internal review the DfT wrote to the complainant on 25 July 2013. It accepted that it had not clearly communicated the basis for its decision and attached some additional information to explain its decision. The DfT upheld its decision to withhold the remaining information within the scope of the request under section 43(2).

### **Scope of the case**

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9. The complainant contacted the Commissioner on 6 August 2013 to complain about the way his request for information had been handled.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270239/lm-franchise-agreement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270239/lm-franchise-agreement.pdf)

10. The Commissioner considers the scope of his investigation to be to determine if the DfT has correctly withheld information which engages section 43(2) of the FOIA.

## **Background**

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11. London Midland is a train operating company with a franchise agreement to operate services on the West Coast Main Line. As part of this franchise agreement there are obligations on London Midland with regard to Smartcard ticketing which required completion by 2012 and 2014. This was later amended to 2013 and 2014.

## **Reasons for decision**

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### **Section 43 – prejudice to commercial interests**

12. Section 43(2) of the FOIA states that:

*"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interest of any person (including the public authority holding it)."*

13. The term 'commercial interest' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance<sup>2</sup> on the application of section 43 which states that:

*"a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*

14. The Commissioner has firstly looked to establish the withheld information in this case in order to be able to determine if this information relates to a commercial activity.

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[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_5\\_V3\\_07\\_03\\_08.aspx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx)

15. In the franchise agreement available through the link provided to the complainant, pages 12 and 13 contain formulae which explain the values repayable by London Midland to the DfT on non-compliance with its obligation in relation to Smartcard ticketing. These formulae have one value removed and replaced with £. The monetary figure that has been redacted from both the 2012 ITSO amount formula and the 2014 formula is the information which the DfT considers should be withheld on the basis of section 43(2).
16. In addition to this the DfT has also explained that in the redacted franchise agreement available on its website it included information which it and London Midland consider to be commercially sensitive and therefore disclosed in error. The DfT has therefore stated that it would redact this information from future publications on this basis. The Commissioner notes this comment from the DfT but is only in a position to make a decision about whether the DfT has correctly applied the exemptions in the FOIA to redact the information that was not in the public version of the franchise agreement. The Commissioner cannot make a determination about any future decisions to redact information.
17. As such, the withheld information in this case is the monetary figures set out in the formula for calculating the value of the cost obligation. The Commissioner has considered this and taken into account the explanations provide by the DfT when determining if this information relates to a commercial activity.
18. The DfT has explained that London Midland has two objectives regarding the uptake in the use of ITSO smart ticketing. These have to be achieved by specific dates (originally 2012 and 2014, amended to 2013 and 2014). These obligations require London Midland to achieve a certain percentage of journeys on ITSO Smartcards and if not then to deliver investment to a specified value (the withheld information).
19. The Commissioner accepts that this monetary value does represent a commercial activity as it is an amount payable should it fail to meet its obligations under the franchise agreement.
20. However, the information will only fall within the scope of the exemption if its disclosure would, or would be likely to, prejudice a commercial interest. The Commissioner has therefore gone on to consider the nature of the prejudice which the DfT has argued that disclosure would create.
21. In order to demonstrate prejudice the Commissioner considers the prejudice should be seen to be real, actual or of substance and the

public authority should be able to show a causal link between the potential disclosure and the prejudice.

22. The DfT has stated that at the time of the request the 2013 obligation was being negotiated by the DfT with London Midland and by London Midland with their suppliers. The DfT considers that the disclosure of this information would be likely to adversely affect its negotiating position with other train operators who have franchise agreements, during negotiations in relation to Smartcard initiatives.
23. The DfT has not provided detailed arguments to support its view that the information, should it be disclosed, would or would be likely to prejudice its commercial interests. Nevertheless the Commissioner has considered the central question in this case to be as set out by the DfT – whether the release of the monetary value would be likely to be prejudicial to the DfT's commercial interests as it would affect its negotiating position with other franchisees.
24. As well as any potential prejudice to the DfT, London Midland when asked for their views on disclosure also argued that the release of such commercially sensitive information would be prejudicial to its negotiating position as at the time of the request it was involved in negotiating with third party suppliers.

*Potential prejudice to the DfT*

25. The Commissioner accepts that the release of the figure would clearly reveal some information to other train operators but the likelihood of prejudice occurring would be dependent on several factors.
26. He has first considered the high level nature of the information given that it is a monetary figure which is used as part of a formula to calculate the amount payable if the franchisee fails to meet its Smartcard ticketing obligations. This information should it be disclosed will clearly show other train operators the amount that London Midland has negotiated with the DfT as deliverable if it fails to meet its targets.
27. However, the Commissioner is not convinced that the DfT has gone on to sufficiently demonstrate that this single figure would be likely to prejudice the DfT's ability to negotiate similar figures with other train operators. This is because it would appear to the Commissioner that there are a number of variables which will factor into the determination of this figure and it will not be a set

figure for each franchisee as they may vary in size and resources as well as there being differences in the rail networks they operate. Without knowing more about this and without this information also being available, for example by specific details of the contract being in the public domain, it is difficult to see how this figure could be used by other train operators to negotiate more favourably with the DfT.

28. The Commissioner therefore considers that the DfT has not demonstrated the causal link between the specified withheld information and the alleged effects of disclosure. The Commissioner is not satisfied that disclosure would be likely to have a prejudicial effect as the disclosure of a single value is unlikely to impact on negotiations with another operator as each operator is different and operates in a different area.
29. As such, the Commissioner has concluded that the DfT has failed to explain the nature of the implied prejudice and the causal link between any such prejudice and the disclosure of the information. As such he does not consider the DfT has demonstrated that there would be any prejudice to its commercial interests.

*Potential prejudice to London Midland*

30. The DfT consulted with London Midland regarding the disclosure of this information at the time of the request. London Midland stated that it considered disclosure could prejudice its negotiating position as at the time of the request it was in discussions with its suppliers about a potential new ticketing solution.
31. As with the potential prejudice to the DfT, the Commissioner notes that he has received limited arguments to support this position and to demonstrate any causal link between disclosure of the information and the prejudice that may occur to London Midland.
32. The Commissioner is therefore not minded to accept that disclosure would have a prejudicial effect on London Midland as this figure is in relation to an amount payable to the DfT in the event it fails to meet its ticketing targets, it is not clear how this would impact on suppliers as it does not reveal any information about London Midland's financial situation other than to show what it may have to deliver in the event it fails to meet its targets.
33. As such, the Commissioner has concluded that the DfT and London Midland has failed to explain the nature of the implied prejudice and the causal link between any such prejudice and the disclosure of the information. As such he does not consider it has been

sufficiently demonstrated that there would be any prejudice to London Midland's commercial interests.

34. The Commissioner has concluded the section 43(2) exemption is not engaged and he therefore requires the DfT to disclose the withheld information.

### **Section 10**

35. Section 10(1) states that:

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

36. As the Commissioner has found that the exemption was not engaged he finds that the DfT has breached section 10(1) by failing to provide the information within the statutory time for compliance.

## Right of appeal

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37. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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 .....**

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**