

**Public Interest Test****Section 31 Law Enforcement**

Section 31(1)(a) of the Act exempts information if its disclosure under this Act would, or would be likely to, prejudice the prevention or detection of crime. In this case the information contains details of procedures that could be exploited maliciously by anyone intent on causing harm to HS2 Ltd.

*Factors for disclosure*

It is in the public interest for HS2 Ltd to be as open and transparent as possible as this promotes accountability.

*Factors against disclosure*

Release of the information would undermine the security of HS2 Ltd by providing details which could be exploited by criminals.

Releasing the information into the public domain would compromise the security of HS2 Ltd and therefore facilitate crime (and potential loss of taxpayer funds). This is not in the interest of the public.

***Balance Test***

In considering the public interest in relation to Section 31(1) the factors in relation to transparency and accountability need to be weighed against the public interest in ensuring that the security of HS2 Ltd is not undermined unnecessarily.

It is recognised that there is a general public interest in being open and release of this information may assist in the public being more aware of the work of HS2 Ltd. However it has been well documented that criminals will use every advantage they can gain to successfully carry out their criminality. In this case this release of the information could lead to the security of HS2 Ltd being compromised. Having considered the arguments for and against release, the public interest test favours non-release of material which (if released) could impact on the safety and security of HS2 Ltd.

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### **Section 36 Prejudice to the effective conduct of public affairs**

Section 36 (2)(b)(ii) of the Act exempts information if, in the reasonable opinion of a 'qualified person', disclosure would (or would be likely to) inhibit the free and frank exchange of views for the purposes of deliberation

#### *Factors for disclosure*

There are general public interest arguments in favour of greater transparency, visibility and accountability around the progress of the HS2 programme. In this case release of the information would demonstrate that matters have been considered and discussed at Board level.

#### *Factors against disclosure*

It is in the public interest that the HS2 Ltd Board are able to express themselves openly, honestly and completely when expressing their views as part of the process of deliberation. If such views were disclosed this would inhibit the free and frank exchange of views, as unfair scrutiny could prevent officials from wanting to express their views in the future and in a reluctance to record those views.

The release of information would be detrimental to the decision-making process, as it would hinder the ability of HS2 Ltd Board members to exchange information (and have a consequential impact on the quality of Board decisions). HS2 Ltd Board members need to be able to debate issues and discuss opinions openly in order to make the best decisions.

### **Balance Test**

For a public interest test, issues that favour release need to be measured against issues that favour non-disclosure. The public interest is not what interests the public, or a particular individual, but what will be the greater good, if the information was released, to the community as a whole.

The public interest arguments in relation to transparency and accountability are noted. However, the release of the ideas that are exchanged in the minutes would restrict the deliberations or notes that are taken in future and lead to a reluctance to fully record or share opinions. Such restrictions on the recording or sharing of information would reduce the quality of the internal deliberations and ultimately impair the decision-making process. It is important that Board members can express views and record information and ideas without fear that these will be placed in the public domain.

Therefore, on balance, I consider that the public interest to maintain the exemption outweighs any public interest in release of the information.

**Public Interest Test****Section 42 Legal Professional Privilege**

Section 42 of the Act provides an exemption under FOIA for information protected by Legal Professional Privilege ('LPP'). LPP protects confidential communications between lawyers and clients: it is a fundamental principle of English law. It is vitally important that HS2 Ltd can seek legal advice, and deliberate matters with in-house lawyers without fear of release.

*Factors for disclosure*

There is a public interest in openness and transparency. Disclosing the information will demonstrate the reasoning behind a decision and will enable the public to understand the reasons for the decisions made.

*Factors against disclosure*

There is an inherently strong public interest in ensuring frankness between lawyer and client. It is important that the HS2 Ltd Board can exchange ideas about legal issues facing HS2 Ltd and seek legal advice without fear that such advice will be made public (and potentially used to the detriment of HS2 Ltd).

***Balance Test***

The issues of openness and transparency are noted. However, it is considered that these factors are outweighed by the need to protect the confidential and legally privileged information. If Board members cannot receive, or discuss, legal advice without fear of disclosure, then this will inhibit HS2 Ltd's ability to carry out its public functions. Therefore, at this time and for this information, the public interest favours the withholding of the information.

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### **Section 43 - Commercial interests**

Section 43 (2) exempts information whose disclosure would, or would be likely to, prejudice the commercial interests of any person (an individual, a company, the public authority itself or any other legal entity). In this case release of this information would undermine the ability of HS2 Ltd to negotiate contracts and obtain best value for money.

#### **Public interest in disclosure**

Disclosure of the data would encourage transparency and accountability regarding the use of public funds.

#### **Public interest in maintaining the exception**

It is in the public interest to protect HS2 Ltd's ability to secure the best value outcome for the taxpayer. Inappropriate release of information regarding tenders and future spending projections would undermine the necessary trust and confidence between HS2 Ltd and those considering placing tenders. This would undermine the process and prejudice the ability of HS2 Ltd to participate effectively within an open market. These comments are equally true of the need for HS2 Ltd to secure the best value outcome for the taxpayer in the administration of awarded contracts (e.g. including negotiation/pricing of contract variations).

It is important that the competitive position of companies in their particular market is not disadvantaged by doing business with HS2 Ltd. It would not be in the public interest to disclose sensitive information about a particular company (e.g. its labour rates) if that information would be likely to be used by competitors to gain a competitive advantage and/or to deprive HS2 Ltd of the best value for taxpayers.

#### ***Balance Test***

While I acknowledge the public interest in being open and transparent, placing this information in the public domain at this time would undermine HS2 Ltd's commercial position by weakening its ability to negotiate effectively and/or would have a prejudicial impact on the value that HS2 Ltd is able to achieve for taxpayers.

There is a strong public interest in ensuring HS2 Ltd is able to negotiate with suppliers and contractors appropriately and anything that undermines these negotiations would not be in the public interest. Weakening HS2 Ltd's bargaining position would be to the detriment of the project and the public interest in seeing that HS2 is developed with the best advice and services, and at most favourable and competitive rates/costs.

Therefore, disclosure of this information would adversely affect both competitiveness within a market and future negotiations with private sector organisations over the

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provision of services. It is in the public interest that any negotiations regarding commercial contracts should be undertaken in an environment where no party has an unfair advantage over the other. Therefore, it is considered that in this instance, at this time, disclosure of the withheld information would provide an unfair advantage to third parties and/or would result in HS2 Ltd failing to obtain best value for the taxpayer, accordingly, such information has been withheld.