



Department
for Transport

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15 May 2017

Mr Paul Barker

[By e-mail: request-385632-4246f013@whatdotheyknow.com]

Dear Mr Barker

Re: FOI Request F0014479 - Internal Review

I am writing with regard to your request for information which you originally made to the Department for Transport on 30 January 2017. You requested the following information:

“Please release all correspondence including emails, meetings notes & minutes between Chris Gibb and staff at Department for Transport (DfT) in regard Southern’s contract and network rail.

This should include detail report Chris Gibb has written on Southern contact.”

The Department responded to your request on 10 April 2017. The response confirmed that the Department holds the information you requested but advised you that it was withholding the emails, meetings notes and minutes between Chris Gibb and staff at the Department for Transport under the exemptions in Sections 41(1), 43(2) and 35(1)(a) of the FOI Act. In addition the response informed you that the Chris Gibb report was being withheld at this point under exemption at section 22(1) of the FOI Act.

On 11 April 2017 you requested an Internal Review of the Department’s handling of your FOI request and decision to withhold the information you requested.

As a member of the Department’s Senior Civil Service who was not involved in the original consideration of your request, I have carried out an independent internal review. My findings are set out below.

Release of Correspondence

The release of all correspondence including emails, meeting notes and minutes between Chris Gibb and staff at the Department for Transport in regard to Southern’s contract and Network Rail was withheld under a combination of Sections 41(1) (information provided in confidence); 43(2) (prejudice to commercial interests); and 35(1)(a) (formulation or development of government policy) of the FOI Act. I have considered each exemption in turn.

Section 41(1) – Information provided in confidence

Section 41(1) of the FOI Act states that information is exempt if (a) it was obtained by the public authority from any other person..., and (b) the disclosure of the information to the public (otherwise than under the FOI Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

In other words, for the exemption to be engaged, two criteria need to be met. First, the information must have been provided to the Department from an outside source. That is the case here to the extent that the in-scope information was provided to the Department by Chris Gibb. Second, disclosure would need to constitute an actionable breach of confidence. In other words, an aggrieved party would have a right to take the authority to court as a result of the disclosure. In this case, I note that the contract for Chris Gibb to produce the report was between CLGR Limited and GTR and that it contains a wide ranging confidentiality cause. In order to formulate the report, Chris Gibb will have needed to engage with various parties including the Department for Transport. Given the wide ranging confidentiality clause in the contract, there would be an implicit expectation from both GTR and CLGR Limited that such engagement and any information that was shared with third parties in the course of the work would be treated confidentially by those third parties. CLGR do not consent to the release of the information and I am satisfied that they would have the right to take legal action against the Secretary of State were we to disclose the information you requested.

In determining whether the Section 41 exemption is engaged, a public authority needs to consider whether there is an *overriding* public interest in the disclosure of the information. As noted above, a breach of confidence is actionable if a person could bring a legal action in respect of the unauthorised disclosure of information and be successful. A person will not succeed in an action for breach of confidence if the public interest in disclosure outweighs the public interest in keeping the confidence. Therefore, although section 41 does not explicitly impose a public interest test, I have considered whether the public interest in disclosure is sufficiently strong to form a defence against an action for breach of confidence. The public interest arguments for and against disclosure mirror those of the Public Interest Test relating to the Section 43(2) exemption which are examined below.

Section 43(2) – prejudice to commercial interests

Section 43(2) of the FOI Act is a qualified exemption, subject to a Public Interest Test, that provides for information to be exempt from disclosure if its release would, or would be likely to, prejudice the commercial interests of any party. In this case, it is whether the commercial interests of GTR, CLRG/Chris Gibb and the Department for Transport would, or would likely to be prejudiced by the disclosure of the requested information. I have considered the arguments both for and against disclosure set out in Annex A of the letter of 10 April 2017. The factors for disclosure at the time are shown in italics below and followed by my consideration of them:

- *Disclosure of communications between Chris Gibb/CLGR Limited and the DfT with regard to the Southern Network would promote accountability and transparency by the DfT for decisions it takes.*
- *Disclosure of the communications could help to allow the individual concerned, or the public as a whole, to understand the decision making process of public authorities.*
- *Disclosure of this information would contribute to the Government's wider transparency agenda.*

Rail franchises are high value contracts for the provision of vital public services and there is a clear public interest in being able to understand how such contracts are managed by the Department in life, particularly in cases where the performance or deliverables under the contract are in question.

The factors against disclosure at the time are shown in italics below followed by my consideration of them:

- *Emails, meeting notes and minutes between Chris Gibb/CLGR Limited and the DfT with regard to Govia Thameslink Railway's (GTR's) contract and Network Rail's activities were communicated as part of Chris Gibb's work to understand fully the relevant performance issues, in the course of exploring the issues and writing his report.*
- *The DfT's role during this time was to manage the commercial interests of the DfT in respect of the contractual relationship with GTR, and other related parties. As the contractual relationships are still live and critical to the commercial interests of all the parties, it would be likely to prejudice those commercial interests if emails, meeting notes and minutes on this subject were disclosed.*
- *Releasing any information pertaining to GTR will give its competitors access to commercially sensitive information. This would be likely to prejudice GTR's commercial interests by disadvantaging them in future competitions.*
- *In order for the DfT to be able to carry out its role effectively, consultants and operators must feel that they can disclose highly sensitive commercial information to the DfT without risk that this information will be disclosed to the public or competitors.*
- *If consultants and operators do not have the confidence that the DfT will protect the information provided to it, it is unlikely that they will provide any information in the future that they are not obliged to.*
- *This in turn, would be likely to prejudice the DfT ability to carry out its policy and planning functions, and limit the information available to the DfT when franchises are being let.*

The GTR franchise is still a live contract with a number of years left to run. By its very nature many aspects of the contract are commercially sensitive and I note that the Department redacted commercially sensitive information when publishing the franchise agreement on the GOV.UK website. In order to effectively manage such a contract, it is vital that the parties involved are able to discuss and share information about the contract and its management, including information relating to performance issues. Such discussions will on many occasions involve commercially sensitive information, which if made public would prejudice the commercial interest of one or more of the parties involved in relation to both the current contract but also with future competitions and contracts.

If the parties involved do not have confidence that commercially sensitive information will be protected, the likelihood is that they will either not share the material or enter into discussion at all or will significantly censor what they do provide or say. This would be detrimental to the effective management of any existing or future contract which is not in the public interest.

I am satisfied that in the case of the information being requested, its release would prejudice the commercial interests of GTR, CLRG/Chris Gibb and the Department for Transport. I am also satisfied that the public interest in withholding the information outweighs the public interest in its release.

Section 35(1)(a) – formulation or development of government policy

Section 35(1)(a) is a qualified exemption subject to a Public Interest Test that provides for information to be exempt from disclosure if it relates to the formulation or development of government policy. In this case, the policy in question is in relation to how the department plans to address the severe performance issues that are being experienced under the live GTR rail franchise. I am satisfied that to the extent that the information requested relates to how the live GTR contract and related performance issues should be addressed, it falls within the scope of the Section 35(1)(a) exemption.

As it is a qualified exemption I have considered the arguments both for and against disclosure set out in Annex B of the letter of 10 April 2017. The factors for disclosure at the time are shown in italics below and followed by my consideration of them:

- *Disclosure of the communications between Chris Gibb/CLGR Limited and the DfT would contribute to the government's wider transparency agenda.*
- *Disclosure of the information would promote government accountability with regard to decisions on the Southern Network.*
- *Disclosure would also help to increase public understanding of the function of the DfT and enable public debate.*

I am content that these are the arguments in favour of disclosure and support the terms of the general duty of transparency. I consider too that there is a particular public interest in the disclosure of information relating to the Southern rail franchise given the considerable disruption that passengers using services under that franchise have faced in recent months.

The factors against disclosure at the time are shown in italics below followed by my consideration of them:

- *Between 1 September and 31 December, 2016, Chris Gibb was commissioned through CLGR Limited to write a report about performance issues on the Southern network. The report was written under the terms of a contract between CLGR Limited and GTR. The contract contains a wide-ranging confidentiality clause.*
- *This is a 'live' government policy. Officials need a safe space away from public scrutiny where they can formulate and develop government policy with regard to business case proposals without fear of premature disclosure.*
- *In developing proposals for the Southern Network, policy advice should continue to be free, frank and candid. By releasing communications between Chris Gibb/CLGR Limited and the DfT, future discussions may not be as free, frank and candid, because officials would be reluctant to give their views and opinions if they felt that they would be routinely disclosed. This would be likely to lead to poorer decision making which is clearly not in the public interest.*
- *Officials need to be able to conduct rigorous and candid risk assessments of their policies and programmes of work including considerations of the pros and cons without there being premature disclosure which might close off better options.*
- *Maintaining a safe space to consider policy options in private is in the public interest.*

As noted previously, the contract to produce the report was between CLGR limited and GTR and it contained a wide ranging confidentiality clause. Consequently, there would have been an implicit expectation from both GTR and CLGR limited that any information, including correspondence or information that was shared with third parties such as the Department in the course of the work would be treated confidentially by those third parties. Also as noted earlier, CLGR limited do not consent to the release of the information.

Rail franchises are significant and complex commercial contracts that run for many years. As such, during the life of the contracts the parties need to be able to discuss a range of issues including development or changing policy, business case proposals (for example exploring opportunities to deliver additional passenger benefits) and risk assessment. Such discussions need to be undertaken in an open and frank environment in order for the likely impacts and benefits to be fully explored and to ensure that decisions are properly informed. Routine disclosure or fear of premature disclosure of information relating to such discussions would be likely to influence and inhibit the extent to which parties engage with the Department on such matters. The likely result would be that policy, business cases and decision making would be less well informed, increasing the risk of inappropriate decisions being taken or unintended consequences arising. Such outcomes are not in the public interest and a 'safe space' for such discussions should be maintained.

Conclusion on release of Correspondence

In conclusion, having reviewed the scope of information and the application of the three exemptions as set out in the letter of 10 April 2017, I am satisfied that the exemptions have been appropriately applied and that the public interest in withholding the requested information outweighs the public interest in its disclosure.

Release of Chris Gibb Report

The release of the Chris Gibb report was withheld under Section 22 of the FOI Act. This provides a qualified exemption for information intended for future publication. It states:

Information is exempt information if—

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

For this exemption to be engaged, the information must meet two criteria. Firstly, the information must have been held at the time the request was made and secondly there must have been an intention to publish at some point in the future prior to the request having been made.

I can confirm that the Report was held by the Department at the time you made your request and that, at the time of your request, the Department had the intention of releasing it at some time in the future.

Section 22 is a qualified exemption and thus subject to a public interest test. I have considered the arguments both for and against disclosure set out in Annex C of the letter of 10 April 2017. The factors for disclosure at the time are shown in *italics* below and are followed by my consideration of them:

- *The general public interest in disclosure for the scrutiny of the Chris Gibb report and of the Department for Transport's (DfT's) decisions relating to the performance of the Southern network.*
- *Disclosure could help to allow the individual concerned, or the public as a whole, to understand the decision making process of the DfT.*
- *The Government's promotion of the ideal that information should be made public rather than not, and that Government should be more transparent.*

Chris Gibb, previously chief operating officer of Virgin Trains and now a non-executive Network Rail board member, is a rail industry expert, having once been seconded from Virgin Trains to Network Rail for six months to improve reliability on the southern end of the West Coast Main Line. He was asked to consider how the Southern network can be improved, given the ongoing sustained levels of poor operational performance which are seriously inconveniencing large numbers of commuters and other rail passengers. Release of the report would allow the public to engage in the debate regarding how those improvements can be made.

Releasing the report would provide the public with the views of an industry expert which were commissioned and provided to inform decision making within the Department.

I am content with the arguments put forward in favour of disclosure in terms of the general duty of transparency. The factors against disclosure at the time are shown in italics below and are followed by my consideration of them:

- *It is important that we are able to publish the Chris Gibb report and related documents in a manner, form and timing of our own choosing.*
- *It is important that the DfT is able to consult with the relevant people before the documents are published.*
- *Publishing the documents for the first time on the DfT's website will allow everyone to see them at the same time and provide a clear and consistent approach.*
- *Officials' time would be better spent compiling and verifying the information in readiness for publication as opposed to dealing with piecemeal requests and to avoid misinterpretation and confusion.*

The Chris Gibb report concerns the operation of the Southern network, an issue that has caused considerable interest in the media and there is a clear public interest in its release.

The Department intends to release the report and Ministers have given assurances in Parliament that this would be done in the second quarter of the year. The Department also believes it should release a response alongside the report, so that people can see how Government intends to react at the same time.

Release of the report before stakeholders (such as Govia Thameslink Railway (GTR) and Network Rail) have been fully consulted could have further impact upon the operation of the franchise. In addition, releasing the report before policy officials and ministers have thoroughly scrutinised it and developed its response is likely to lead to officials being distracted from that function by having to respond to queries and questions that might arise from early release, and could in turn delay the production of the Government's response which will be of equal if not more interest to the public.

Conclusion on release of the Chris Gibb Report

I agree that there is a legitimate public interest in releasing the report. However, the Department is intending to publish the report in the near future (in the second quarter of this year) and has given assurances in Parliament that this will happen. I note that the Department also aims to publish its response alongside the report.

I am satisfied that the Department correctly applied the exemption at section 22 of the FOI Act and that the public interest in withholding the report at this time outweighs the public interest in its early release now.

If you are not content with the outcome of this internal review, you have the right to apply to the Information Commissioner for a decision. The contact details are:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire

Yours sincerely,

Nigel Nuttall
Project Director