



Department for Transport

Julian Ross

[by email:
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Dear Mr Ross

Re: FOI Request F0013398 - Internal Review

I am writing with regard to your request for information which you originally made to the Department on 21 February 2016. You requested the following information (I have numbered your questions for ease of reference):

“(1) Please tell me how many passengers arrived at London Paddington between 08.00 and 08.59 on a typical weekday in 2015 using First Great Western (now GWR) high speed services (i.e. those operated by HST or Class 180) legitimately travelling in first class accommodation. What is the basis for this number (i.e. on-train passenger counts, or other means of estimation)?

(2) What is the comparable figure for passengers travelling standard class using First Great Western (now GWR) high speed services?

(3) Of the passengers travelling in first class accommodation, what proportions are travelling with: 1) free passes issued to former British Rail (or Railtrack) employees; and 2) free passes issued to First Great Western (now GWR) employees? If separate data is not available for 1) and 2), please supply a combined figure.

(4) If numbers of passengers travelling with free passes is not recorded, please advise me of this fact and provide an estimate for the number or proportion of such passengers together with an explanation of how the estimate was arrived at.”

The Department responded to your request on 10 March. The response confirmed that the Department holds information on the number of first class and standard class passengers travelling on Great Western Railway services into London Paddington during the one-hour morning peak (parts 1 and 2 of your request). It explained that these data are collected by guards on the trains or counters on station platforms. However, the Department was withholding that passenger count information under Section 41 of the FOI Act.

The Department did not hold information that would enable it to answer part 3 of your request, regarding the use of free passes on Great Western Railway services. Finally, the Department said that it was unable to provide an estimate of the number or proportion of passengers travelling with free passes (part 4 of your request).

On 10 March you wrote to the Department to complain about the handling of your request. You expressed dissatisfaction that the Department had not released the information it holds. You

also questioned why “information on those who do not pay to travel can be withheld on commercial grounds, and why this information cannot be estimated”.

As a member of the Department’s Information & Security Division who was not involved in the original consideration of your request, I have carried out an independent Internal Review. In doing so, I have had regard to the findings of an ICO appeal and subsequent Information Tribunal decision in relation to a request for similar passenger count information. My findings are set out below.

Parts 1 and 2 of your request

I can confirm that the Department does hold information on the number of passengers arriving at London Paddington between 08.00 and 08.59 on a typical weekday in 2015 using First Great Western high speed services. The Department holds this information broken down into numbers of first class and standard class passengers.

The information in question was provided to the Department by First Great Western (FGW). Train Operating Companies (TOCs) provide passenger count information to the Department in confidence. TOCs have expressed a very strong and clear view that they consider their passenger counts to be commercially confidential, and they do not want the DfT to make these data public (beyond the detail that is included in its annual publication or in the list of top ten most overcrowded trains).

I have established that the National Rail Franchise Terms in place between the Secretary of State and FGW (now GWR) do include a provision on confidentiality of information. Schedule 17, paragraph 3.1(h) allows the Secretary of State to release, “the results, on a Service Group, Route, station or other comparable basis, of any calculation of passenger numbers under Schedule 1.5 (Information about Passengers).”

The link to the Department’s annual publication given in the original answer provides the latest available estimate of the number of FGW passengers arriving at the station in the one-hour peak. The additional level of detail you requested on class of travel for high speed services is for a small and more detailed subset of information that does not fit into the category of Group, Route-, or station- level data. That being the case, Schedule 17, paragraph 3.1(h) within the First Great Western franchise agreement does not provide for the potential release of the specific information you sought.

Section 41(1) of the FOI Act states that information is exempt information 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 clearly the case here: the information you requested was provided to the Department by FGW. 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 the case of the withheld information, the contractual National Rail Franchise terms impose a confidentiality obligation on the Department. The information has the necessary quality of confidence: it is not trivial, and a persuasive argument can be made that disclosure would prejudice the commercial interests of FGW. This is because TOCs compete both with each other and with providers of other modes of public transport. Detailed patronage (and revenue) information about services they operate is of value to their competitors. Furthermore, the

information is not readily available by other means. I am satisfied that the FGW would have the right to take the Department to court were it 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.

As well as there being a general public interest in promoting openness and transparency, many TOCs do receive public subsidies. In requesting an Internal Review, you commented that there is "serious overcrowding in standard class whilst the first class carriages are often half-empty". There is a public interest in rail services not being excessively crowded so that passengers can travel in comfort. Release of the information might inform debate on whether the current balance between standard- and first-class accommodation is appropriate.

Set against these arguments, there are both general and specific public interest arguments for not releasing the information. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. There is a public interest in maintaining trust and preserving a free flow of information to a public authority. More specifically, it is vital to the effective administration of franchised rail services by DfT that it is able to maintain good working relationships with FGW (now GWR) and other TOCs. These relationships would be significantly undermined if DfT were to engage in breaches of confidence concerning information provided by TOCs. It is clearly also contrary to the public interest for the DfT to run the risk of having to pay damages to TOCs for breach of confidence.

In addition, releasing the data would make possible the analysis of TOC demand and revenue and of the growth in revenue. Detailed revenue and patronage information is of high value to the operators' competitors and the release of this information would prejudice TOCs' ability to compete. The TOCs are separate commercial entities and it would not be in the public interest were the Department to release information the disclosure of which would prejudice a private company's commercial interests.

Overall, I consider that the public interest arguments in favour of releasing the information do not outweigh the public interest in maintaining the Department's duty of confidence to FGW/GWR.

The application of the Section 41 exemption to information relating to passenger loadings on trains was considered by the Information Tribunal in 2014 (case EA/2014/0014). In the case in question, the Information Commissioner found that the information was exempt under section 41 of the FOI Act because disclosure would give rise to an actionable breach of confidence. The Information Tribunal unanimously agreed with the Commissioners' Decision. A copy of the Tribunal's decision can be viewed at the following website:

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i1352/Green,%20Andrew%20EA.2014.0014%20%2811.08.2014%29.pdf>.

Although the information which you sought in your request is not identical, the considerations that applied in the above Tribunal case are equally relevant in this instance.

Having found that the Section 41 exemption is engaged, and that the public interest in disclosure of the information you requested does not override the public interest in the

Department maintaining its duty of confidence – and taking into account the above decision of the Information Tribunal – I uphold the Department's original decision to refuse your request under Section 41 of the FOI Act.

Part 3 of your request

In Part 3 of your request, you asked, *"Of the passengers travelling in first class accommodation, what proportions are travelling with: 1) free passes issued to former British Rail (or Railtrack) employees; and 2) free passes issued to First Great Western (now GWR) employees? If separate data is not available for 1) and 2), please supply a combined figure."* I have asked the policy team to check their records and they have confirmed to me that the Department does not hold information relating to the number of passengers travelling with free passes. It has been explained to me that FGW/GWR do not provide this information to the Department. There is no obligation for them to do so.

Part 4 of your request

In the event that the number of passengers travelling with free passes was not recorded, you asked the Department to *"provide an estimate for the number or proportion of such passengers together with an explanation of how the estimate was arrived at"*. I can confirm that the Department does not hold an estimate of the proportion of passengers (either on the services to which your request relates, or more generally) who travel with free passes. The FOI Act provides (subject to certain exemptions which may apply) a right of access to information which public authorities hold in recorded form. The Act does not oblige public authorities to create information which they do not already hold in order to respond to a request. I therefore consider that the Department's handling of Part 4 of your request was appropriate, and that there is no requirement for the Department to provide the estimate you requested. I also consider that it would be very difficult for the Department to provide any meaningful estimate. As I have noted above, TOCs do not provide the Department with data on the level of usage of free passes on their services.

If you are not content with the outcome of this internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Yours sincerely,

P Parr