

Mr David Lake
Via email: request-440819-7f663e25@whatdotheyknow.com

5 December 2017

Dear Mr Lake,

FOI17-1870R – Internal review response

Thank you for your email dated 14 November clarifying that you request an internal review. I am sorry that you are unhappy with HS2 Ltd's handling of your request for information dated 25 October and which was responded to on 14 November.

Your information request was handled by M Choudhari, Freedom of Information Adviser and was processed under the Freedom of Information Act 2000 ('the FOI Act'). I was appointed to carry out an independent review as a Director of HS2 Ltd not involved in the original decision.

In your request you asked for:

"Please provide an unredacted copy of the service agreement between High Speed Two (HS2) Ltd and Smith Lambert Hampton Ltd Property Management and Estate Services."

Original decision

HS2 Ltd responded to your request on 14 November as follows:

Confirmed that HS2 Ltd holds the information requested and released information which was provided to the suppliers for the tender. These documents included the Framework Scope, the Selection Procedure, the Quotation Procedure and the Package Order Conditions of Contract for Services. Part of the information was withheld under section 43(2) of the FOI Act for commercial information.

Internal review request

On 14 November you responded to the original decision as follows:

"The documents provided do not relate to the FOI17-1870 request made, the exemption provided is not absolute and the public interest outweighs your reasoning for non-disclosure. If you are in any doubt as to your legal standing, Please refer to <https://ico.org.uk/action-weve-taken/decision-notices/fs50296349/>

This request and decline will now be submitted for review by the Information Commissioner."

HS2 Ltd asked for clarification on 14 November that you would like us to conduct an internal review since the ICO would require this before they review a case, to which you responded that you would like an internal review.

Information requested

The withheld information relates to commercial pricing and financial management, data management and performance review, amongst other information. The disclosure of this information would likely cause harm to and impact upon the commercial position of HS2 Ltd. Furthermore, HS2 Ltd considers that the disclosure of the withheld information would adversely affect its relationship with its suppliers, who have specifically requested this information not be made available to the public. The third party in question believes that the information would likely prejudice its commercial interests if released and would give a competitor an unfair advantage. This would be to the detriment of the project and public interest in seeing that the project is developed with the best services, advice and at favourable rates for taxpayers' money.

Interests of third parties

As mentioned above, the information requested contains sensitive pricing information the disclosure of which would likely cause harm and prejudice the commercial interests of the third party involved. In particular, disclosure of this information would give its competitors a financial advantage on future tenders; would enable competitors to engage in destructive competition and likely lead to misunderstanding.

The third party operates in a highly competitive consultancy industry in which they must negotiate with a number of interested parties, where they need an even playing field. In particular, the disclosure of the information would enable competitors to use the market intelligence as a competitive advantage in future tenders.

Given the above, I have considered the exemption under the FOI Act that was applied in our original response below:

Section 43(2) of the FOI Act - Commercial Information

Under the FOI Act Section 43(2), Commercial Information allows public authorities to refuse a request for information if it is likely to prejudice the commercial interests of any person. (A person maybe an individual, a company, the public authority itself or any other legal entity). The legislation is available via the following link: <http://www.legislation.gov.uk/ukpga/2000/36/section/43>.

I have considered the above factors for withholding the information requested as well as the likelihood of commercial prejudice occurring as the Information Commissioner's Office (ICO) recommends in their three tier test as to whether Section 43 is engaged. I see that the test is also quoted in the case you have referred to from the ICO – BBC and Capita Business Services Ltd. I thank you for attaching the link to this case whilst also recognising that each case turns on its own facts. I can see that given the active and long term nature of the HS2 project as well as the expectations of further procurements this year and beyond there is a significant risk of harm occurring if the withheld information were to be disclosed.

I therefore agree with the original decision that section 43(2) applies to the information that was withheld.

Section 43(2) – Public Interest Test

The fact that the exemption is engaged does not mean that the information automatically falls to be withheld. Section 43 of the FOI Act is a qualified exception, which means that HS2 Ltd can only withhold the information if the public interest in doing so outweighs the public interest in disclosure.

I have reviewed the public interest test and have weighed up the benefits to the public of releasing the information against the factors for not releasing it. While I recognise the general arguments in favour of openness and transparency, I consider that if the requested information were to be released it would compromise HS2 Ltd's ability to conduct reasonable commercial negotiations in the future. It is important that HS2 Ltd protects its interests and its bargaining position in negotiations. Disclosure at this stage

would adversely affect the commercial interests of HS2 Ltd and the third party involved for the reasons given above.

I consider that the factors for not releasing the information outweigh that for disclosure and uphold the decision provided in the original response. Please see Annex A for full details of the public interest test.

Conclusion

Hopefully, my position on this is clear and the explanation responds to the concerns you raised. If you are not content with the way we have handled your review, you may take this up in writing with the Information Commissioner, please see further details below.

Please remember to quote reference number **FOI17-1870R** in any future communication relating to this request.

Yours sincerely,

Paul Griffiths

Managing Director – Phase Two
High Speed Two (HS2) Limited

Your right to complain to HS2 Ltd and the Information Commissioner

If you are not content with the outcome of the 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