



Department
for Transport

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Layla

[By email: request-487745-62b0cff1@whatdotheyknow.com]

31 August 2018

Dear Layla

Re: Freedom of Information Act and Environmental Information Regulation Request E0016172 - Internal Review

I am writing with regard to your request for information that you originally made to the Department for Transport (the “**Department**”) on 28 May 2018. You requested the following information:

On 27 March 2018, DfT published the Invitation to Tender for the West Coast Partnership on its website. However, Attachment B, the draft franchise agreement, was missing - and two months later it is still missing. Potential bidders would need information in this attachment in order to prepare their bid, and it is therefore likely that they have been provided with a draft of the agreement or some information about what it is anticipated to contain.

I therefore request, in accordance with the Freedom of Information Act, any documents that have been provided to potential bidders by the date of this request pertaining to the anticipated content of Attachment B of the ITT , including (but not limited to) a draft of the draft franchise agreement.

Section 5.19.4 e) of the ITT addresses mobile connectivity, which inherently involves electromagnetic radiation. Electromagnetic radiation is categorised as environmental information under the Environmental Information Regulations 2004. I therefore also request disclosure of any applicable part of the documentation in accordance with these Regulations.

Please note that this request is specific to information that has been supplied to potential bidders by the date of this request, and will not be satisfied by any information published subsequently on the DfT website.

The Department responded to your request on 25 June 2018. It advised you that it was responding to those parts of your request covered by the Environmental Information Regulations 2004 (the “**EIR**”) only. This was on the basis that it did not have your full name to respond to and therefore the Freedom of Information Act 2000 (the “**FOIA**”) could not apply. In its response, the Department advised you that it held information relating to your request but was withholding that information in accordance with the exception at

Regulation 12(4)(d) of the EIR given that your request related to material that is still in the course of completion and comprised parts of unfinished documents.

On 7 July 2018 you requested that the Department reconsider its decision to withhold the information, based on the following arguments:

- 1. The franchise agreement must have been sufficiently mature and stable for franchise bidders to rely on it in preparation of their bids.***
- 2. Any 'draft, incomplete and/or unfinished information' contained within the franchise agreement must have been drawn to the attention of potential bidders, so that they could have taken this into account in developing their bids.***
- 3. The draft franchise agreement had already been shared with potential bidders and as such there was no reason why it should not be made available more widely.***

As a senior member of the Department who was not involved in the original consideration of your request, I have carried out an independent Internal Review of the original rejection of your request. My findings are set out below.

Decision to apply the EIR and not the FOIA to your request

The decision to treat your request under the EIR and not under the FOIA was taken as the Department did not have your full name as required under the FOIA. As the EIR does not have the same requirement, your request was considered under these regulations alone, rather than also under the FOIA. This decision was communicated to you by Ivan Pocock on 18 June. That did mean only the information you had requested that was covered by the EIR was considered in responding to your original request. I consider that this decision was correct and that the consequences of your decision not to provide your full name were made clear to you at the time. However, I do consider that the response to your request could have been clearer in identifying what sections of the Franchise Agreement were considered to be covered by the provisions of the EIR rather than by the FOIA. The West Coast Partnership team has subsequently confirmed to me that the provisions of the Franchise Agreement that they consider to be covered by the EIR are Clauses 15 and 16 of Schedule 11.2.

Since that point, you have provided your full name and so it is appropriate that the Department now considers your request under both the FOIA and the EIR. I will return to this below.

Decision to decline your request under Regulation 12.4(d) of the EIR

Having limited its consideration of your request to that information that is covered under the EIR, the Department declined to provide any relevant information, relying on the exception under Regulation 12.4(d). This exception applies to material that is still in the course of completion and which comprises unfinished documents. For that regulation to be applied, a Public Interest Test must be applied and this was done in relation to your request. In this instance, the conclusion reached was that the arguments in favour of release (that the disclosure of information relating to a large-scale procurement would promote accountability and transparency) were outweighed by the dis-benefits of disclosure (that it might mislead the public into thinking that decisions have been made when in fact that they have not, and that given the information only pertained to draft and

unfinished forms of documents officials' future decision-making abilities would be hampered if they knew such drafts would be routinely published).

My view is that this is a finely balanced decision but that in this instance it was the correct one at the time taken. I recognise your view that the risks of disclosure misleading the public should be mitigated by the fact that such information should have been clearly brought to the attention of bidders and accept that this should mitigate, though not completely remove, the risk of misleading people. However, my view is that the stronger argument is that of the need to preserve a safe space for the development of the final policy and contractual documentation as contained within the franchise agreement. I also accept the balance given to the argument in the Department's initial response that to publish such draft material while it is still being formulated is likely to affect the quality of advice and information provided by officials and may damage the integrity of the final decision making process.

Subsequent to your original request and the Department's response, the Department has published the West Coast Partnership Franchise Agreement on the government website (please refer to the link in the paragraph below). The West Coast Partnership team has confirmed that in relation to information in the Franchise Agreement caught by the EIR, namely Clauses 15 and 16 of Schedule 11.2 (including Appendix 1 to that Schedule), the information in the published Franchise Agreement has not changed from that provided to bidders in the draft issued at the time the ITT was published.

Consideration of your request under the FOIA

As referred to above, now that you have provided your full name, the Department is able to reconsider your original request under the FOIA. As, subsequent to your original request, the Franchise Agreement has been published on the government website, most of the information that is captured by your original request is now publically available. That is, all of the Franchise Agreement content that has not changed since the initial draft was provided to bidders in March this year. As such, Section 21 of the FOIA applies to this content only, and is not being provided separately here as it is information that is reasonably available to you. The published version of the Franchise Agreement can be found at the following link: <https://www.gov.uk/government/publications/west-coast-partnership-2018-invitation-to-tender>.

In relying on this exemption, I recognise that the published version of the Franchise Agreement alone does not allow you to identify those elements of the Franchise Agreement that were incomplete or subject to further development at the time that it was provided to bidders alongside the ITT. I have provided a list of those elements of the Franchise Agreement below. In a number of identified instances, the section of the Franchise Agreement was not populated in the version provided to bidders, so there is no information covered by your request. In other instances, my view is that, had your request been considered under FOIA at the time, the information may well not have been disclosed, in line with the exemption under section 35(1)(a) of the FOIA; that is information that relates to the formulation or development of government policy. In this instance, given that the policy has now been settled and, in most cases, the original drafting has only changed in minor ways, I do not see that there is a strong public interest in withholding the information and am therefore happy to disclose it to you now. The information is exhibited to this letter at **Annex A** but for ease of reference the relevant parts of the Franchise Agreement which fall into this category are set out in the table below as follows:

Sections left blank in Franchise Agreement shared with bidders in March	Schedule 9.4 Schedule 16 Schedule 6.1 (section on Digital Railway)
Sections updated between March version and version published in July	Volume 1: Updates to definitions Volume 2: Minor updates to Schedules 1.1, 1.4, 5.4, 6.1, 6.3, 7.1, 7.3, 8.4, 8.7, 9.4, 11.2, 11.3 and 12 Volume 3: Minor updates to Schedules 6.1, 8.1, 9.1, 11.3 and 12

In respect of drafting in schedules 18, 19 and 20 (and consequential amendments to Schedule 8.1) however, I consider that the exemption under Section 35(1)(a) of FOIA applies; this exemption covers information relating to the formulation and development of government policy. The schedules referred to above address the role of the shadow operator under the Franchise Agreement. This is a novel concept when set against franchise agreements previously entered into by the Department and significant policy development was undertaken, including with bidders, to arrive at the point as drafted into the published Franchise Agreement. At the point that the ITT was issued to bidders, the approach to this policy point was still in formulation and required iteration with bidders to ensure that the approach when finalised would be robust and deliver the outcomes being sought.

To engage this exemption, a Public Interest Test is required. The exemption exists to protect the integrity of the policymaking process and to prevent disclosures that would undermine this process, resulting in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private. There is a clear public interest in providing transparency about the outcome of the policy consideration and how this will be given effect through the Franchise Agreement. How the franchisee will fulfil its shadow operator role and support the efficient development and delivery of services through HS2 is clearly in the public interest. This would argue for disclosure. However, given that this is a novel policy area, officials required a safe space in which to develop and iterate with bidders for the franchise their policy approach. Exposing that policy consideration and development greatly risks that safe space and creates a potential 'chilling effect' of inhibiting openness in future policy consideration, leading to poorer quality policy consideration and decision making with consequential negative impacts for taxpayers and rail users. On balance, given the novelty of this policy formulation and the need for open exchange between officials and the bidders, I am satisfied that the public interest is not best served by disclosure.

Finally, in relation to the published version of the Franchise Agreement, you will note that some information has been redacted. This has been done where publishing the information would have a detrimental effect to the commercial position of either the successful franchisee or to the Department. Section 43(2) of the FOIA provides an exemption to publication of such information where disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). For such an exemption to be applied, it must be subject to a Public Interest Test. The public interest in disclosing the information lies in the promotion of openness and

transparency in large procurements undertaken on behalf of the taxpayer. It would also provide accountability for the expenditure of public money; transparency in this data may lead to more robust decision making by public officials and may allow members of the public to challenge what they perceive as poor decision making on their behalf. Against this, the public interest in not disclosing the information lies in the damage that it would be likely to cause by reducing the ability of the successful bidder for the franchise to negotiate or compete in a commercial environment.

Having considered the Public Interest Test, I am satisfied that if the Department were to disclose the information redacted in the published version of the Franchise Agreement, it would prejudice the successful bidder in future commercial negotiations with other suppliers. This in turn would be likely to result in changed behaviour in subsequent franchise competitions, where bidders would look to pass such risk to the Department, leading to additional costs for the public purse. In addition, there is a more direct risk to the taxpayer in disclosing the areas on which the Secretary of State has taken direct financial risk (Schedule 9.4). I am satisfied that, on balance, the public interest in this instance is served by not disclosing this limited information.

Appeals process

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,

Stuart White

Annex A

The Disclosed Information

See attached document entitled “Annex A – The Disclosed Information”

Annex B

The Relevant Legislation

Regulation 12(4)(d) EIR - Material in the course of completion, unfinished documents and incomplete data

12.—(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data

Section 21 FOIA - Information accessible to applicant by other means

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

Section 35(1) FOIA - Formulation of government policy

(1) Information held by a government department or by the national assembly for Wales is exempt info if it relates to-

(a) The formulation or development of government policy

Section 43(2) FOIA – Commercial interests

(1) Information is exempt information if it constitutes a trade secret.

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

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).