



Department
for Transport

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Layla

[By email: request-496286-670770a3@whatdotheyknow.com]

Our Ref: F0016246

3 August 2018

Dear Layla,

Freedom of Information Act request – F0016246

Thank you for your Freedom of Information request of 7 July 2018. You requested the following information:

“any documentation provided to potential bidders for the West Coast Partnership that describes ‘any draft, incomplete and/or unfinished information’ in the draft franchise agreement.”

The Department for Transport (the “**Department**”) considers that the following information would be covered by this request:

1. Drafts of schedules of the proposed franchise agreement for the West Coast Partnership shared with shortlisted bidders in draft and subsequently incorporated into the final draft franchisee agreement published on gov.uk against which bidders have been invited to bid (the “**Published Draft Franchise Agreement**”); and
2. Any other information communicated between the Department and Bidders describing the approach to be set out in the draft franchise agreement prior to the Published Draft Franchise Agreement being shared.

You asked us to treat the request under both the Freedom of Information Act 2000 (“**FOIA**”) and the Environmental Information Regulations 2004 (the “**EIR**”).

A. Treatment under the FOIA

The Department has provided a response to the request under the FOIA for each of these classes of information in turn below:

1. ***Drafts of schedules of the proposed franchise agreement for the West Coast Partnership shared with shortlisted bidders in draft and subsequently incorporated into the Published Draft Franchisee Agreement,***

Under section 21 of the FOIA, we are not required to provide information which is already reasonably accessible to you. The full Published Draft Franchise Agreement, including the draft schedules, was uploaded onto gov.uk on 26 July 2018 and is available here:

<https://www.gov.uk/government/publications/west-coast-partnership-2018-invitation-to-tender>.

The Department therefore does not intend to supply it separately to you in this instance.

2. Any other information communicated by the Department to Bidders describing the approach to be set out in the draft franchise agreement prior to actual contractual drafting being shared.

Under section 35(1)(a) of the FOIA, the Department is not required to share information which was shared with bidders during the formulation or evaluation of government policy.

As set out in the Franchise Competition Guide through the preparation of the West Coast Partnership Invitation to Tender ("ITT") and associated documents, the Department's Franchise project team engage with shortlisted bidders to seek their feedback on the draft ITT and associated documents (which included, in this competition, a working earlier draft version of the Published Draft Franchise Agreement). The working version of the franchise agreement shared with bidders at this time contained policy in formulation and was provided to invite feedback during a confidential consultation process with bidders which contributed towards the Published Draft Franchise Agreement itself. Furthermore, the policy issues which were being explored are in some cases subject to Ministerial approval which had yet to be received. As such, this clearly meets the test of government policy in development.

The Franchise Competition Guide is published on our website (last updated January 2016) and the process outlined above is set out in sections 3.65-3.66.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/496844/franchise-competition-guide.pdf

Therefore, the process of policy formulation was underway with the publication of the ITT (27 March 2018) but not fully complete.

Both the ITT and the Published Draft Franchise Agreement are available here:

<https://www.gov.uk/government/publications/west-coast-partnership-2018-invitation-to-tender>.

The Department therefore considers that on this basis, given that "information communicated by the Department to Bidders" clearly occurred at the time and within the context of continued policy formulation, section 35(1)(a) of the FOIA is engaged with respect to this information.

As section 35(1)(a) of the FOIA is a qualified exemption, when engaging it we are required to balance the public interest in disclosing the information against that for withholding it. Annex B to this letter sets out the exemption prescribed by section 35(1)(a) of the FOIA in full and details why, on balance, the public interest test favours withholding the information.

B. Treatment under the EIR

To the extent that some of the requested information falls within the scope of the EIR, the Department has provided a response to the request for each of these classes of information under the EIR in turn below:

1. *Drafts of schedules of the proposed franchise agreement for the West Coast Partnership shared with shortlisted bidders in draft and subsequently incorporated into the Published Draft Franchisee Agreement,*

Given that the full Published Draft Franchise Agreement, including the draft schedules, was uploaded onto gov.uk on 26 July 2018 and is readily available to you by means of the link provided in paragraph A.1 above, the Department is not providing the information separately here.

This is pursuant to regulation 6(1)(b) of the EIR, which states that where information is already publicly available and easily accessible in another form or format, public authorities are not required to provide it separately.

2. *Any other information communicated by the Department to Bidders describing the approach to be set out in the draft franchise agreement prior to actual contractual drafting being shared.*

Under regulation 12(4)(d) of the EIR, the Department may withhold information if the request relates to material which is still in the course of completion. An example of what constitutes “in the course of completion” typically includes scenarios where a public authority is formulating and developing policy.

For the reasons set out in paragraph A.2 above, information falling within this category was done so at the time and in the context of formulating and developing policy, and therefore regulation 12(4)(d) of the EIR is engaged with respect to this information.

As regulation 12(4)(d) of the EIR is a qualified exemption, when engaging it we are required to balance the public interest in disclosing the information against that for withholding it. Annex B to this letter sets out the exemption prescribed by regulation 12(4)(d) of the EIR in full and details why, on balance, the public interest test favours withholding the information.

C. Complaints procedure

If you are unhappy with the way the Department has handled your request or with the decisions made in relation to your request you may complain within two calendar months of the date of this letter by writing to the Department’s Information Rights Unit at:

Zone D/04
Ashdown House
Sedlescombe Road North
Hastings
East Sussex TN37 7GA
E-mail: FOI-Advice-Team-DFT@dft.gsi.gov.uk

Please see attached details of Department’s complaints procedure and your right to complain to the Information Commissioner.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours sincerely

Michael Evans
Senior Correspondence Manager- Passenger Services

Your right to complain to DfT and the Information Commissioner

You have the right to complain within two calendar months of the date of this letter about the way in which your request for information was handled and/or about the decision not to disclose all or part of the information requested. In addition a complaint can be made that DfT has not complied with its FOI publication scheme.

Your complaint will be acknowledged and you will be advised of a target date by which to expect a response. Initially your complaint will be re-considered by the official who dealt with your request for information. If, after careful consideration, that official decides that his/her decision was correct, your complaint will automatically be referred to a senior independent official who will conduct a further review. You will be advised of the outcome of your complaint and if a decision is taken to disclose information originally withheld this will be done as soon as possible.

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

Annex A

FOIA

21 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.

EIR

6.—(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

Annex B

FOIA

Section 35: 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

EIR

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

Public Interest Test

Factors for disclosure	Factors against disclosure
<ul style="list-style-type: none">- Disclosure of the information relating to the plans and proposals for the West Coast Partnership Franchise Proposition would allow the individual, and the public at large to see the options being considered by the Government and therefore contribute towards the Government's wider transparency agenda.- As public knowledge of the way in which the Government works increases, the public contribution to the policy making process could become more effective.	<ul style="list-style-type: none">- The disclosure of correspondence relating to the formulation and development of live government policy in respect of passenger services, will inhibit discussions, as officials will be reluctant to provide views and opinions if they were routinely disclosed ahead of any formal announcements. This may in turn have a 'chilling effect' on the consideration of all available options, as in this instance disclosing drafts would mean that those producing them will be less frank and candid in giving their views or presenting information in future, and so the quality of the advice and information in the drafts, and hence the quality of decision making, would suffer to the detriment of the travelling public. In addition, bidders may be reluctant to provide their feedback if there were to be revealed by changes in the drafts being made available to the public.- It is in the public interest that Ministers and officials have a 'safe

	<p>space' in which to formulate and develop government policy and that decision making is based on the best advice available and a full consideration of all the options.</p> <ul style="list-style-type: none"> - The information supplied to shortlisted bidders may still be used to help officials formulate advice to Ministers on future franchise competitions in the context of wider franchise programme reform, so it would be detrimental to the decision making process not just in the context of this competition, but potentially in future competitions for the procurement of operators of passenger services as well. - When shared, some elements of the policy were still live and had not yet been given Ministerial approval. If such information and advice was routinely made public there is a risk that officials could come under political or public pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision making, which would more broadly have detrimental effect on the travelling public. - Ministers and officials need to be able to conduct rigorous assessments on any future policy on managing passenger services including considerations of the pros and cons without there being premature disclosure which might close off better options. The effect on future investment also needs to be considered and would likely be detrimental in this instance, with the associated knock on effects to investment in the railways and franchising in general.
<p style="text-align: center;">Decision Reached</p> <p>As the policy had not yet been approved, ministers and officials need to be able to conduct rigorous assessment on any future policy concerning passenger services without the risk of the information being prematurely disclosed, which might close off better options.</p>	

This information is being **withheld** as on balance the factors for withholding this information outweighs the factors for releasing it.