



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2017/0145

**Decided without a hearing
On 6 August 2018**

Before

JUDGE HAZEL OLIVER

MR NIGEL WATSON

MR NARENDRA MAKANJI

Between

MR LAURENCE FALLON

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

DEPARTMENT OF TRANSPORT

Second Respondent

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. This appeal concerns information sought under the Freedom of Information Act 2000 ("FOIA") on train overcrowding for the West Coast Main Line as used in the HS2 Strategic Case.

3. On 22 September 2016, the Appellant made a request to the Department of Transport (the “Department”) for various information relating to overcrowding forecasts given in the November 2015 update to the HS2 Strategic Case, West Coast Main Line (“WCML”).

4. The Department responded on 19 October 2016, on the basis that the request covered information on growth scenarios considered, an assessment of the likelihood of each scenario, and the train capacities, lengths and service patterns used as the basis for future crowding assessments. The Department stated that this information was held, but they were not required to provide information that was already reasonably accessible to the Appellant under section 21 of FOIA.

5. The Appellant replied on 20 October 2016 and requested a review, saying that the response did not contain the information requested and he had already read the documents mentioned in the response. The Appellant requested the following information: *“What I would like to obtain is the basis, and calculations, of the demand and overcrowding forecasts, and whether other growth scenarios were considered. The loading forecasts are given in terms of percentages of the capacity of particular types of obsolescent train...without reference to individual hours of the peak. This makes it impossible to determine the size and distribution of the overcrowding. So far as I can determine, the reports do not even state the Standard Class capacity of a Reconfigured Pendolino, or the standing areas (sq m) of Class 350 trains with 2+3 or 2+2 seating.”*

6. The Department treated this as an Independent Internal Review, and replied on 2 December 2016. The Department confirmed that it held the information requested, some information was disclosed in the first section of the response, but other elements had been partially withheld under sections 41 and 43 of FOIA. In particular, the Department confirmed that it held Excel documents in which the analysis of calculations underlying the WCML technical annex was undertaken. However, this contained certain information that is supplied to the Department in confidence and/or is considered to be commercially sensitive.

7. The Appellant complained to the Information Commissioner (the “Commissioner”) on 5 December 2016.

8. The Commissioner issued Decision Notice FS50658490 on 15 June 2017. The Commissioner found that the Department had correctly applied section 41 (information provided in confidence) to refuse to provide the information used in its calculations. The Commissioner found that the information on trains, capacities and service patterns was correctly refused under section 21. She also found that section 21 was incorrectly applied in relation to growth scenarios and assessments of likelihood as the specific information requested was not reasonably accessible, but no steps were required to be taken as the information had either been provided or the Department had confirmed that the information was not held.

The Appeal

9. The Appellant appealed to this Tribunal on 14 July 2017. We had a hearing on 20 and 21 February 2018. The Appellant and the Department attended this hearing, and the Commissioner did not attend.

10. The issue in dispute was the disclosure of information on the basis and calculations of the demand and overcrowding forecasts, as contained in the document “Supplement to the October 2013 strategic case for HS2” and “Supplement to the October 2013 strategic case for HS2 Technical Annex: Demand and Capacity on the West Coast Main Line (the “Technical Annex”).

11. We spent considerable time at this hearing clarifying the scope of the appellant’s request. This overall scope of the request was reformulated to cover six specific items, as set out in paragraphs 5(a) to (f) of the Tribunal’s Case Management Directions dated 28 February 2018.

12. On the morning of the second day of the hearing, the Department confirmed that it could provide all of the information requested by the Appellant in relation to revised requests 5(a) to (e). This was ordered to be provided in accordance with paragraphs 9 and 10 of the Case Management Directions, without a determination as to whether or not the information must be provided under FOIA. In relation to request 5(f), the Department was unable to confirm whether it could provide the information. This information relates to one train operating company, Virgin Trains, and they had been unable to obtain full instructions in the time provided during the hearing. It might also be necessary for them to obtain evidence from Virgin Trains in order to fully explain its reasons if the information cannot be provided. After hearing submissions from both parties, the Tribunal decided to adjourn the hearing in relation to 5(f) of the reformulated request.

13. On 21 March 2018 the Department confirmed to the appellant and the Tribunal that it was not able to provide the requested information in relation to 5(f)(i) of the reformulated request (although it could in relation to 5(f)(ii)). This remains to be determined by the Tribunal.

14. Both parties agreed that this remaining issue could be dealt on paper. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

15. Reformulated request 5(f)(i) is as follows (“Virgin Passenger Count Information”):

In relation to the table at page 118 of volume 1 of the open bundle (part of annex C headed “Figure 2: ICWC PM peak timetable, autumn 2014”) which was provided to the appellant by the Department under cover of a letter dated 2 December 2016.

Please tell me, in relation to the train services departing at or after 19.00 hours (of which there are 9 in the table):

i. the aggregate number of passengers travelling on those trains.

16. The Appellant submits that this information is in the public interest and should be disclosed as transparency should outweigh commercial interests. The Department submits that the disclosure would be likely to prejudice the commercial interests of Virgin Trains and this is not outweighed by the public interest, and alternatively disclosure is prohibited under an enactment.

Applicable law

17. The relevant provisions of FOIA are as follows.

- 1 **General right of access to information held by public authorities.**
(1) Any person making a request for information to a public authority is entitled—
 (a) to be informed in writing by the public authority whether it holds
 information of the description specified in the request, and
 (b) if that is the case, to have that information communicated to him.

.....
43 Commercial interests

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(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).

.....
44 Prohibitions on disclosure.

- (1) Information is exempt information if its disclosure (otherwise than under this
 Act) by the public authority holding it—
 (a) is prohibited by or under any enactment.

18. Section 43 is a qualified exemption, meaning that the information should only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Section 44 is an absolute exemption.

Evidence and submissions

19. We had an agreed bundle of open documents which was provided for the first hearing. We also had some closed material, consisting of the Excel documents setting out the analysis of calculations underlying the Technical Annex. We had an open witness statement from Jacqueline Starr (Managing Director, Customer Experience Portfolio at Rail Delivery Group), and Emma Campbell (Department of Transport). We also had a closed version of Ms Campbell's statement. We did not hear any live evidence from these witnesses. We had written submissions from the Appellant and from the Department.

20. For the resumed consideration of this matter we had further written submissions from the Appellant and from the Department. We also had a witness statement from Sarah Copley (Executive Director, Commercial Director at West Coast Trains Ltd). We did not have any additional evidence or submissions from the Commissioner.

21. We have taken all of the evidence and submissions into account in making our decision.

Appellant's case

22. The appellant submits that the requested information does not reveal the number of passengers heading for a particular destination on a particular train, or show a breakdown of ticket sales or revenue data. He also says that this count information could be collected by observation at the Euston platform access ramp, including a count of standard class travellers only. The appellant therefore argues that this limited information would not realistically cause detriment to commercial interest. It is something that could have been openly and legally acquired by a member of the public at the station.

23. In relation to the public interest, the appellant says that WCML InterCity trains are operation in a for-profit franchise which depends on substantial support from public funds – so there is a clear rationale for having high-level information about utilisation and performance of these services in the public domain. The appellant argues that the right balance between transparency and commercial interests requires disclosure.

Department's case

24. The Department submits that disclosure likely to prejudice the commercial interests of Virgin Trains, as shown in the witness statements. For the specific information that remains in dispute the Department relies on section 43 of FOIA (not section 41 on which the Commissioner based her original decision).

25. The Department's argument is that this detailed information could be used by rivals in a competitive market – to optimise pricing and level of service in order to encourage a shift to other modes of transport, and to prejudice Virgin Trains' position against other competing train operators. This would also cause cost to the taxpayer in relation to competitive tendering as the price of bids would be increased.

26. The Department refers to a previous First-Tier Tribunal decision in *Andrew Green v Information Commissioner*, which found that information on peak and off-peak loadings on the WCML had the capacity to cause commercial prejudice. We note that this Tribunal is not bound by this earlier decision, and that this decision concerned section 41 rather than section 43 of FOIA.

27. The Department submits that the public interest in protecting these interests is strong. The consequences of releasing this commercially sensitive information would include increases in pricing for passengers, and a detrimental effect on Department's relationship with Virgin Trains. The Department argues that the public interest in disclosure is limited, as other information is available about HS2 and demand/capacity, HS2 is already under public scrutiny, and the public interest in this very specific information is limited.

28. The Department alternatively argues that disclosure would breach section 145 of the Railways Act 1993 if it is disclosed without Virgin Trains' consent, and therefore section 44 of FOIA applies to prohibit disclosure.

Discussion and conclusions

29. The first question is whether section 43 (prejudice to the commercial interests of any person) is engaged. We find that it is. Disclosure of the Virgin Passenger Count Information would or would be likely to prejudice the commercial interests of Virgin Trains.

30. As explained in the open witness statements of Ms Starr and Ms Campbell, train operating companies ("TOCs") such as Virgin Trains operate in a competitive market, which includes both other TOCs and competing modes of transport. Passenger count data is provided to the Department on terms of commercial confidentiality. In a competitive tender situation, it will only be provided to the shortlisted candidates on a strictly confidential basis.

31. As explained by Ms Starr, competitors already have access to rail pricing by route and time of day as this is predominantly based on fixed price tickets. The detailed passenger

demand information that would be provided by passenger counts is the missing piece of data that would enable competitors to estimate rail/air and rail/coach cross-elasticity, i.e. how the pricing of one transport mode is affected by the pricing of another transport mode. Competitors could then set prices to encourage the public to shift from rail travel to air or road travel, and could also lay on extra services at busy times. In addition, there are competing TOCs on the WCML, and release of this data for one TOC would benefit the others – such as by laying on extra competing capacity at busy times.

32. As explained by Ms Copley, the requested Virgin Passenger Count Information would reveal passenger count information on nine specific trains. These are some of the busiest on the service, and the count data would reveal the overall demand and revenue potential of this route. If this was released, it could be used in conjunction with the publicly available timetables and ticket pricing information to undercut Virgin Trains.

33. The appellant makes the point that this passenger count information could be obtained by a member of the public observing passengers from the Euston platform access ramp. Although this may be possible in theory, it does not prevent the Virgin Passenger Count Information from being commercially sensitive. Virgin Trains produce count information from manual counts and from automatic counts on the relevant trains. The Tribunal feels that there is a big difference between publication of this accurate and detailed information as collated by Virgin Trains, which could simply be picked up and analysed by a competitor, and any attempt by a competitor to make its own count which would be both time-consuming and less accurate.

34. The appellant makes the point that the Virgin Passenger Count Information does not show the destination of the passengers on the train, but simply the initial loading. He also says that this cannot be mapped to ticket type or revenue. Certainly information about the destinations would make the data even more useful to competitors. However, even without information about destinations, we accept the Department's evidence that detailed information about the demand for these services would be of interest and use to competitors, and so prejudice Virgin's commercial interests. Similarly, even if ticket type or revenue cannot be mapped exactly, we accept that passenger count data combined with publicly available information about ticket prices could be used by other transport operators to obtain a competitive advantage by fixing prices to attract customers based on demand.

35. The next issue is whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information

36. We have found that release of the Virgin Passenger Count Information would be likely to prejudice the commercial interests of Virgin Trains. The Department's witnesses have explained why this would not be in the public interest. As noted by Ms Starr, this could affect the cost of franchises to the Department (and so to the taxpayer), because the risk of disclosure of commercially sensitive information would be factored into their bids. As explained by Ms Campbell, release of this information would affect the Department's relationship with both Virgin Trains and other TOCs. The Department would be in breach of its contractual obligations to keep this information confidential, and this would cause a lack of trust from other TOCs and other organisations, and in turn an unwillingness to provide such sensitive information. The Department relies on both contractually and voluntarily provided commercially sensitive data from TOCs (and other organisations) in performing its functions.

This would affect the Department's relationship with private sector organisations, and so its ability to obtain value for money from the taxpayer.

37. The Tribunal is satisfied that disclosure of this information creates a real risk that the ability of the Department to carry out its functions would be impaired, and the cost to the taxpayer of rail franchises increased. We therefore find that the public interest in maintaining the exemption in this case is significant.

38. The appellant argues that the right balance between transparency and commercial interests requires disclosure of the information in this case. He notes that the WCML franchises involve substantial support from public funds, and so there is a public interest in having high-level information about utilisation and performance of the relevant services.

39. We accept that there is a clear public interest in knowing information about how a publicly-funded rail franchise is operated and run. The appellant's final submissions do not mention HS2, but his original appeal was put on the basis that railway capacity and crowding issues are central to the case for HS2. We accept that HS2 generally and the business case behind it are of considerable interest to the public, due to the size of the project and cost to the taxpayer. But, as submitted by the Department, there is already significant information publicly available about the HS2 project and its impact on demand and capacity issues – including the Supplement and Technical Annex referred to above and ongoing published business cases. The Virgin Passenger Count Information formed the basis of calculations and conclusions on demand and capacity that have already been published. It is unclear to the Tribunal how additional disclosure of this very specific information would be of any significant benefit to the public interest.

40. Taking all of the above into account, we find that there is some public interest in disclosure of the specific Virgin Passenger Count Information, but this is not as significant as the public interest in upholding the exemption.

41. As we have found that the Virgin Passenger Count Information can be withheld under section 43 it is not necessary for us to decide on the application of section 44.

42. The information in dispute has changed considerably since the Commissioner made her decision. The Commissioner's decision was based on section 41, although section 43 was also relied on by the Department at the time. The voluntary disclosures by the Department after the first hearing did not involve a finding by the Tribunal that this information should be disclosed under FOIA, and so this does not overturn the Commissioner's decision. We have made no finding that the Commissioner's decision was not in accordance with the law, and therefore the appeal is dismissed.

Signed Hazel Oliver

Judge of the First-tier Tribunal
Date: 10 August 2018