

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 August 2024

**Public Authority:** London North Eastern Railway  
**Address:** East Coast House  
25 Skeldergate  
York YO1 6DH

#### Decision (including any steps ordered)

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1. The Commissioner's decision is that London North Eastern Railway (LNER) is entitled to withhold some of the requested information about ticketing under section 43(2) of FOIA, which concerns commercial interests.
2. It's not necessary for LNER to take any corrective steps.

#### Request and response

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3. The complainant made the following information request to LNER on 17 January 2024:

"Please provide, for fares between London and Edinburgh:

\* The number of Advance tickets LNER makes available at each price point.

\* Any variations in this, for example based on season or time of day.

\* Any plans to change the above after the elimination of Super Off-Peak tickets.

If it's impractical to provide the above, I'm curious in particular whether LNER intends to offer Advance tickets at prices higher than

the former Super Off-Peak ticket (for trains where said ticket would have been valid).”

4. LNER issued a refusal notice on 13 February 2024, refusing the request under section 43(2) of FOIA.
5. The complainant requested an internal review on 14 February 2024 and submitted a complaint to the Commissioner on 19 April 2024 as they hadn't received a review.
6. LNER provided an internal review on 1 May 2024. It confirmed its reliance on section 43(2) and advised that it considered section 44 of FOIA could also be engaged. Section 44 concerns prohibitions on disclosure.
7. On 17 July 2024, LNER provided the complainant with a further response to their request. With regard to part 1 of the request, it said that its dynamic pricing system means that ticket availability at each price is constantly adjusting based on real-time demand and other variables. LNER said it could only therefore, and theoretically, provide a snapshot of the status of tickets available at a set point in time. With regard to part 2, LNER gave some of the factors its dynamic pricing system takes into account. However, it confirmed that it's relying on section 43(1) and 43(2) to withhold the relevant information it holds within scope of these two parts. LNER addressed parts 3 and 4 of the request.
8. The complainant confirmed to the Commissioner on 27 July 2024 that they still dispute LNER's reliance on section 43 of FOIA to withhold information they've requested. They indicated that they were preparing a response to LNER's latest correspondence which they'd send to LNER and the Commissioner. But this didn't arrive, and the Commissioner considers he has enough information to make a decision.

## **Reasons for decision**

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9. This reasoning covers LNER's application of section 43(1) or section 43(2), or both, to parts 1 and 2 of the complainant's request. He'll consider the matter of LNER's internal review under 'Other Matters.'
10. Under section 43(1) of FOIA information is exempt information if it constitutes a trade secret.
11. Under section 43(2), Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority

holding it.

12. Since section 43(1) of FOIA is a much more rarely applied – or engaged - exemption, the Commissioner has considered section 43(2) first.
13. When he's considering whether section 43(2) is engaged, the Commissioner considers whether the envisioned harm concerns commercial interests and whose interests would be harmed; how disclosing the information would cause that harm and the level of likelihood of the harm occurring.
14. In its correspondence to the complainant, LNER explained that disclosing the requested information would damage its own commercial interests. It went on to explain that its commercial interests would be damaged by disclosure because it would provide an insight into LNER's economic performance and profitability, which could be used by its competitors. LNER noted that it faces direct competition from open access operators on its routes.
15. LNER went on to explain that releasing information that's sensitive to market dynamics, like pricing strategies or revenue expectations, could lead to competitors adjusting their behaviours in ways that affect competition, potentially breaching the Competition Act 1998. LNER said that inadvertently facilitating this "tacit collusion, even without explicit agreement" could lead to significant market disruptions or "a reduction of competitive uncertainty", or both.
16. LNER then outlined specific harms that could arise from disclosure, as follows:

"Price Manipulation: Knowledge of the exact number of tickets available at each price point could lead to scalpers purchasing large quantities of tickets with the intention of reselling them at a higher price, exploiting the demand-supply mechanics.

Strategic Planning Exposure: Revealing any plans to change pricing or ticket availability after the elimination of Super Off-Peak tickets could undermine strategic initiatives. Competitors could pre-emptively adjust their own pricing structures to counteract LNER's plans, which would diminish the impact of LNER's strategy.

Customer Expectation Management: Public knowledge of ticket availability could lead to customer dissatisfaction if they cannot obtain tickets at the lower price points, believing that they are sold out due to artificial scarcity or poor management.

Revenue Optimisation Risk: Dynamic pricing algorithms used by railway companies often depend on the ability to adjust prices based

on demand, season, and other factors. If these algorithms are transparent, it may lead to gaming of the system by passengers, leading to suboptimal revenue performance.

Customer Behaviour Prediction: With detailed knowledge of pricing structures, analysts might predict future behaviour of the company regarding pricing strategies, which could be used to the advantage of competitors or lead to market speculation.”

17. LNER discussed similar concerns in its internal review response.
18. Regarding the remaining three criteria at paragraph 13, based on LNER’s reasoning, which for the most part he considers to be clear and to the point, the Commissioner is satisfied, first, that the harm that LNER envisions is relevant to the section 43(2) exemption because it concerns commercial interests. Second, the Commissioner accepts that disclosing the information could lead to the harms LNER envisions, for the reasons it gave to the complainant, outlined above. Finally, it’s not quite clear but it appears to the Commissioner that LNER considers that the envisioned prejudice would be likely to happen, rather than would happen. The Commissioner considers that this lower level of likelihood is reasonable; the probability of prejudice occurring is less than 50% but there’s still a real and significant risk of prejudice.
19. In their request for an internal review (and correspondence to the Commissioner) the complainant said that LNER had overstated the potential harms it had identified and discussed why they considered that was the case. The Commissioner has taken account of those views and considers that LNER addressed them satisfactorily in its internal review response and response of 17 July 2024. The Commissioner is satisfied that the criteria at paragraph 13 have been met. He therefore finds that LNER correctly applied section 43(2) of FOIA to parts of the complainant’s request. He’s gone on to consider the public interest test.

### **Public interest test**

20. In their request for an internal review, the complainant argued that LNER had just more than doubled the range of Advance fares for most trains, which was a significant change in policy by a public body and one that the public is entitled to scrutinize.
21. In correspondence to the Commissioner, the complainant put forward broadly the same argument, in more detailed terms. Other arguments they put forward are somewhat more relevant to the issue of whether section 43(2) is engaged (and the Commissioner has found it that it is) rather than public interest arguments. These arguments concern the reasons why, in their view, Lumo (a train service that travels exclusively

between London and Edinburgh) must already be aware of LNER's pricing strategy and if Lumo already has this information other LNER competitors could access this information. And that LNER has overstated the risk of 'ticket scalping' ie re-selling tickets at a higher price.

22. In further correspondence to the Commissioner, the complainant argued the following:

"Moving on to the public interest test: I agree with all of the factors favoring disclosure given by LNER. I would additionally like to situate this request in the context of LNER's fares trial: by eliminating the fixed-price off peak ticket which previously applied to most trains, they have more than doubled the range within which fares can vary (previously tickets for off-peak trains could be no more than the £91.20 Super Off-Peak fare; now the maximum fare is the Anytime fare, £199.60). This is effectively a loss in transparency, as fixed-price fares are easy to scrutinize, but variable fares are much more difficult without information like that I am requesting. My request, thus, serves to correct for this decreased transparency and allow the public to scrutinize fare increases made by LNER as part of this trial. (While LNER has made a number of public assurances, for example that certain percentages of tickets will be sold at below half the anytime price, cherry-picked statistics allow only limited scrutiny, as there is a substantial risk of "spin".)...

...Ultimately, I believe that the commercial harms to LNER are likely to be minimal, and any small commercial harm is significantly outweighed by the public interest in scrutiny over the fares charged for a taxpayer-funded public service."

23. LNER provided detailed public interest arguments in original response and internal review. It tabulated these arguments in its 17 July 2024 response. LNER's section 43(2) public interest arguments for disclosing the information, summarised here, were: increased public scrutiny, informed consumer decisions, competition and market functioning, investment in services and infrastructure, and 'public interest supremacy' ie the "public's right to understand and scrutinise the pricing strategies of a publicly operated company outweighs the speculative commercial harms. Ensuring fair pricing practices and transparency is vital for public trust and confidence in LNER."

24. LNER provided the following public interest arguments against disclosure:

- "Impact on Cross-Subsidy System: LNER's profitability directly contributes to the rail industry's cross-subsidy system, supporting less profitable commuter lines essential for the average person's

daily commute. Disclosing our pricing strategy would equip competitors to undercut our fares, directly impacting revenue generation and potentially increasing the burden on public funds.

- **Increased Reliance on Public Funds:** If LNER is consistently undercut, it will increase reliance on government subsidies. This diverts public funds from other essential services, ultimately harming the public.
- **Commercial Sensitivity:** LNER's dynamic pricing model is commercially sensitive, and disclosing the data could reveal proprietary algorithms and strategies, directly harming LNER's competitive position.
- **Sustained Investment:** Protecting LNER's commercial interests ensures continued investment in service improvements and infrastructure. Disclosing sensitive information could jeopardise these investments by impacting revenue streams and financial stability.
- **Commercial Viability:** While transparency is important, the commercial viability of LNER must be protected to ensure it continues to operate effectively and sustainably. Balancing transparency with commercial confidentiality is important to maintaining LNER's operational success and public service commitment."

25. LNER concluded its 17 July 2024 response with the following:

"Protecting this data is essential to maintaining a level playing field in the competitive transport market. Forcing LNER to disclose this commercially sensitive information, while other transport providers are not subject to the same transparency requirements, would create a significant competitive disadvantage. Furthermore, disclosing our pricing strategies could lead to a significant loss of revenue for LNER, directly impacting our ability to contribute to the rail industry's cross-subsidy system. This system is vital for ensuring the viability of less profitable rail lines, many of which are commuter lines serving the general public on a daily basis. A decline in LNER's revenue would jeopardise the financial stability of these essential commuter services.

Therefore, protecting LNER's commercially sensitive information is not just about safeguarding our own interests but also about ensuring the stability and viability of the entire rail network, particularly the commuter lines that are so important for the daily lives of millions of people. This, ultimately, serves the broader public interest by maintaining a robust and accessible rail system for all."

26. The Commissioner has noted the complainant's interest in the information they've requested. He considers that that interest, and the wider public interest arguments they and LNER have identified are entirely valid. However, he doesn't consider that those interests outweigh the significant public interest arguments against disclosure that LNER has identified. The Commissioner doesn't consider there's anything to be gained from examining those arguments; he considers they're self-explanatory and he accepts them. LNER is a commercial body, albeit one that's owned by Department for Transport OLR Holdings Limited. He's satisfied that, in this case, there's greater public interest in LNER being able to operate on a level playing field with its competitors, without being disadvantaged through having to disclose its commercially sensitive information.
27. Since the Commissioner has found that section 43(2) of FOIA is engaged, it hasn't been necessary for him to consider LNER's application of section 43(1) to the same information.

### **Other matters**

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28. The Commissioner notes that LNER failed to carry out an internal review within 40 working days. Provision of an internal review isn't a requirement of FOIA but is a matter of good practice. FOIA's Section 45 Code of Practice advises that all public authorities should carry out internal reviews in a timely manner and within 20 working days. A total of 40 working days is acceptable only in particularly complex cases.
29. However, the Commissioner would like to put on record the thoroughness of LNER's communications to the complainant, which included detailed explanations, addressing the majority of the complainant's individual concerns, and worked examples. He considers it would have been difficult for LNER to explain in any more detail why it considered section 43 was engaged, including the public interest factors.

## **Right of appeal**

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30. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals  
PO Box 9300  
LEICESTER  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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**Information Commissioner's Office**  
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