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Department for Transport
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Our Ref: MPG/BRI207.1

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1 February 2022

Dear Secretary of State

***Anticipated award of Southern, Thameslink & Great Northern franchise to GTR
Our Client: Bring Back British Rail***

1. We are instructed by the campaign group Bring Back British Rail (“BBBR”) which has an interest in decisions taken by your department relating to contracts in the rail industry.
2. BBBR is an unincorporated group operated by Ms Ellie Harrison, which was established in 2009 and has been vocal in its support of the re-nationalisation of the rail network for the benefit of rail users across the country. BBBR has a substantial and dedicated base of supporters and volunteer campaigners across the United Kingdom. It is funded purely by donations and merchandise sales and its coordinator takes no salary. This correspondence is supported by crowdfunding from over 534 supporters to date.
3. From March 2018 to June 2019, BBBR and another campaign group, “We Own It”, corresponded with your predecessor Mr Grayling seeking clarification of the handling of the East Coast Franchise. They received unsatisfactory answers and accordingly began preparing judicial proceedings against the Secretary of State and the DfT. Ultimately these proceedings did not take place as the decision was taken to re-nationalise the line as the London North Eastern Railway (“LNER”) from 24 June

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2018. We understand that DfT OLR Holdings Limited (“OLR”) is anticipated to continue to operate LNER until at least 2023.

4. The purpose of this new line of correspondence is to address the well-publicised and highly concerning issues surrounding a different rail operator, Govia Thameslink Railway Limited (“GTR”) (a wholly owned subsidiary of Govia Limited (“Govia”) which is itself owned by Go-Ahead Group plc (“Go-Ahead”) and Keolis LLC (“Keolis”)), in relation to its operation of the Thameslink, Southern and Great Northern franchise (“TSGN”) and, in particular, the anticipated decision to issue a direct contract award to GTR to extend its operation of TSGN for up to six years from 31 March 2022.
5. For the reasons set out in this letter, BBBR and its supporters have serious concerns as to any extension beyond March 2022. This letter seeks information regarding the circumstances of GTR, the investigations that are ongoing and the impending decision on whether to extend the contractual arrangement.

Factual Matrix

6. The following is what we believe to be a non-contentious summary of the circumstances that have led to the present position regarding Govia and its operation of TSGN and Southeastern.

May 2014	Govia awarded new seven year management contract for the Thameslink network.
11 June 2014	GTR enters into franchise agreement dated 11 June 2014.
26 July 2015	The Southern network is introduced into TSGN.
2016	Southern Rail (GTR) cancels nearly 60,000 trains within a year, a period popularly known as the ‘Southern Rail Crisis’.
February 2017	Transport Select Committee 10 th Special Report – Rail Franchising: Government Response to the Committee’s Ninth Report of Session 2016-17 is highly critical of the

	DfT's "commitment to transparency". The TSC finds that "the Department has not actively intervened in a manner proportionate to the problems on the TSGN franchise." ¹
June 2017	Gibb report ² highlights serious structural issues throughout the TSGN franchise and GTR contract.
July 2017	The Association of British Commuters Limited ("ABC") issues a judicial review proceedings against the DfT for excessive delays and cancellations on GTR. The Court orders the DfT to reach a determination regarding GTR within two weeks to avoid a full hearing of the judicial review.
January 2018	NAO report ³ on the TSGN franchise revealed that the penalty that resulted from the Court order obtained by ABC was decided at the last minute through "mostly verbal agreement" and expressed concern about how their remedial plan would work in future.
2018	Following the May 2018 timetable collapse, an ORR inquiry ⁴ finds that GTR had been one of the major contributors. The Department for Transport imposed a profit cap on GTR until the end of their contract in September 2021, understood to be about 1%.
23 March 2020	As a result of the COVID-19 pandemic, Emergency Measures Agreements ("EMA") agreed for all rail franchises. Most EMAs to run from 1 March 2020 to 20 September 2020, with LSER on a longer EMA, until 16 October 2021.

¹ <https://publications.parliament.uk/pa/cm201617/cmselect/cmtrans/66/6602.htm>

² <https://www.gov.uk/government/publications/southern-rail-network-gibb-report>

³ <https://www.nao.org.uk/report/the-thameslink-southern-and-great-northern-rail-franchise/>

⁴ <https://www.orr.gov.uk/search-news/orr-lays-out-timetable-recommendations-improve-service-passengers>

	The new arrangements mean that GTR was effectively released early from its profit cap, as well as no longer being responsible for costs as under its previous management contract.
30 March 2020	Additional direct award to LSER to run “concurrently” with their EMA.
31 March 2020	The DfT writes to Go-Ahead to formalise a dispute over profit share payments on LSER. Go-Ahead indicated in their 2020 accounts that their exposure was about £8 million.
Summer 2020	DfT identifies “first identified irregularities in historic payments re HS1”.
21 September 2020	Emergency Recovery Measures Agreement (“ERMA”) agreed for GTR until September 2021.
Spring 2021	By this time, Chris Heaton-Harris MP stated that “the Department became aware of material sums owed but not declared or repaid to the Department specifically in relation to services operating on HS1, against which it appeared that LSER [London & South Eastern Railway] had breached the good faith obligation within the franchise agreement”. Mr Heaton-Harris MP stated that he was made aware of issues relating to HS1 and the profit share calculation by June.
April 2021	NAO report ⁵ concludes there is insufficient visibility of public finances in rail.
9 June 2021	Collective proceedings issued against GTR in the Competition Appeal Tribunal under s.47B Competition Act

⁵ <https://www.nao.org.uk/report/a-financial-overview-of-the-rail-system-in-england>

	1998 for abuse of dominant position primarily resulting from sub-branding on the London-Brighton mainline. ⁶
July 2021	Public Accounts Committee report ⁷ concludes there is insufficient visibility of public finances in rail. Concerns are raised about the level of risk associated with the new National Rail contracts, as well as the “significant resource” it will require to manage them.
August 2021	The Chairs of both Go-Ahead and Keolis Boards form a non-executive committee to investigate the alleged fraud on LSER, operating under commercial confidentiality, becoming the DfT’s point of contact for the issues. The committee commissions an “independent review”, led by “external legal and accounting advisors”, whom we understand to include Deloitte.
20 September 2021	Term of GTR’s ERMA is extended to 31 March 2022.
28 September 2021	DfT announces that Southeastern would be nationalised due to a “significant breach of the good faith agreement”. ⁸ The announcement confirms that the “Decision follows an investigation which identifies over £25 million of taxpayer money was not declared by LSER, amounting to a significant breach of the franchise agreement, undermining trust.”
17 October 2021	OLR takes over control of Southeastern.
19 October 2021	Further proceedings before the Competition Appeal Tribunal for compensation of up to £93m brought for Southeastern

⁶ <https://www.catribunal.org.uk/cases/14047721-david-courtney-boyle-edward-john-vermeer>

⁷ <https://publications.parliament.uk/pa/cm5802/cmselect/cmpublic/170/17005.htm>

⁸ <https://www.gov.uk/government/news/government-takes-over-running-of-lser-services-in-response-to-over-25-million-breach-of-franchise-agreement>

and South Western rail franchises for failure to provide boundary fares to Travelcard holders or making known their existence (Collective Proceedings Order made 19 October 2021).

November 2021 Further Boundary Fares case commences against GTR (£73m claimed).

2 November 2021 Mr Heaton-Harris MP writes to Huw Merriman MP as Chair of the Transport Select Committee to provide additional information requested by letter of 11 October 2021. This confirms that Govia “did not act transparently and in good faith” and “concealed the money owed through financial reporting over several years”. Govia were aware of the HS1 service monies owed in March 2020, but “did not declare this to the Department and were continuing to minimise the risk of detection by the Department.” Active concealment had been identified by this time – *“LSER concealed the money owed through their financial reporting to the Department over several years. It is incumbent on the operator to act transparently and in good faith to declare payments rightfully due to the Department, and LSER did not do so.”*

9 December 2021 Go-Ahead announces that the internal review has been completed. It finds that “serious errors were made” and extra time is needed “to consider the implications”, meaning that they will miss the deadline for publishing full year accounts to July 2021. Trading in their shares and corporate bond is suspended.

24 January 2022 The Go-Ahead postpones its accounts for the second time. It now expects to publish them by the end of February.

7. In the light of the various circumstances set out above, which represent just a snapshot of recent events in the industry involving Govia, there is understandably deep concern held by our client, its supporters and the public more generally, that there is a little to no transparency as to what steps the DfT are taking to determine the nature and extent of any fraud or frauds conducted on public funds. Whilst assurances have been given that an investigation is underway within GTR / Govia / Go-Ahead / Keolis (together, “the Companies”), this investigation does not appear to be independent or transparent, nor does it appear that the findings will be made publically available either before any decision on the continuation of the TSGN franchise is made in March 2022, or at all.

8. Without robust conclusions being reached in respect of the allegations relating to the obvious financial mismanagement within the Companies (that in the best case is a serious and knowing breach of contract, but at worst a criminal fraud), it is difficult to see how the DfT can reasonably conclude that GTR / Govia is a suitable rail operator to entrust with the future of TSGN, even less that our client, its supporters and the general public can have confidence that their taxes and fares are being well spent. Unless and until the question of deliberate breach of contract and / or fraud is resolved, it would be improper for the DfT to even entertain entering into an extension of the TSGN contract with the Companies. In the event that a suitable existing rail operator is not available to take the place of GTR / Govia, it would be most appropriate for the OLR to take the role.

Assurances Sought

9. Our client draws comfort from your statement in September 2021 that *“There is clear, compelling and serious evidence that for years, London and South Eastern Railway Services have breached the trust that is absolutely fundamental to the success of our railways. When trust is broken, we will act decisively.”*

10. On the basis of this, we would be grateful if you would provide a firm commitment in writing by return that you will not approve any further contractual arrangement with the Companies or any associated entity until such time that:

- a. The allegations have been fully investigated by an appropriate independent body, to its satisfaction;
- b. All public funds determined to have been lost in breach of contract or otherwise as a result of the unlawful or improper conduct of the Companies, have been repaid or arrangements have been agreed for their repayment in short order; and
- c. All appropriate bodies and prosecuting authorities have been notified of all identified and / or suspected corporate and individual wrongdoing.

Requests

11. In accordance with the statement given by you on 28 September 2021 that, *“We won’t accept anything less from the private sector than a total commitment to their passengers, and transparency with taxpayers”*, our client seeks the following information and documents from you:

- a. Of the investigation into the HS1 and any other underpayments conducted by the DfT, please provide:
 - i. A copy of the terms of reference and/or scope document;
 - ii. A copy of the investigative report that details the £25m shortfall;
 - iii. Details of the nature and make up of the £25m;
 - iv. Confirmation of whether further shortfalls have been identified;
 - v. Confirmation of whether a determination as to statutory or contractual penalties has been made or, in the absence of this, an indication of when a determination can be expected; and
 - vi. Confirmation that the cost of the investigation is being met entirely by the Companies.
- b. Of the internal investigation(s) underway within the Companies, please provide:

- i. Confirmation of the identity of the individuals and corporate entities engaged as investigators to conduct the internal investigation, including the solicitors and accountants appointed;
 - ii. Confirmation of whether the investigators identified at (i) above are independent of the Companies or, failing this, confirmation to the basis upon which you consider such parties to be appropriate investigators;
 - iii. Confirmation that the cost of the internal investigation is being met entirely by the Companies;
 - iv. A copy of the terms of reference and/or scope document;
 - v. Confirmation of the level of oversight and involvement that the DfT has had in relation to (a) setting the terms of reference and/or scope document, and (b) the progress of the investigation to date.
 - vi. Confirmation of whether any interim or final reports have been produced and, if so, please provide a copy of any such reports;
 - vii. Confirmation of whether there been any investigation of GTR specifically as part of the wider review. If so, please provide a copy of the report. If not, please confirm whether an investigation has been considered and, if so, please confirm why it has not been undertaken; and
 - viii. Confirmation of whether any interim or final reports (or any correspondence setting out the findings of the same) have been provided to any external bodies including but not limited to HMRC, the Serious Fraud Office (“SFO”), police, Action Fraud, the National Audit Office (“NAO”) or the Government Internal Audit Agency (“GIAA”).
- c. Of your intention to extend or replace the existing contractual arrangement with Govia for TSGN beyond 31 March 2022:
- i. Confirmation of whether you have determined that GTR or any group or associated company of the Companies should be awarded a contract to operate TSGN beyond 31 March 2022; and
 - ii. If so, please confirm whether such a contract is intended as a temporary measure pending either identification of an alternative

operating company or determination of ongoing investigations, or whether you intend to issue the contract irrespective of the allegations.

- d. Of your consideration of alternatives for the TSGN franchise beyond 31 March 2022:
 - i. Confirmation as to whether you are actively considering appointing the OLR to operate the TSGN franchise;
 - ii. Whether a comparative analysis has taken place of costs of using the OLR as against contracting a private TOC; and
 - iii. If an analysis of the type referred to at (d)(ii) above has been completed, please provide a copy.

- e. Of the GIAA report commissioned by the DfT to review existing controls and assurance procedures to protect the DfT and to advise on areas for improvement:
 - i. Please confirm whether you have received an interim or final report, or failing this confirm whether and/or when you expect to receive one;
 - ii. Please confirm whether any findings have been reached by the GIAA which relate to the contractual controls and/or internal DfT assurance procedures in relation to the GTR ERMA; and
 - iii. Please confirm whether the DfT has implemented any changes as a result of the GIAA findings identified at (e)(ii) above.

Refusal to provide information

12. We recognise that a number of documents referred to above will by their nature contain personal data or otherwise sensitive information. It would be appropriate for you to in such circumstances redact the elements of those documents before providing copies to us. It would not however be appropriate for you to reject disclosure of the same purely on the basis of those elements.

13. Your department will be aware that, prior to our instruction, BBR made an FOI request by letter dated 2 January 2022 for Go-Ahead's report which was announced on 9 December 2021. That request was refused on multiple grounds, and we anticipate that you will take the same or similar view in relation to some of the requests set out above.
14. Whilst this letter is not a letter sent under the Pre-Action Protocol for Judicial Review, the requests are made in the context of anticipated litigation in the event that the GTR contract is continued beyond March 2022. We therefore ask you to consider your response to our requests in the context of the disclosure obligations that will rest upon you in those circumstances.
15. In the event that you refuse to provide such information or documents we would be grateful if you would give a precise indication of the basis upon which you make that refusal (including reference to legal principles, legislation or contractual obligations as appropriate). In particular, in the event that you refuse to disclose information or documents on the basis that it is confidential, please provide evidence of that status by reference to contractual or other legal obligations binding on you.
16. If you allege that material is protected from disclosure by legal professional privilege, please explain precisely how that privilege attaches. We do not see any basis upon which you can assert legal professional privilege over documents provided to you by the Companies. You have no shared interest with these entities that would attract such privilege.
17. We see no basis upon which it can be asserted that placing the investigatory reports into the public domain is prejudicial to commercial interests. The funds involved are public monies and any findings of loss related to those monies is of fundamental public interest. Whilst we would anticipate some level of redaction of documentation provided to protect personal data and limited financial information, there is no commercial detriment to placing in the public domain details of financial loss created by the Companies, particularly where the loss was created under a contract that no longer exists and, in light of the substantial changes caused by the pandemic, are

unlikely to be reinstated in such terms. The public interest weighs heavily in the interest of transparency. If you disagree, please provide an illustrative example of the type of content you believe to be protected on this basis.

18. Finally, we note that in response to Ms Harrison's FOI request you relied upon s.44(1)(a) FOI Act 2000 and s.145(1) Railways Act 1993, which together prohibit disclosure without express consent. We presume, albeit it is not clear from your letter of 25 January 2022, that you have not taken steps to seek approval from Govia for the same. Please confirm and provide a copy of any refusal to provide approval.

Next steps

19. We have set out above a number of reasonable requests which we trust you will engage with in the spirit of openness and transparency. In the event that you do not engage with us and then go on to extend the Companies' involvement in the operation of the TSGN franchise beyond March 2022 without reaching final and public conclusions on the alleged fraud conducted by the Companies, our client anticipates that it will be necessary to commence judicial review proceedings to challenge that decision.

20. Please acknowledge safe receipt of this letter and respond within 14 days.

Yours faithfully

A handwritten signature in cursive script that reads "Devonshires".

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