

FAO: Secretary of State for Transport
Department for Transport
Great Minster House
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London
SW1P 4DR

Our Ref: MPG/BRI207.1

ALSO BY EMAIL
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11 February 2022

Dear Secretary of State

Anticipated award of Southern, Thameslink & Great Northern franchise to GTR
Our Clients: Bring Back British Rail & the Association of British Commuters

1. We write further to our letter of 1 February and your acknowledgment of 3 February.
2. Please note that we are now taking instructions from both Bring Back British Rail (“BBBR”) and the Association of British Commuters (“ABC”) in relation to this matter and write to you on behalf of both groups. As previously referenced in our letter of 1 February, ABC was the group behind the 2017 judicial review of the Department’s handling of the Southern Rail franchise. We acted for them in that matter and their interests align with those of BBBR in this matter.
3. Prior to our instruction in relation to this present matter, Ms Emily Yates of ABC made an FOI application to the Department on 14 January (reference F0020680). Adopting the phraseology of Ms Yates, this request sought provision of, amongst other things:
 - a. A copy of the terms, members and scope of the review (“the Review”) recently undertaken into the Southeastern franchise by LSER's two owning groups, the Go-Ahead Group and Keolis;
 - b. The names and roles of other parties working on that review;
 - c. Confirmation of who authored the terms and scope of this review;
 - d. Information on the expected timeline for the conclusion of this review;

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- e. The projected timeline and actions that will be taken as part of the DfT's own review of the material;
 - f. Terms and scope of the DfT review; and
 - g. For both owning group and DfT reviews, more information on the terms and scope of any investigation into Govia Thameslink Railway.
4. Your reply of 4 February fails to fully address all of these requests and we are concerned that your response (or lack thereof) indicates that you are unlikely to provide a full response to our own letter of 1 February. Accordingly we address these concerns on behalf of our clients in order to seek to avoid a further exchange of correspondence following your response to our letter. For avoidance of doubt, we do not act for Ms Yates in her personal capacity.

Failure to disclose terms, members and scope of the Review

5. In respect of a copy of the terms, members and scope of the review undertaken by LSER's owning groups, you have refused on the basis of s.41 of FOIA 2000. Would you please provide evidence of the alleged confidential basis upon which the information was provided. Specifically, please provide a copy of "*the Department's general confidentiality provisions*" referred to within Annex A to your letter of 4 February.
6. In any event, on the basis of this refusal we presume, unless otherwise corrected by you, that the terms and scope were produced and provided to you by LSER's owning groups. Accordingly, can you please confirm whether the Department had any input in the settlement of the terms and scope. We find it extraordinary that an issue as serious and time sensitive as the determination of the veracity of allegations of fraud within a TOC have been left to the corporate owners. There is an obvious, profound and unavoidable conflict of interest.
7. If we are wrong and in fact the Department did have a role to play in the production of the terms and scope for the Review, would you please provide a full copy, or whatever part of the terms and scope the Department did produce. Failing this, please provide a summary of the issues that the Department required, requested,

proposed or suggested to the owning groups that the terms and scope should include.

8. Similarly, we presume from your refusal that the membership (including both internal and external members) of the review group was confirmed to you by the owning groups. Again, we would query whether the Department had any involvement in the selection or approval of the members. We would ask that you confirm by return that you were made aware, in advance of the commencement of the Review, of the identity of the members and that you approved these members. Further, would you please confirm the basis upon which you assessed the appropriateness or otherwise of proposed members, and whether you rejected any that were proposed by LSER's owning groups.
9. You also rejected disclosure of this information under the qualified exemption in s.43(2) FOIA 2000. We fail to see the basis, on any reasonable assessment, that the disclosure of information relating to the alleged dishonest handling of public funds can be withheld on balance for commercial interests.
10. In order that we can weigh the factors given in favour of withholding against the factors in favour of disclosure, would you please address the following points:
 - a. Of *"Disclosure of the requested commercially sensitive information would be likely to significantly weaken the competitive position of the owning group bidders for future franchises as well as the Department."*

Would you please confirm how disclosure of the terms, scope and members of an internal review can possibly, either in and of themselves or in combination with other information, serve to weaken a competitive position. These documents do not contain the findings of the Review. To the extent that any specific questions set out in the terms or scope identify specific figures that would go to indicate profitability or performance targets, for example, these matters could be redacted.

- b. Of *“Release of financial and commercial material used to determine the terms and scope of the review would expose the Department’s internal decision-making processes, and the factors and financial assumptions it takes into account in making commercial decisions.”*

Release of underlying material is not sought within the FOI request, and so this reason for rejection is wrong. To the extent that underlying material used to produce the terms and scope may be contained in, attached to or referred to by documents which do fall within the ambit of the request, such documents could be partially redacted to entirely remove this risk. It is unreasonable to suggest that terms and scope could be ‘reverse engineered’ to identify *“factors and financial assumptions”* taken into account by the Department.

Indeed, if such material was contained in, attached to or referred to in the terms and scope, then the Department has already provided such information to the owning groups and has thereby already lost its competitive advantage to them.

Further, it would be unfair now to provide that information to the owning groups but to refuse to disclose that material more widely (i.e. to the general public and by implication to other potential TOCs). On your own argument, you have put the owning groups at an unfair competitive advantage to their industry rivals.

- c. Of *“Release of this commercially sensitive information would be likely to compromise the Government’s negotiating position for future competitions which would again harm the Department’s ability to secure the optimum bid from the market and therefore secure the best offer for passengers.”*

As above in relation to (b), this argument is not rational. Material disclosed can be redacted insofar as necessary to retain commercially sensitive data. It cannot be argued that the Department is protecting a negotiating position in future competitions if that information has already been shared with the

owning groups, who will undoubtedly bid in future competitions. Such an argument supports unfair competition.

- d. Of *“The information was provided to the Department in strict confidence and on the assumption that it would not be published. Disclosure of the information would be likely to damage the trust between the Department and franchisees. This would be likely to have an adverse effect on their owning groups’ willingness to bid for future franchises and on the value for money which can be achieved through future competitions.”*

Please clarify – was this information provided under terms of strict confidence, or was it on an *assumption* that it would not be published – both cannot be correct.

There has already been a breach of trust by LSER and the owning groups. TOCs should appreciate that, as a matter of public policy, where there has been a prima facie case of fraud or other serious dishonesty, or substantial and prolonged breach of contract (which has effectively been admitted), then there shall be a transparent review of their conduct. It is not reasonable to consider that such transparency would have any lasting or real effect on TOCs more generally.

In any event, this argument for withholding disclosure does not apply to material produced by the Department and provided to the owning groups. This argument on its own is insufficient to outweigh the strong public interest arguments in favour of disclosure.

Failure to disclose the names and roles of parties working on the Review

11. You have failed to respond to this request at all. It is unclear what, if any lawful basis upon which you could refuse to disclose this information.

12. We do not see any reasonable basis upon which you can refuse to disclose the identity of the professional firms engaged in the Review. Failure to do so only serves

to heighten our concern that either (a) you do not know their identities, (b) they were not independent, and / or (c) there has been insufficient external oversight of the Review.

Failure to confirm who authored the Review

13. Again, you have failed to respond to this request at all. We repeat our criticisms set out above at para 12.

Failure to provide sufficient information on the DfT's internal review of the Review

14. The request sought disclosure of information regarding the "*projected timeline and actions*" that would be taken as part of the DfT's internal review. The only response you provided was to state that "*The Department's review of the material is ongoing. The Department has not yet reached any decisions on any further actions that will be taken following its review.*"

15. In the context of our client's concerns regarding the upcoming decision on whether to extend or amend contractual relations with GTR by no later than 31 March 2022, this response is unacceptable. Obviously, in the absence of completing your internal review in very short order, we do not see how you can reasonably be in a position to consider the appropriateness or otherwise of TSGN remaining in the hands of GTR beyond March 2022.

16. We would therefore ask you to confirm:

- a. The anticipated date for conclusion of your review;
- b. Whether and when you intend to publish or disclose:
 - i. The review report, or any headline findings of your review;
 - ii. Any directions, requirements or requests issued to the owning companies or GTR in light of the findings of the review.
- c. Whether you anticipate requiring the owning groups to undertake any further internal investigation in light of inadequacies identified in the internal review;
- d. Whether you are taking steps to actively prepare the OLR for the possibility of taking on the operation to TSGN from the expiry of the existing GTR contract

term, in the event that your internal review concludes that TSGN should not remain under GTR operation; and

- e. Whether the conclusion of your internal investigation is dependent upon the publication of Go-Ahead's delayed FY20/21 accounts.

Requests

17. The bottom line to the information provided and refused in reply to Ms Yates' FOI request is that you have confirmed the owning groups' Review has been concluded and that you have a copy of the same which you are refusing to disclose.

18. That position causes significant concern to our clients who, quite reasonably, fear that public money is about to be put at risk again without adequate oversight or protection, with a company that now has a proven record of improperly retaining public funds (dishonestly or otherwise).

19. We would accordingly invite you to provide a copy of the Review (redacted to the minimum extent necessary to protect legitimate commercial interests and personal data), or failing this to provide a detailed summary that sets out the following:

- a. The terms and scope of the Review;
- b. The identities of the internal members and external advisors;
- c. The key findings; and
- d. Whether any conduct has been identified that merits a referral to the police, Serious Fraud Office and/or other investigatory body (and whether such referrals have been made).

OLR Readiness

20. Irrespective of whether you agree to provide the above, our clients urge you to disclose the state of readiness of the OLR to take on the operation of TSGN from 31 March 2022. This is a matter which is entirely sheltered from public scrutiny in that our client has no reliable information on whether the OLR is ready.

21. We are aware that the Department invested at least £20 million in the OLR in 2019¹. The Department has formerly commented that contracts with Arup, Ernst & Young and SNC-Lavalin are held on a flexible and easily scalable² basis. However, given suggestions in the press from 'unnamed sources' that the OLR may not have capacity, it is vital that the Department provides transparency on its current state of readiness.

22. A Department spokesperson has been recently quoted in the Telegraph³ as stating *"Our ongoing investigation into London South East Railway will determine whether it is appropriate to enter into this contract nearer this expiry date. The 'Operator of Last Resort' is always available if required in accordance with the secretary of state's statutory obligations."* In the light of this, our clients would be grateful for specific clarification as to whether:

- a. The OLR partners (whom we understand to be Arup Group, Ernst & Young and SNC-Lavalin Rail & Transit) have been formally notified that operation of TSGN may be transferred to it from 31 March 2022;
- b. The OLR partners have confirmed they have sufficient capacity to take on TSGN;
- c. A deadline has been fixed for a decision on transfer to the OLR;
- d. All necessary corporate entities are in place through which the OLR would operate TSGN; and
- e. All relevant personal and operational information and data has been provided by GTR, sufficiently up to date and correct, to allow for the transfer of operation to take place, including TUPE transfers.

23. The purpose of these questions is to ascertain whether the Department has taken appropriate and timely steps to make transfer to of TSGN to the OLR a realistic and favourable option in the circumstances. In the event that any of these steps have not been completed, we would be grateful if you would confirm when they shall be

¹ <https://www.gov.uk/government/publications/dft-spend-control-data-for-july-to-september-2019>

² <https://questions-statements.parliament.uk/written-questions/detail/2019-10-15/626>

³ <https://www.telegraph.co.uk/business/2022/01/24/govia-thameslink-races-avoid-nationalisation/>

completed by. Our clients are seeking to ensure that the Department does not allow itself, by effluxion of time, to be forced to extend the GTR contract.

24. We trust that you will agree any move by default into continued operation of TSGN by GTR through the failure to ready the OLR would be a deeply unsatisfactory outcome. Not only would it leave vital commuter rail lines in the operation of corporate entities over which serious questions of probity exist, but it would also miss an opportunity, perhaps for an extended period of time, to reform the network by severing ties with a TOC that has a history of performance issues.

25. Nothing in this letter serves to withdraw the questions and requests set out in our letter of 1 February. Our clients' rights remain fully reserved.

Yours faithfully

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

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