

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

29 November 2006

**Public Authority:** Department for Transport  
**Address:** Great Minster House  
76 Marsham Street  
London  
SW1 4DR

#### Summary

The complainant requested copies of the invitation to tender that had been issued to four bidders for a major rail franchise. The public authority initially withheld the information under section 43 on the basis that its disclosure would prejudice its commercial interests and under section 22, as it intended to publish the information at a later date. At internal review the public authority also applied section 36 – information likely to prejudice the conduct of public affairs. The public authority did release this information to the complainant once the franchise had been awarded and the public authority perceived it was no longer commercially sensitive. The Commissioner found that section 43 did not apply and that although section 36 was engaged, the exemption could not be maintained in the public interest. In relation to section 22 the Commissioner found that there was no settled intention to publish the information at the time the request was received and so the exemption could not be relied on. In light of this the Commissioner found the public authority had failed to provide the information within the 20 working days allowed by the Act. This constitutes a breach of section 10.

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#### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

#### The Request

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2. On the 18 January 2005 the Strategic Rail Authority (the 'SRA') announced that it had issued four pre-qualified applicants with invitations to tender for the Integrated Kent Franchise (the 'IKF'), the train service connecting the south east and channel tunnel to London. From these four applicants a preferred bidder would be selected. It was anticipated that the preferred bidder would be selected

by the early autumn of 2005, after which there would be further negotiations with that bidder prior to the franchise being awarded by the end of October 2005. At the same time as this announcement was made, the SRA published the Stakeholder Briefing Document which provided interested parties with a summary of the results of an earlier consultation process on the specifications for the IKF and as it states in its introduction "...sets out the commercial context and key issues which bidders are being asked to consider...".

3. On the 11 February 2005 the complainant wrote to the SRA and requested a copy of the "final Invitation to Tender document" that had recently been issued to contractors bidding for the IKF.
4. On the 24 February 2005 the SRA refused the request explaining that to release the information at this moment in time would, or would be likely to, prejudice the commercial interests of the SRA, or of others. The SRA therefore concluded that the information was exempt under section 43(2) of the Act. (The full text of the sections referred to is available in the Legal Annex attached to the end of this Notice.) Reference to the public interest arguments in favour of maintaining the exemption was limited to a brief comment that the SRA had concluded that it would not be in the public interest to make the invitation to tender available.
5. The refusal notice went on to advise the applicant that the invitation to tender would be made available through the SRA's publication scheme at "an appropriate point after the completion of the franchising competition".
6. The refusal notice also referred the complainant to the Stakeholder Briefing Document which the SRA had already made available to interested parties and which, it said, set out in some detail what the SRA's requirements were.
7. The complainant requested an internal review of this decision in a letter dated 17 March 2005. The complainant emphasised the strong public interest in publishing the invitation to tender and allowing interested parties to properly assess the assumptions on which the contractors were expected to base their bids, including subsidy levels, service specification and fare levels.
8. On the 1 June 2006 the complainant received what appears to be a letter sent by the SRA to all stakeholders updating them on developments on the IKF. The letter informed the recipient that it had refined the specifications issued to bidders and provided an annex which amended the Stakeholders Briefing Document to reflect these changes. Also enclosed were the contact details for the four consortia that had been invited to bid for the IKF. Finally the stakeholders were informed that following the introduction of The Railways Act 2005 the SRA was closing and that responsibility for the IKF would pass to the Department for Transport, however no time scale was provided for this. The letter did not refer to the complainant's request or the subsequent internal review.
9. On the 19 July 2005 the SRA wrote to the complainant informing him of the outcome of the internal review. The SRA stated that originally it had relied on two exemptions to refuse the request, section 43(2) – commercial interests, and section 22 which, in broad terms, provides an exemption for information which the

public authority intends to publish in the future. It is noted that although the refusal notice made reference to the invitation to tender being published at a later date the actual exemption was not cited.

10. The review letter expanded on the explanation that was provided in the original refusal notice regarding how the disclosure would prejudice commercial interests. The SRA argued that its position as the franchising authority would be harmed because disclosure would disrupt the procurement process and as a result;
  - the SRA's business reputation, or confidence that bidders may have in the SRA to run a professional procurement exercise, would be damaged; and/or
  - there would be a detrimental impact on the subsidy or premia offered by bidders in a franchise competition.
11. During the internal review process the SRA introduced a third exemption, section 36(2)(c), which provides that information is exempt where in the opinion of the qualified person (in the SRA's case, its Chief Executive Officer) releasing the information would prejudice the effective conduct of public affairs. The SRA took the view that disclosing the invitation to tender document during the franchise competition would disrupt the process which would stretch resources and distract bidders at a critical point in the process.
12. The SRA had considered the public interest arguments in relation to each of these exemptions and had concluded that on balance the public interest favoured maintaining the exemptions.

## The Investigation

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### Scope of the case

13. On 23 June 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the application of the exemption provided by section 43(2) – commercial interests. It was also clear from the complaint that he was concerned with the time being taken to deal with his request and the internal review as it was critical for him to obtain the information before the tendering process was completed.
14. At this stage the request had not gone through the internal review. However the Commissioner did not have the opportunity to consider the complaint until October 2005 by which time the complainant had written again on the 1 August 2005 following the conclusion of the SRA's internal review. In his letter of the 1 August 2005 the complainant argued that the three exemptions cited were not applicable. He argued that disclosing the invitation to tender would not prejudice the SRA's commercial interests. He disputed that there was any policy in relation to publishing invitations to tender once contracts were awarded and that the application of section 36 relied on an unsupported assertion that disclosure would disrupt the procurement process. He also argued that in assessing the public

interest the SRA failed to properly take account of factors in favour of disclosure. Furthermore he contended that since the SRA had claimed that it had taken account of stakeholders' comments in drafting the invitation to tender there was a public interest in revealing the extent to which those comments were reflected in the invitation to tender. He also countered the argument presented by the SRA that the Stakeholders Bid Document met the material needs of interested parties by suggesting that the SRA was not in a position to determine what the material needs of interested parties were.

## Chronology

15. **13 October 2005.** The Commissioner rang the SRA and was advised that the matter should be addressed to the Secretariat Team Manager. The Commissioner was also informed that the SRA would cease to exist on the 31 December 2005 but that many functions had already been transferred to the Department for Transport.
16. **14 October 2005.** The Commissioner wrote to the Secretariat Team Manager. In relation to the application of section 43(2) the SRA was asked to explain in more detail how disclosing the invitation to tender would result in the prejudice predicted in its review letter of the 19 July 2005. The Commissioner also asked the SRA to provide evidence that at the time of the request it had a settled intention to publish the invitation to tender at a future date. The Commissioner also pointed out to the SRA that the application of section 22 depended, in part, on it being reasonable in all the circumstances to withhold the information until the planned publication date. In light of this the Commissioner asked the SRA to clarify what issues it had taken into account when applying this test of reasonableness. The Commissioner invited any further submission that the SRA may wish to make in support of its application of section 36 and finally requested a copy of the invitation to tender itself.
17. **28 October 2005.** The Commissioner was advised that the Legal Services Directorate of the Department for Transport would be preparing a response and so forwarded a copy of his opening letter to that directorate.
18. **11 November 2005.** A representative of the National Union of Rail, Maritime & Transport Workers (the RMT) contacted the Commissioner on behalf of the complainant. The RMT was concerned over the length of time it was taking to resolve the complaint as it was expecting the preferred bidder to be announced at the end of November after which the value of the information to the complainant would diminish. The RMT also stressed that the request was not for any information submitted by the bidders, it was solely for the invitation to tender that had already been issued to the four pre-qualified bidders.
19. **11 November 2005.** A response was received from the SRA, forwarded by the Department for Transport. Enclosed was the invitation to tender together with all the appendices that had been provided to the bidders. The SRA emphasised that this information had been provided in confidence.

20. In relation to the application of s 43(2) – commercial interests, the SRA declined to identify each commercially sensitive section of the invitation to tender document, primarily, it is assumed, because of the amount of information involved (the invitation to tender is itself over 80 pages and there are another 550 pages contained in a further 8 annexes).
21. The SRA reiterated the concerns over the potential disruption to the tendering process that had been expressed in its review letter to the complainant (see paragraph 10 above) and explained that all the bidders were required to sign a confidentiality clause at the start of the tendering process. This was because the invitation to tender document contained information that might be adversely interpreted by stakeholders and provided seven examples of provisions it considered controversial and therefore commercially sensitive. These included requirements for bidders to undertake an analysis of future pension liabilities and staff numbers, the fact that bidders were told not to assume any limit on the extension of driver only operations. The SRA was concerned that some stakeholders would lobby the bidders to reject what they (the stakeholders) perceived to be controversial proposals. There was also concern that meetings between bidders and stakeholders might focus on discussions of these sensitive proposals, which may never be implemented, and that this may frustrate the procurement process. Similarly, the SRA argued that bidders would be deterred from submitting a “genuinely innovative” High Return Alternative Bid i.e. a proposal that, although based on the same overall objectives set out in the invitation to tender, aims to minimise costs/ maximise returns. Finally the SRA considered that those opposed to the franchise agreement may choose to manipulate the information in the invitation to tender document and seek to generate adverse media comment. This, the SRA argued, would mean bids were prepared in an adversarial environment and result in more conservative bids being submitted to the detriment of the SRA.
22. In light of the above the SRA concluded that there was a real risk that disclosing the information would jeopardise the IKF procurement exercise. In support of this decision the SRA referred to guidance on Freedom of Information and public sector procurement that has been produced by the Office of Government Commerce. This guidance, Freedom of Information (Civil Procurement) Policy and Guidance - Version 1.1, advises that invitation to tender documents should not, as a general rule, be released ‘in phase’. The SRA had interpreted this as meaning the information should not be completed until the contract is let.
23. In applying the public interest test to section 43(2) the SRA recognised the value that quality information had in assisting public debate. However it argued that this had been met by the publication of the Stakeholders Bid Document, which it described as being the invitation to tender document, but with the commercially sensitive provisions excised. Therefore it believed the public interest favoured maintaining the exemption.
24. In relation to section 22 – information intended for future publication, the SRA enclosed a copy of a chain of emails between members of its Freedom of Information group discussing how to deal with requests for invitation to tender documentation. That discussion, which had been prompted by an earlier request,

concluded that it was reasonable in all the circumstances to make the invitations to tender available through the SRA's publication scheme once a franchise competition had been concluded. The SRA claims that, although not documented, in reaching this decision the group took account of the following factors;

- the publication of the Stakeholders Bid Briefing for the IKF to interested parties,
- that stakeholders were not prejudiced by delaying publication of the invitation to tender as they had all the information they required to engage with the bidders, and,
- the risk of disruption to the procurement process.

25. The emails span a period from the 8 February 2005 to 17 February 2005 and relate to a request by a journalist from the specialist press, presumably for the IKF invitation to tender document.

26. In its letter of the 11 November 2005, which had been prepared in conjunction with its Chief Executive Officer, its qualified person, the SRA argued that the application of section 36 – prejudice to the conduct of public affairs, was justified because it was important to protect the relationship between the public and private sectors in order to conduct successful procurement exercises. If the relationship was damaged there would be a risk that;

- the fear of commercially sensitive information being disclosed would discourage private sector companies doing business with the public sector,
- companies' legitimate commercial concerns would be overridden by demands for information which could be used for purposes other than which it was prepared,
- companies would withhold information from the public sector making the choice of best bidder more uncertain.

27. **21 December 2005.** The Commissioner wrote to the SRA noting that in relation to section 43(2) – Commercial Interests, there was no suggestion that releasing the invitation to tender document would prejudice the competitive position of any of the bidders in relation to their rivals in the tendering process. The SRA was asked to provide more details on how releasing the invitation to tender document would disrupt the tendering process. It was put to the SRA that those parties against the franchise would already be familiar with the sorts of issues raised by such franchising operation and so could still mount opposition to the franchise. The Commissioner was also aware having viewed the Stakeholder Briefing Document, that there were references to continuing dialogue between stakeholders, bidders and the SRA (paragraph 2.8 of the Stakeholder Bid Document). Therefore it seemed to the Commissioner that these meetings would present an opportunity to voice that opposition to the franchise. In light of this the Commissioner was not clear the extent to which disclosing the information would increase the risk of the tendering process being disrupted.

28. It seemed plausible to anticipate that the bidders would have experience of operating rail franchises and similar procurement exercises, and so would be ready to deal with the pressure associated with doing business in this environment. Therefore further evidence that there was a real risk of bidders making less attractive bids as a result of any pressure brought to bear by stakeholders was also requested.
29. Similarly, further information was requested to support the SRA's assertion that the disclosure would undermine the private sector's confidence in it to run a professional procurement exercise as it was not clear that this would be the result. The private sector may have some anxiety over the impact of Freedom of Information on its dealings with the public sector, but it seemed reasonable to assume that private companies who did business with the public authorities would have expected the introduction of the Act to lead to greater transparency around procurement.
30. Section 22 provides that where there is an intention to publish the information that has been requested at a future date the information exempt. However for the exemption to be engaged the intention to publish must exist at the time the request is received, which is taken to be the time at which the request is received by the public authority. In light of this the Commissioner informed the SRA it was not clear that the timetable for publishing the invitation to tender document was decided upon prior to the complainant's request being received. To help establish whether the exemption applied the SRA was asked to clarify the following issues:
  - what was the content of a report on the disclosure of invitations to tender referred to in one of the emails enclosed in the SRA's letter of the 11 November 2005,
  - the date the complainant's request was received,
  - when the actual policy regarding the publication of invitations to tender was actually adopted and who was responsible for that decision.
  - at what stage of the tendering procedure would invitations to tender be published.
31. The Commissioner noted that in applying section 36 the SRA was concerned with the impact on the private sector's willingness to do business with public authorities if private companies feared this would lead to commercially sensitive information about them being disclosed under the Act. However the Commissioner pointed out that it was very unlikely that invitations to tender would contain sensitive information about those bidding for a contract. He also requested further information on what public interest arguments had been considered in favour of disclosure.
32. Confirmation was requested that once the SRA ceased to exist the Department for Transport would be responsible for dealing with this matter.

33. **16 January 2006.** The RMT advised the Commissioner that the franchise had now been awarded. The RMT explained that although this meant the actual information was of less value to the complainant, it still believed that there was an important matter of principle at stake that needed to be addressed. There would be similar franchises let in the future and so a decision in this case would help public authorities in responding promptly to future requests for such information. The RMT had previously expressed concern that there was scope for public authorities to frustrate attempts to access information by lengthy internal review procedures after which an applicant may then have to refer the issue to the Commissioner. Delays in resolving rights of access to such information were, it believed, critical when information was of particular value only for the limited period leading up to the letting of the franchise.
34. **20 January 2006.** The Office of Government Commerce (the 'OGC') responded to a query relating the guidance it had produced on Freedom of Information referred to in paragraph 22 above. The OGC confirmed that when advising that requirements information, including invitations to tender, should not be released in 'phase', the phase referred to what they termed the 'initiation phase' which ended upon issuing the invitations to tender. It went on to say that it followed that once the invitations to tender had been issued to bidders, the information was much less likely to be subject to an exemption. However it did add that ultimately the sensitivity of the information had to be considered on a case by case basis. It should be noted that the OGC were not asked to comment on the circumstances of this particular case.
35. **23 January 2006.** The SRA advised the Commissioner that as the SRA would close at the end of the financial year it seemed sensible for the Department for Transport to adopt the case.
36. **23 February 2006.** The Department for Transport informed the Commissioner that it was now in a position to release the invitation to tender document to the complainant as the franchise award had been made on the 30 November 2005. However it remained of the view that at the time the original request was made, the information was sensitive because the tendering process was still underway and its disclosure could have prejudiced the commercial interests of both the SRA and the bidders. It reiterated that there had always been a commitment to publish the information once the "commercial and operational sensitivities had reduced", and the Department for Transport would assess any future requests for such information on a case by case basis taking account of the sensitivities that existed at the time.
37. **9 March 2006.** The Commissioner contacted the Department for Transport to advise it that it had not responded to the questions raised in his letter of the 21 December 2005 and that he was not persuaded by the arguments presented so far in support of the three exemptions that had been relied on. He also advised the Department for Transport that it may have misinterpreted the advice contained in the Office of Government Commerce's guidance.



38. **28 March 2006.** The RMT responded to a letter dated 9 March 2006 from the Commissioner offering the RMT the opportunity to present any further public interest arguments that favoured releasing the information at the time the request was original made. The RMT referred to the SRA's refusal notice (see paragraphs 4-6 above) in which it had said that the Stakeholders Briefing Document "set out in some detail what the SRA is asking of bidders". The RMT claimed that having now compared this document to the invitation to tender, it had identified a number of significant differences, for example changes to ticketing arrangements which it in its view could have a significant impact on jobs. Similarly it claimed the possibility of removing more guards from trains, which was not explicit in the briefing document, had implications for jobs, industrial relations and safety.
39. The RMT concluded that had this information been available whilst the bidding process was still ongoing, it would have allowed an informed public debate on whether the proposals were in the public and passengers' interest that may have influenced the basis upon which the franchise was offered. The RMT contended that such a public debate was particularly important considering the amount of public subsidy that would be paid to the franchise holder.
40. **1 September 2006.** The Commissioner wrote again to the Department for Transport advising it that despite being sent a reminder on the 9 March 2006 he had not yet had a full response to the issues raised in his letter of the 21 December 2005.
41. **20 October 2006.** The Department for Transport provided a response. In relation to section 22 the Department for Transport referred to the documentary evidence that had been enclosed with the SRA's letter of the 11 November 2006 and maintained this evidence showed that by 17 January 2005 there was a settled intention to publish the invitation to tender once the franchising operation was complete. As is explained in more detail in paragraphs 73 – 75 the Commissioner's view is that the Department for Transport gave this date in error and that the correct date should have been the 17 February 2005. The Department for Transport went on to explain that in its view the Stakeholders' Briefing Document represented an overview of the procurement process and provided a comprehensive package of information that would allow meaningful consultation with stakeholders. In light of this the Department for Transport considered that it was reasonable to expect the complainant to wait until the planned publication date. Unfortunately the Department for Transport did not clarify the date on which the complainant's request had been received.
42. In relation to section 43 the Department for Transport disputed that they had misinterpreted the advice provided by the Office of Government Commerce (see paras 34 & 37) It explained that because of the nature of rail franchise procurement, in which invitations to tender were only issued to a limited number of bidders who are bound by a confidentiality agreement, they had interpreted the term 'in phase' as being a period that did not end until the franchise had been let. It had raised the matter with the Office of Government Commerce and the Office of Government Commerce had not disagreed with its interpretation. It is not clear whether the matter was raised when the exemption was initially considered at the

beginning of 2005 or in response to the observations contained in the Commissioner's letter of 9 March 2006.

43. In relation to section 36 the Department for Transport argued that to disclose the invitation to tender at, what it described as, a crucial time would have resulted in negative lobbying which would have inhibited officials in properly considering the merits of the different tenders. The Department for Transport went on to clarify that it was only in considering the matter at the internal review stage, that the exemption provided by section 36 had been applied by SRA's qualified person.
44. **16 November 2006.** The Commissioner again sought clarification of the date on which the SRA had received the complainant's request.
45. **21 November 2006.** The Department for Transport responded that it did not have a record of when the request had been received.
46. **27 November 2006.** The RMT was contacted by phone and asked whether it was able to confirm how the request had been sent to the SRA. The RMT explained that, although it was unable to provide proof, it was confident that the request would have been sent by first class mail as this was the established office practice for correspondence of this nature.

## Findings of Fact

47. The request was made on the 11 February 2005. The complainant received a copy of the information sometime in February 2006.
48. At the time the request was initially refused on 24 February 2005 the SRA's qualified person had not considered the application of section 36.

## Analysis

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### Exemption

#### Section 43(2) – Commercial Interests

49. Section 43 provides an exemption where the disclosure of information would prejudice the commercial interests of any person including the public authority. It is accepted that within the invitation to tender document there are proposals that may be controversial and examples of these were presented by the SRA in its letter to Commissioner dated 11 November 2005 as being commercially sensitive (see paragraph 21 above). The Commissioner is not satisfied that the information referred to in these examples is itself commercially sensitive even though it may generate public debate if disclosed. The thrust of the SRA/Department for Transport's argument is that the disclosure of the information would enable any party opposed to the franchise to lobby the bidders and influence the nature of the tender they submitted. This would be compounded by the effect of adverse media attention. This, it is argued, would result in poorer quality bids, and so prejudicing the commercial interests of the SRA.

50. The Commissioner acknowledges that compiling bids in such an environment may not actually promote the successful conclusion of a procurement exercise. However the Commissioner anticipates that the bidders would have the experience, capability and resources to manage relations with stakeholders. In deed the SRA circulated contact details for the four pre-qualified bidders to stakeholders. More importantly the Commissioner is not persuaded that contractors would be deflected from preparing their most competitive bids based on the public authority's requirements in order to provide them with the best opportunity of winning, what is assumed to be, a lucrative franchise. Therefore the Commissioner is not persuaded that ultimately the SRA would be commercially disadvantaged by the disclosure.
51. It is noted that the RMT has made it clear that it would seek to use the information to fuel a public debate on the franchise in general as well as on particular issues of concern to it. However in its email of the 28 March 2006 it made reference to lobbying the SRA and government for changes to the terms of the invitation to tender rather than attempting to influence the bidders. It does seem logical that an interest group would direct its efforts on those who have most control on the terms of the invitation to tender. It is not the Commissioner's intention to examine the motives of this particular complainant in determining the sensitivity of the information. However the complainant is representative of a section of the stakeholders. Therefore the RMT's comments on how the information could be used by opponents to the franchise process are relevant.
52. In R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 Mr Justice Munby considered the term 'likely to prejudice' as used in the Data Protection Act 1998 and concluded that there had to be "a very significant and weighty chance" of prejudice occurring. This decision informed the Information Tribunal's consideration of the commercial interest exemption under the Act in John Connor Press Associates Limited and The Information Commissioner [Appeal Number EA/2005/0005]. In this case the Tribunal interpreted the expression 'likely to prejudice' as being more than a "hypothetical or remote possibility", there had to be "a real and significant risk" of commercial interests being prejudiced. Based on the information provided by the SRA/Department for Transport, the Commissioner is not persuaded that this threshold is met. There does not seem to be a realistic prospect that the SRA/Department for Transport's commercial interests would have been prejudiced if the invitation to tender document had been disclosed at the time requested. The exemption is not engaged.
53. As the exemption is not engaged there is no requirement to consider the public interest in maintaining the exemption.

### **Section 36(2)(c)**

54. Section 36(2)(c) provides that information is exempt where in the opinion of the qualified person its disclosure would, or would be likely to, prejudice the conduct of public affairs. Its application is dependant on the qualified person reaching a reasonable opinion on the likelihood of the prejudice occurring. The

Commissioner does not need to agree with qualified person's opinion, but he does have to consider whether it was reasonable for the qualified person to reach that opinion. In other words he does not have to agree that the conduct of public affairs would be prejudiced in the manner described. The Commissioner does however have to satisfy himself that the qualified person's opinion is not irrational. The Commissioner's approach is set out in more detail in his Awareness Guidance No 25.

55. It is noted that this exemption was not initially claimed at the time the request was first refused on the 24 February 2005, and the Department for Transport accept that the relevant qualified person had not considered the matter at that time. Therefore the exemption could not have been engaged at the time the request was first refused.
56. However in its review letter of the 19 July 2005 the SRA informed the complainant that its Chief Executive Officer, its qualified person, had formed the opinion that, if the information was released during the franchise competition the procurement process would be disrupted and that this would prejudice the effective conduct of public affairs. The SRA expanded on its reason for claiming section 36 in its letter to the Commissioner dated 11 November 2005 (see paragraph 26 above). It argued that successful public sector procurement exercises depended upon mutual trust between the private and public sectors and claimed that if this relationship broke down there would be a risk that private companies would be deterred from doing business with the public sector altogether, or at least be reluctant to provide any information that could prejudice their own commercial interest for fear it would be released under the Act. If the procurement process was disrupted in the manner envisaged by the SRA then this would constitute a prejudice to public affairs.
57. It is noted that the SRA argued that it intended to release the information at a future date and indeed has now released the information. It is not clear how the timing of the release of this information would change the interpretation that the SRA claim private companies would place on the disclosure i.e. that it would lead them to believe that sensitive information about themselves would also be released. However the SRA also argued in its letter of the 11 November 2005 that disclosing this information during the franchise operation would disrupt the tendering process and lead to a diversion of resources. This appears to be a very similar argument to that presented in favour of applying the commercial interest exemption provided by section 43.
58. In its letter of the 20 October 2006 the Department for Transport introduces a new explanation of how the negative lobbying that would result if the information was disclosed would prejudice the conduct of public affairs. The Department for Transport explains that this lobbying would deter officials from considering the merits of each bid and so increasing the risk that of a weaker bid could succeed.
59. The Commissioner is prepared to accept that it is the reasonable opinion of the qualified person that releasing this information would prejudice the conduct of public affairs. The exemption is engaged.

## Public Interest

60. However in assessing the public interest in maintaining the exemption it is necessary to consider the extent to which future tendering processes may be compromised and weigh this against the public interest arguments in favour of disclosure. The Commissioner agrees that the nature of the relationship between a public authority and a private sector contractor is a contributory factor in successful procurement exercises. However the Commissioner is less convinced that the disclosure of invitations to tender once they had been issued to bidders would significantly undermine this relationship. As the Commissioner put to the SRA in his letter of the 21 December 2005, it seems reasonable to expect that those private companies doing business with public authorities would anticipate a greater level of transparency with the advent of Freedom of Information.
61. Furthermore there is a clear distinction between information contained in an invitation to tender, which does not contain information about the bidders, and the information that bidders provide to a public authority as part of their tenders. Therefore it is not clear the extent to which private sector companies would draw the conclusion that if the SRA were prepared to release the invitation to tender, it would also be prepared release commercially sensitive information that bidders had confided to the SRA. The Commissioner recognises that in the early days of Freedom of Information there may be some anxiety within the private sector as to the types of information that may be released. However it is not obvious that there is significant risk of the concerns identified by the SRA in paragraph 26 above being realised if the invitation to tender had been disclosed at the time requested. Certainly no evidence has been presented that suggests an appreciable number of companies would jeopardise their competitiveness when tendering for contracts by declining to provide the commercial information that a public authority require.
62. The Department for Transport's has also argued that officials would be inhibited in their consideration of the merits of the different bids. Clearly there is a very strong public interest in ensuring that public money is spent effectively, especially considering the substantial sums of money involved and the impact rail service can have on the regional and even national economy. However it is again necessary for the Commissioner to take a view on the degree to which these interests would be harmed by the disclosure in order to weigh public interest in favour of maintaining the exemption.
63. The Commissioner doubts that officials of the seniority that would consider the bids would easily be deflected from properly discharging their duties, particularly as they would recognise that the importance of the decision being made required the highest standards of professionalism.
64. In light of the above the Commissioner judges there is little public interest in maintaining the exemption, however it necessary to weigh this against the public interest in disclosing the information.
65. The provision of an efficient rail service is a matter of great public interest, it has a direct impact on a great many commuters as well as a affecting the economic

prospects for the region and impacting on the environment. Whilst these wide reaching affects may bolster arguments that the procurement exercise should proceed without interruption, it also identifies that this is a matter of public debate. This is an issue which the SRA accepted as evidenced both by the public consultation that it conducted prior to issuing the invitation to tender documentation and the publication of the Stakeholders Briefing Document. The Commissioner recognises that the public interest has been met to some extent by the public debate facilitated by the consultation procedures adopted by the SRA.

66. However the quality and value of any public debate depends on the accuracy of the information on which that debate is based. Whilst some interested bodies may have a degree of specialist knowledge that would allow them to enter into an informed debate on the franchise operation, it is nevertheless true that access to the detailed invitation to tender document would improve the quality of the debate. In the Department for Transport's letter of the 20 October 2006 it referred to the Stakeholders Briefing Document as an overview of the procurement process which contained all the information that stakeholders needed in order to engage in a meaningful consultation. However in order to fully appreciate the potential implications of the franchise it is still necessary to have the details as well as the overview. This is supported by the RMT's submission of 28 March 2006 (see paragraph 38) in which they identify particular issues of concern contained in the invitation to tender document that was omitted from the Stakeholders Briefing Document. Bearing in mind that, according to the Stakeholders Briefing Document, it was envisaged that consultation with, at least some, stakeholders would continue once the invitations to tender had been issued, there is a public interest allowing access to such information.
67. When presenting arguments in support of its application of the commercial interests exemption the SRA argued against providing information that would allow opponents to the franchise operation to lobby for changes to the invitation to tender as it believes that would have disrupted the tendering process. This could be interpreted as an argument against encouraging public debate or at least controlling the parameters of that debate. If nothing else it is recognition that the privatisation of the rail network is an issue that generates significant public debate. The Commissioner recognises the need to manage consultation processes in order to draw public debate of an issue to conclusion and progress matters in a timely manner (see Decision Notice FER0086629). However he is also alert to the fact that in this case there appears to have been an intention to continue the consultation process in some form following the issue of the invitations to tender. Even though it is understood that the RMT was not involved in these latter stages of the consultation process, in weighing up the public interest the Commissioner has taken account of the public interest in a disclosure to the public at large including any parties that were involved in these later stages of the consultation process as well as any party that may have a legitimate interest in protecting service levels or safeguarding jobs.
68. The Commissioner recognises that although there is a public interest in debating the pros and cons of rail franchises in general and in allowing transparency of decisions that have already been made, there is a heightened public interest in

allowing access to information prior to decisions being taken, when there is potential for the public debate to inform and influence the procurement process.

69. The RMT has argued that there is a public interest in having access to information that would reveal the extent to which the SRA has taken account of the submissions it received during the earlier stage of consultation. The Commissioner agrees that where a public authority has consulted with interested parties, presumably on the basis that those representations would influence the development of some proposals e.g. an invitation to tender, then the confidence that those respondents would have that their participation in such exercises was worthwhile would be enhanced if information was released showing that their views had been taken into account. This in turn would encourage participation in future consultation exercises. However an analysis of how consultees had shaped the invitation to tender could have been carried out just as effectively once the franchise had been awarded. Those consultees whose views may not have proved persuasive to the SRA would have an incentive to continue petitioning the SRA once they became aware that they had failed to exert influence. However bearing in mind that it seems reasonable for a public authority to be able to manage any consultation exercise and bring it to a conclusion it is not clear that this in itself is in the public interest.
70. The Commissioner has concluded that there is little prospect of significant harm arising out of the disclosure of this information and therefore little public interest in maintaining the exemption. He has found that there a public interest in releasing the information as it would lead to a more informed public debate whilst there still at least the possibility of influencing the outcome of the franchise. The Commissioner therefore concludes that the public interest in disclosing the information is at least equal to that in maintaining the exemption. The public interest test established by section 2(2)(b) provides that an exemption can only be relied on where the public interest in maintaining the exemption **outweighs** the public interest in disclosing the information. In light of this the Commissioner's decision is that the exemption provided by section 36 cannot be maintained.

## **Section 22 - Information intended for future publication.**

71. The exemption provided by section 22 allows information to be withheld if there is an intention to publish that information at sometime in the future so long as it is reasonable in all the circumstances to wait until the time of publication. For the exemption to be engaged however the exemption must be held with view to publication at the time the request was made.
72. The request was made on Friday 11 February 2005. The SRA were asked to confirm on what date the request was received in the Commissioner's letter dated 21 December 2005 (see paragraph 30 above) but declined to do so. Unfortunately the Department for Transport were also unable to clarify the matter (see paragraph 41 above and 45). However if the request was sent first class, as suggested by the RMT (see paragraph 46) it is reasonable to assume that the request would have been delivered by the Monday the 14 February 2005, which the Commissioner has taken to be the date the request was made. Technically therefore, the exemption will not be engaged unless there is evidence that the

SRA had already taken the decision to publish this information by the 14 February 2005. Even if the request had been sent second class it should have been delivered by the 16 February 2005 at the very latest.

73. The chain of emails that the SRA provided to support its application of this exemption (see paragraph 26 above) commence on the 8 February 2005. The SRA has explained that this debate was sparked in part by the need to respond to another, earlier, request for the IKF invitation to tender. The issue of providing invitations to tender through the SRA's publication schemes is first raised on the 16 February and on the 17 February 2005 the chain concludes with what appears to be agreement from senior management that the earlier request should be refused on the basis that it would prejudice commercial interests and this position is strengthened by the SRA's view that the information should be made available through its publication scheme in the future, at a date to coincide with the inclusion of the franchise agreement in a public register.
74. Neither the SRA or the Department for Transport have provided any further evidence that there was an intention to publish the invitation to tender at the time the request was received. A copy of the SRA's publication scheme has been accessed from its website. The version available is shown as being revised in June 2005. The first class of information described by the publication scheme relates to franchising; however there is no mention of invitations to tender being available under this class.
75. In its letter of 20 October 2006 the Department for Transport claim the chain of emails provided by the SRA identify that it had reached a decision to publish the invitations at a future date by 17 January 2005 (see paragraph 41). This seems to be an error on behalf of the department as the final emails concluding the debate on the intention to publish are clearly dated 17 February 2005. The Commissioner is satisfied that the department's reference to the 17 January 2005 should be a reference to 17 February 2005 and confirms this as the earliest date on which there was a settled intention to publish.
76. Even though the SRA/Department for Transport did provide the complainant with a copy of the invitation to tender once the franchise had been let there is clearly a distinction between providing an individual applicant with information in response to an earlier request once the public authority perceives the information is no longer sensitive and proactively disseminating or publishing the information. The Commissioner concludes that the exemption was not engaged at the time the information was requested.
77. It seems likely that the SRA did make the decision to publish the information, once the franchise had been awarded, some time after the complainant's request was received. However the exemption explicitly states in section 22(1)(b) that for the information to be exempt, the intention to publish must exist at the time the request was made. Hence any change in circumstances that occur following the receipt of a request cannot alter the status of this information in respect of whether or not it is exempt under section 22.



78. Since it has not been established that, at the time the request was received, there was a settled intention to publish the information, it is not necessary to consider whether it was reasonable to expect the complainant to wait until the due publication date or the public interest in maintaining the exemption.

## **The Decision**

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79. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act since the exemptions it initially relied on to withhold the information either did not apply, or could not be maintained in the public interest. However although this led to the public authority originally withholding the information, it did, eventually, provide the information. In light of this the Commissioner's decision is that the public authority failed to comply with section 10(1) of the Act.
80. Section 10(1) provides that a public authority should comply with a request promptly and in any event not later than the twentieth working day following the date of receipt.
81. In relation to the application of the exemptions relied on by the public authority the Commissioner's decision is as follows:
82. The information is not exempt information under section 43 - (commercial interests).
83. The information is exempt under section 36 –(prejudice to the conduct of public affairs), however the exemption could not be maintained in the public interest.
84. The information was not exempt under section 22 – (information intended for future publication)

## **Steps Required**

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82. The Commissioner requires no steps to be taken since the public authority has now provided the complainant with a copy of the information that it originally withheld.

## Right of Appeal

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83. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 29<sup>th</sup> day of November 2006**

**Signed .....**

**Richard Thomas  
Information Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF  
Legal Annex**

### **General Right of Access to Information**

1. - (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.

### **Time for Compliance with a Request**

10. - (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

### **Information intended for future publication**

22. - (1) Information is exempt information if-

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).

### **Effective conduct of public affairs.**

36. - (1) This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

(5) In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
  - (i) a Minister of the Crown,
  - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
  - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.

(6) Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions.

(7) A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

### **Commercial interests.**

43. - (1) Information is exempt information if it constitutes a trade secret.

(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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).