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XXXX  
Department for Transport  
Zone 2/19  
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London  
SW1P 4DR  
Direct Line: 020 7944 0075

Web Site: [www.dft.gov.uk](http://www.dft.gov.uk)

E-mail: XXXX  
Your Ref: RRO/CJCW/LJW

Our Ref: F0007087

14 January 2011

Dear Sirs

**Freedom of Information Act request in relation to the sale of HS1 Limited (the "Company") -**

I refer to your Freedom of Information request dated 18 November 2010 on behalf of the Barlow Consortium in respect of the sale of the Company to a consortium comprising Borealis Infrastructure and Ontario Teachers' Pension Plan (the "Purchaser").

Following a search of our paper and electronic records, I can confirm that the Department for Transport holds information which falls within a number of the parts of your request, namely:

- (i)(a) the agreement for the sale and purchase of shares in the Company and CTRL (UK) Limited entered into by the Purchaser and London & Continental Railways Limited (the "Vendor");
- (i)(c) the statement of calculation of the enterprise value of the Company submitted by the Purchaser;
- (i)(d) the direct agreements entered into or proposed to be entered into by the Secretary of State in respect of the Company and its business and/or the comfort letters provided by the commercial counterparties of the Company or the Secretary of State in relation to the Company or its businesses;
- (iv) all materials, advice and commentary on the relative merits of the bids received that were submitted to or are held by the Department for Transport, including those on which the decision to select the Purchaser and/or reject the Barlow Consortium was made;
- (v) bid letters and related materials received from all bidders (including the Purchaser) on or around 29 October 2010;
- (vi) details of feedback given to all bidders (including the Purchaser) following receipt of bids on or around 29 October 2010;
- (vii) revised bids and related materials received from all bidders (including the Purchaser) following the feedback referred to in (vi); and

- (viii) the "risk assessment letters" setting out bidders' (including the Purchaser) analyses of the merger control issues raised by their bids.

However, much of this information is also held by the Vendor and, to avoid duplication, it has been decided that, where information is held by both the Department and by the Vendor, that your request will be addressed by the Vendor. In respect of such information, the Department agrees with the decisions and explanations set out in the attached letter from Herbert Smith LLP.

The information you have requested which is held exclusively by the Department falls within parts (i)(d), (iv) and (vi) of your request.

Some information is being withheld on the basis of the exemptions provided for in Sections 29, 40, 42 and 43 of the Freedom of Information Act 2000.

A list of documents exclusively held by the Department is set out at **Annex A**, and copies are enclosed with this letter, some of which contain redactions. The list does not include documents which are being withheld.

**Annex B** to this letter sets out the Section 29 exemption in full and explains the reasons why we believe the exemption applies. In applying this exemption we have had to balance the public interest in withholding the information against the public interest in disclosure. The public interest factors for and against disclosure are also set out in the Annex.

**Annex C** to this letter sets out the Section 40 exemption in full and explains the reasons why we believe the exemption applies.

**Annex D** to this letter sets out the Section 42 exemption in full and explains the reasons why we believe the exemption applies. In applying this exemption we have again had to balance the public interest in withholding the information against the public interest in disclosure. The public interest factors for and against disclosure are also set out in the Annex.

**Annex E** to this letter sets out the Section 43 exemption in full and explains the reasons why we believe the exemption applies. In applying this exemption we have again had to balance the public interest in withholding the information against the public interest in disclosure. The public interest factors for and against disclosure are also set out in the annex.

The Department has not redacted any information about the bid submitted by the Barlow Consortium. It is the Department's normal policy to publish on its Website all materials disclosed under Freedom of Information requests. We have provisionally concluded that information about the bid submitted by the Barlow Consortium should be redacted in the same way as we have redacted information about the other unsuccessful bids prior to publication on the Website. But please let me know if you would prefer information about the Barlow Consortium's bid to be published in unredacted form.

If you are unhappy with the way the Department has handled your request or with the decisions made in relation to your request you may complain within two calendar months of the date of this letter by writing to the Department's Information Rights Unit at:

Zone D/04  
Ashdown House  
Sedlescombe Road North

Hastings  
East Sussex, TN37 7GA

E-mail: [FOI-Advice-Team-DFT@dft.gsi.gov.uk](mailto:FOI-Advice-Team-DFT@dft.gsi.gov.uk)

Please see attached details of the DfT's complaints procedure and your right to complain to the Information Commissioner. If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours sincerely,

XXXX  
Director, Major Projects Directorate

### **Your right to complain to DfT and the Information Commissioner**

You have the right to complain within two calendar months of the date of this letter about the way in which your request for information was handled and/or about the decision not to disclose all or part of the information requested. In addition a complaint can be made that DfT has not complied with its FOI publication scheme.

Your complaint will be acknowledged and you will be advised of a target date by which to expect a response. Initially your complaint will be re-considered by the official who dealt with your request for information. If, after careful consideration, that official decides that his/her decision was correct, your complaint will automatically be referred to a senior independent official who will conduct a further review. You will be advised of the outcome of your complaint and if a decision is taken to disclose information originally withheld this will be done as soon as possible.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

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

## ANNEX A

### List of documents held

No	Document Name	Date
(i)(d) the direct agreements entered into or proposed to be entered into by the Secretary of State in respect of the Company and its business and/or the comfort letters provided by the commercial counterparties of the Company or the Secretary of State in relation to the Company or its businesses		
1.	Secretary of State Funders' Direct Agreement	15 November 2010
2.	Secretary of State comfort letter in relation to EDF Agreements	4 November 2010
(iv) all materials, advice and commentary on the relative merits of the bids received that were submitted to or are held by the Department for Transport, including those on which the decision to select the Purchaser and/or reject the Barlow Consortium was made;		
3.	DfT Board – (LCR Sub-Committee) paper DfTB(LCR)(10)15 – Sale of High Speed 1: Second Round Bids and Subsequent Process	1 November 2010
4.	Cameron McKenna email on issues in relation to Bromley offer	4 November 2010
5.	Cameron McKenna email on Arsenal change of control proposal	4 November 2010
6.	DfT paper on Sale of High Speed 1: Conclusion of Negotiations from receipt of 2 <sup>nd</sup> Round Bids	4 November 2010
7.	SofS Private Office email about SofS's decision on the sale of HS1 Limited	4 November 2010
8.	Minutes of the DfT Board (LCR Sub-Committee) meeting held on 2 <sup>nd</sup>	14 December 2010
(vi) details of feedback given to all bidders (including the Purchaser) following receipt of bids on or around 29 October 2010;		
9.	Citi email commenting on UBS draft bidder scripts	1 November 2010
10.	UBS email about revised draft bidder scripts	1 November 2010

<b>Exemption</b>	
<p><b>Section 29 – The Economy</b></p> <p>1. Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice</p> <p>(a) the economic interests of the United Kingdom or of any part of the United Kingdom, or</p> <p>(b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).</p>	
<b>Public interest test factors for disclosure</b>	<b>Public interest test factors against disclosure</b>
<ul style="list-style-type: none"> <li>the general public interest in disclosure</li> <li>greater transparency makes government more accountable to the electorate and increases trust</li> <li>the need to hold public authorities to account for their stewardship of public resources</li> </ul>	<ul style="list-style-type: none"> <li>the disclosure of sensitive bid information which would be likely to be beneficial to a bidder's commercial competitors or to parties negotiating with the bidder could lead to bidders choosing not to provide key information or deciding not to participate in future Government asset sales. In such circumstances the economic interests of the Government and the tax payer would be put at risk due either to a lower number of bidders participating in sales and thus less competition and/or a reduction in the quality or detail of bids making a proper assessment of each much more difficult.</li> </ul>
<b><u>Decision</u></b>	
<p>The Department's assessment of the balance of the public interest is not to disclose the information. While the considerations in favour of disclosure are important, it is the Department's judgment that they are outweighed by the considerations against such disclosure. If the United Kingdom Government wishes to sell assets in the future, it needs a competitive market and access to reliable and detailed information from bidders. But potential bidders may be put off from bidding or be less frank and provide less sensitive information if they perceive a risk that information will be disclosed while it is still current enough to affect the bidders' negotiating positions in other commercial matters. There is a substantial prospect that prejudice will result and damage</p>	

will be caused to the United Kingdom's financial interests because if bidders are discouraged from bidding or become inhibited about disclosing relevant information this will reduce the competitiveness of future asset sales and therefore reduce the attractiveness of the terms and likely purchase price. The United Kingdom Government's ability accurately to assess the relative merits of bids and to make the best decisions for the economy and taxpayers will also be undermined.

**Section 40 - Personal information**

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if—
  - (a) it constitutes personal data which do not fall within subsection (1), and
  - (b) either the first or the second condition below is satisfied.
- (3) The first condition is—
  - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
    - (i) any of the data protection principles, or
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

The names of external stakeholders and Departmental junior officials, that is staff below the senior civil service, have been withheld in reliance on the personal information exemption at section 40(2) and 40(3) of the Freedom of Information Act 2000. These individuals are not in public facing roles and therefore have an expectation that their names will not be put into the public domain. It would be unfair for us to disclose their names and would contravene the first data protection principle.



Exemption	
<b>Section 42 - Legal professional privilege</b>	
<p>1. Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information</p>	
General public interest considerations	
<u>In favour of disclosure</u>	<u>Against disclosure</u>
<ul style="list-style-type: none"> <li>there is a public interest in public authorities being accountable for the quality of their decision making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. Transparency in the decision making process and access to the information upon which decisions have been made can enhance accountability.</li> </ul>	<ul style="list-style-type: none"> <li>it is in the public interest that the decisions taken by government are taken in a fully informed legal context where relevant. Government departments therefore need high quality, comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of the facts.</li> <li>The legal adviser needs to be able to present the full picture to his or her departmental clients, which includes not only arguments in support of his or her final conclusions but also the arguments that may be made against them. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits. This means that legal advice obtained by a government department will often set out the perceived weaknesses of the department's position.</li> <li>Without such comprehensive</li> </ul>

	<ul style="list-style-type: none"><li>• Disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. Neither of these is in the public interest. The former could result in serious consequential loss, or at least in a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because decisions themselves may not be taken on a fully informed basis.</li><li>• There is also a risk that lawyers and clients will avoid making a permanent record of the advice that is sought or given or make only a partial record. This too would be contrary to the public interest. It is in the public interest that the provision of legal advice is fully recorded in writing and that the process of decision making is described accurately and fully. As policy develops or litigation decisions are made it will be important to be able to refer back to advice given along the way.</li><li>• At worst there may even be a reluctance to seek the advice at all. This could lead to decisions being made that are</li></ul>
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	<ul style="list-style-type: none"> <li>• It is likely that legal advice given in one context will be helpful or relevant to subsequent issues. This means not only considering the circumstances in which future legal interests could be prejudiced but also bearing in mind that the public interest in protecting the confidential relationship between lawyer and client is a long term public interest which could be damaged by individual disclosures. The disclosure of legal advice even when no litigation is in prospect may disadvantage the government in future litigation</li> </ul>
<p align="center"><u>Reasons why public interest in withholding information</u></p>	
<p>The Department's assessment of the balance of the public interest at this point in time is not to disclose the information. While the considerations in favour of disclosure are important, it is the Department's judgment that they are significantly outweighed by the considerations against such disclosure.</p>	

Exemption	
<b>Section 43 - Commercial Interests</b> <ol style="list-style-type: none"> <li>1. Information is exempt information if it constitutes a trade secret;</li> <li>2. Information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).</li> </ol>	
General public interest considerations	
<u>In favour of disclosure</u>	<u>Against disclosure</u>
<ul style="list-style-type: none"> <li>• the general public interest in disclosure</li> <li>• greater transparency makes government more accountable to the electorate and increases trust</li> <li>• the need to hold public authorities to account for their stewardship of public resources</li> </ul>	<ul style="list-style-type: none"> <li>• disclosure of the financing and security arrangements of the Purchaser would be likely to substantially to prejudice its commercial interests and would seriously affect the Purchaser's ability to run its businesses, including the newly acquired HS1 Limited</li> <li>• disclosure of the terms on which unsuccessful bidders were prepared to acquire HS1 Limited would be likely substantially to weaken their ability to bid competitively for other assets since both their competitors and future vendors would have knowledge of the terms that the unsuccessful bidders had previously found acceptable.</li> <li>• disclosure of information comparing the terms offered by the various bidders for HS1 Limited would also be likely to create a future competitive disadvantage for those parties when they approach other financiers or third parties in the future.</li> </ul>

	<ul style="list-style-type: none"> <li>disclosure of sensitive information supplied by unsuccessful bidders would be likely to enable third parties to determine bidders' investment return requirements for assets in the same sector or with similar risk profiles.</li> </ul>
<p><u>Reasons why public interest in withholding information</u></p>	
<p>The Department's assessment of the balance of the public interest at this point in time is not to disclose the information. While the considerations in favour of disclosure are important, it is the Department's judgment that they are outweighed by the considerations against such disclosure particularly as the likelihood and level of prejudice is considerably greater given the timing of the request for information which was received on the day of completion of the sale of HS1 Limited.</p>	