



Department for Transport

From the Office of the Minister of State
The Rt. Hon. Theresa Villiers MP

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Our Ref: FOI F0007993
Your ref:

XXXX

Dear xxxx,

Thameslink FOI Request

I am in receipt of your request relating to information about the Thameslink Programme which we received on 12 August 2011 and for your subsequent letter of 8 December 2011. The Department for Transport has now completed its search for the information which you requested. I apologise for the length of time it has taken to respond.

You asked for:

1. 'final and draft copies of all documents, emails and submissions regarding the preparation; and delivery of the Thameslink Rolling Stock OJEU notice';

You can view the tender documents, including the Thameslink rolling stock OJEU notice, on the Department's website:

<http://webarchive.nationalarchives.gov.uk/20100409040702/http://www.dft.gov.uk/pgr/ra/il/pi/thameslinkrollingstock/>

I attach at Annex B information in respect of the preparation and delivery of the OJEU notice. Some of the information you requested is being withheld in reliance on the exemptions in the following sections of the Freedom of Information Act 2000 (the "Act"):

- (a) section 36; where in the reasonable opinion of a qualified person, in this case the Minister of State, disclosure would inhibit free and frank advice to Ministers and the free and frank exchange of views, and would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs; and
- (b) section 43(2), under which information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.

These exemptions apply because:

- (a) in the case of section 36, the disclosure of internal communications would inhibit the free and frank provision of advice to Ministers and the free and frank exchange of views for the purposes of deliberation in relation to the Thameslink competition, and would be likely to prejudice the effective conduct of the Department in the procurement process; and

- (b) in the case of section 43(2), disclosure of much of the information you requested would prejudice the commercial interests of the Department, Bombardier Transportation UK Ltd with VeloCity – a special purpose company comprising Bombardier Transportation (Holdings) UK Ltd, RREEF Ltd, Serco Holdings Ltd, Amber Infrastructure Group Ltd and SMBC Leasing (UK) Ltd and Siemens Plc with Cross London Trains (XLT), the consortium comprising of Siemens Project Ventures GmbH, Innisfree Ltd and 3i Infrastructure Plc.

The names of officials have been withheld pursuant to section 40(2) and 40(3) of the Freedom of Information as disclosure could contravene data protection principles.

2. 'Final and draft copies of all documents, meeting notes, papers and submissions regarding the applicability of the Utilities Contracts Regulations 2006 to the procurement of rolling stock where DfT leads the procurement. Copies of all emails held on the computers and/or email applications of rail officials, legal services officials and finance officials regarding the Utilities Contracts Regulations 2006 and the procurement of rolling stock where DfT leads the procurement.'

In its submission to the Transport Select Committee in September 2011 the Department said:

"The question has been raised in the press as to whether we have used the correct procurement Directive for the new Thameslink trains.

As explained earlier the procurement is being conducted by the Department to facilitate the Thameslink Train Operating Company (First Capital Connect) to enter into a suite of agreements to take on lease and to pay for the benefit of the trains for a fixed period. The Department will enter into related arrangements including the provision of a commitment to lease the trains for an agreed period through a section 54 undertaking.

The Utilities Contracts Regulations 2006 (Utilities Regulations) apply to procurement by a utility. A 'utility' is defined as *"a relevant person specified in one of the Parts of Schedule 1 carrying out an activity in that Part"*. Part Q of Schedule 1 includes any relevant person involved in *"The provision or operation of a network providing a service to the public in the field of transport by railway."* Train Operating Companies running passenger rail services fall within this definition.

The use of the Public Contracts Regulations 2006 was considered but these Regulations exclude the seeking of offers in relation to a proposed public contract where the contracting authority is a utility within the meaning of regulation 3 of the Utilities Contracts Regulations 2006(b) and that contract is for the purposes of carrying out an activity listed in any Part of Schedule 1 to those Regulations in which the utility is specified.

Therefore, as the purpose for which the trains are being procured is a utility purpose, and the contracting party is a utility the Department concluded that the procurement should be governed by the Utilities Regulations.

It is also worth noting that it is usual for the procurement of rolling stock to be conducted by train operating companies in accordance with the negotiated procedure

under the Utilities Regulations, and that rolling stock manufacturers, finance lessors and other relevant market players are accustomed to the use of this procedure. “

The remaining information you requested is being withheld in reliance on the exemption section 42 of the Freedom of Information Act 2000 under which legal advice received is exempt from disclosure to protect the confidential relationship between lawyers and their clients. This exemption applies because there is an important public interest in a person (including a public authority) being able to consult his or her lawyer in confidence.

In applying the exemption under sections 36, 42 and 43(2) we have had to balance the public interest in withholding the relevant information against the public interest in disclosure. The attached annex A to this letter sets out the exemptions in full and details why the public interest test favours withholding the information. Section 40 is an absolute exemption, and therefore not subject to a Public Interest Test (PIT).

Please note that we are processing a number of FOI requests on the subject of the Thameslink Rolling Stock procurement. Our answers will be published on the DfT website and you may wish to view these responses there.

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

Please see attached details of DfT's complaints procedure and your right to complain to the Information Commissioner.

If you have any queries about this letter, please contact Mel Gillett at Thameslink.programme@dft.gsi.gov.uk. Please remember to quote the reference number above in any future communications.

Regards,

XXXXXXXXXX
Private Secretary
The Rt. Hon. Theresa Villiers

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

Exemptions in full

Section 36: prejudice to effective conduct of public affairs

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:

(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.

Public interest test factors for disclosure

- The general public interest in the scrutiny and transparency of public procurement processes, including the scrutiny and transparency of relevant public expenditure and the impact on UK jobs.
- The particular public interest in the scrutiny and transparency of Thameslink procurement, which is of high value and national significance.

Public interest test factors against disclosure

- The public interest in preserving effective public administration and decision making through the free and frank provision of advice and exchange of views.
- The public interest in giving Ministers and officials space to think through the implications of particular options and undertake rigorous and candid assessments of the risks to particular programmes and projects, and to obtain expert advice as necessary.
- The public interest in preserving public and industry confidence in the ability of public authorities to protect confidential information.

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 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 Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

42 Legal professional privilege

(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.

(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) in respect of which such a claim could be maintained in legal proceedings.

Public interest test factors for disclosure

Public interest in ensuring that decisions have been made on the basis of good quality legal advice.

Public interest test factors against disclosure

Public interest that Thameslink decisions are taken in a fully informed legal context where necessary, and that the Minister is fully cognisant of both the strengths and weaknesses of any relevant position.

Public interest in protecting the relationship between a client and their lawyer.

43(2) Commercial interests

(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).

Public interest test factors for disclosure

Public interest test factors against disclosure

<ul style="list-style-type: none"> • The general public interest in the scrutiny and transparency of public procurement processes, including the scrutiny and transparency of relevant public expenditure and the impact on UK jobs. • The particular public interest in the scrutiny and transparency of Thameslink procurement, which is of high value and national significance. 	<ul style="list-style-type: none"> • It would be likely to prejudice the ability of the Department to achieve value for money in relation to the Thameslink Programme procurement. • The public interest in preserving public and industry confidence in the ability of public authorities to protect confidential information. • The DfT intends to publish substantial information in relation to the Thameslink Programme procurement once contracts have been signed. That information is likely to include redacted contracts. • Disclosure would prejudice the commercial interests of the bidders in that it would weaken the bidder's position in negotiations with third party suppliers. • Disclosure would be likely to reveal market-sensitive information or information of potential usefulness to the bidders' competitors. • The public interest in achieving value for money from the Thameslink procurement. • The Thameslink procurement process is in any case subject to scrutiny within the Department for Transport, by the National Audit Office and by the Public Accounts Committee. • Disclosure could damage the business reputation of the Department and the confidence that suppliers have in it.
<p><u>Decision</u></p> <p>In view of the above, the Department is of the view that the balance of the public interest is clearly against disclosure of the relevant information.</p>	