**IN THE FIRST-TIER TRIBUNAL**
**GENERAL REGULATORY CHAMBER**
**(INFORMATION RIGHTS)**

**Appeal No: EA/2014/0014**

**BETWEEN**

**ANDREW GREEN**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**DEPARTMENT for TRANSPORT**

**Second Respondent**

**Before**

**Brian Kennedy QC**
**Dave Sivers**
**Henry Fitzhugh**

**Representation:**

**For the Appellant:** **Julianne Morrison of counsel**
**For the Second Respondent:** **Karen Steyn of counsel**

**Date of Decision:** 11th August 2014

**Date of Promulgation:** 12th August 2014

## DECISION

The Tribunal refuses the Appeal.

We direct that the requested information should not be disclosed and the Closed Bundle should remain confidential.

**Introduction:**

**[1]** The appeal is brought under section 57 of the Freedom of information Act 2000 ("FOIA"). The Tribunal and the parties worked from an open Trial Bundle ("OB") indexed and paginated and from a smaller Closed Bundle ("CB") also indexed and paginated and authorities bundle AB.

**[2]** The impugned decision under appeal is the Decision Notice ("DN") from the Respondent dated 4 December 2013: Reference FS50483547.

**Background:**

**[3]** Data on passengers loadings are provided to the Department for Transport ("the DfT") by Train Operating Companies ("TOCs"), as required by their franchise agreements. Passenger loading information is provided for individual train services by the TOCs. The data, obtained either manually or by automatic counting equipment fitted to the train, shows the number of passengers on board a train at a particular point on its route.

**[4]** On 5 February 2012 the Appellant wrote to the DfT making the following request:
***"Can you please supply me with the statistics for peak and off peak loadings of rail passengers on the west coast main line?"*** *(*"the Disputed Information").

**[5]** On 2 March 2012 the DfT responded stating that it held the requested information but that it was withholding it under section 43(2) FOIA.

**[6]** The Appellant requested that the DfT carry out an internal review of its decision. On 19 April the DfT advised the Appellant that it was upholding its original decision.

**[7]** The Commissioner then investigated and received sample extracts of the Disputed Information. The DfT also advised that it was seeking to withhold the Disputed Information under section 41 FOIA rather than section 43(2) FOIA.

**[8]** Having taken into account all the arguments raised, in his DN the Commissioner set out his conclusions that:

a). The requested information was not"environmental information" as defined under the Environmental Information Regulations 2004 ("EIR") and so it should be assessed under FOIA ( §§24-29 DN).

b) The information was exempt information under section 41 FOIA because disclosure would give rise to an actionable breach of confidence ( §§31-98 DN); and

c) One specific aspect of the information was exempt under section 21 FOIA because it had been disclosed in open court and recorded in the court judgment( §§99-101 DN)

**The issues:**

**[9]** In his Grounds of Appeal the Appellant asserts that:

a) The Commissioner should have found that the information was "environmental information" and so access to it should have been considered under EIR; and

b) The Commissioner was wrong to find section 41 FOIA was engaged in this case.

These are effectively the issues in this appeal.

**The relevant Legal Framework:**

**[10]** The definition of "environmental information" is at regulation 2(1) EIR and states:"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material on:-

**a)** the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal, and marine areas, biological diversity and its components, including genetically modified organisms,and the interaction among these elements;

**b)** factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in a);

**c)** measures (including administrative measures), such as policies, legislation, plans programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in a) and b) as well as measures or activities designed to protect those elements;

**d)** reports on the implementation of environmental legislation;

**e)** cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in c); and

**f)** the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in a) or, through those elements, by any of the matters referred to in b) and c)."

**[11]** Section 41(1) FOIA provides and absolute exemption from the presumed duty of disclosure on a public authority for:

"Information - - - if- (a) it was obtained by the public authority from any other person (including another public authority), and (b) the disclosure of information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

**The Evidence:**

**[12]** In addition to the Open and Closed Bundles, the Tribunal had access to evidence from Edward John Palmer (Head of Rail Service Analysis division in the Department for Transport) See Tab 7 page 299 (with appendices) and David Blair Mapp (Commercial Director at the Association of Train Operating Companies) See Tab 7 page 294 OB and both witnesses were subjected to cross examination.

**Conclusion:**

**[13]** The Tribunal unanimously agree with the Commissioners' Decision as per the DN and his reasoning therein. The Appellant has failed to persuade us that the Commissioner was wrong in his conclusions and we endorse and adopt them herein. The appeal is refused.

Reasons:

**[14]** We find the first issue at [9] a) above relatively straightforward and unanimously agree that the disputed information is not "environmental information" within the meaning of reg 2(1)(b), (c) or (e) of the EIR. The evidence before us persuades us that on any interpretation the withheld information is not related to "emissions" in any real or meaningful way. We also agree that the information is too far removed from, or related to, and is entirely unconnected to, the HS2 high speed rail project.

**[15]** On our consideration of the content, and the purpose and method of compilation and recording of the disputed information, which is data on the number of passengers using trains, as described by the witnesses, it has no significant or meaningful bearing on, or relation to "emissions". We find on the facts of this case it bears no relation to "emissions" and accept that it would be erroneous to construe reg 2(1)(b) so broadly as to encompass this information as doing so.

**[16]** The Appellant seeks to rely on the case of Southwark Council V ICO and others EA/2013/0162in which the Tribunal, whilst agreeing that ***"there may be a tendency to overuse EIR"*** ( §29), took the view that *"the answer to this tendency, it seems to us, is not the development of the vague notion of "remoteness. Rather it lies in the purposive application to the facts of a case of the definition of "environmental information" in Reg 2(1) EIR* ( §30). Our panel member Mr. Fitzhugh was on the Panel in the Southwark case and indicates the subject matter of the disputed information in that case is to be distinguished from this case in that it related to EIR Reg 2(e) on a direct issue on costs benefits. This case on the facts has no such determinative connection.

**[17]** We accept the submission made on behalf of the DfT that the application of the following guidance is of assistance:

**a)** The right of access to "environmental information" is important, but the right only exists if, and to the extent, that the requirements laid down in the Directive and reflected in the EIR are satisfied. (See Flachglas Torgau GmbH V Germany Case C-204/09. at AB/2 at( §32.)

**b)** Those requirements will only be satisfied (leaving aside Reg. 2(1)(a), (d) and (f) which are not relied on in this case) if the requested information is properly classified as information on, that is to say, about (i) the factors set out in Reg 2(1)(b); (ii) the measures set out in Reg.2(1)(c); or (iii) cost benefit/economic analyses/assumptions used within the framework of Reg. 2(1)(c) measures. The information must fall within one of those categories.

**c)** Information will not fall within one of those categories if it merely "relates to" or has "minimal connection" to those factors, measures or analyses/assumptions. This, we agree, accords with both the natural and purposive construction.

It is our view that the disputed information in this case clearly is not on or about "emissions" nor is it, in our view on the facts before us, in any way relate to or have a minimal connection to "emissions".

**[18]** On the second issue at [9] b) above, we also find no difficulty in accepting the Commissioners conclusion as correct and unanimously reject the appeal in this regard. The Appellant has failed to persuade us that the Commissioner was wrong in his interpretation of the application of the exemption under section 41 FOIA. On the contrary the evidence at the oral hearing supports the position taken by the Commissioner in the DN.

**[19]** The Appellants argument that the disputed information is not confidential in that anyone could count the numbers of passengers fails to take into account that the withheld information is the product of a very precise exercise carried out in the course of a commercial undertaking of some magnitude for a particular purpose. We unanimously agree with the Commissioners' finding that:
" *- - - it is not accessible by other means and given the level of detail in it the data is confidential"* ( §§38 -62 DN)

**[20]** The evidence from both Mr. Palmer and Mr. Mapp was unambiguous and compelling in persuading us inter-alia that the disputed information is confidential and sensitive material which has the capacity to cause commercial prejudice it released. In particular Mr Palmer

demonstrated how and why the DfT recognise that such detailed and disaggregated data, if released, could be analysed by a competing TOC or other modes of transport operators (he mentioned also airlines) together with information already in the public domain (such as fares) to assess the actual and potential revenues available to each TOC in respect of specific routes and stations at different times of the day, week or year. Furthermore, he explained, competition exists between individual TOCs (giving commercial examples) and the DfT considers that disclosure of the deputed information would cause prejudice to the TOCs, as described by Mr. Mapp.

**[21]** Mr Palmer further described how release of the disputed information would detrimentally and materially affect the DfT relationship with the TOCs and other non-rail private sector organisations. Inter-alia he explained how it would prejudice the DfTs' own commercial interests and ability to secure value for money for the taxpayer if the DfT was regarded by private sector organisations as being indifferent to protecting their commercial interests. We accept this cogent and pertinent evidence and accordingly are of the view that disclosure of the disputed information would not be in the public interest in all the circumstances.

**[22]** In the factual circumstances outlined above we find that section 41 is engaged and on the facts of this case and for the reasons given by the Commissioner and through the evidence at this hearing the Tribunal has not been persuaded that the Commissioner was wrong in the conclusions reached in his DN and refuse this appeal.

**[23]** The Tribunal do not consider the objective reading of the request needs to be determined in this case as it would not affect the outcome. Obiter we note Section 16(2) FOIA provides that a public authority that conforms with the Code of Practice issued under s 45 is to be taken to comply with the duty to advise and assist. Where there is a doubt about the objective meaning of the nature or extent of a request therefore, we say, that it is incumbent on the public authority to clarify any potential need for clarity, including determining the specific intended nature and extent of the request where necessary.

Signed:

Brian Kennedy QC 11th August 2014.