

Lindsay Durham
Head of Rail Strategy
Freightliner Group Ltd
3rd Floor The Podium
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London NW1 2FL



1st May 2015

Dear Lindsay

**APPEAL UNDER REGULATION 29 OF THE RAILWAYS
INFRASTRUCTURE (ACCESS AND MANAGEMENT) REGULATIONS
2005 FOR ACCESS AND SERVICES AT SOUTHAMPTON MARITIME
FREIGHTLINER TERMINAL**

1. Thank you for your letter of 4 February 2015 setting out your response to the Regulation 29 appeal made by DB Schenker ("**DBS/the applicant**").
2. We note that in your letter you stated that your response contains a significant volume of confidential and business sensitive information and consequently the provision of such information to DBS would "*seriously and prejudicially affect the interests of Freightliner*". You have therefore requested that DBS are only provided with a non-confidential version of your response, which you have provided.
3. This letter sets out our initial consideration of your request for redactions within the legal framework of a Regulation 29 appeal and the procedures we intend to adopt in order to determine whether to permit redactions on the grounds of confidentiality etc.
4. I will first summarise our position and then set out the context in more detail.

Summary

5. Our starting principle is that there should be as full disclosure as possible between the parties to an appeal of all information provided in connection therewith. The Office of Rail Regulation¹ will, therefore, disclose information to the parties, whether confidential or not, where:
 - a. the information relates to the issue under appeal;
 - b. it is fair and proper for a party to be given the opportunity to see and comment on that information in connection with the appeal; and

¹ Since 1 April 2015 we are now called the Office of Rail and Road although our legal name remains the Office Rail Regulation, see <http://orr.gov.uk/about-orr>.

- c. it is information which ORR will need to take into account in reaching its decision.

This approach ensures that parties to an appeal are able to properly understand the gist of the appeal, the nature of the representations that are being made and is given a full and fair opportunity to comment on all representations. Such an approach is also in line with ORR being an open and transparent regulator, accountable for our decisions.

6. However, we do of course recognise that there may be circumstances where information that is provided by a party in connection with an appeal may contain information that is of a commercially sensitive nature or confidential and consequently the disclosing party does not want that information to be disclosed to the other party, particularly if that party may also be its competitor. We also recognise in those circumstances, disclosure could raise concerns from a competition law perspective.
7. There is a balance to be struck between complete transparency, ensuring a fair an open appeals process and protecting a party's commercially sensitive information. Therefore, where a party has requested redactions to its representations on the basis of confidentiality, commercial sensitivity or competition law concerns, ORR will not take any steps to disclose such material (or publish it more widely) without prior discussion and communication with the parties to enable them to make any representations they wish, and to explore alternative methods of resolving the concern. However, this does not necessarily mean that ORR will agree not to disclose certain information a party has requested is redacted.

The legislative framework

8. The applicant's appeal is made under Regulation 29 of The Railways Infrastructure (Access and Management) Regulations 2005, as amended (the "**2005 Regulations**"). The 2005 Regulations implement the First Railway Package² as adopted, and subsequently developed, by the European Commission. The package was designed, among other things, to increase freight operating companies' (each a "**FOC**") access to railway infrastructure.
9. A FOC has the right of appeal to ORR if it believes that it has been unfairly treated, discriminated against or in any other way aggrieved. The matters covered include denial of access and services by an infrastructure manager.
10. ORR prescribes the form and manner for an appeals application under Regulation 29(4) and our '*Guidance on Appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005 (dated March 2006)*'³ sets out the process and procedure for such appeals. The issues associated with our consideration of an appeal under Regulation 29(4) are similar to applications made under section 17 of the Railways Act 1993 (the "**RA 1993**"). In particular, our guidance provides that we will follow the procedures set out in Schedule 4 of

² <http://orr.gov.uk/about-orr/what-we-do/the-law/eu-law>

³ Guidance on Appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005 at http://orr.gov.uk/data/assets/pdf_file/0018/1692/275.pdf

the RA 1993, which sets the framework for access applications made to ORR, for appeals made under Regulation 29(4).

11. Paragraph 3 of Schedule 4 sets out the procedure for notifications, representations and information. This provides that ORR shall send a copy of any application for directions received by it to the facility owner and shall send a copy of any representations received by it from the facility owner to the applicant. Schedule 4 is, however, silent on whether any information could or should be redacted from those representations.
12. The provision of information to ORR in connection with an appeal is dealt with under Regulation 31 of the 2005 Regulations which provides that where ORR requests information in connection with its functions under Regulation 29, section 80 of the RA 1993 will apply.
13. Section 80 of the RA 1993 places a duty on parties to provide ORR with information in such form and manner as ORR requests that ORR considers necessary for the purpose of facilitating the performance of its appeal functions under the 2005 Regulations (unless the documents fall within section 80(5) of the RA 1993).
14. Regulation 39 concerns restrictions on disclosure of information and provides that section 145 of the RA 1993 shall take effect in relation to information ORR obtains under the 2005 Regulations.
15. Section 145(1) of the RA 1993 provides that information in respect of a particular business obtained under the RA 1993 (or in this case under the 2005 Regulations) cannot be disclosed without its consent. However, section 145(2)(gb) of the RA 1993 provides that the restriction in section 145(1) shall not apply to any disclosure of information which is made for the purpose of facilitating the carrying out by ORR of any of its functions under the 2005 Regulations.
16. It is also worth noting that consideration of this particular issue, i.e. sharing a full copy of your representations on the appeal with DBS, is a matter of disclosure and is not, at this stage of the appeal, a matter of publication. The RA 1993 specifically recognises this distinction between disclosure and publication with separate and distinct clauses regarding rules on disclosure (section 145) and publication (section 71).
17. Section 71 of the RA 1993 provides that ORR “...*may arrange for the publication, in such form and in such manner as [it] considers appropriate, of such information and advice as it may appear to [it] expedient to give to users or potential users of railway services in Great Britain.*” Section 71(2) sets out the test that ORR should have regard to when arranging for the publication of such information or advice. This requires ORR to have regard to the need for excluding, so far as is reasonably practicable, any matter which relates to the affairs of an individual or specifically to the affairs of a particular body where publication would or might ‘...*in the opinion of [ORR] seriously and prejudicially affect the interests...*’ of that individual or body.

18. However, publication and the application of section 71 and in particular the test under section 71(2) only becomes relevant where ORR is seeking to make public the representations, for example during the consultation process or following determination of the appeal when ORR publishes the decision on its website. The sharing of a party's representations with the other party to the appeal as part of the appeal determination process does not amount to publication. It is purely an issue of disclosure, for which there is no equivalent statutory test as for publication.

Redactions

19. You have stated that disclosure of your representations to the applicant would seriously and prejudicially affect Freightliner's interests. While we consider that it is in the interests of conducting a fair and proper appeal that there is full disclosure, ORR will agree to certain redactions in material to be disclosed to the applicant where we consider it appropriate to do so in the round.

20. Having considered the context of this case it appears to us that disclosing information to another FOC could have a similar or analogous impact on Freightliner to publishing that information and making it available to the wider public, i.e. it could seriously and prejudicially affect your interests. It therefore seems practicable, as matters stand and for this particular appeal, to have regard to the test established in section 71 of the RA 1993 when determining whether to permit all or some of the proposed redactions. This would be consistent with our duties in section 4 of the Act and the appeals framework.

21. We will consider any representations you make with regard to the issue of redactions and take that into account in considering whether, in our opinion, disclosure of such information to the applicant would seriously and prejudicially affect Freightliner's interests. In reaching our decision we will be taking into account:

- a. the relevance of the information to the appeal;
- b. whether the applicant can make informed representations on the basis of the information that is disclosed;
- c. whether the applicant is able to comment on matters affecting it and able to draw attention to any possible inaccuracies or incomplete or misleading information in your representations;
- d. the extent to which the redactions affect the comprehension of the document;
- e. the risks to each party in disclosing or redacting the information;
- f. the risk of any adverse impact on competition in disclosing or redacting the information;
- g. the need for transparency and the desirability of making sufficient information available to the public;
- h. the need and desirability for ORR to be able to take a consistent approach in its handling of redaction requests;
- i. our ability to conduct decision-making efficiently and effectively; and
- j. our ability to reach properly reasoned decisions within statutory and administrative timetables.

22. Please therefore provide detailed reasons as to why you consider the information you wish to redact from your representations is commercially sensitive and or confidential such that disclosure of this information to DBS would seriously and prejudicially affect your interests. You have also raised potential competition law concerns so please also explain why you consider disclosure of certain information could impact competition law issue.
23. Alternatively, if you disagree with this approach and consider that a test other than the section 71 test should be used to determine the issue over the scope of disclosure for this appeal, please explain this in your response.
24. We have written to DBS to inform them that we have received your representations but that you have requested a number of redactions which we are currently considering. In the meantime, we have provided DBS with the non-confidential version of your representations that you provided to us for its initial consideration. Please note that we will provide the applicant with a copy of your representations on disclosure for its consideration and will invite it to make any representations in return. We will then consider all representations received from you and DBS in relation to this issue before making our decision on the scope of redactions.
25. Once we have made our decision we will write again to you and DBS setting out our decision and reasons seeking any further response to that decision. Please note that if we determine that some or all of the information you want redacted should be disclosed to the applicant, we will not disclose that information until we have been through this process and obtained your further representations on our decision.

Next Steps

26. We wish to resolve the disclosure issue as promptly as practicable so that we may progress this appeal. Given that you have already indicated in your last letter that you are willing to provide appropriate justifications as to why you consider the redacted information meets the section 71 test, we would be grateful if you could provide your response by 5pm on Friday 15 May 2015. Subject to any further iteration with you or the applicant, it will then be for ORR to make a judgement on what should be disclosed and what should remain confidential and therefore be redacted.
27. I do not attempt here to cover all aspects of the 2005 Regulations. But if you wish to discuss any of this further, please do let me know.

Publication of information

28. While the issue over the scope of disclosure is on-going, we have taken the decision not to publish any information received from either party in connection with the appeal. Once this issue has been resolved we will determine the matter of publication of such information in accordance with the test under section 71 of the RA 1993 and may, at that time, write to you seeking your views on whether there are any elements in the information you have provided that should be excluded from publication in accordance with the criteria set out in section 71.



29. I have sent a copy of this letter to Stewart Smith and Nigel Oatway at DBS. I look forward to hearing from you.

Yours sincerely
Bill Hammill

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