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## **By Email & Post**

18 October 2013

Dear Mr Garner

### **Proposal for a Quality Contracts Scheme in Tyne and Wear – Confidential information**

We write in advance of Go Ahead North East's (GNE) response to the proposal for a QCS in respect of bus services in Tyne and Wear.

GNE is considering how it may proceed in respect of information that is important to its consultation response but at the same time commercially sensitive. It would appreciate some guidance from you on how Nexus will approach this issue. While GNE is, as you are aware, working hard in an effort to meet the challenging consultation response deadline that Nexus has set, it has not yet been able to finalise the precise data which it may wish to submit and which falls into this category. However, commercially sensitive and confidential information is most likely to be required to assist GNE in providing the information about 'adverse operator detriment' that is requested.

Regulation 14(3)(c) of the Quality Contracts Schemes (QCS Boards) (England) Regulations 2009 provides that Nexus must not disclose confidential information it receives from consultees to any other party without their consent. This includes information which would be exempt from a request under the Freedom of Information Act 2000 (FOIA) by virtue of sections 41 (information provided in confidence) and 43 (commercial interests) of FOIA. The same provisions apply to the QCS Board in the event that, having considered the responses to the current consultation, the ITA decides to proceed.

GNE proposes to submit two versions of its consultation response, one which is unredacted and for Nexus' use and the ITA's consideration, and another with information that it considers to be confidential and commercially sensitive blacked out (redacted). It hopes, by this method, to draw to Nexus' attention the areas of sensitivity to which regulation 14(3)(c) applies.

However, it would assist if you would provide further information about how Nexus will go about protecting sensitive information of this sort. For example, it would be useful to understand also how Nexus will

ensure that the exemptions under FOIA are properly applied and whether Nexus is likely to accept operators' assertions of confidence and commercial interest or seek to reach its own view on the matter.

We note in this respect that when the ITA directed and authorised Nexus to commence the QCS consultation on 26 July 2013, it made various directions regarding the handling of confidential information (see paragraphs 1.12 – 1.13 of Appendix B of the Report of the Bus Strategy Delivery Project). The ITA directed that Nexus may accept reasonably made redactions provided that "*such redaction will not materially disadvantage other consultees*". Please would you also provide further guidance as to what Nexus would consider to be a "material disadvantage" in this sense, who would make any such decision on this point, and whether and how a consultee would be able to challenge this if Nexus refused to accept redacted data.

In the event that Nexus may decide to challenge an operator's assertion of confidence and commercial interest, it would be useful to understand how Nexus will reach this view and what engagement it will have with an operator such as GNE to seek its representations. In the event that any such representations are not accepted, to what extent will Nexus allow an operator to re-submit its consultation response, with the information in question omitted?

Further, it is not clear to GNE how Nexus itself will handle and protect the sensitive information in question. Will it, for example, restrict the commercially sensitive information to only certain of its employees and/or advisers and, it would be useful to understand on what basis it will make the decision in question and the extent to which it will seek GNE's consent before providing the information in question to them and under what obligations of confidentiality those employees and/or advisers are employed / retained.

We note in this respect that Nexus has invited statutory consultees to notify it in advance and reach "*... agreement as to the basis on which such data may be disclosed and the extent to which such data can be redacted*".

Accordingly, it would assist in reaching such agreement if you could respond to these queries at the earliest opportunity.

We note that Nexus' letter to consultees also states that it can "*only rely on data disclosed to it to the extent that it can do so meaningfully and transparently in the context of its analysis of the consultation*". Please provide further guidance on the meaning of this and the extent to which Nexus considers that it can assess confidential information submitted by consultees but not publish or otherwise disclose this in its published findings and comments. There must be scope, for example, for a bus operator to submit relevant, commercially sensitive information relating to the projected impact of QCS upon its business operations, without this being published in Nexus' analysis of consultees' responses.

Thank you for your assistance.

Yours faithfully

*ffw LLP*

**Field Fisher Waterhouse LLP**