



For the attention of Martin Smith
Partner
Field Fisher Waterhouse LLP
35 Vine Street
London
EC3N 2AA

Our ref BGG/TJH/ffw_confidentialinfo
Your ref MLS/TCX/48603-00004/27835788v1
Direct line 0191 203 3201
Facsimile 0191 203 3181
Email b.garner@nexus.org.uk

By post and email: martin.smith@ffw.com

28 October 2013

Dear Sirs

Proposal for a Quality Contract Scheme in Tyne & Wear - Confidential Information

Thank you for letter of 18 October 2013.

The point you raise on confidentiality is an important one and one which Nexus is keen to deal with in a manner which ensures that all consultees can be as open as possible with the ITA and the QCS Board in terms of their overall consultation responses.

Our understanding of the effect of Regulation 14(3) of the Quality Contracts Schemes (QCS Boards) (England) Regulations 2009 ("**Regulations**") is that they confirm the application of the Freedom of Information Act 2000 ("**FOIA**") to any "confidential" and/or "commercially sensitive" information submitted to Nexus/the ITA pursuant to section 126C(2) of the Transport Act 2000 (as amended).

As you will appreciate, this statutory framework does not mean that if a Freedom of Information Request is made or if legal proceedings are commenced and disclosure is required, that Nexus/the ITA and/or the QCS Board (as appropriate) would be the final and/or absolute arbiter of whether any information is definitely confidential and/or commercially sensitive. It follows that no absolute assurance can be provided in respect of the matter you have raised.

You will appreciate that even if information is said to be confidential or commercially sensitive by you, this does not automatically mean that the relevant exemptions under FOIA will be engaged. For example the exemption for commercially sensitive information is subject to a public interest test and, although the exemption for confidential information is absolute, it still requires the authority to assure itself that disclosure of the information would constitute an actionable breach of confidence. The Authority is responsible for determining objectively whether these exemptions

apply and this will depend largely on the nature of the information in question and the impact of disclosure considered from an objective perspective.

It follows, as I am sure you are aware, that Nexus/the ITA and/or the QCS Board cannot realistically provide your client with an absolute assurance that information that is provided to us during consultation, which is subject to a claim to either confidentiality or commercial sensitivity, can and will have that claim upheld. In the first instance Nexus/the ITA would have to satisfy themselves that such claims were objectively justified and, secondly, that assessment could, for example, ultimately be subject to review if an FOI Request was made and any refusal to make disclosure was challenged.

Nexus' understanding of the direction from the ITA referred to in your letter is that it is intended to highlight the point that there is a legal duty on Nexus/the ITA to ensure that the consultation process is required to be as meaningful and as transparent as possible and hence that there is a clear public interest that that should be the case. It follows that any consultation responses that are to be provided to Nexus/the ITA for consideration and which may then need to be referred to in any analysis undertaken by Nexus and any report/submissions made to the ITA or to the QCS Board, must be as full as possible and must be internally coherent and consistent so that they are capable of being understood and commented on by third parties who will not have an opportunity to refer to any underlying confidential or commercially sensitive information that has been redacted.

Any more detailed commercially sensitive and/or confidential information should then be provided to evidence any assertions or points made in the public submission/material and can then be used to allow Nexus and/or the QCS Board to satisfy themselves that any conclusions and/or assertions contained in the public submission/ material can be objectively substantiated. This should ensure that Nexus/the ITA are in a position to comment meaningfully and effectively on that information whilst third parties will be able to understand and to the extent relevant comment on the public submission.

So long as that balance can be achieved this should ensure that the quality of the consultation process is not materially impaired and it seems to Nexus/the ITA that any arguable public interest in disclosure of the confidential/commercially sensitive material would then have been substantially mitigated.

The purpose of the direction was to invite any consultee minded to make disclosure of confidential or commercially sensitive information to Nexus/the ITA to have a preliminary discussion with Nexus around these issues so that the risk of any subsequent disagreement arising as to the status of the information, once it had been submitted, could be mitigated and any potential disputes or misunderstandings avoided. Clearly in this respect, Nexus/the ITA will seek to be as flexible as possible so as to ensure that relevant consultees can get comfortable with their position before any information is actually submitted on the basis that it is to form either part of an open or confidential consultation response.

I hope that this response helps clarify matters. I confirm that unless you object it is proposed to publicise both your letter and this response on the consultation website so as to assist other consultees.

As indicated above, if you wish to arrange a meeting or have a discussion with Nexus to clarify these matters, please let us know.

Yours faithfully

A handwritten signature in black ink, appearing to read 'B Garner', with a long horizontal flourish extending to the right.

Bernard Garner
Director General