EXPLANATORY MEMORANDUM TO

THE FREEDOM OF INFORMATION (DESIGNATION AS PUBLIC AUTHORITIES) ORDER 2015

2015 No. 851

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order designates Network Rail Limited (NRL), Network Rail Holdco Limited (NRHC), and Network Rail Infrastructure Limited (NRIL) as public authorities for the purposes of the Freedom of Information Act 2000 ("the FOI Act") in relation to their functions that appear to the Secretary of State to be of a public nature.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The FOI Act applies to a public authority, as defined in section 3 of that Act. Included in that definition is a person designated by an order made under section 5 of the Act. Section 5(1)(a) of the FOI Act enables the Secretary of State to designate a person as a public authority on the basis that a person appears to him to exercise functions of a public nature.

4.2 This Order designates NRL, NRHC and NRIL as public authorities and is made by the Secretary of State in exercise of the powers conferred by sections 5(1)(a), 5(2) and 7(5) of the FOI Act. Where a person is designated as a public authority under section 5, section 7(5) provides that the Order must also specify each of the functions of a public nature that will be covered by this designation. The Schedule to this Order specifies those functions, about which clarification is also provided by Article 2(2).

4.3 The Government announced its intention to introduce this Order in a new Framework Agreement setting out its working relationship with Network Rail published on 1 September 2014 following its reclassification to the public sector by the Office for National Statistics[1] (ONS). This decision by the ONS was taken on the basis of guidance issued under the 2010 European System of Accounts.

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[1] https://www.gov.uk/government/publications/network-rail-framework-agreement

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Minister of State for Justice, Simon Hughes, has made the following statement regarding Human Rights:

In my view the provisions of the Freedom of Information (Designation as Public Authorities) Order 2015 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 The FOI Act was brought into force on 1 January 2005. The primary objective of the FOI Act is to increase the openness, transparency and accountability of those bodies subject to the FOI Act. The provision of information under the FOI Act enables greater transparency about how public money is spent and greater scrutiny of public services. It allows the public to gain information about services and decisions that affect them and to hold bodies to account for those decisions.

7.2 The Government believes that there is a strong case to extend the FOI Act to bodies which exercise functions of a public nature. The Government remains committed to facilitating greater openness and transparency in the public sector in order to enable the public to hold politicians and public bodies to account. 'The Coalition: our programme for government' set out this intention stating that the Government would 'extend the scope of the Freedom of Information Act to provide greater transparency'[2].

7.3 The Secretary of State has also used his power under section 5(1)(a) to extend the FOI Act to the Association of Chief Police Officers (ACPO), Financial Ombudsman Service (FOS) and Universities and Colleges Admissions Service (UCAS) in relation to functions of a public nature which they perform. Other recent steps to expand the scope of the FOI Act include extending it by primary legislation to academies through the Academies Act 2010, and to more than 100 companies wholly owned by more than one public authority through the Protection of Freedoms Act 2012 (by amendments to section 6 of the FOI Act).

7.4 There have also been a number of calls to extend the FOI Act to Network Rail[3], which have reflected amongst other things the significant public interest in

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[2] The Coalition: Our programme for Government (http://www.cabinetoffice.gov.uk/news/coalition-documents)

[3] There have been several parliamentary questions asking about the extension of the FOI Act to Network Rail, and the issue has also been raised by the Public Accounts Committee on several occasions.

information about safety on the network, and about how taxpayers' money is spent being subject to the FOI Act. Network Rail is not a single legal entity but a group of companies. NRL is the umbrella company for the entire group, NRHC a subsidiary of it. NRIL, in turn, is a subsidiary of NRHC. All three perform a number of functions of a public nature capable of designation through an order under section 5(1)(a) of the FOI Act. Their public functions are those relating most directly to their key role in operating the rail network, its managed stations and light maintenance depots. They include Network Rail's own maintenance and development of the rail network, and its role in permitting others to use the network, stations and light maintenance depots in providing railway services. The other companies within the Network Rail are not considered by the Secretary of State to perform public functions.

7.5 The following paragraphs set out in greater detail the public functions of NRL, NRHC and NRIL that are specified by the Order. Generally, activities for which each of the designated companies makes a charge or obtains consideration are not of a public nature and will not be subject to the FOI Act. However, as explained below, there are exceptions.

(a) NRIL

7.6 It appears to the Secretary of State that NRIL exercises functions of a public nature in relation to each of the activities specified in Column 2 of the table in the Schedule in the Order carried out in England, Wales and Scotland[4].

7.7 The Secretary of State considers that several of the factors relevant to public functions considerations are common across the specified functions performed by NRIL. The degree of government control is a key factor in determining whether a function is of a public nature. Following reclassification the degree of such control exerted over the designated Network Rail bodies is significant. For example, the Chief Executive of Network Rail is now appointed by the Secretary of State for Transport and the Principal Accounting Officer is the DfT Permanent Secretary. It is also accountable to a significant degree both to government and to Parliament. For example, from 1 April 2015, DfT will consolidate Network Rail into the Department's Group Accounts which are laid before Parliament.

7.8 It is also important to the Secretary of State's opinion that the specified functions are funded to a very considerable degree from the public purse, receiving a grant from DfT of approximately £3.5bn per annum. These functions are also carried out in the public interest, as their primary purpose is to facilitate the operation of the rail network.

7.9 NRIL's "network services" function, "a" in the Schedule to the Order, is largely centred on the management and development of the railway network. A "network service" is defined in section 82(2) of the Railways Act 1993. Two main

[4] Network Rail does not operate in Northern Ireland.

categories of activities carried out by NRIL under the Network Licence issued to it under section 8 of the Railways Act 1993 constitute "network services". These are:-

(i) The operation, maintenance, renewal, replacement, improvement, enhancement and development of the network. The Licence sets out a series of requirements that NRIL must fulfil in delivering these functions, including: that it plans the means by which it will deliver this service in the short, medium and long term; provides delivery plans to the Office of Rail Regulation; cooperates with potential providers to identify ways in which reasonable requirements in relation to the allocation of capacity can be satisfied; develops and applies policies and criteria in respect of the management etc of the network; and operates an effective and efficient process for establishing a timetable.

NRIL's Memorandum of Association also provides an indication of the activities that may be carried out in delivering these functions. They include: responsibility for current and new passenger and goods railway networks and stations; permanent way, including track, ballast and any associated structures (e.g. level crossings, bridges, cuttings, drains and roads); signalling systems and control of train movements; power distribution; weedkilling and the removal of obstructions (including leaves); and equipment used to perform these functions.

(ii) The provision of information about train movements to enable train operators to meet their information obligations to customers. The Network Licence sets out a series of requirements that NRIL must fulfil in delivering this function, including: that it cooperates with train operators to enable them to inform passengers, and responds promptly to timetabling issues; publishes, or procures the publication of, a national timetable of passenger services; ensures that timely information about changes to the timetable is provided to train operators; and provides information on train movements to providers of train enquiry services.

7.10 NRIL's "station services" function, "b" in the Schedule to the Order, relates to the operation of railway stations[5]. "Station services" are defined in section 82(2) of the Railways Act 1993 as any service which consists of, or is comprised in, the provision or operation of a station. NRIL is permitted to provide "station services" under the Stations Licence issued to it under section 8 of the Railways Act 1993.

7.11 The Transfer Scheme of British Railways Board in favour of Railtrack PLC, made pursuant to section 85(1) of the Railways Act 1993 on 31 March 1994, from

[5] Network Rail currently operates the following stations: Birmingham New Street; Bristol Temple Meads; Cannon Street; Charing Cross; Edinburgh Waverley; Euston; Gatwick Airport; Glasgow Central (excluding the low level station); Fenchurch Street; Kings Cross (excluding Thameslink); Leeds; Liverpool Lime Street; Liverpool Street; London Bridge; Manchester Piccadilly; Paddington; Reading; Victoria; Waterloo (excluding Waterloo East). Other railway stations are operated by Train Operating Companies.

which NRIL inherited many of its functions is helpful in explaining in more detail the activities NRIL performs at the stations it manages itself in delivering "station services". The functions which, in the opinion of the Secretary of State, are of a public nature encompass the performance of activities such as: concourse and forecourt management; car parking; customer service centres; cleaning and maintenance; left luggage; lost property; platform operations; train announcing and indicators; safety, security fire and emergency; public and staff toilets; and road traffic management and taxis.

7.12 NRIL's "light maintenance services" function, "c" in the Schedule to the Order, relates to the provision and operation of "light maintenance depots" as defined by section 83(1) of the Railways Act 1993. A "light maintenance depot" includes land or property which is used in connection the provision of "light maintenance services", as defined by section 82(2) of the Railways Act 1993, whether or not it is also used for other purposes. "Light maintenance services" are the refuelling, or the cleaning of the exterior, of locomotives or other rolling stock; and also the carrying out to locomotives or other rolling stock of maintenance work of a kind which is normally carried out at regular intervals of twelve months or less to prepare it for service.

7.13 Also falling within all three of these functions will be relevant administrative information, such as information on staff numbers or staff salaries, and information relating to safety on the rail network.

(b) NRHC

7.14 NRHC is the parent company of NRIL, and performs some of the same functions, namely the acquisition and ownership of network and station services in its role as the holding company for Network Rail in respect of NRIL. NRHC does not perform any other functions performed by NRIL. It is the opinion of the Secretary of State that where NRHC performs the same functions as NRIL, those functions are also of a public nature where performed by it.

7.15 Of particular relevance to the Secretary of State's opinion is the degree of government control that NRHC is subject to following reclassification, as made clear in the Framework Agreement. Other factors are also important, including the fundamental contribution of the functions performed by NRHC to the operation of railways in England, Wales and Scotland which indicate that they are carried out in the public interest.

(c) NRL

7.16 NRL is the parent company of NRHC. It is also the umbrella company for the entire Network Rail group. NRL's Memorandum of Association states that it performs the same functions as those performed by NRIL and NRHC. It is also the opinion of the Secretary of State that, to the extent that NRL performs these

functions they are of a public nature. The Secretary of State has formed this view for the same reasons as outlined above in relation to NRIL and NRHC.

Functions for which Network Rail makes a charge or receives consideration etc but which are unrelated to the use or operation of railway assets

7.17 In designating Network Rail under the FOI Act, the Secretary of State has taken into account the extent to which Network Rail engages in activities for which NRL, NRHC or NRIL charge fees or obtains consideration of any kind (such as profit shares), usually within in a competitive environment. As a general rule, these activities are not in the Secretary of State's view of a public nature.

7.18 However, the Secretary of State considers that some functions for which Network Rail receives fees or other consideration are exercised in such a way that they are intrinsic to the running of the network, stations or light maintenance depots. When exercised for such purposes those functions do constitute a public function, notwithstanding that a fee or other consideration is received or obtained. This is where NRIL, NRL or NRHC obtain a fee or consideration for allowing an operator to use or operate a railway asset. This includes, for example, the granting permission to run trains or stop them in stations through access agreements granted in accordance with sections 17-22C of the Railways Act 1993, or letting stations to train operating companies in return for a fee to allow passenger and freight trains to operate. Similarly it includes permitting an operator to use or operate a light maintenance depot. Article 2(2) also clarifies that these activities, unlike others of a more commercial nature in which Network Rail is in competition with rival companies, are subject to the FOI Act.

7.19 In order to be clear about where the dividing line falls viz-a-viz functions for which fees are paid or other consideration is given, Article 2(2) of the Order clarifies that where a fee is charged or consideration is obtained by NRIL, NRL or NRHC, then that activity is not designated for the purposes of the FOI Act unless the activity allows an operator to use or operate a railway asset. This exclusion should capture, for example, estate management (e.g. arches and station retail lettings), property development, as well as the exploitation of other assets, such as telecoms or advertising space.

7.20 An "operator", is defined by section 6(2) of the Railways Act 1993 in relation to any railway asset as the person having management of that railway asset for the time being. It includes train operating companies providing services and operating stations, but it does not, for example, include retail and other private tenants who may rent parts of the network for non-rail related purposes. A "railway asset", as defined by the same section of that Act, is a train, network, station, or light maintenance depot.

8. Consultation outcome

8.1 Under section 5(3) of the FOI Act the Secretary of State is required to consult 'every person to whom the order relates, or persons appearing to him to represent such persons' before making an order under section 5.

8.2 Following the current Government's announcement on 1 September 2014 that it would extend the FOI Act to Network Rail, the Ministry of Justice has consulted Network Rail representatives about the companies and functions it would be appropriate to cover in the Order. Network Rail views its inclusion under the FOI Act positively and has identified a number of functions which it believes may be of a public nature. The Secretary of State and Network Rail are in agreement about these functions and the companies performing them.

8.3 The Ministry of Justice has also consulted Network Rail on the wording of this Order and they are content. The Government has not held a public consultation on the extension of the FoI Act to Network Rail.

9. Guidance

9.1 The Ministry of Justice provides guidance on its website for all bodies and office holders covered by the FOI Act[6] on all aspects of compliance. The Information Commissioner also provides extensive guidance also freely available online[7].

10. Impact

10.1 Total transition costs to Network Rail, which will answer requests submitted to NRIL, NRHC and NRL collectively, are expected to be in the region of £0.39m. Ongoing quantifiable annual costs to Network Rail are estimated to be £0.93m annually, although costs in the first year may be slightly greater as a result of possible high volumes of requests immediately after designation. Network Rail already spends in the region of £0.25m per annum on voluntary transparency activity, including both the proactive publication of information and responding to information requests outside the scope of the FOI Act.

10.2 Other affected groups include the Information Commissioner's Office (the "ICO") which will have to consider any increase in numbers of appeals and enforce the proper application of the FOI Act. There will also be costs to the tribunals and higher courts, and to the wider public sector if they receive any additional related FOI requests. However, only a small percentage of cases reach the appeal stages. Consequently, the addition of only NRIL, NRHC and NRL to the scope of the FOI Act should have a minimal impact given over 100,000 bodies are currently within the scope of the Act.

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[6] http://www.justice.gov.uk/guidance/freedom-and-rights/freedom-of-information/index.htm.
[7] https://ico.org.uk/for-organisations/guide-to-freedom-of-information/

10.3 In terms of non-monetised benefits, extending the FOI Act is intended to aid the openness, transparency and accountability of NRIL, NRHC and NRL, which will in turn benefit society more generally. Increased public access to information could lead to greater scrutiny, increased awareness and greater confidence in NRIL, NRHC and NRL. Organisations currently within the scope of the FOI Act may receive fewer requests (if these are instead directed to NRIL, NRHC and NRL).

10.4 In order to allow sufficient time to prepare for inclusion within the FOI Act, Network Rail was advised in September 2014 that we aim to commence the legislation, subject to Parliamentary approval, by April 2014. The Order has been drafted to enable it to be made and commenced by this time, and on the day after the day on which it is made. The Ministry of Justice is in close contact with Network Rail to ensure it is aware of when the Order will come into force.

10.5 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk .

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 Following the previous order made under section 5, the Ministry of Justice consulted ACPO, FOS and UCAS about their experience of the FOI Act. Written responses were received from ACPO and UCAS, and officials met with FOS. The information received has been taken account of in our assessment of the likely impact on NRL, NRIL and NRHC. It is proposed to carry out a similar assessment of their experience of the FOI Act in spring 2016.

12.2 The ICO will consider complaints about NRL, NRHC and NRIL's compliance with the FOI Act and enforce its proper application. The First Tier Tribunal (Information Rights), Upper Tribunal and higher courts will also consider subsequent appeals.

13. Contact

Oliver Lendrum at the Ministry of Justice, Tel: 020 3334 4619 or email: informationrights@justice.gsi.gov.uk, can answer any queries regarding the instrument.