

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 18 June 2020

Public Authority: Transport for the North
Address: 4 Piccadilly
Manchester
M1 3BN

Decision (including any steps ordered)

1. In a multi-part request to Transport for the North (TfN), the complainant has requested information associated with the Southern Pennines: Strategic Development Corridor. TfN initially withheld information relevant to two parts of the request under regulation 12(5)(e) of the EIR (commercial information). It addressed the remaining parts of the request as 'normal course of business'. During the Commissioner's investigation, TfN withdrew its reliance on regulation 12(5)(e). It has categorised the request as manifestly unreasonable under regulation 12(4)(b) and considers that the information it is withholding engages regulation 12(4)(d) (material in the course of completion). The complainant disputes this position.
2. The Commissioner's decision is as follows:
 - TfN cannot rely on regulation 12(4)(b) to refuse to disclose the requested information.
 - The information can be categorised as material in the course of completion under regulation 12(4)(d), however the public interest favours releasing the information.
3. The Commissioner requires TfN to take the following step to ensure compliance with the legislation:

- Disclose the three reports being withheld under regulation 12(4)(d).
4. TfN must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. TfN is a partnership of public and private sector representatives working with central government and national transport bodies to develop and deliver strategic transport infrastructure across the North of England.
6. On its website, TfN explains that the Southern Pennines: Strategic Development Corridor concerns an Investment Programme to provide a pipeline of projects to support economic growth in the North between now and 2050. It looks at the case for improving east-west connectivity between some of the major economic and population centres of the North, along with four major ports, and four airports.

Request and response

7. On 3 June 2019 the complainant wrote to TfN on behalf of the Friends of the Peak District and the Campaign to Protect Rural England (South Yorkshire) and requested information in the following terms:

"1. The report refers to the Options Assessment Report (presumably as per WebTAG) which we have been unable to find online. Please could we see a copy of this.

2. In order to understand the environmental baseline change please could we see copies of the Current and Future Situation Technical Note and Impacts of Future Technology Report.

3. The EAR Para 3.5.3 states 'For the environmental appraisals, the Reference Case schemes have been considered as part of the baseline.' Para 3.5.4 then states 'The influence of the Reference Case schemes on the environmental baseline has not been considered in this study'... 'any significant environmental effects will be minimised through the application of mitigation'. Therefore, from the point of view of the environment there appears to be no point in having a reference case. Please would you clarify the purpose of the reference case for the EAR.

4. If we have understood the assumptions of the EAR paras 3.5.3 & 3.5.4 (and the SPOC) correctly, then the environmental impacts recorded in the results are caused only by the proposed Strategic Outline Programme (in blue on Fig 4.1 for roads, and listed in Table 4.1; all of the improvements on Fig 4.2 and listed in Table 4.2 for rail) – is that correct? If so, when and how would the total or cumulative impacts of the entire SDC programme (reference case plus SOP) be appraised and understood?

5. Schemes in the list of those appraised in the EAR e.g. M1-M18 link road and A61 dualling between A616 and Sheffield, appear in the Trans-Pennine Tunnel Wider Connectivity (TPTWC) as published in March 2017. TPTWC is included in the reference case (EAR para 3.5.3, although only some of its schemes appear in the SPOC Table 3 Reference Case List). As the TPTWC is considered part of the reference case we do not understand why some of its components have been appraised in the EAR. We would therefore be grateful to understand why some schemes have been appraised and others not.

Have other schemes included in the reference case also been appraised in the EAR?

6. EAR Paragraph 3.5.1 states that the Reference Case includes 'other transformational work programmes.' What are these?

7. According to EAR Table 6.1 page 35 the Strategic Outline Programme (SOP) includes separate improvement schemes. In Fig 4.1 these are shown in brown whilst the SOP schemes are shown in blue. Table 6.1 refers to 'SOP including improvement schemes that would impact on the Peak District National Park', yet in Fig 4.1 there are no brown lines near the Park. What are these improvement schemes? Are their impacts included in the EAR? And which ones would impact on the National Park?

8. The SPOC para 12.15 states 'some interventions present a high risk of significant environmental impacts and therefore a risk of failing to comply with policy, legislation and STP objectives. These interventions have been identified in the Environmental Appraisal Report.' We are having difficulty finding them. Which interventions risk failing to comply?

9. The reason given in the EAR for not including the influence of reference case schemes on the environmental baseline was lack of environmental information. Through use of what evidence base has this risk of the reference case failing to comply be turned into 'any

significant environmental effects will be minimised through the application of mitigation' (EAR para 3.5.4)?

10. When will the shortlist of schemes for consideration in development of road and rail plans be identified and available for us to see?

11. It would appear that the Trans-Pennine Tunnel scheme is progressing as a scheme independently of the SDC package, with its strategic outline business case (SOBC) to be submitted to DfT in 2019 for inclusion in RIS2. Although the SOBC is concerned with the economics of the scheme it does require some environmental input (DfT's 'The Transport Business Cases 2013 para 3.5). When will we be able to see the EAR, traffic modelling and Appraisal Summary of the Trans-Pennine Tunnel scheme?"

8. TfN responded on 12 July 2019. It withheld information the complainant has requested in parts 1 and 2 of the request under regulation 12(5)(e) of the EIR and said that the public interest favoured maintaining this exception. TfN considered the remaining parts of the request were general queries rather than requests for recorded information and treated them as such.
9. Following an internal review TfN wrote to the complainant on 19 September 2019. It maintained its position regarding the three documents it was withholding that fall within the scope of parts 1 and 2 of the request.
10. During the Commissioner's investigation TfN reconsidered its response. In correspondence to the complainant of 26 February 2020 TfN advised that it is now relying on regulation 12(4)(b) and 12(4)(d) to refuse to disclose the information it is withholding.

Scope of the case

11. The complainant contacted the Commissioner on 9 October 2019 to complain about the way her request for information had been handled.
12. In view of its new response, the Commissioner's investigation has considered whether TfN can rely on regulation 12(4)(b) and/or regulation 12(4)(d) to refuse to disclose the information the complainant has requested in parts 1 and 2 of her request, and the balance of the public interest.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable request

13. Regulation 12(4)(b) of the EIR says that a public authority may refuse to disclose information to the extent that the request is 'manifestly unreasonable'. This exception can be used when a request is vexatious or when the cost of complying with a request would be too great. In this case, TfN has indicated that it considers the complainant's request to be a disproportionate burden (the equivalent of section 14(1) of the FOIA) and because of the cost of complying with it (the equivalent of section 12 of the FOIA).
14. The Commissioner considers that the inclusion of 'manifestly' in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under the exception, the information request must meet a more stringent test than simply being 'unreasonable'. 'Manifestly' means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.
15. In line with her published guidance on manifestly unreasonable requests, the Commissioner considers whether the request itself is manifestly unreasonable rather than the individual submitting it. Sometimes, it will be patently obvious that a request is manifestly unreasonable. In cases where it is not so clear cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually be a matter of objectively judging the evidence of the impact on the authority and weighing this against any evidence about the purpose and value of the request. Public authorities may also consider the context and history of the request where relevant.
16. The EIR does not contain a limit at which the cost of complying with a request is considered to be too great. However, the Commissioner's guidance suggests that public authorities may use the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 as an indication of what Parliament considers to be a reasonable charge for staff time. It has been determined that £450 is the appropriate limit for public authorities that are not central government departments, and that the cost of complying with a request should be calculated at £25 per hour; this applies a time limit of 18 hours.
17. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is then expected to consider the proportionality of the cost

against the public value of the request before concluding whether the cost is excessive. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:

- determine whether it holds the information
 - locate the information, or a document which may contain the information
 - retrieve the information, or a document which may contain the information, and
 - extract the information from a document containing it.
18. Where a public authority claims that regulation 12(4)(b) is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with regulation 9(1) of the EIR.
 19. Where the exception is engaged it is subject to a public interest test under regulation 12(1)(b) to determine whether the information should be disclosed in spite of the exception applying.
 20. The information that is the focus of this case is the three documents that the complainant requested in parts 1 and 2 of her request. TfN says these are 1) the Option Assessment Report (which is referred to in a Southern Pennines: Strategic Development Corridor Environmental Appraisal Report), 2) the Existing and Future Evidence Report (DRAFT) (referred to by the complainant as the 'Current and Future Situation Technical Note') and 3) the Future Technology Intervention Impacts Report (referred to by the complainant as the 'Impacts of Future Technology Report').
 21. TfN says that these documents are associated with the Southern Pennines: Strategic Development Corridor Environmental Appraisal Report¹, which it published in April 2019. This, in turn, is associated with the Southern Pennines: Strategic Development Corridor Strategic Programme Outline Case (SPOC). The Environmental Appraisal report was compiled as a Stage 1 assessment, as stated in TfN's Strategic

¹ https://transportforthenorth.com/wp-content/uploads/TfN_Southern_Pennines_EAR_FINAL_V4_130319.pdf

Transport Plan² (STP): *"In developing and delivering TfN's Investment Programme a two-stage sustainability appraisal approach will be carried out. For the Strategic Development Corridors an Environmental Assessment Report is being undertaken as part of the Strategic Programme Outline Case."* Stage 1 assessments help to shape (transport) interventions that will be included in the Investment Programme. Stage 2 will ensure that as interventions are developed and designed, further detailed sustainability assessments are undertaken to inform final funding decisions and approvals. The STP was approved in February 2019.

22. TfN has explained that the withheld information forms part of this two-stage sustainability appraisal approach, which TfN says is based on a high level understanding of the nature of the proposed interventions in the Southern Pennines: Strategic Development Corridor. The overall process will not be complete until final funding and approval decisions for any transport interventions are made.
23. In its submission to the Commissioner, TfN noted that the complainant raised 11 queries in her email of 3 June 2019. TfN says it provided a detailed response to queries 3-11 in its response of 17 July 2019 and treated queries 1 and 2 as formal requests for information under the EIR. TfN confirmed that the complainant has requested copies of the three reports referred to above. Referring to the Commissioner's published guidance on manifestly unreasonable requests, TfN says that it considers that it is entitled to refuse the complainant's request on the basis that complying with it would impose a disproportionate burden and divert its resources. TfN says it would be distracted from delivering other services, if the requested information is disclosed.
24. TfN has advised that the three reports contain a large volume of data and information regarding proposed transport interventions in the Southern Pennines: Strategic Development Corridor. It says that each of the '222' pages of the three reports would need to be considered in detail as to what information could be released into the public domain. The figure of 222 is a combined figure; in its fresh response to the complainant TfN broke down the number of pages per report: 76,68 and 78. Considering each page would, says TfN, be a disproportionate burden and diversion of resources. It would hinder TfN from delivering

² <https://transportfornorth.com/wp-content/uploads/TfN-final-strategic-transport-plan-2019.pdf>

other projects in the Major Roads Team. This is a team of only four officers with support from the Major Roads Senior Planning & Strategy Officer who responded to the complainant on 17 July 2019.

25. TfN has estimated that it would take at least 37 hours to review the three reports. The Commissioner understands that TfN therefore considers it would take 10 minutes to review each of the 222 pages it has referred to. TfN says its Interim Head of Programme Management Office provided it with this estimation of the time involved. It considers that, when reading the contents of the three reports, TfN would be entitled to have regard to exceptions available under the EIR, unlike the limitations under the Freedom of Information legislation. By this the Commissioner understands TfN to be referring to the fact that, unlike the FOIA, in addition to the activities listed at paragraph 17, the provision under regulation 12(4)(b) of the EIR includes the time it would take to consider whether any information is exempted information. In the current case TfN considers it would take 10 minutes to review each of the 222 pages and to consider whether any of the information in each page is exempt from disclosure. In TfN's view carrying out the above process would unreasonably divert its resources from providing public services.
26. TfN has provided the Commissioner with copies of the three reports in question, which she has reviewed. While it does contain some pages of text, the majority of the 76 page 'Option Assessment Report' is made up of tables, maps and diagrams. The 68 page 'Future Technology Intervention Impacts Report' also contains many pages of tables. In its fresh response to the complainant, TfN describes the 'Current and Future Situation Technical Note' as comprising 78 pages. However, the report TfN has provided to the Commissioner is called the 'Existing and Future Evidence Report DRAFT' and comprises 108 pages. Again, this report is made up of some text and many tables, maps and diagrams.
27. Having reviewed the three reports, the Commissioner considers that, although much of the content is of a technical nature, 10 minutes to review each page of each report and consider whether any information should be withheld is an over-estimation. In her view, a more reasonable amount of time would be an average of four minutes to review each page – she agrees with the complainant in that respect. The Commissioner assumes the total number of pages is 254 rather than 222. In that case, the process would take approximately 17 hours, which is within the time limit provided by regulation 12(4)(b). The Commissioner also notes, as did the complainant, that TfN withdrew its reliance on regulation 12(5)(e) and so she must assume that TfN does not consider the reports contain any commercially sensitive information.

28. Nor can the Commissioner take into account the fact that it is because the team concerned is small that complying with the request would be an unreasonable diversion, and hamper the team and TfN from delivering other projects. That is an issue for TfN and not one that should therefore prevent the complainant from having access to information she has requested.
29. The Commissioner appreciates that dealing with the request may involve a degree of burden for TfN (although it has not made a strong case for this). But the information requested has a value and, given the significance and wider public interest of the Southern Pennines: Strategic Development Corridor project, the Commissioner does not consider that any burden is disproportionate. Having considered all the circumstances, the Commissioner has decided that TfN cannot rely on regulation 12(4)(b) to refuse to disclose the requested information.
30. Because she has found that regulation 12(4)(b) is not engaged, it has not been necessary for the Commissioner to consider the associated public interest test. She has gone on to consider the exception under regulation 12(4)(d).

Regulation 12(4)(d) – material in the course of completion

31. Regulation 12(4)(d) of the EIR says that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
32. The explanatory memorandum to the EIR (COM/2000/0402) states that *"...the Commissioner places great importance on public authorities being afforded safe space (thinking space) and drafting space when considering whether, and on what terms, a venture should be entered into."*
33. Regulation 12(4)(d) is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception. However, regulation 12(4)(d) is a qualified exception so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
34. The fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be

finished, it may be part of material which is still in the course of completion.

35. In its submission to the Commissioner, TfN has advised that the three reports have to be seen in the context of the overall two-stage sustainability appraisal approach referred to on page 151 of the STP. It says that the reports are part of the ongoing two-stage process which will be refined and further developed and helped to shape the interventions for inclusion in the Investment Programme. Stage 2 will ensure that as the interventions are developed and designed, further detailed sustainability assessments are undertaken, which will inform final funding decisions and approval.
36. In her correspondence to the Commissioner, the complainant has focussed on the fact that it appears to her that the reports are finished (despite one being labelled 'DRAFT'). However, TfN is correct that documents may be finished but if they are part of wider material that is still in the course of completion, regulation 12(4)(d) can be applied.
37. The Commissioner is satisfied that in this case the three reports may be finished but they are part of wider material that is still in the course of completion; namely the two-stage sustainability appraisal approach associated with the Southern Pennines: Strategic Development Corridor. In its fresh response to the complainant, TfN confirmed that the three reports form part of the Stage 1 process, which will not be completed until the more enhanced appraisals in Stage 2 have been carried out.
38. The Commissioner has therefore decided that TfN is entitled to withhold the information the complainant has requested under regulation 12(4)(d) of the EIR as it can be categorised as material in the course of completion. She has gone on to consider the public interest test.

Public interest test

Public interest in disclosing the information

39. TfN has acknowledged the general public interest in it being transparent and accountable.
40. In correspondence to the Commissioner the complainant has argued that the three requested documents are essential to an understanding of the assumptions and development of both the Environmental Appraisal Report and the associated SPOC to which she refers in her request. She considers that the public interest between disclosing and withholding the information is therefore heavily weighted in favour of the requested information being disclosed.

Public interest in maintaining the exception

41. TfN argues that withholding the disputed information will protect the integrity of the Stage 1 assessments process.
42. It says that, taking account of the point at which the request was submitted and the current position, disclosing the information would make it difficult to bring the process to a conclusion. TfN argues that there is a public interest in ensuring that public authorities are given space to compile appraisals and for informed decisions to be made, without concern that the public debate could be skewed by releasing information early.
43. Finally, TfN argues that releasing the information would have a detrimental effect on the on-going process of shaping interventions and may prove misleading if it was placed in the public domain at this point.

Balance of the public interest

44. The Commissioner does not find the complainant's public interest argument to be particularly strong. However, the Commissioner notes that there is always a general public interest in disclosing environmental information and that there is a presumption in favour of disclosure.
45. It could also be argued that because the wider issue – the Southern Pennines: Strategic Development Corridor - was still 'live' at the time of the request, and currently, releasing information which could add to the public debate on the issue is in line with the purpose of the EIR. This is particularly so since, as the complainant has noted, all three of the disputed reports are referred to in the published, Environmental Appraisal Report and two are referred to in the published SPOC.
46. TfN has argued that releasing the information would make it "difficult" to bring the assessment process to a conclusion and would have "a detrimental effect on the on-going process of shaping interventions". It has not, however, explained in any detail why that would be the case. The Commissioner therefore does not find these arguments persuasive. Regarding the matter of the public being misled, the Commissioner considers it should generally be possible for a public authority to put a disclosure into context.
47. The Commissioner appreciates the public interest in TfN having thinking space to make decisions. However, she has not been persuaded that that its thinking space would be significantly hampered in this case. Given the various potential impacts of the decisions associated with the Southern Pennines: Strategic Development Corridor – such as environmental and economic impacts - the Commissioner considers there is a greater public interest in the public having access to as much

related information as possible in order to engage effectively in the debate. As such she finds that the public interest favours releasing the three reports.

Right of appeal

48. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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