

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

Decision notice

Date: 21 October 2021

Public Authority: Network Rail Limited
Address: 1 Eversholt Street
London
NW1 2DN

Decision (including any steps ordered)

1. The complainant has requested information about a specific railway station. Network Rail Ltd (NR) initially released some information and, in addition to personal data, withheld some information under regulation 12(5)(e) of the EIR (commercial confidentiality). NR subsequently identified further relevant information that it holds, some of which it released. NR continues to withhold information under regulation 12(5)(e) and is also now withholding a small amount of it under regulation 12(5)(a)(public safety).
2. The Commissioner's decision is as follows:
 - NR applied regulation 7(1) of the EIR correctly initially but breached regulation 5(2) of the EIR as it did not make available to the complainant all the disclosable information it holds within the required timescale.
 - NR breached regulation 14(2) of the EIR as it did not issue a refusal notice in respect of some of the relevant information within the required timescale.
 - NR is entitled to withhold some of the requested information under regulation 12(5)(e) of the EIR and the public interest favours maintaining this exception.

3. The Commissioner does not require NR to take any remedial steps.

Request and response

4. Following on from an earlier request for information about Dorking Deepdene station, which NR had refused on the basis of the cost/time associated with complying with it, on 13 October 2020 the complainant wrote to NR and requested information in the following terms:

“[1] These six drawings:

PWR/899C BASEPLATE FOR USE OF LONGITUDINAL TIMBERS
PWR/899K BRACKET AND LUBRICATED BASEPLATE FOR ELLSON
JOINT
PWR/870 DETAIL OF BOLTS
PWR/899VZ ELLSON JOINT WITH ROLLED STEEL BRACKET
PWR/899/UZ ELLSON JOINT WITH ROLLED STEEL BRACKET
PWR/899N ELLSON JOINT WITH ROLLED STEEL BRACKET 15 LONG
AND TWO CAST IRON BASEPLATES

- [2] Copy of the station lease agreement between Network Rail and First Great Western, current and any previous.
- [3] Works to alter features of the station due later this year.
 - A copy of the scope of work for the project.
 - A copy of any GRIP stage outputs and associated approvals, if generated.
 - A copy of business plans/justifications underpinning the project, [d] along with the budget and any cost share arrangements.”

5. NR responded on 9 December 2020. It released some information and withheld some under regulation 12(5)(e) of the EIR. NR advised that it considered the public interest favoured maintaining this exception. NR also withheld personal data under regulation 13.
6. The complainant requested an internal review on 4 January 2021, with regard to NR's reliance on regulation 12(5)(e). NR provided an internal review on 1 March 2021; it disclosed some information that it had previously withheld but maintained its reliance on regulation 12(5)(e) to withhold other information falling within scope of the request.
7. As a result of his subsequent complaint to the Commissioner, NR reconsidered its response and provided the complainant with a fresh response to his request on 26 August 2021. NR released some further information it had previously withheld. It also advised that it had

identified additional information within scope of the request, and it released this to him with some information redacted under regulation 12(5)(e) and a small amount redacted under regulation 12(5)(a). During the course of the investigation, on 19 October 2021, NR released a further small amount of information that it had advised it was withholding in its correspondence of 26 August 2021.

Scope of the case

8. The complainant first contacted the Commissioner on 20 November 2020 to complain about the way his request for information had been handled.
9. Following NR's fresh response, the complainant confirmed in correspondence to the Commissioner on 18 September 2021 that he remains dissatisfied with NR's reliance on regulation 12(5)(e) to withhold some information falling within scope of his request.
10. The Commissioner's investigation has therefore focussed on NR's application of regulation 12(5)(e) to information it is now withholding and the balance of the public interest. She has also considered procedural aspects of NR's handling of the request.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

11. Regulation 12(5)(e) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
12. To summarise, NR is withholding under regulation 12(5)(e):
 1. An Implementation Agreement dated 2019
 2. Some information from an 'Agreement Variation No 1' document
 3. An 'Agreement Variation No 2' document
 4. Some information from a 'Lease Document' dated March 2019
 5. Some information from a 'Lease Document' dated March 2020

6. Some information from an 'ESA Actions Report' document
 7. Some information from a 'Pre-Construction Information' document
13. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

In the information commercial or industrial in nature?

14. The Commissioner's published guidance on section 12(5)(e) advises that for information to be commercial in nature, it will need to relate to a commercial activity; either of the public authority or a third party. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information.
15. With regard to part 2 of the request, NR has explained that the lease documents from which some information has been withheld form part of its contractual arrangements with First Greater Western Railway (GWR) to deliver a programme of station enhancement works.
16. NR has noted that the Commissioner's published guidance on commercial information states that 'a commercial activity will generally involve the sale or purchase of good or services'. In the case of the platform extension programme, GWR has procured design and construction services from Network Rail. Details of this transaction – including estimated costs and negotiated terms – are set out in the Agreement documents and this is information that NE has withheld.
17. NR has gone on to explain that the cost and milestone information withheld from the documents for the project work at Dorking Deepdene station also relates to separate contractual agreements between GWR and third parties which – operating on a commercial basis – have provided funding.
18. The withheld information in the two Lease documents consists of rental charges and special conditions negotiated between NR (as landlord) and GWR (as tenant). GWR's lease of stations from NR is a commercial transaction. NR has noted that the Commissioner has previously

recognised the commercial nature of negotiated lease agreements between companies, for example in decision notice FS508692163, which related to lease agreements and lease costs for fishing rights, and in decision notice FS507045364 which related to proposed rent figures for leasing a plot of land for commercial telecommunications purposes.

19. With regard to part 3 of the request, the information being withheld is associated with recent platform extension works at the station. NR has explained in its submission that GWR has engaged it to deliver this works; contracting NR to deliver this work on a commercial basis based on NR's infrastructure specialism and knowledge of the rail network. This information therefore directly relates to the commercial activity of Network Rail, GWR and also the third-party funders.
20. Having reviewed the information being withheld and NR's submission, the Commissioner is satisfied that the information in question meets the first condition at paragraph 13 because it concerns upgrade proposals for Dorking Deepdene railway station. These works were commissioned by GWR and are based on contractual agreements with NR and third party funders.

Is the information subject to confidentiality provided by law?

21. In her published guidance on regulation 12(5)(e) the Commissioner advises that, in this context, this will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute.
22. In assessing whether the information has the necessary quality of confidence, the Commissioner will consider 1. whether the information is more than trivial, 2. whether or not it is in the public domain and 3. whether it has been shared in circumstances creating an obligation of confidence. A useful test to consider with regard to the latter is to consider whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.
23. In its submission, NR has noted that in his request for an internal review, the complainant opined that once a contract with a public sector [body] is declared exclusive, the information becomes subject to FOIA and EIR. In the complainant's view, unless there are elements in the contract that include, for example, "proprietary technology" or intellectual property rights, there are no grounds for refusal on confidentiality grounds.
24. NR considers this view is not correct and has noted the Commissioner's decisions on a wide variety of different types of information that have

been refused on the grounds of the confidentiality of commercial information.

25. The Commissioner is satisfied that the information is more than trivial as it is associated with a multi-million pound railway station infrastructure project. NR has confirmed in its submission that the information now being withheld has not been put into the public domain.
26. Regarding the third point, NR says that both the withheld lease information and the withheld project information form part of the contractual agreements between NR and GWR. These agreements were negotiated, NR says, with an expectation of confidentiality on both sides, as the agreed terms provide insight into the commercial operations of both parties in the context of a competitive industry.
27. NR has passed to the Commissioner GWR's detailed explanation of why information should be withheld, and the adverse affects disclosure would cause to its commercial interests, including in relation to elements of the information where this might be less obvious. The Commissioner has reviewed and taken account of GWR's arguments, but she does not intend to detail them in this notice. Suffice to say, GWR expects this information to remain confidential and NR also considers that GWR would not have shared the information it considers to be so commercially sensitive if it did not have a strong expectation that that information was confidential between the two parties and was to be protected from disclosure.
28. The Commissioner agrees with NR that requests for different types of information can be refused on the grounds on the grounds that it is confidential, commercial information. In this case, for the reasons above the Commissioner considers that the information in this case has the necessary quality of confidence: it is more than trivial, it is not currently in the public domain and was shared in circumstances creating an obligation of confidence. In the Commissioner's view, a reasonable person who was provided with the requested information would consider that the information had been provided to them in confidence. She is therefore satisfied that the withheld information is subject to confidentiality provided by law and that the second condition has been met.

Is the confidentiality provided to protect a legitimate economic interest?

29. In her related guidance, the Commissioner advises that a commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent.

30. NR considers that disclosing the information would adversely affect the economic interests of GWR, NR and the multiple third parties involved in the scheme for several reasons, which can be summarised as follows:

- Trust and confidence are necessary for the complex relationships and contractual agreements between NR and the train operating companies (such as GWR) to operate successfully. NR and GWR benefit from sharing confidential information with one another to inform improvements to the railway. This close working would be impeded if trust between the parties were diminished. If GWR felt unable to openly share information with NR or enter into agreements that, by necessity, involved confidential terms, this would not only damage GWR's revenue but also heavily affect NR's operation, particularly given that GWR currently manages nearly 200 stations owned by NR.
- Withholding the information protects not only the private contractual agreements and commercial relationships between GWR and its third party funders, but the wider reputations of GWR and NR as commercial partners.
- GWR is involved in separate contractual agreements with multiple private companies. Disclosure would reveal details of their commercial operation and harm GWR's working relationships with these companies, currently and into the future.
- Disclosure would have a detrimental effect on GWR's reputation within the rail industry. This would in turn impact on the company's ability to build new working relationships in the future. The rail industry has historically been a competitive one, with franchises coming up to tender every few years. Moving forward, following the publication of the Williams-Shapps Plan for Rail and the proposed creation of Great British Railways, competition will continue between private companies to obtain contracts for operating train services. If GWR were to be seen to be an unreliable partner with a reputation for disclosing confidential information, it will fail to gain the confidence of third parties and to build the commercial relationships that are necessary to operate in such a competitive environment.
- GWR will be – like all train operators – required to bid in the future for contracts to operate services. Any disclosure of confidential terms that reflect GWR's business model could be used to GWR's detriment by competitors looking to gain an advantage in the tendering process. The information withheld from the lease agreements between GWR and NR in particular could be used by competitors to gain an advantage over GWR based on the insight

that information provides into the way GWR operates its business and the current terms of its lease with NR.

31. The Commissioner is persuaded by NR's reasoning, and GWR's arguments, and is satisfied that it is the legitimate commercial interests of NR and GWR, and not any other interests, that are being protected through the confidentiality of the withheld information.

Would the confidentiality be adversely affected by disclosure?

32. The Commissioner considers that although this stage of the test is a necessary element of the 12(5)(e) exception, once the first three elements are established, as in this case, it is inevitable that this fourth element will be satisfied. This is because disclosing truly confidential information into the public domain would inevitably harm the confidential nature of that information and the legitimate economic interests identified.
33. However, she has noted that in its submission to her, NR has addressed arguments that the complainant provided in his correspondence with NR. These are summarised as follows:
- The complainant's argued that loss of commercial competitive advantage [in the future] is not a valid reason for non-disclosure. In response, NR has said that to awarded either franchises or contracts, train operators need to be able to demonstrate that they can offer the most efficient, reliable and customer-focussed service, offering the best value for money. The market should therefore be a 'level playing field' to encourage a range of competitors and to ensure that the best deal can be achieved on behalf of railway users. Placing the withheld information in the public domain would give an insight into GWR's financial arrangements, giving its competitors an advantage and weakening GWR's ability to negotiate.
 - The complainant argued that franchise agreements are public records and therefore, as related agreements, station leases and individual station management plans can be disclosed. In response, NR has said that station lease agreements are drawn up between NR and train operating companies such as GWR. They relate to specific commercial transactions arranged with an expectation of confidentiality. It notes that although GWR's franchise agreement is published on the Department for Transport's public register, information about costs has been redacted from that document.

Conclusion

Since the four conditions at paragraph 13 have been met, the Commissioner is satisfied that the information being withheld engages the exception under regulation 12(5)(e) of the EIR. She has gone on to consider the public interest test.

Regulation 12(1)(b) – public interest test

Public interest in disclosing the information

34. In his request for an internal review the complainant noted that the station projects(s) involve a substantial, if not total, contribution from public funds. As such, he considered it not unreasonable that taxpayers' economic interests should be considered since, in his view, they would be bearing the majority of the financial risk.
35. In its submission to the Commissioner, NR says it recognises that not only public authorities' spending but also their activity generally should be open to scrutiny wherever possible to help inform public debate on important issues. NR notes that, in this case, it has disclosed a large number of documents, which it considers provide as much transparency as possible around the Deepdene station works, without harming the commercial interests of the companies involved. These documents, NR says, provide extensive insight into the reasons for the works, what the works entailed and its approach to carrying these out. NR considers the disclosed information goes some way to providing the public with transparency in relation to this project

Public interest in withholding the information

36. NR notes that in his correspondence with it the complainant had stated that *'the public's interests should be considered on at least the same basis as the "contracted" parties, if not more so.'* In NR's view these two sets of interest – the public interest and the commercial interests of the companies involved – do not oppose one another. It had advised the complainant that disclosing the information has the potential to impact on the fairness of future franchising, or equivalent processes, by placing one train operating company at a disadvantage compared to another.
37. NR has confirmed to the Commissioner that it considers that competition within the railway industry has always been to the public's benefit, as it helps to encourage improvement to services and value for money.
38. There is greater public interest in strong competition now more than ever, with the move away from franchises to operators competing for contracts. This this new model for operating the railways should be done fairly, to encourage competition and ensure the procurement process delivers the best service and value for money to passengers and the taxpayer.

39. Finally, NR says that in light of the increased importance of private investment under the new system, GWR (and all train operating companies) will need to seek support from third-party funders to be able to make improvements to infrastructure without government subsidy. It says that if it were to disclose confidential information shared between GWR and its third-party funders, this would result in GWR being unable to secure the investment needed to deliver improvements to services and infrastructure for the benefit of passengers. This would mean that improvements would either not take place or would take place at cost to the taxpayer. NR argues that it is therefore in the public interest that GWR should be able to preserve its reputation as a reliable partner when seeking third-party investment, as the services it is seeking investment for will ultimately benefit the public.

Balance of the public interest

40. The costs associated with the Dorking Deepdene railway station upgrade are unlikely to be surprising, given the scale of the project. And the Commissioner has not been presented with any evidence that the costs are a concern or that there *any* concerns about how the project is being managed. As such, while particular detail of the Dorking Deepdene works is of interest to the complainant, it appears to the Commissioner that there is limited wider public interest in this information. In the Commissioner's view, such public interest as there is in the project has been met by the substantial volume of relevant information NR has released to the complainant in response to his request (and previous requests).
41. The Commissioner acknowledges the EIR's presumption in favour of disclosing environmental information, but she considers that NR has made substantially more compelling arguments. The Commissioner is satisfied in this case that there is greater public interest in: NR maintaining a good working relationship with its partners; those partners maintaining good working relationships with their partners and in all these bodies being able to operate effectively and fairly in a very competitive environment.

Procedural matters

Regulation 5 – Duty to make environmental information available on request

42. Under regulation 5(1) of the EIR, a public authority that holds environmental information shall make it available on request.

43. Under regulation 5(2), information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
44. The complainant submitted his request to NR on 13 October 2020. NR disclosed the majority of the information in its response of 9 December 2020. But NR released other information at the point of its internal review in March 2021 and subsequently disclosed further information to the complainant on 26 August 2021 and 19 October 2021. NR therefore breached regulation 5(2) in respect of that information.

Regulation 7 – Extension of time

45. Under regulation 7(1) of the EIR, a public authority may extend the period of 20 working days referred to in the provisions in regulation 5(2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to decide to refuse to do so.
46. In this case, NR advised the complainant that it was relying on regulation 7 to extend the deadline for its response.
47. The complainant has expressed dissatisfaction with NR taking “exactly” 40 days to respond to his correspondence (ie its initial response and internal review response) ie he appears to be indicating that NR could have responded earlier than that had it chosen to.
48. In the course of her investigation, the Commissioner has corresponded with NR about this complaint. She has discussed the processes NR has gone through to identify relevant information, and to identify information that it considered could be released. This has included communicating with third parties and it involved a large amount of information. Given the complexity and its dependence on third parties, the Commissioner accepts that it was reasonable for NR to extend the deadline for its initial response to this request by 20 working days and that regulation 7(1) was correctly applied.
49. The complainant submitted his request on 13 October 2020 and NR responded to it on 9 December 2020. The 40 working day provision was not exceeded. Information subsequently identified is discussed at paragraph 44, but NR’s initial response did not breach regulation 5(2).
50. The Commissioner has not considered the matter of the timeliness of NR’s internal review but notes that it was provided within the 40 working day requirement under regulation 11(2) of the EIR.

Regulation 14 – Refusal to disclose information

51. Under regulation 14(2) of the EIR, if a request for environmental information is refused by a public authority under regulation 12, the refusal must be made as soon as possible and no later than 20 working days after the date of receipt of the request.
52. As has been discussed, NR subsequently identified further information relevant to this request of 13 October 2020. It advised the complainant that it was refusing to disclose some of this information in its correspondence to him of 26 August 2021. NR's refusal of that particular element of the request therefore breached regulation 14(2).

Right of appeal

53. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

54. 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.
55. 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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