

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

Decision notice

Date: 24 October 2022

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested information about the HS2 Wendover tunnel proposal. The above public authority's ("the public authority's") final position was that it wished to rely on regulation 12(4)(e) – internal communications – and regulation 12(5)(d) – confidentiality of proceedings – to withhold one report.
2. The Commissioner's decision is that the public authority has correctly applied 12(5)(d) to the withheld information and that the balance of the public interest favours maintaining the exception. He is not satisfied that regulation 12(4)(e) is engaged. As the public authority failed to deal with the request under the EIR within 20 working days, it breached regulation 14 of the EIR. As it disclosed environmental information late, it also breached regulation 5(2) of the EIR.
3. The Commissioner does not require further steps.

Request and response

4. On 23 July 2021, the complainant requested information of the following description:

"I should like to request the following information under the Freedom of Information Act 2000 on the Wendover Tunnel proposal (HS2 Phase One line of route):

- (1) A copy of the independent consultant report produced by KPMG (2018) on behalf of the Department for Transport to review the presented options, from HS2 Ltd and from mbpc Ltd (on behalf of Wendover Parish Council) for the HS2 Phase One route at Wendover.
 - (2) A copy of the Infrastructure and Projects Authority (IPA) report (2018) on whether HS2 Ltd had followed a competent process in making its decision on the Wendover Tunnel proposal.
 - (3) Copies of all correspondence between the Department for Transport, KPMG and HS2 Ltd relating to the independent consultant report produced by KPMG (2018) on behalf of the Department for Transport to review the presented options, from HS2 Ltd and from mbpc Ltd (on behalf of Wendover Parish Council) for the HS2 Phase One route at Wendover.
 - (4) Details of all meetings between Department for Transport Ministers and officials, HS2 Ltd and KPMG relating to the Wendover Tunnel proposal between January 2018 - July 2021.
 - (5) Details of all correspondence between Department for Transport Ministers and officials, and HS2 Ltd in relation to the HS2 Phase One consented scheme at Wendover between January 2016 - July 2021.
5. On 20 August 2021, the public authority responded. It relied on section 12 of FOIA to refuse element (5) of the request, but provided information within the scope of elements (3) and (4). The public authority withheld the information within the scope of elements (1) and (2) and relied on section 36 of FOIA (prejudice to the effective conduct of public affairs) in order to do so.
 6. The complainant requested an internal review on 24 September 2021. The public authority sent the outcome of its internal review on 10 November 2021. It upheld its original position.

Scope of the case

7. The Commissioner wrote to the complainant on 24 August 2022 to set out his proposed scope for the complaint. Based on the request correspondence, the Commissioner was only proposing to deal with the public authority's response to elements (1) and (2) of the request. The complainant agreed to this scope.

8. On the same day, the Commissioner also wrote to the public authority to set out his initial view of the complaint. He noted that the information seemed likely to be environmental and therefore the request should have been dealt with under the EIR. He asked the public authority to either issue an EIR-compliant response or explain why it considered that the information was not environmental.
9. The public authority disclosed a copy of the information it held within the scope of element (1) on 21 October 2022. However it explained to the Commissioner that it still wished to withhold the information within the scope of element (2). It was now relying on regulation 12(4)(e) and regulation 12(5)(d) of the EIR in order to do so.
10. The Commissioner has therefore considered the extent to which both those exceptions apply to the withheld information.

Reasons for decision

11. The Commissioner is satisfied that the information is environmental as it is information on a "measure" (the construction of a railway tunnel) affecting or likely to affect the elements of the environment.

Regulation 12(4)(e) – internal communications

12. The Commissioner is not satisfied that the remaining withheld information is an "internal communication". Regulation 12(8) requires the Commissioner to consider the government as a whole when deciding whether a particular communication is internal. That means that communications between government departments will be internal, as will communications between an executive agency and a government department. Although the Infrastructure Projects Authority sits underneath the Cabinet Office and HM Treasury rather than the Department for Transport (DfT), the Commissioner recognises that it still forms part of central government and therefore its communications with the DfT remain internal for the purposes of this exception.
13. However, the Commissioner does not accept that communications between HS2 Ltd and the DfT are internal communications. HS2 Ltd is not a part of the DfT: it is a company, wholly owned by the Secretary of State for Transport, but with its own separate legal personality. The Commissioner does not therefore consider that HS2 Ltd falls within the scope of central government.
14. It is not clear from any of the public authority's submissions whether it did or did not share a copy of the report with HS2 Ltd. However, having seen the withheld information, the Commissioner considers it more than

likely that a copy was shared. The report discusses HS2 Ltd's actions and processes and, although it was not addressed to HS2 Ltd, the Commissioner considers it very unlikely that the report was not shared with anyone at HS2 Ltd.

15. Once a communication is shared outside the public authority that holds it (or, in the case of central government, outside of central government) it loses its status as an internal communication. As the Commissioner is not satisfied that the withheld information was not shared outside of central government, it follows that regulation 12(4)(e) cannot apply.

Regulation 12(5)(d) – confidentiality of proceedings

16. The public authority has explained (and the Commissioner agrees) that reviews by the Infrastructure Projects Authority carry a degree of formality. There is a set process to be followed and reviews must accord with assurance principles. Such reviews therefore qualify as proceedings for the purposes of this exception.
17. The Commissioner also accepts that the proceedings carry a duty of confidence. Whilst there is no statutory obligation to maintain confidence, carrying out such a review will inevitably involve access to information that would not normally be shared outside of the particular organisation that created it. Staff of the Infrastructure Projects Authority would be aware that such information is not trivial and must not be more widely disseminated. This is sufficient to impose a common law duty of confidence upon them.
18. Finally, the Commissioner has considered whether disclosure would adversely affect the confidentiality of those proceedings. Clearly, it would as the information is not already in the public domain.
19. The Commissioner notes that there is a significant and weighty public interest in understanding decisions around the construction of the HS2 line. It is a project of major national significance, but also one that that will have a significant effect on the elements of the environment – especially during the construction phase. There is a particular interest in the Wendover section, as the route passes through the Chiltern Hills Area of Outstanding National Beauty and is likely to have at least some form of permanent effect on that area.
20. However, in the Commissioner's view, the public interest in this particular information is diminished by what it says about the measure that is not already in public domain. The report is not a technical feasibility study of a particular route option, nor does it expand on why that route option was disregarded (besides what is already in the public

domain). It is a report on the process that was followed in order to disregard the route option.

21. Because of the relatively generic material contained in the withheld information, the Commissioner does not consider the public interest in maintaining the exception to be strong – however he recognises that there will always be an inherent public interest in protecting proceedings which require confidentiality to be effective. The Infrastructure Projects Authority has strongly objected to disclosure and has argued that disclosure would undermine its ability to carry out such reviews in future.
22. In the Commissioner's view, the public interest in understanding how various route options came to be considered and disregarded is best served by disclosure of the KPMG report, along with the associated correspondence. This, in his view, contains much more detail about how the options were assessed. Disclosing the withheld information would add little to that debate whilst undermining the ability of the Infrastructure Projects Authority to carry out assurance reviews.
23. The Commissioner is therefore satisfied that the balance of the public interest lies in maintaining this exception.

Procedural matters

24. As the public authority failed to deal with the request under the EIR within 20 working days, it breached Regulation 14 of the EIR (requirement to issue a refusal notice).
25. As the public authority disclosed information outside of the 20 working day timeframe to respond to EIR requests, it also breached regulation 5(2) of the EIR.

Right of appeal

26. 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

27. 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.
28. 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

Roger Cawthorne
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