

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 March 2014

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 contributions being made by Councils and funding being sought by Councils for HS2 within 10 specific areas. The Department for Transport (DfT) refused to provide the requested information under section 29 and section 35(1)(a) of the Freedom of Information Act 2000 (FOIA) or regulation 12(4)(d) and (e) of the Environmental Information Regulations 2004 (EIR) in the alternative.
2. The Commissioner's decision is that the DfT should have dealt with the request under EIR, however it was correct to apply regulation 12(4)(d) EIR and the public interest favours withholding the information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 12 June 2013 the complainant requested information of the following description:

"...details of all correspondence including emails between the Department for Transport and : (1) any of the councils listed below (2) HS2 Ltd (3) any other Government departments (4) internal DfT correspondence concerning (a) the contributions that these councils may

be required to make to support the costs associated with HS2 and (b) the contributions being sought by these councils from government to assist with integrating HS2 with their local infrastructure. The date range for this correspondence should be between 1 January 2013 and 12 June 2013. The list of councils is as follows: Birmingham, Crewe, Derby, Leeds, Liverpool, London, Manchester, Nottingham, Sheffield and Solihull."

5. On 9 August 2013 the DfT responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:

Section 29
Section 35(1)(a)

6. The complainant requested an internal review on 13 August 2013. The DfT sent the outcome of its internal review on 10 September 2013. It upheld its original position but also said that if the information were environmental and dealt with under the Environmental Information Regulations 2004 (EIR), the exceptions at regulation 12(4)(d) and 12(4)(e) would apply.

Scope of the case

7. The complainant contacted the Commissioner on 3 October 2013 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, the DfT did provide the complainant with some of the information it had withheld.
9. The Commissioner has considered whether the DfT dealt with the request under the correct legislation and whether the DfT was correct to withhold the remaining withheld information.

Reasons for decision

Is the request for environmental information?

10. Within the internal review the DfT explained that regulation 2(c) of the Environmental Information Regulations 2004 (EIR) defines environmental information as "measures...such as policies, legislation,

plans, programmes...and activities affecting or likely to affect" the state of the elements of the environment. It said that whilst HS2 is clearly a measure that will affect the environment, the information held by the DfT that falls within the scope of the request, relates to the funding of HS2. It said that it does not relate to the question of whether HS2 will be funded as it has already been agreed that the scheme will go ahead. It said that it relates to the issue of how the scheme (and local connectivity) will be funded, and specifically to the question of whether funding contributions may be sought from third parties.

11. The DfT reiterated within its submissions to the Commissioner that it considers that it was correct to deal with the request under FOIA rather than EIR for the reasons set out above.
12. Whilst the Commissioner accepts that the HS2 scheme had been agreed at the time of the request, the withheld information, which relates to funding in particular relating to the specifics of local connectivity, this is a measure which will or will be likely to affect the environment. He does therefore consider that the withheld information is environmental under regulation 2(c) EIR and the request should therefore be considered under this legislation.

Regulation 12(4)(d)

13. The DfT has confirmed that it holds ten documents within the scope of the request (two documents were provided to the complainant during the course of the investigation). It said that regulation 12(4)(d) EIR was applicable to all eight withheld pieces of information.
14. Regulation 12(4) of the EIR states that for the purposes of paragraph(1)(a), a public authority may refuse to disclose information to the extent that – (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data.
15. The DfT explained that the withheld information is part of material which is still in the course of wider completion in conjunction with formulating and developing policy. It explained that that the withheld information relates to a policy regarding funding contributions for HS2 which may be sought from third parties, including councils. It said that at the time the request was made it was at a very early stage of policy formulation. It clarified that even now it is still not at the stage where a decision has been made on third party contributions. Ministers have not taken a view on the extent or level of any contributions that may be sought from third parties and policy in this area is still under development. It said that some of the work is now under review so it may be some time before the policy is finalised.

16. The Commissioner has issued guidance on this subject¹. This states that:

*"The fact that the exception refers to both **material** in the course of completion and 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. An example of this could be where a public authority is formulating and developing policy."*

17. After viewing the withheld information and taking into account the DfT's submissions as set out above, the Commissioner considers that it is part of material which is still in the course of completion. The material relates to the formulation and development of the DfT's policy position regarding funding contributions for HS2 which may be sought from third parties. The Commissioner therefore considers that regulation 12(4)(d) EIR was correctly engaged in this case.
18. As regulation 12(4)(d) EIR is subject to the public interest test, the Commissioner has gone on to consider the public interest factors in favour of disclosure and the public interest factors in favour of maintaining the exception.

Public interest arguments in favour of disclosing the requested information

19. The DfT acknowledged that disclosure would promote accountability and transparency and increase understanding of decisions made.
20. The Commissioner considers that there is a public interest in the government working in an open and transparent way. There is a public interest in disclosing information which provides the public with a better understanding behind the decision making process and enables the public to contribute where possible in relation to policies which are going to have a significant affect upon them. Furthermore there is a public interest in the government being accountable for decisions made.

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[http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.ashx)

Public interest arguments in favour of maintaining the exemption

21. The DfT has explained that it believes the following public interest arguments favour maintaining the exemption:

- Good government depends on good decision making and this needs to be based on the best advice available and a full consideration of all the options. In this particular case, the final decision on financial support from Local Councils on the proposed route has not been made yet.
- Policy on this subject was at a very early stage of formulation when the initial request was received and even now no decisions have been made. To release information at this time before any decisions have been made could present a distorted picture of the outcome of the policy and could mislead the public.
- Ministers and officials need to be able to conduct rigorous and candid risk assessments of their policies and programmes including considerations of the pros and cons without there being premature disclosure which might close off better options.
- There needs to be a free space in which it is possible to explore all options and use imagination, without the fear that policy proposals will be held up to ridicule before they are fully formed.
- As an area of developing policy where a significant level of research and assessment is still ongoing, the effect of disclosure at this time, before having been comprehensively discussed and agreed, would be to undermine the further development of the policy.

Balance of the public interest arguments

22. The Commissioner gives weight to the general public interest in the government operating in an open and accountable manner. He considers that greater transparency leads to a better public understanding of particular issues and enables the public to assist in the decision making process where possible. The Commissioner also notes the general significance and levels of public interest in the HS2 project as whole, including the overall environmental impact and cost to the taxpayer (at national and local level). There is also considerable public interest in how different regions will benefit and the different views about those benefits. Whilst he has given these factors some weight in general terms the Commissioner has also considered the specific information in this case and how it links with these general factors related to HS2. The information is specific to specific aspects of HS2 and the Commissioner gives strong weight as to how it will enable understanding of those parts

of the project but he does give strong weight in relation to understanding the project as a whole.

23. The Commissioner considers that effective policy making depends on good decision making which depends not only on sound evidence but candid communications that allow a full consideration of all the options without any concern over premature disclosure. Furthermore evidence based policy is considered to be more robust and experts or industry stakeholders may be reluctant to offer their opinions if there cannot be the assurance of non-disclosure. Finally government policy needs to be thoroughly evaluated before it can be properly implemented and this can only happen when all parties have the confidence that there is no risk that those exchanges will be disclosed prematurely. The impact on these processes and weight to be given to these arguments must be determined on the circumstances of each case.
24. In this case the policy was still live at the time of request still being formulated, and this increases likelihood and severity of adverse effects on the specific policy process in question, as well as more general impact, which gives greater weight to the public interest arguments in favour of maintaining the exemption. On balance the Commissioner considers that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Regulation 12(4)(d) EIR was therefore correctly applied in this case.

Right of appeal

25. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

26. 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.
27. 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

Steve Wood
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