

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 October 2016

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

Decision (including any steps ordered)

1. The complainant made a request for information to the Department for Transport (DfT) for copies of assessment reports produced by the Major Projects Authority on HS2. The DfT handled the request under FOIA and found that the information was exempt under section 35(1)(a) (policy formulation and development). During the course of the Commissioner's investigation the DfT said that were the Commissioner to find that the request should have been considered under the EIR then it would seek to rely on the exceptions in regulations 12(4)(d) (material still in course of completion), 12(4)(e) (internal communications) and 12(5)(d) (confidentiality of proceedings etc.).
2. The Commissioner has found that the request is for environmental information and the DfT should have considered it under the EIR. The Commissioner has also decided that the regulation 12(4)(d) exception is not engaged; regulation 12(5)(d) is engaged and regulation 12(4)(e) applies to only some of the withheld information. The Commissioner has decided that for some of the information the public interest in maintaining an exception outweighs the public interest in disclosure but for some of the withheld information the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The DfT shall disclose the September 2013, December 2014 and April 2015 reports to the complainant.

4. The public authority must take these steps 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The complaint in this case concerns a request for copies of assessment reports into HS2 prepared by the Major Projects Authority (MPA). The MPA was a part of the Cabinet Office responsible for providing independent assurance on the Government's Major Projects Portfolio. On 1 January 2016 the MPA merged with Infrastructure UK to form a new organisation, the Infrastructure and Projects Authority (IPA). The Commissioner has continued to refer to the MPA when discussing the assessment reports and the review process.
6. The Commissioner has already considered disclosure of two such reports in cases involving requests to the Cabinet Office (FER046548) and to HS2 Ltd (FER0536325). In both cases the Commissioner found that the requests were for environmental information and ordered disclosure of reports produced in November 2011 and November 2012.¹

Request and response

7. On 4 October 2015 the complainant made a request to the DfT for information about the Major Project Authority's assessment of HS2. The request read as follows:

"What is the text of the subsequent 2013, 2014 and 2015 reports prepared by the Major Projects Authority on its assessment of the HS2 rail project ("HS2")?"

¹ Cabinet Office case: https://ico.org.uk/media/action-weve-taken/decision-notices/2013/869356/fer_0467548.pdf

HS2 case: https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432386/fer_0570401.pdf

8. In asking for this information the complainant stressed that he was making his request under the EIR.
9. The DfT responded to the request on 30 October 2015 when it explained that the request was being dealt with under FOIA and that the information was being withheld under the exemption in section 35(1)(a) (formulation and development of government policy). The DfT concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
10. The complainant subsequently asked the DfT to carry out an internal review of its handling of his request and it presented its findings on 23 November 2015. The review upheld the decision to consider the request under FOIA and withhold the information under the section 35(1)(a) exemption.

Scope of the case

11. On 19 December 2015 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. The Commissioner agreed that the scope of his investigation would be to consider whether the request should be considered under the EIR or FOIA and whether the DfT was correct to withhold the information under any exemption or exception.
13. During the course of his investigation the Commissioner asked the DfT to confirm which exceptions it would seek to rely on to withhold the information were he to find that the request should have been considered under the EIR. In response the DfT said that it would seek to rely on the exceptions in regulation 12(4)(d) (material still in the course of completion etc.), regulation 12(4)(e) (internal communications) and regulation 12(5)(d) (confidentiality of proceedings).

Reasons for decision

Environmental information

14. The first thing to consider is whether or not the requested information is environmental and therefore which access regime, the EIR or FOIA, is the correct legislation to apply.
15. Environmental information is defined in regulation 2(1) of the EIR:

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

16. As noted above, the Commissioner has already found in two previous cases involving requests for MPA reports that HS2 is a measure or programme which is likely to affect many of the elements and factors referred to in regulations 2(1)(a) and (b). As noted in those cases, its construction is likely to affect land and landscape, and its construction and operation will be likely to have a significant impact on environmental factors such as energy and noise.
17. The DfT disagrees with the Commissioner and argues that the requested information is non-environmental in nature and should be dealt with under the FOI regime. It argued that the requested information was not about the actual construction of the high speed rail network, or the environmental impact of the project. Rather, it said that the information

related to wider issues around the planning and management of the HS2 project. It said that in its view, such planning and management information does not constitute environmental information and therefore does not fall within the definition in regulation 2(1) of the EIRs.

18. The Commissioner has considered the DfT's arguments but takes a different view. In his view the information is clearly 'on' HS2 which is a measure likely to affect the elements and factors in regulation 2(1)(a). Therefore, the information is clearly environmental information by virtue of regulation 2(1)(c).
19. The assessment reports are concerned with the delivery of the HS2 project and the delivery of the project plainly has environmental consequences. The DfT suggests that the information has no direct connection with the environment but only relates to wider issues such as planning and management information. Again, the Commissioner would take the view that the information does not itself have to have a direct connection with the elements of the environment. Rather the information need only be 'on' a measure affecting elements of the environment or factors affecting the environment. In any event, the information is ultimately about whether the project can be delivered successfully and on time. That information is informative about the progress of the project which will impact on the environment. Therefore it falls within the definition of environmental information.

12(4)(e) – internal communications

20. The DfT has applied the exception in regulation 12(4)(e) which provides that a public authority may refuse to disclose information to the extent that it involves the disclosure of internal communications. Regulation 12(8) of the EIR also specifies that for these purposes internal communications includes communications between government departments. In this case the requested information consists of six reports prepared by the Major Projects Authority and subsequently passed to the DfT. Three of the reports are project wide reports produced in 2013, 2014 and 2015 and three of the reports are on specific parts of the HS2 project and were produced throughout 2015.
21. The Major Projects Authority is a partnership between the Cabinet Office and HM Treasury and its "fundamental aim" is described as "significantly improving the delivery success rate of major projects across central government".
22. The concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others

may consult it. In this case the reports were sent to the DfT to allow it to track the progress of HS2 and the Commissioner is satisfied that they are clearly communications.

23. The second point to consider is whether the reports are internal communications. An 'internal' communication is a communication that stays within one public authority. Once a communication has been sent to someone outside the authority, it will generally no longer be internal. One exception is communications between government departments as this is specifically provided for in regulation 12(8) of the EIR. Therefore, where the reports have been passed solely to the DfT or another central government department then the Commissioner would accept that the exception is engaged. However, the Commissioner is aware that certain reports have been shared with HS2 Ltd, specifically the project wide reports for 2013 and 2014.
24. HS2 Ltd is not a government department but is instead a Non Departmental Public Body (NDPB) and a company limited by guarantee, its sole member being the Secretary of State for Transport. The DfT has argued that the reports shared with HS2 can still be classed as internal communications by virtue of the role and nature of HS2 which it said meant that HS2 Ltd was in effect an adjunct to the DfT. It said that it was worth noting that Sir David Higgins, HS2 Ltd Chairman, reports to the Secretary of State for Transport.
25. The EIR implement the EU directive on access to Environmental Information and the Commissioner accepts that member states with complex government structures should not be disadvantaged by being unable to rely on the exception for communications between departments. For this reason the Commissioner accepts that 12(4)(e) can for instance be applied to communications between a government department and an Executive Agency. However, the Commissioner does not accept that this principle can be applied to communications with an organisation which has been specifically placed outside of government by virtue of its designation as an NDPB.
26. The Commissioner's long established view is that communications between a government department and a NDPB or a wholly owned company are not internal communications. This is because these organisations are separate legal entities. They are set up precisely to act independently from government and at arms' length from Ministers.
27. The Commissioner finds support for this view in the findings of the First-tier Tribunal (Information Rights) in *Defra v Information Commissioner and Portmann (EA/2012/0105)*. In that case the Tribunal found that communications between the Department for Environment, Food and

Rural Affairs (Defra) and the Marine Management Organisation, a NDPB sponsored by Defra, could not be classed as internal communications:

"We agree with the Commissioner that these considerations do not suffice to render the communications 'internal', particularly given the need to interpret the exceptions under the EIR restrictively...the MMO was deliberately established as a non-departmental public body rather than as a departmental one, or a government agency. We disagree with Defra's submission that it would be a strange outcome if the result of a change in the machinery of Government were to have the effect of rendering formerly 'internal' communications 'external' when in substance the nature of the dialogue between the parties was materially unaltered. The 'change in machinery' was far wider than simply renaming the MFA the MMO. The MMO has separate accountability and can be called before a select committee for example. If Parliament had intended a non-departmental public body in general, or the MMO specifically, to be included within the definition in regulation 12(8) EIR as to the extent of 'internal' in the governmental context it would have done so in the framing of the regulations or by amending them at a later date. This is entirely consistent with the sea change brought about by the introduction of the Freedom of Information Act 2000 and the EIR."²

28. For these reasons, the Commissioner finds that where any of the reports have been shared with HS2 Ltd as well as the DfT then regulation 12(4)(e) is not engaged. The Commissioner will now go on to consider the public interest test in respect of the reports which have been shared with the DfT only and for which he has found that the exception is engaged.

Public interest test

Public interest arguments in favour of disclosure

29. The complainant has argued that the public interest favours disclosure because of the highly contentious nature of HS2. He said that in his view disclosure would allow for informed debate as well as promoting transparency and accountability.
30. The complainant also referred to the Commissioner's previous decision involving requests for MPA reports on HS2 and argued that the same

² Defra v Information Commissioner (EA/2012/0105), para. 26.

arguments applied here. It is worth noting that in those cases the Commissioner found that the HS2 project is a very major undertaking, involving the expenditure of very significant amounts of public money, over a long period of time. In the Cabinet Office case he found that

“the impacts of this project would be myriad, in particular to the environment and to residents along its route. There is also a significant public debate about the arguments for HS2 in terms of enabling economic growth. Disclosure here would significantly add to transparency about the plans of the Government for HS2. The information would significantly enable the public to take part in the debate about the merits and wide ranging impacts of the HS2 project.”

31. Having reviewed the withheld information the Commissioner is satisfied that these arguments apply equally in this case.
32. For its part the DfT said that the when balancing the public interest it had taken into account the need to be open, honest and transparent as this allows the public to scrutinise its actions and see that public money is being spent effectively. It also acknowledged that disclosure would contribute to the Government's wider transparency agenda.

Public interest arguments in favour of maintaining the exemption

33. As regards the public interest in maintaining the exemption the DfT explained that the information relates to recommendations made by the Review Team in the reports which it said were still in the course of completion because it was still formulating and developing government policy on specific planning and management aspects of the HS2 project. By way of an example, it said that 'live' aspects included the development of plans for Phase 2 and the Northern Transport Strategy.
34. The DfT referred to the safe space and chilling effect arguments which it had originally considered under the section 35 exemption in FOIA but which it suggested were also relevant when considering the information under the EIR. It said that in its view premature disclosure of the information contained in the reports would compromise the safe space within which officials can provide free and frank information and advice as part of the MPA process, potentially having negative consequences for the taxpayer. It said that government needed a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction.
35. The DfT also said that because policy was still live chilling effect arguments were likely to carry significant weight. It said that officials would be reluctant to provide detailed input into the MPA reports if they

felt that these would be routinely released soon after completion. It said that and the loss of frankness and candour would damage the quality of the advice and lead to poorer decision making.

36. It also suggested that disclosure could lead to misinterpretation of the information or the misleading of the public who might be led to believe that certain decisions about HS2 have been made. It said that this could have potentially negative implications for taxpayers and individuals living along or near the line of the route.
37. The DfT referred to the Commissioner's guidance on regulation 12(4)(e) which says that the exception protects a public authority's private thinking space. It said that it was important to maintain the integrity of the deliberation and decision making processes so as to ensure the effective delivery of the HS2 project and to provide value for money for the taxpayer.

Balance of the public interest arguments

38. The Commissioner's view is that although a wide range of internal information will be caught by the 12(4)(e) exception, public interest arguments should be focussed on the protection of internal deliberation and decision making processes. This reflects the underlying rationale for the exception: that it protects a public authority's need for a 'private thinking space'. As set out above, this rationale was made clear in the proposal for the European Directive which the EIR are intended to implement.
39. The Commissioner has considered the DfT's arguments for maintaining the exception and accepts that government needs a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. The DfT's arguments were originally made in the context of the section 35 exemption and so focus on the need for a safe space for policy formulation and development. Moreover, the DfT's arguments are predicated on the idea that HS2, or at least elements of the project, are still 'live' policies. It is accepted that safe space arguments of this kind will only attract weight where a policy is still live.
40. However, the Commissioner's view is that government policy regarding HS2 was well advanced by the time of the complainant's request and that therefore arguments around needing a safe space to consider 'live' policies carry little weight. The Commissioner would refer to the Cabinet Office case where he noted that the Government had announced that it was proceeding with HS2 in January 2012 and that therefore a major milestone in the HS2 policy process had been reached by the time the

complainant in that case made his request in May 2012. The Cabinet Office case referred to a number of decisions from the Tribunal and the High Court where he found support for his position that the need for a safe space was diminished. It is not necessary to repeat those cases here but the Commissioner is satisfied that they apply equally in this case.

41. Clearly the policy process in relation to HS2 is even more advanced given that over 3 years have passed between the request being made in the Cabinet Office case and the request in this case. In particular, the Commissioner notes that in November 2013, HS2 Ltd deposited a hybrid Bill with Parliament to seek powers for the construction and operation of Phase One of HS2 (the route from London to the West Midlands). A timetable for its construction has also been agreed.
42. There are no doubt issues that still need to be resolved and decisions that have to be made in the course of the HS2 project but having reviewed the withheld information the Commissioner considers that these issues are more to do with the implementation of the policy rather than the formulation and development of policy.
43. Nevertheless, the Commissioner would accept that whilst the wider government policy on the HS2 scheme had been decided there will still be distinct policies related to HS2 that remain at the formulation and development stage. Indeed, the DfT did point to specific policy areas which it said were still live policies, notably phase 2a (the section of the route from the West Midlands to Crewe) and the Northern Transport Strategy but gave no further information about these 'policies' and what stage they might have reached at the time of the request. In any event the withheld information does not directly relate to these issues but rather focuses on the governance and assurance arrangements of the project as a whole or on the implementation of specific aspects of the project. Therefore, the Commissioner remains of the view that the need for a safe space to debate policy is limited. Just because some elements of the scheme have not been finalised it does not follow that the whole of the HS2 project can be characterised as a live policy. This would be akin to the 'seamless web' argument, i.e. a policy cycle in which a policy is formulated following which any information on its implementation is fed into the further development of that policy or the formulation of a new policy. This has been dismissed by the Information Tribunal.³ Issues

³ Department for Education and Skills v Information Commissioner [EA/2006/0006], para. 75.

of the kind discussed in the MPA report are likely to arise throughout the life of the project so to suggest that HS2 is still a live policy would be to accept that policy formulation and development on HS2 will not be complete for many years to come. The Commissioner cannot support such an argument.

44. That said, the Commissioner would accept that a separate safe space is required to allow the DfT and HS2 Ltd to consider the recommendations from the MPA report and take any action necessary to address the issues raised. Again, the timing of the request is crucial. The 4 reports which the Commissioner understands were not shared with HS2 Ltd were produced in April, July (2 reports) and September 2015. The complainant made his request in October 2015 and in the circumstances the Commissioner considers that disclosure at this point would have served as a distraction from considering the findings of the reports. HS2 is a very high profile project which has faced a lot of opposition from people and communities likely to be affected. Therefore, it is reasonable to assume that any risks if highlighted in the report would be seized upon by those opponents as well as in the media which would make it harder to carry out the work needed. Therefore, the Commissioner has given arguments for maintaining the safe space to consider the reports' recommendations some weight when balancing the public interest.
45. The Commissioner has also taken in to account the arguments that disclosure would lead to a chilling effect whereby HS2 officials would be discouraged from contributing to the review process with frankness and candour if they knew that information would be disclosed. The Commissioner has not dismissed these arguments out of hand and accepts that they will carry some weight given that the reports were relatively recent at the time of the request. However, the Commissioner would also note that none of the comments made in the report are attributable to any one individual and in his view the public will rightly expect that officials should not be easily deterred from carrying out their public duty. Moreover, the Commissioner would expect that it would be in HS2's own interest for its officials to provide robust advice if they want to satisfy the government that the project is on track or to obtain the support needed to deliver the project successfully. Therefore the Commissioner finds that the chilling effect arguments, whilst carrying some weight, are overstated.
46. Finally, the Commissioner has considered the DfT's arguments that disclosure could lead to the report being misinterpreted as the public might be led to believe that certain decisions about HS2 had been made when this is not necessarily the case. However, the Commissioner has not given this argument any weight as it would be open to the DfT to

provide some kind of explanation to put the information in context when it was being disclosed.

47. As regards the public interest in disclosure the Commissioner accepts that there is also a strong case for releasing the reports. HS2 will have a widespread and significant impact on the public. It's a major undertaking which involves huge sums of money and its planning and construction will take place over many years. Disclosure would allow for greater public debate about the project and aid public understanding of the risks and challenges involved in its successful delivery. However, the Commissioner is also aware that the DfT has already released a certain amount of information, in particular the two earlier MPA reports, and so the public interest in greater transparency is perhaps not as pronounced as in the earlier cases.
48. In conclusion, the Commissioner has found that the competing arguments are finely balanced and that the age of the information is the determining factor. The last 3 reports produced in July and September 2015 were around 3 months old and barely 1 week old respectively at the time of the request. Therefore, there was a greater need for a safe space to consider and act on the recommendations in the report and that any chilling effect would be more significant if the reports were disclosed so soon after the request was made. For these 3 reports this tips the balance in favour of maintaining the exception.
49. The report produced in April 2015 falls on the other side of the scale. It would have been 6 months old at the time of the request and in the Commissioner's view this should have provided ample time to consider the recommendations. The passage of time also means that any chilling effect will be limited and so the Commissioner has decided that for this report the public interest in maintaining the exception outweighs the public interest in disclosure.
50. The Commissioner will now go on to consider whether the 2013, 2014 and April 2015 reports should be withheld under any of the other exceptions relied upon by the DfT.

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

51. Regulation 12(5)(d) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law. The Commissioner has now considered whether this exception would apply to the information which is not exempt under regulation 12(4)(e) or which is exempt but the public interest favours disclosure.

52. The DfT explained that the MPA process is designed to support project development and delivery. It said that it carries out reviews that provide assurance and recommendations to ensure the timely and cost effective delivery of the government's major projects. The DfT argues that this is an action that constitutes formal 'proceedings' because the reviews carried out by the MPA have a formal nature and are carried out in accordance with assurance review principles.
53. The term 'proceedings' is not defined in the EIR. However, the Commissioner in his guidance on this exception has said that he considers that:
- "...the word implies some formality, i.e. it does not cover an authority's every action, decision or meeting. It will include, but is not limited to:*
- formal meetings to consider matters that are within the authority's jurisdiction;*
 - situations where an authority is exercising its statutory decision making powers; and*
 - legal proceedings."*⁴
54. In the Commissioner's view the term 'proceedings' should be taken to mean a formal means to consider an issue and reach a decision. Proceedings should be governed by formal rules.
55. In this case the Commissioner is satisfied that the MPA's review of HS2 was a formal process designed to support project development and delivery. Each review has agreed terms of reference and there are specific rules that must be followed.
56. In deciding whether the exception is engaged, the next thing to consider is whether the confidentiality of the proceedings is provided for in law. That confidentiality must be provided for in statute or derived from common law. In this case the DfT have said that the information is subject to the common law duty of confidence.

⁴ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

57. For information to be subject to the common law duty of confidence a public authority will need to demonstrate that the information has the necessary quality of confidence and that it was shared in circumstances importing an obligation of confidence. Information will have the necessary quality of confidence if it is not in the public domain and so long as it is not trivial. In this case the Commissioner is satisfied that the information has not previously been made public and he is happy that the information is not trivial – clearly a review into a project involving billions of pounds of public money cannot reasonably be characterised as trivial.
58. As regards any obligation of confidence, the DfT explained that the reviews are conducted in the expectation that the MPA and the department whose project is being reviewed expect the information obtained and the report prepared as a result of the IPA process would not be disclosed. On this point, the Commissioner is satisfied that given the sensitivity of the issues under discussion and the formal nature of the review process their would be a reasonable expectation amongst all parties that the information would remain confidential.
59. The next thing to consider in engaging the exception is whether disclosure of the information would adversely affect the confidentiality of the proceedings. 'Adversely affect' means there must be an identifiable harm to or negative impact on the interest identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure *would* have an adverse effect. 'Would' means that it is more probable than not the adverse effect would occur if the information were disclosed.
60. The DfT has said that in its view disclosure would adversely affect the confidentiality of the review process because confidentiality is important in assuring effective project delivery and breaching an obligation of confidence would undermine the IPA process across the whole of government. The reviews report the findings of interviews conducted with officials involved in the HS2 project and report on the present state of the project and if this was disclosed then those involved in the review process would have less confidence that their contributions would not be made public. Therefore, the Commissioner is satisfied that disclosure of this information would therefore adversely affect the confidentiality of the proceedings which in this case is the MPA's review of HS2.
61. The Commissioner has found that regulation 12(5)(d) is engaged and he has now gone on to consider the public interest test, balancing the public interest in maintaining the exception against the public interest in disclosure.

Public interest test

62. The arguments for disclosure and for maintaining the exception are as discussed in relation to regulation 12(4)(e). As with the Freedom of Information Act, under the EIR a public authority can only take in to account arguments for maintaining the exception which are relevant to the interest which the exception is designed to protect against, which in the case of regulation 12(5)(d) are the consequences of a breach of confidence.
63. The public interest arguments for maintaining the exception do not focus specifically on the duty of confidence. However the Commissioner is satisfied that they are relevant to this exception since the DfT's concerns stem from the effects the loss of confidence would have on the review process.
64. In addition to the arguments considered in relation to regulation 12(4)(e), there is an additional public interest because in the Commissioner's view there is a general public interest in protecting confidential information. There will always be an inherent public interest in maintaining the exception because breaching an obligation of confidence undermines the relationship of trust between confider and confidant.
65. Notwithstanding this, the Commissioner has concluded that the public interest in disclosure outweighs the public interest in maintaining the exception on the particular circumstances of this case. Under regulation 12(4)(e) the Commissioner found that for the 3 reports produced in July and September in 2015 the public interest test was finely balanced but given the age of the information and the timing of the request the balance of the public interest narrowly favoured maintaining the exception.
66. The reports which the Commissioner has decided are not exempt under regulation 12(4)(e) are the reports from September 2013 and December 2014. Clearly the public interest for these reports are balanced differently as they were over 2 years old and 10 months old respectively at the time of the request. In the Commissioner's view the arguments around safe space and chilling effect will carry much less weight given the passage of time between the reports being produced and the complainant making his request. The DfT and HS2 will have had adequate time to consider and act on the recommendations in these reports. For the April 2015 report the Commissioner found that regulation 12(4)(e) did apply but the public interest favoured disclosure and the Commissioner is satisfied that the same reasoning applies under the regulation 12(5)(d) exception. Whilst the inherent public interest in

protecting confidential information will add some weight to arguments for maintaining the exception the Commissioner is also mindful that under regulation 12(2) the EIR apply a presumption in favour of disclosure and so for all of these reasons the Commissioner finds that the public interest in maintaining the exception in regulation 12(5)(d) does not outweigh the public interest in disclosure.

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

67. Regulation 12(4)(d) provides 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.
68. The DfT has said that in its view the limb of the exception which covers material still in the course of completion applies in this case. It referred to the Commissioner's guidance on this exception which states that whilst a document may itself be finished, it may be part of material which is still in the course of completion. The guidance suggests that one example may be where a public authority is formulating and developing policy.⁵
69. The DfT explained that in this case the information relates to recommendations made by the review team in the reports which are still in the course of completion because it was still formulating and developing government policy on specific planning and management aspects of the HS2 project to which the withheld information relates.
70. The Commissioner has considered the DfT's arguments but does not accept that reports of this kind can be said to be material still in the course of completion. Whilst HS2 may still be considering the recommendations made in the report – the report and the recommendations themselves are not incomplete.
71. To accept that the exception is engaged would be to accept that so long as the HS2 project is ongoing related information must be material in the course of completion. The Commissioner would expect that the MPA, or its successor the Infrastructure and Projects Authority will continue their review of the HS2 project for many years to come if not throughout the lifetime of the project. Therefore to suggest that the exception is

⁵ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

engaged because certain issues surrounding the HS2 project are still to be resolved is essentially the seamless web argument which the Commissioner has dismissed above.

72. The Commissioner does accept that the regulation 12(4)(d) exception can apply to information which is part of the policy making process. However, the DfT must be able to point to specific policies which are still being formulated and developed and demonstrate how the actual information relates to that policy. It is not enough to say that just because HS2 is an ongoing project, with certain issues still to be resolved, the exception is engaged. Whilst the DfT has pointed to specific policy areas which it says are ongoing – phase 2a and the Northern Transport Strategy – the reports do not focus on these issues.
73. In any event, as he indicated in relation to the internal communications exception, the Commissioner is not satisfied that the reports are part of that policy making process. Rather, they appear to the Commissioner to be more concerned with the implementation of existing policy and therefore cannot be said to relate to material still in the course of completion. Consequently the Commissioner has found that regulation 12(4)(d) is not engaged.

Right of appeal

74. 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@hmcts.gsi.gov.uk

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

75. 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.
76. 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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