

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 October 2019

Public Authority: Highways England

Address: Piccadilly Gate

Store Street

Manchester

M1 2WD

Decision (including any steps ordered)

1. The complainant has requested the Construction Environmental Management Plan (CEMP) for part of the A14 road upgrade project. Highways England refused the request under regulation 12(5)(e).
2. The Commissioner's decision is that some of the information in the CEMP is information on emissions and therefore regulation 12(9) of the EIR prevents the information being withheld under regulation 12(5)(e). For the remaining information in the CEMP the Commissioner finds that the regulation 12(5)(e) exception has been correctly applied and the public interest favours withholding the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information in the CEMP identified as being directly on emissions – namely the following sections: Section 5 Air Quality Management and Section 6 Noise and Vibration Management.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 11 November 2018 the complainant made a request to Highways England in the following terms:

"The CEMP for the A14 Huntingdon to Cambridge project. If you have more than one versions of CEMP (for example covering different geographic sections of the project), please provide me with the CEMP that covers work at the A14 junction 32 (Histon and Impington)."

6. Highways England responded on 5 December 2018 and stated that the information was being withheld on the basis of the exception at regulation 12(5)(e) as it was considered the information contained commercially confidential information and disclosure would be harmful to Highways England and its contractors.
7. The complainant asked for an internal review of this decision on 6 December 2018 raising concerns about the use of regulation 12(5)(e) as she considered that the information may be information on emissions and therefore the cited exception could not be applied to withhold the requested information.
8. Highways England responded on 8 February 2019. It explained that it did not consider the information was information on emissions and as such maintained its position that the information should be withheld on the basis of the exception at regulation 12(5)(e).

Scope of the case

9. The complainant contacted the Commissioner following the internal review on 20 February 2019 to complain about the way her request for information had been handled.
10. The Commissioner considers the scope of her investigation to be to determine if any of the requested information is information on emissions and if any other information that has been withheld under regulation 12(5)(e) has been correctly withheld.

Reasons for decision

Regulation 12(9)

11. Regulation 12(9) of the EIR states that *"to the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose*

that information under an exception referred to in paragraphs (5)(d) to (g)."

12. The complainant has suggested that some or all of the information in the Construction Environmental Management Plan (CEMP) will be information on emissions and therefore Highways England is unable to rely on regulation 12(5)(e) of the EIR in this case.
13. Regulation 2(1)(b) refers to "*any information on ... emissions*" and regulation 12(9) will apply to information falling within this definition.
14. Regulation 12(9) will only be relevant where information falls within the definition of environmental information directly under regulation 2(1)(b). In other words it will only apply where information is directly linked to emissions.
15. This interpretation is in line with European Directive 2003/4/EC, Article 4(2) which states that "... Member States may not by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.
16. This interpretation is also supported by the Advocate General's Opinion in a case concerning Article 4(2) of the Directive, *Ville de Lyon C-524/09*. Advocate General Kokott found that information on the sale of emissions allowances was environmental information because licence holders are permitted to release substances and transaction details would allow the public to ascertain who has the right to produce emissions.
17. However, he also found that it was doubtful that, "restriction of the exceptions to the right of access under the fourth sentence of Article 4(2) of the Environmental Information Directive is intended to encompass indirect information on emission in exactly the same way as the definition of environmental information. The two provisions have different functions which preclude a uniform interpretation." He went on to say that if the exception regarding confidentiality of commercial or industrial information could not apply to information indirectly linked with emissions then the scope of that exception would be severely restricted as most environmental information can be linked indirectly with emissions.
18. The Section 5 CEMP is an environmental management document for the A14 highways infrastructure project which Highways England considers is, by nature, industrial. The CEMP describes the site specific procedures for managing the environmental aspects of construction works to comply

with the requirements of the contracts, legislation and industry best practice.

19. The Commissioner considers that the majority of this document is information relating to implementation of the A14 project and tools to achieve this, including detailed information on how to manage the construction and this is not information directly linked to emissions. The Commissioner does not therefore consider that regulation 12(9) EIR prevents Highways England from relying on regulation 12(5)(e) of the EIR for the majority of the CEMP.
20. More specifically, in the Commissioner's view the requested information falls within the definition of environmental information via regulation 2(1)(c) given that it is clearly information on a measure, i.e. the construction plan for environmental management, that is likely to affect the elements and factors listed in regulation 2(1)(a) and (b).
21. However, having viewed the withheld information in the Commissioner's view it cannot be said to all be information which falls within the definition of environmental information at regulation 2(1)(b) simply because it does not focus on the factors listed in that regulations. More specifically the majority of the CEMP does not make reference to emissions that may be produced in the construction of the A14. Therefore the Commissioner has concluded that regulation 12(9) is not relevant to the majority of the CEMP as the information cannot be said to be information that is *directly* linked to emissions. She has gone on to consider the application of regulation 12(5)(e) to this information.
22. Before considering regulation 12(5)(e) the Commissioner must firstly address the sections of the CEMP which she has found are directly linked to emissions.
23. Regulation 2(1)(b) refers to factors affecting the state of the environment and lists these 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 (2)(1)(a).
24. Section 5 of the CEMP covers the subject of Air Quality Management, including dust management, plant and vehicle emissions and greenhouse gases. The Commissioner considers that all of the information contained in this section relates directly to emissions into the air, touching upon effect, consequences and management.
25. Similarly, section 6 covers Noise and Vibration Management, again establishing areas of risk, consequences and management. The

Commissioner considers that noise and vibration are emissions and this information is directly linked to emissions.

26. The Commissioner's guidance on emissions¹ states that they will generally be the by-product of an activity or process which is added to and affecting the elements of the environment and over which control is relinquished. The above sections relate to emissions which are the by-product of an activity (the construction) and will affect the elements of the environment and are outside the control of the constructors as they will occur regardless of any mitigating steps taken to control levels.
27. For this reason, the Commissioner finds that regulation 12(9) is relevant to sections 5 and 6 of the CEMP and therefore the exception at regulation 12(5)(e) cannot be applied to withhold this information. As no other exception has been put forward by Highways England, the Commissioner requires that this information is disclosed.
28. She has now gone on to consider the application of regulation 12(5)(e) to the rest of the CEMP.

Regulation 12(5)(e) – commercial confidentiality

29. Regulation 12(5)(e) of the EIR provides 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".
30. 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?

Is the information commercial or industrial in nature?

¹ <https://ico.org.uk/media/for-organisations/documents/1616/information-on-emissions-eir-guidance.pdf>

31. Highways England considers the information is industrial in nature as the CEMP is an environmental management document for the A14 highways infrastructure project.
32. The Commissioner's guidance on this exception² finds that 'industrial' is generally understood to describe the processing of raw materials and the manufacturing of goods. Industrial information can therefore include information about methods of manufacture or, in this case, construction.

Is the information subject to confidentiality provided by law?

33. In considering this matter the Commissioner has focused on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
34. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
35. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of the information.
36. Highways England states that the A14 Integrated Delivery Team (IDT) produced the CEMP and as part of the contractual obligations it was passed to Highways England in confidence. The CEMP is an internal document produced for the environmental management of the construction during the project and it was intended to be confidential between the client (Highways England) and the contractor (A14 IDT).
37. The Commission accepts that, at the very least there is a clear implied obligation of confidence in the withheld information. The information was generated by a third party (A14 IDT) who the Commissioner understands are a joint venture company between several organisations in the construction and design industries.

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

38. It is also clear to the Commissioner that the information is not trivial in nature. The Commissioner also understands that the information has not been placed in the public domain.
39. The Commissioner considers that it is reasonable to assume that the information has been shared with Highways England in circumstances creating an obligation of confidence. The Commissioner accepts that, there is no blanket exception for the withholding of confidential information. However, for the purposes of this element of the exception, she is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

40. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest it was intended to protect.
41. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
42. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probable than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".
43. Highways England has argued that disclosure of this information would adversely affect the legitimate economic interests of A14 IDT. Highways England explained that the CEMP contains examples of best practice where the A14 has worked with a number of contractors to develop environmental and monetary savings. Some of these initiatives are industry leading or novel and are vital for tendering for future projects.
44. The A14 IDT believe that should the information in the CEMP be made available to a wider audience it would prevent the contractors involved on the A14 having an advantage when it comes to future work.
45. The Commissioner considers the threshold for the engagement of regulation 12(5)(e) is a high one and, in order for it to be applied, it

must be shown that the disclosure of specific information will result in specific harm to the legitimate economic interests of one or more parties. In demonstrating harm, an explicit link needs to be made between specific elements of withheld information and specific harm which disclosure of these elements would cause.

46. In this case Highways England has said that the A14 would impact on contractors in future tendering work. In explaining this further Highways England pointed to the significant sustainability details in the CEMP that could be used as an advantage by outside organisations when tendering for new projects. The CEMP is an internal document written in a particular way because the A14 IDT had no expectation it would be disclosed. The document is a unique environmental document which details things not occurring on other projects across the country. The A14 IDT have taken the best parts from each parent company to form the CEMP and disclosure runs a real risk of affecting each parent company's economic interests if the CEMP were to be used in bids or tenders for future work.
47. The Commissioner has reviewed the CEMP and notes that it does contain significant detail on solutions, including some methods which appear to be unique or are being trialled on this scheme. The A14 project was already underway at the time the request was made so the main argument in this case is that due to the content of the CEMP and the fact it contains novel ideas and details of trials of new solutions it would be disadvantageous to all of the parent companies of the A14 IDT for this to be disclosed and used by rivals in future tendering exercises.
48. The Commissioner would accept that there is a real risk. Having viewed the information it is clear that it contains significant detail on how A14 IDT intended to handle a wide array of environmental issues and it is likely that a number of these solutions will be novel and therefore may be of interest to competitors.
49. For the above reasons, the Commissioner is satisfied that regulation 12(5)(e) applies.

Public interest test

50. The complainant has argued that there is significant public interest in disclosure of information relating to a large-scale road upgrade which runs close to houses. The public have a right to know what steps are being taken to minimise emissions and to ensure the health and safety of residents are taken into account.
51. Highways England recognises there is public interest in the work of public bodies being transparent and open to scrutiny to increase

diligence and to protect the public purse. It also recognises there is general public interest in having access to environmental information to give greater awareness and allow more effective participation in environmental decision making. There is also a public interest in understanding how decisions are made where they relate to activities that may affect people's day life.

52. Against disclosure, Highways England argued that the fact the CEMP contains confidential information that could be used as an advantage by outside organisations when tendering for new project would not be in the public interest. It argued there is a public interest in protecting 'trade secrets' and Highways England and its contractors would be at a commercial disadvantage regarding future business if competitors are aware of the methods employed on this scheme as it could be used in their submissions.
53. Furthermore Highways England consider that innovation would be reduced if contractors felt that their ideas would not be protected as 'trade secrets'. This would have a detrimental effect on competition and lead to fewer contractors bidding for contracts with Highways England.
54. The CEMP contains significant sustainability details that could be used as an advantage by outside organisations when tendering for new projects. It is believed it would be detrimental for each parent company and Highways England if the CEMP were to be in the public domain because of this. Although Highways England states it wants to encourage innovation across the construction industry, the A14 IDT would be at a commercial disadvantage regarding future business if competitors are aware of the methods that they employ on this scheme.
55. The Commissioner considers there is a public interest in openness, transparency and accountability. There is also a public interest in disclosure of information which may impact on people's lives and understanding the measures being taken to mitigate these. It is understandable that members of the public will be concerned about the road upgrade and the impact of this on their communities and will want to be aware of all of the information about this.
56. However, in this case the Commissioner considers the public interest rests in maintaining the exception. At the time of the request work on the stretch of the A14 covered by the section 5 CEMP had not started. Highways England and the A14 IDT should be afforded the space to submit and approve plans without the fear of premature disclosure.
57. The Commissioner also does not consider it is in the public interest to disclosure information which would adversely affect the economic interests of the A14 IDT. They are entitled to submit new and innovative

solutions with the expectation this information will be protected to some degree from being disclosed so that it can be used by competitors.

58. The information most likely to carry significant weight in favour of disclosure is that which links directly to emissions as this is the information most relevant to the local communities and health and safety. As the Commissioner has already identified this information in the CEMP and ordered disclosure she considers that the information that remains in the CEMP carries less public interest in favour of disclosure as it is more focussed on methodologies and plans for the road upgrade than on how to mitigate the unavoidable by-products of the constructions.
59. The Commissioner therefore finds based on the above that the balance of the public interest favours withholding the remaining information in the CEMP.

Right of appeal

60. 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

61. 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.
62. 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

Jill Hulley
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