

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 December 2019

Public Authority: Transport for the North
Address: 4 Piccadilly
Manchester
M1 3BN

Decision (including any steps ordered)

1. The complainant made a request for documents for the Northern Powerhouse Rail Strategic Outline Business Case. Transport for the North (TfN) refused the request citing the exception provided by 12(5)(e) (commercial confidentiality) and 12(4)(d) (material in the course of completion) of the EIR.
2. The Commissioner's decision is that TfN correctly applied regulation 12(4)(d) of the EIR to the withheld information and that the public interest favours maintaining the exception. Therefore, the Commissioner does not require TfN to take any steps as a result of this decision.

Request and response

3. On 8 February 2019 the complainant requested the following items of information:

'According to Sir Peter Hendy on Twitter - "At Transport for the North. Crucial meeting: an update on Trans Pennine Route upgrade in 2019/24, agreed the final Strategic Transport Plan and in private session approved the submission to Govt of the Northern Powerhouse Rail Strategic Outline Business Case. Progress for TfN!"

<https://twitter.com/SirPeterHendy/status/1093510184058654725>

TfN has approved the submission to Govt of the Northern Powerhouse Rail Strategic Outline Business Case.

I would like to request the documents making up this case.'

4. On 29 March 2019 TfN confirmed that at its meeting on 7 February 2019 the TfN Board approved the submission to the Department of Transport of the Northern Powerhouse Rail Strategic Outline Business Case (the Business Case). TfN considered that the information contained in the documents making up the Business Case constitutes environmental information and refused to provide the requested information citing regulations 12(5)(e) (commercial confidentiality) and 12(4)(d) (material which is still in the course of completion) of the EIR.
5. The complainant requested an internal review on 1 April 2019. He argued that *'it is unclear how or why the entire Outline Business Case would need to be withheld to protect a legitimate economic interest, nor is it clear what that legitimate economic interest is.'*
6. TfN sent the outcome of its internal review on 29 May 2019 upholding the decision.
7. TfN went on to provide further explanation for refusing to disclose the documents and advised that TfN's published Strategic Transport Plan contains information relating to Northern Powerhouse Rail.

Scope of the case

8. The complainant contacted the Commissioner on 19 June 2019 to complain about the way his request for information had been handled.
9. During the course of the investigation, TfN provided the complainant with further information that was published on 3 September 2019. It was not intended as a public summary of the Strategic Outline Business Case but gave helpful information about the project. (See https://transportforthenorth.com/wp-content/uploads/Potential-of-NPR_TfN-web.pdf)
10. The Commissioner wrote to the complainant seeking an informal resolution as it was her initial view that at the time of the request in February, TfN was correct to refuse the information under Regulations 12(5)(e) and 12(4)(d). The Northern Powerhouse Rail (NPR) Strategic Outline Business Case was commercially confidential information for the co-clients (TfN and the Department of Transport) and was still in the course of completion.
11. The complainant did not accept this:

'In my view, any project involving up to 39 billion pounds of investment ought to be open to effective public scrutiny, based on access to information.'

In the case of Northern Powerhouse Rail, public scrutiny is curtailed by there being very little information available, and that which is available, tends to be promotional rather than evidential, in nature.

There seems to be no new information in the 'Potential of NPR' document, and its coverage of value for money and alternative schemes is entirely lacking. I would categorise it as promotional, rather than analytic, in character.

I consider that TfN should release Business Case documents, in much the same way as other authorities have done for their transport schemes (see attached MetroWest example, from West of England Combined Authority).'

12. The Commissioner has focussed her investigation on whether TfN was entitled to rely on regulation 12(5)(e) and/or 12(4)(d) of the EIR to refuse to disclose the withheld information.

Background

13. TfN provided the following as a background.
14. Transport for the North was established as the first statutory sub-national transport body on 1 April 2018. Under Section 102I (8) of the Local Transport Act 2008 , in preparing its Strategic Transport Plan, Transport for the North must (among other matters) have regard to the promotion of economic growth in its area. The Strategic Transport Plan was approved by the members of the Transport for the North Board at its meeting on 7 February 2019. The Board also decided, whilst sitting in exempt session, members of the public having been excluded, the following:-
 - I. To approve the Strategic Outline Business Case for submission to government, noting the significant progress made in the development of Northern Powerhouse Rail (NPR) and the further work undertaken since the December Board.
 - II. To agree the statutory advice to the Secretary of State that emphasised the need for full commitment to NPR, supported by funding to ensure that rapid progress can be made by the early 2020s.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

15. Regulation 12(5)(e) states:

'...a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.'

16. The Commissioner's guidance on regulation 12(5)(e) (See https://ico.org.uk/media/fororganisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf) explains that in order for this exception to be engaged several conditions need to be met. The Commissioner 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?

17. TfN stated that the withheld information relates to a commercial activity, in that the Northern Powerhouse Rail Strategic Outline Business Case (the Business Case) relates to a major national infrastructure project involving up to 39 billion pounds of investment.

18. The Commissioner accepts that such information can be defined as being commercial in nature.

Is the information subject to confidentiality provided by law?

19. 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.

20. 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.

21. 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.
22. TfN stated that the Business Case was co-written with the Department of Transport and the information is subject to a duty of confidence provided by law. It is not in the public domain. TfN referred to Paragraph 8 of the Business Case which stressed the need for confidentiality in connection with its information: *'The cases which make up the Business Case contain a large volume of financial and commercial information, which includes economic modelling information.'*
23. Having viewed the withheld information, the Commissioner notes that it consists of the key document dated 7 February 2019 (the Business case) which *'translates the North's vision for Northern Powerhouse Rail into a robust and credible case for up to £39bn of investment'* and other supporting documents such as the NPR Commercial Case and the NPR Economic Case. TfN also provided additional correspondence for background information.
24. The Commissioner accepts that there is a clear implied and explicit obligation of confidence in the withheld information. The information was generated with a third party and at the time of the request the Business Case had just been approved by the TfN for submitting to government.
25. It is also clear to the Commissioner that the information is not trivial in nature and she understands that the information has not been placed in the public domain.
26. The Commissioner considers that it is reasonable to assume that the information has been created with the Department of Transport and submitted to government 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?

27. 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.

28. 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.
29. 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'.
30. TfN has argued that disclosure of this information would adversely affect the legitimate economic interests of TfN *'with its statutory duty to have regard to the promotion of economic growth and the Department of Transport advising on the investment funding in respect of the project'.*
31. 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.
32. In this case TfN stated that *'disclosure of the information to a member of the public would adversely affect this confidentiality. I have had regard to the sensitivity of the information at the date of the request, and to the continuing sensitivity and that on the balance of probabilities, disclosure of the requested information at this stage of the project would adversely affect the project'.*
33. The Commissioner has reviewed the withheld information and she notes that it does contain significant detail on financial and commercial options which includes economic modelling. However, it is unclear to the Commissioner who were the competitors of TfN at the time of the request. Given the early and strategic nature of the withheld information the Commissioner is not clear how disclosure would adversely affect a legitimate economic interest from the arguments presented by TfN. There is no indication as to who would use the information or how the information would assist competitors.
34. The Commissioner appreciates that TfN's view is that the commercial confidentiality relates to the major infrastructure transport project that is in the economic interests of the North but she is not convinced that an

explicit link has been made between specific elements of the withheld information and the specific harm which disclosure of these elements would cause.

35. As the Commissioner is not convinced that the exception at regulation 12(5)(e) – commercial confidentiality - can be successfully applied in this case, she has gone on to consider the exception at regulation 12(4)(d) - material still in the course of completion.

Regulation 12(4)(d) Material still in the course of completion

36. Regulation 12(4)(d) of the EIR states 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.
37. The exception sets out three distinct categories and the information must fall within one of these for the exception to be engaged. The first category is that the request relates to material which is in the course of completion. The "material" in question may relate to a policy that is being developed; therefore, although the requested information may be contained in a document which is in itself complete, if that document is intended to inform a policy process that is still ongoing, the information may engage the exception.
38. TfN stated that *'the submission of the Business Case was the start of an ongoing process, and that the information in the documents making up the Business Case is material which is still in the course of completion. The former Secretary of State refers in his letter dated 10 April 2019 to the "initial Strategic Outline Business Case" and his looking forward "to receiving a revised Business Case, with a single preferred network and phasing profile in 2020".'*
39. The complainant has argued that this Strategic Outline Business Case should be disclosed as other authorities have done (see Paragraph 11 above). The Commissioner asked TfN to comment on this.
40. TfN explained in some detail that there were essential differences between these documents:
- Fundamentally, MetroWest is a funded scheme and NPR is not. The Business Case provided by the complainant for MetroWest appears to be an Outline Business Case and it was released after funding was confirmed. NPR is still at feasibility (Strategic Outline Business Case - SOBC) stage. MetroWest's equivalent SOBC document is at <https://metrowestphase1.files.wordpress.com/2017/10/phase-1-preliminary-business-case-sept-2014.pdf> Their SOBC document sets out on page VII that feasibility stage work for MetroWest was

complete at the time of the finalisation of the SOBC. The FOI request and release of information came after government committed funding to the project – we are some way off that for NPR.

- MetroWest's alignments are known, as they are either existing railways or are defined by the alignments, and landowners have been consulted. Several rounds of public consultation appear to have been held on it. As yet, no discussions with landowners or public consultation in any form have been held on NPR alignments.

41. The Commissioner accepts that TfN has explained that there is an essential difference between its withheld documents (which are at an earlier strategic stage and have not been approved for funding) and the disclosed document from MetroWest which is at a later stage and has received approval and funding.
42. The Commissioner has considered whether (as argued by TfN) the Strategic Outline Business Case comprises material in the course of completion. The ICO's published guidance on this exception (see https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf) provides the example of a public authority formulating and developing policy, which is relevant to this case.
43. The Commissioner accepts that the "material" in question relates to a policy that is still being developed. Although the requested information is contained in a document which is in itself complete, that document is intended to inform a policy process that is still ongoing and therefore the withheld information may engage the exception.
44. In this case, the Commissioner understands that the contents of the withheld information including the Strategic Outline Business Case relate to matters which have not yet been settled. It is clear that the withheld information contains significant detail on options on how TfN proposes to translate 'the North's vision for NPR into a robust and credible case for investment' where final decisions on the Business Case and the funding have yet to be made.
45. The Commissioner accepts that the information is material in the course of completion and that the exception at regulation 12(4)(d) is engaged. She has therefore gone on to consider the public interest in the disclosure of the information.

Public interest test

Public interest arguments in favour of disclosure

46. The complainant has argued that there is significant public interest in disclosure of information as *'any project involving up to 39 billion pounds of investment ought to be open to effective public scrutiny, based on access to information'*.
47. TfN have stated that there is a public interest in disclosure to promote transparency and accountability of public authorities and that *'there is a presumption of disclosure of environmental information in the public interest and this presumption was applied in respect of both exceptions.'*

Public interest arguments in favour of maintaining the exception

48. TfN considered that *'the key issue that weighed in respect of both exceptions was protecting the integrity of the process which involves a major national infrastructure project and in respect of which a final decision would not be made until 2020.'*
49. TfN also considered that *'the particular relationship of trust between Transport for the North and the Department of Transport in respect of the Business Case serves the public interest'* and *'disclosure of information regarding material in the course of completion would make it difficult to bring the process to a conclusion. There is a public interest in ensuring that public authorities are given space to compile business cases, and for informed decisions to be made, without concern that the public debate could be skewed by the early release of documents'*.

Balance of the public interest arguments

50. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities. The Commissioner notes that there is already some information on this project in the public domain (see paragraph 9 above) and therefore, this goes some way towards satisfying the public interest.
51. The Commissioner notes that the publicly available information is not as detailed as the complainant would like but at the time of the request, TfN had just approved its strategic Business Case for submitting to the next stage of the approval process.
52. The Commissioner's view is that there is a stronger public interest in protecting the interests of TfN by allowing the space to compile business cases, by allowing the on-going approval process to continue and for informed decisions to be made.

53. As explained above, TfN and the Department for Transport were in the initial stages of seeking approval (and a commitment to a long term capital investment) for negotiating a long term transport project of up to £39 billion in the North and therefore disclosure would have had an impact on TfN's interests with regard to the promotion of economic growth in the area.
54. Given the sensitive timing of the request, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the exception at regulation 12(4)(d) outweighs the public interest in disclosure.

Right of appeal

55. 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

56. 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.
57. 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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