

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

Decision notice

Date: 1 July 2020

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 the Department for Transport (DfT) to disclose copies of letters between Patrick McLoughlin, George Osborne, Chris Grayling and Philip Hammond relating to HS2 between 2016 and 2019. The DfT refused to disclose the requested information citing section 35(1)(a) and 35(1)(b) of the FOIA.
2. During the Commissioner's investigation the DfT confirmed that if it was found that the request should have been considered under the EIR, it wished to rely on regulations 12(4)(e), 12(4)(d) and 12(5)(e).
3. The Commissioner's decision is that the request should have been considered under the EIR and the DfT is entitled to rely on regulation 12(4)(e) for the non-disclosure of the requested information. She therefore does not require any further action to be taken.

Request and response

4. On 29 August 2019, the complainant wrote to the DfT and requested information in the following terms:

“Would you please provide copies of any letters between:

Patrick McLoughlin and George Osborne, relating to HS2

Chris Grayling and Philip Hammond 2016 to 2019, relating to HS2"

5. The Dft responded on 24 September 2019. It refused to disclose the requested information citing section 35(1)(a) and 35(1)(b) of the FOIA.
6. The complainant requested an internal review on 10 October 2019.
7. The DfT completed the internal review and notified the complainant of its findings on 22 October 2019. It upheld the application of the exemptions cited.

Scope of the case

8. The complainant contacted the Commissioner on 23 October 2019 to complain about the way his request for information had been handled. He believes the DfT has taken a blanket approach to withholding the information, without giving proper consideration to the individual letters, their contents and the public interest. He stated that while he may accept that the public interest may favour non-disclosure for some of the information, he considers there are significant public interest factors in releasing communications relating to the cost and timetable of HS2.
9. The DfT has provided the Commissioner with a copy of the withheld information and explained that if she considers any of the information is environmental information, it wishes to rely on regulations 12(4)(e), 12(4)(d) and 12(5)(e) of the EIR.
10. The Commissioner considers the scope of her investigation to be to determine if the DfT should have considered the request under the FOIA or the EIR and whether the DfT was correct to rely on the exemptions/exceptions that have been applied to the withheld information.

Reasons for decision

Is the information environmental?

11. Regulation 2(c) of the 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.
12. The DfT is of the view that all the withheld information is non-environmental and therefore falls to be considered under the FOIA.

13. In [Crane v The Information Commissioner and The Department for Transport EA/2016/0087 and EA/2016/00881](#), the Tribunal recognised that, “We follow the Upper Tribunal’s reasoning in *The Department for Energy and Climate Change v The Information Commissioner and H* [2015] UKUT 0671 (AAC) and take the view that there is sufficiently close connection between the withheld information and the overall HS2 project for us to look beyond the precise issue with which the disputed information is concerned and to have regard to the “bigger picture”. We are satisfied that the HS2 project is a “measure” which affects or is likely to affect the elements and factors referred to in regulation 2(1) EIRs and that the documents breaking down the budget information into sub-categories is information on an integral, rather than an incidental aspect of that measure.”
14. The withheld information discusses issues for both Phase 2a and Phase 2b of HS2 (eg Transport for the North’s aspirations for HS2, the interface with Northern Powerhouse Rail, funding decisions and financial analysis being worked on at the time and timeframes). This information clearly relates to a measure (the HS2 project) which will or will be likely to affect the environment.
15. The Commissioner does therefore consider that this information is environmental under regulation 2(c) of the EIR and this request should be considered under the EIR.

Regulation 12(4)(e) – internal communications

16. Regulation 12(4)(e) of the EIR says that an authority may refuse to disclose information to the extent that the request involves disclosure of internal communications.
17. Essentially, the Commissioner considers 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. But for communications between central government departments, it is accepted that they are expressly included as internal communications by virtue of regulation 12(8) of the EIR.
18. This approach was supported by the tribunal in [Friends of the Earth v Information Commissioner and ECGD \(EA/2006/0073, 20 August 2007\)](#). The tribunal considered communications between ECGD and other central government departments. Friends of the Earth argued that regulation 12(8) was inconsistent with the European Directive, which did not explicitly protect communications between departments. However, the tribunal found that the Directive defined central government as one public authority for these purposes, and that communications between departments should be protected as internal communications.

19. The DfT confirmed that all the withheld information in this case is communications between the department and HM Treasury dated 2017, 2018 and 2019.
20. The Commissioner has reviewed the withheld information herself and she is satisfied that it is communications solely between the DfT and HM Treasury relating to HS2. She is therefore satisfied that regulation 12(4)(e) of the EIR applies to the withheld information in its entirety.

Public interest test

21. The DfT acknowledged that the information would contribute to the government's wider transparency agenda and would provide assurance to the public that decisions on the HS2 project are fully informed and based on the best available advice. Disclosure of the communications may help to inform the public so as to allow greater participation in the environmental policy decision making process, all of which ultimately contributes to a better environment.
22. However, it considers the HS2 project, as a significant national infrastructure project, has complex issues that need to be resolved. It argues that ministers in the department and HM Treasury need to have the necessary safe space to consider various matters set out in the letters and make decisions on the way that is best for the HS2 project to proceed to minimise the impact on the environment. It considers these matters need to be protected from external scrutiny and to prevent a chilling effect on free and frank views in the future so as to ensure that sound and fully informed decision making takes place.
23. The DfT stated that ministers need protection for internal deliberation and decision making processes so as to ensure that free and frank ministerial discussions take place without the fear of premature disclosure. At the time of the request the matters under discussion were live policy issues on the phases of the HS2 project. The departments required the safe space to discuss and consider these issues and the options available freely, frankly and candidly. It is of the view that officials and stakeholders would be reluctant to contribute to the policy making process if they felt that policy information contained in ministerial communications was routinely disclosed. It could lead to the reduction in the levels of communications between ministers and this could then give rise to sub-optimal outcomes for policies where formulation is taking place.
24. The complainant considers there are significant public interest factors in favour of disclosure. He believes there is considerable public interest in releasing communications relating to the cost and timetable of HS2. He has commented that under Theresa May, the government consistently

claimed that the budget for the project was £55.7 billion and that it was on track to be completed within its stated timetable. However, since the new Secretary of State came into office there has been clarity on the true position on costs and timetable after he gave a statement to MPs saying he wanted them to have the "full picture". The complainant is of the view that any information shedding light on what was known within government at the time the prior claims were being made about costs and timetable would be of considerable public interest. In particular, if there was any case of a disparity between what was said publicly and what was said privately. He believes there is an overwhelming public interest in disclosure, not least so that the public can come to an informed view on the project and whether they were at any time misled.

25. The Commissioner considers there is a general public interest in DfT operating in an open and accountable manner. She accepts that greater transparency leads to better public understanding of particular issues and enables the public to assist in the decision making process where possible. She notes there is a significant public interest in the cost and timetable for HS2 and in the public having a true picture of the costs involved, the overall environmental impact and the timeframe for its delivery. It involves a significant amount of public expenditure and this will heighten the public interest in disclosure.
26. However, she also accepts that there is a strong public interest in enabling ministers and senior officials to discuss and debate policy issues, options, funding, timeframes and so on in a free and frank manner, away from public scrutiny, especially when the issues under discussion and debate are still live. There is a strong public interest in allowing ministers and senior officials the safe space to engage with each other without undue or premature scrutiny to preserve the quality of such discussions and views and advice being exchanged.
27. The Commissioner does not readily accept that disclosure would cause a chilling effect on future exchanges and deliberations and discourage senior officials and ministers from offering such candid, free and frank advice and views in the future. Ministers and senior officials are expected to be robust in meeting their responsibilities and not easily deterred from expressing their views by the possibility of future disclosure. She accepts that the possibility of a chilling effect cannot be completely dismissed. But considering the roles they undertake and seniority, the scale of HS2 and the need to ensure all possible options are explored and the most appropriate decisions are made, she considers this argument does not carry as much weight in the balancing of the public interest as the DfT claims.
28. The timing of the request is often crucial to the balance of the public interest and whether the issues and matters contained in the withheld

information are sensitive, crucial to the development of the project going forward and live at that time. If they are live, the argument for the need for safe space is much stronger and more compelling.

29. The Commissioner is satisfied that at the time of the request the matters under discussion were still live and under debate. She therefore accepts that there was a need for safe space at the time of the request and weighty public interest arguments in favour of protecting this safe space and the ability of ministers and senior officials to debate the issues, consider options free and frankly so as to ensure that the most appropriate decisions were made.
30. Although there are persuasive public interest arguments in favour of disclosure in this case, the Commissioner considers the public interest rests in maintaining the exception due to the circumstances at the time of the request and the issues under discussion still being live.

Right of appeal

31. 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

32. 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.
33. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF