Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **18 February 2020**

Public Authority: **Highways England**
Address: **Piccadilly Gate**
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested information in relation to an Options Report for a Motorway Study as well as modelled traffic volumes, presentations and terms of references. Highways England provided some information but withheld the Options Reports and modelled traffic data in the Reports under regulation 12(4)(d).

2. The Commissioner's decision is that the information does not engage the regulation 12(4)(d) exception and the Reports should be disclosed.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Disclose the Options Reports previously withheld under regulation 12(4)(d).

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 24 January 2019 the complainant made a request to Highways England (HE) in the following terms:

   1) *"The Options Report for the Motorway Hub Study in relation to the work undertaken by Highways England and Midlands Connect FOR Packages B and C, including the tables showing the forecast economic benefits of each of these Options.*

   2) *The modelled changes in traffic volumes and traffic speed for the aadt, am and pm peaks in the study output years for the different scenarios (e.g. do-something and do-minimum). These may exist either as tables or diagrams.*

   3) *Presentations given to the External Workshops on the Motorway Hub Study.*

   4) *The terms of reference and timescales for the study into the Western Access Routes which Highways England is undertaking following the study."*

6. HE responded on 12 February 2019. For part 1 HE refused to provide the information on the basis of regulation 12(4)(d) of the EIR. For part 2 the information was partially withheld under the same exception but some modelled outputs from the Enhanced Strategic Case were provided. The modelled outputs from the Western Strategic Route and the M6 Toll were withheld under regulation 12(4)(d). For part 3 HE disclosed the presentations and for part 4 of the request HE explained it had not and was not planning to undertake a study about Western Strategic Route so the information was not held.

7. The complainant requested an internal review on 6 March 2019 and HE conducted a review and responded on 27 March 2019. The internal review focused only on the responses to parts 1 and 2 of the request and upheld the decision to withhold information.

Scope of the case

8. The complainant contacted the Commissioner following the internal review on 4 June 2019 to complain about the way his request for information had been handled.

9. The complainant raised specific concerns about the decision by HE to refuse to disclose the economic outputs and modelled changes in traffic speed and volume in relation to either the Western Strategic Route or M42 Improvements which were proposed in the Hub Study.

10. The Commissioner considers the scope of her investigation to be to determine if HE has correctly withheld information within the scope of parts 1 and 2 of the request on the basis of regulation 12(4)(d) of the EIR.

Reasons for decision

Regulation 12(4)(d) – material which is still in the course of completion, unfinished documents or incomplete data

11. HE has applied regulation 12(4)(d) to information in the scope of parts 1 and 2 of the request for a number of different reasons.

12. Regulation 12(4)(d) 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;
- unfinished documents; or
- incomplete data.

13. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception. However, Regulation 12(4)(d) is a qualified exception, so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

14. The fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion.

15. The withheld information in this case are the Motorway Hub Study Option Assessment Reports and the material contained within them which includes modelled traffic information.

The Pre-Feasibility Study

16. HE has stated that the Midlands Motorway Hub Study ("the Study") was a pre-feasibility exercise looking at the relative merits of a range of multi-modal options to assist with the performance of the M5, M6 and M42 motorway network in the region. HE explained it has a project control framework (PCF) that maps the transition of schemes from

concept through design, construction and hand-over into future maintenance.

17. HE has provided the Commissioner with an overview of its PCF and notes that HE considers the Study is pre-stage 0. Stage 0 appears to be the pre-project stage, defined as the stage when strategy shaping occurs. As the Study sits pre-stage 0 HE considers it does not benefit from the project control process, governance and assurance of a full stage 0 study which, it argues, shows the work was an early investigation and the material was still in the course of completion.

Unassured commercial costs

18. HE considers the high-level costs provided in the Option Assessment Reports ("the Reports") are not formally approved by HE's Commercial Directorate and the information is therefore incomplete data.

19. HE explained that all investment decisions are informed by formally signed-off and assured estimates that have been through a robust estimating and review process. For example, the schemes that will be announced for the next roads period which runs from 2020 to 2025, are supported by these to enable the Department for Transport to prioritise spending.

20. HE argued that release of unassured cost estimates based on limited evidence may be viewed as inaccurate and provide a misleading representation of the likely costs of interventions. Since the cost estimates have not been approved by HE Commercial, it considered the information is incomplete data.

Package Level Economic Analysis

21. HE explained that the economic analysis to demonstrate the level of expected benefits of the interventions was carried out at a package level i.e. schemes were not tested in isolation which would be required to fully understand the scheme impacts. The figures presented are likely to be viewed out of context and represent an inaccurate and incomplete representation of the likely benefits.

Outline Highway Scheme Interventions

22. The Western Strategic Route is a historic highway scheme from the 1990s and was considered in the study. HE is concerned that local businesses and residents may be alarmed if they could view maps that illustrate indicative alignments that may pass near their businesses or properties. HE stressed that at this pre-feasibility stage there are no actual route options – maps are used to illustrate a broad corridor where the route could theoretically go. Actual routes are not considered until

PCF Stage 1 and public consultation does not take place until PCF Stage 2.

Is the exception engaged?

23. The Commissioner must consider whether regulation 12(4)(d) is engaged in relation to the Reports. Whilst HSE has broken this down into sections to explain its decision the document can be considered as whole for the purposes of determining if the information is still in the course of completion.

24. HE has explained its internal PCF and that the study was pre-stage 0 on this framework meaning that it was at a pre-project stage. This argument from HE seems to be that the Reports were not 'final' versions at this stage; there was an initial overarching study exploring broad options and generating the initial Reports and upon further review and feedback the Reports would evolve until a final position was reached.

25. The Commissioner does however note that a summary version of the Report was published[1]. The complainant therefore argues the Reports are not a work in progress but are finished documents intended to form the basis for future decision making.

26. There is an argument that the Reports, though an important part of an evidence base for an evolving process, are a finished snapshot of the situation at the time. They have been able to be published in summarised form and figures and estimates from the published summaries have been used in public debates and discussions.

27. In determining whether the withheld information comprises material in the course of completion the Commissioner has referred to her published guidance[2] on this subject. This explains that, in some cases, information which is being gathered in the process of a public authority formulating its policy or deciding how to proceed in relation to a particular matter can be said to form part of an overall, larger, 'end product' which is in itself still in the course of completion. HE is of the view that the Option Reports are part of a larger project as if it is decided to pursue further interventions in the study area beyond the

[1] https://www.midlandsconnect.uk/media/1209/midlands-motorway-hub-summary-report-final-06062018.pdf

[2] https://ico.org.uk/media/fororganisations/documents/1637/eir_material_in_the_course_of_completion.pdf

Option Reports, options to be taken forward to public consultation would be identified following appraisal work at a greater level of detail.

28. Issues relevant to this case were considered by Upper-tier Tribunal (Information Rights)[3] where the Tribunal found that the exception could apply where the requested information *relates* to material in the course of completion, as well as where the request is, in itself, *for* material in the course of completion. In recognising this, the Tribunal emphasised that any relevant incomplete project or larger piece of work must in itself be 'material'.

29. The Tribunal concluded that, while the exception may still apply where the requested information *relates* to material in the course of completion, rather than only being *for* information which is in itself in the course of completion, the EIR require a judgement to be made. This judgement involves consideration of whether the requested information can be considered as separate from any continuing work.

30. In this case, the Reports have been completed and published in summarised form. In the Commissioner's view this can be considered discretely and separately from any further work that may occur in the future from the Report analysis. She also notes that it has not been suggested by HE that any continuing work is occurring, only that it may occur.

31. In reaching this view, the Commissioner is also mindful of her guidance on the exception where she finds that *"the fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception."*

32. She is therefore satisfied in this case that the Reports should not be considered more widely as 'material in the course of completion' and that they do not fall within the scope of the first limb of this exception.

33. With regard to the third limb (incomplete data), HE has only referred to this in relation to the unassured commercial costs and not the Reports as a whole. It stated that the high-level costs in the Reports had not been formally approved by HE's commercial directorate and the information is therefore incomplete.

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3 https://assets.publishing.service.gov.uk/media/5c7fad1640f0b6332c6c6851/GIA_1589_2018-01.pdf

34. However, the Commissioner considers that her guidance is clear on this point. It states that:

    "If a public authority has collected raw data and is using it as part of ongoing research, that data is not incomplete, even though the data may later be published in a more meaningful form."

35. The guidance reflects the *Implementation Guide for the Convention (2nd edition 2014)* ("the Guide")[6], which provides guidance on the implementation and interpretation of EU Directive 2003/4/EC, which the EIR implement, as previously stated. It summarises the relevant provisions on access to environmental information from page 78. Referring to what has now been implemented in the UK as regulation 12(4)(b) of the EIR, the Guide states (page 85) that *"a request for access to raw environmental data cannot be refused on the grounds that it is 'material in the course of completion' to be made publicly available only after processing or correction factors have been applied"*.

36. The information in this case is not raw data but it cannot be said to be incomplete data simply because it has not been formally approved and may be misleading. The Commissioner acknowledges that any commercial costs may be subject to change if and when options are pursued but she does not accept that HE has demonstrated the information should be regarded as incomplete for the purposes of regulation 12(4)(d).

37. In conclusion the Commissioner does not consider HE has provided arguments which wold be sufficient to engage the exception either in terms of the Reports being in the course of completion or the costs being incomplete data for the purpose of regulation 12(4)(d).

Right of appeal

38. 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

39. 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.

40. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF