

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

Decision notice

Date: 14 December 2022

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 the Business Cases for the electrification of the Bolton to Wigan railway line and the re-opening of the Exeter to Okehampton railway line. The DfT disclosed some information but withheld the remainder under regulation 12(5)(d) and 12(5)(e) of the EIR.
2. The Commissioner's decision is that the DfT is entitled to refuse to disclose the remaining withheld information under regulation 12(5)(e) of the EIR. It however breached regulation 5 by failing to respond to the request within 20 working days of receipt.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 10 January 2022, the complainant wrote to the DfT and requested copies of the Business Cases for the electrification of the Bolton to Wigan railway line and the re-opening of the Exeter to Okehampton railway line.

5. The DfT responded on 7 March 2022. It disclosed some information but withheld the remainder, citing section 43 of FOIA. It upheld this position at internal review.

Scope of the case

6. The complainant contacted the Commissioner on 24 April 2022 to complain about the way their request for information had been handled. They believe the remaining information should be disclosed.
7. During the Commissioner's investigation the DfT agreed the request should have been handled under the EIR, as it is a request for environmental information. It provided an updated response to the complainant on 6 December 2022 advising them that it was now relying on exceptions 12(5)(d) and 12(5)(e) of the EIR.
8. The Commissioner has received a copy of the withheld information and further submissions from the DfT. He is satisfied that the remaining withheld information is exempt from disclosure under regulation 12(5)(e) of the EIR. The following section will explain why.

Reasons for decision

9. Information can be withheld under regulation 12(5)(e) of the EIR if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
10. The Commissioner is satisfied that the remaining withheld information is commercial in nature and was provided to the DfT under a common law duty of confidence by Network Rail (NR) and the Train Operating Companies. It has the necessary quality of confidence; it is not trivial nor is it already in the public domain. These elements of the exception are therefore met.
11. The DfT explained that the project is moving from the design to the delivery stage and this therefore requires NR to procure contractors and engineers from third parties to deliver the works. There are live negotiations and disclosure of the remaining withheld information would adversely affect achieving the best outcome and value for the taxpayer. It would put NR's negotiating hand at a significant disadvantage. The third parties would be able to negotiate far more financially favourable contracts if they had access to the remaining withheld information.

12. The DfT also argued that the type of contract being pursued is a 'Target Cost contract, whereby the successful third party engineering firm must deliver the works to the agreed upfront costs and any efficiencies it makes must be given back to the DfT. It stated that this incentivises contractor efficiency because there is also no means under the contract to pass on extra costs incurred throughout the works to the DfT/taxpayer.
13. DfT explained further that an unsuccessful contract, as the scheme moves into delivery, would force NR to have to use alternative multiple 'short-term' type contracts, given the range of engineering disciplines required. It confirmed that these come at a considerably greater cost and are intended to be used for urgent works rather than planned schemes. This would also mean that the scheme's core milestones and delivery dates would be prolonged and the associated additional cost passed on to the government and taxpayer to pay.
14. Additionally it stated that is the withheld information contains sensitive commercial and financial information from train operators. Specific operating costs and future rolling stock targets from today's train operator (Northern Trains Limited) are set out in the withheld information to ensure that true cost-benefit is reached. The DfT argued that disclosure of any detailed costs relating to train operations will expose assumed rates and figures relating to operating costs and is therefore highly sensitive information for the businesses operating the rail franchises. Putting this information into the public domain will diminish any opportunity to improve taxpayer value for money at the procurement negotiations that operators are having with third party organisations (e.g. for fuel supplies, maintenance firms for their train fleets and procurement of new train types that will be used across this route and franchise).
15. The DfT confirmed that this is particularly pertinent given the current position of rolling stock procurement with external businesses. Permission to engage or commence negotiations with the rolling stock manufacturers and financiers has not been granted yet. Disclosure of the withheld information would share the position before the negotiations have even commenced, thereby removing any fiduciary benefit for the companies, government and the taxpayer. It commented that disclosure would give future companies, who competitively bid for the franchise an unfair advantage, thereby frustrating the benefits and competition. The effect would again adversely affect the train operator's economic interests and prevent taxpayers getting the most cost-efficient outcome.
16. The DfT said that electrification engineers are part of a specialist supply chain which the rail industry needs to use for electrification schemes.

The specialist nature of the market means there is tough competition to deliver the most engineering and cost-efficient results. It argued that this is critical to getting the best outcomes from the project, environmentally and financially. If the level of funds set out for contingency and its changing nature at different stages of the scheme were placed into the public domain, the incentive to drive best price for future schemes will adversely be compromised. It stated that the same is true of the negotiating position for rolling stock manufacturers, and the immense costs of the new trains for Northern Trains Ltd in a frustrated economic climate will increase significantly if manufacturers know the thresholds and current costs involved in railway operations.

17. The Commissioner is satisfied that disclosure would adversely affect the legitimate economic interests of the third parties mentioned and the DfT itself for the reasons given above and based on the circumstances at the time of the request. The project is moving into the delivery phase and commercial negotiations will either be required in the near future or are currently underway and live for the services that will or are required to deliver it. Disclosure of the remaining withheld information will reveal upfront or whilst negotiations are ongoing, how the project has been costed and what margins the relevant parties are operating to. This information would hinder the ability of those concerned to negotiate competitively and fairly and achieve the best possible outcome for themselves and ultimately the public.
18. The Commissioner is therefore satisfied that regulation 12(5)(e) of the EIR is engaged.
19. In terms of the public interest, the Commissioner recognises the public interest in accountability and transparency and in allowing members of the public access to information to enable them to see exactly how projects of this scale and cost have been thought through. It involves a significant amount of public money and disclosure would enable the public to scrutinise and challenge how this is being spent and whether value for money is being or is likely to be achieved.
20. However, at the time of the request the project was moving into the delivery phase and contractual negotiation for its delivery. Disclosure at this time would reveal negotiating positions upfront or whilst negotiations are live and this would place those mentioned above at a significant commercial disadvantage. It would prevent them from negotiating freely and fairly and securing the best possible deal for themselves and ultimately the public. This is not in the interests of the wider public. Disclosure would lead to increased costs and less favourable terms being achieved and this ultimately would have to be paid by the government and taxpayer. Again, this is not in the public interest.

21. For the above reasons, the Commissioner has decided that the public interest rests in maintaining the exception.

Procedural matters

22. Regulation 5 of the EIR requires a public authority to respond to information requests within 20 working days of receipt. The DfT failed to do that in this case and so the Commissioner has recorded a breach.

Right of appeal

23. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

24. 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.
25. 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