

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

Decision notice

Date: 1 March 2023

Public Authority: National Highways Ltd
Address: Bridge House
1 Walnut Tree Close
Guildford
GU1 4LZ

Decision (including any steps ordered)

1. The complainant has requested information about the Transport Decarbonisation Plan. The above public authority ("the public authority") denied holding some of the information and also relied on regulation 13 of the EIR to withhold some information.
2. The Commissioner's decision is that the public authority was entitled to rely on regulation 12(4)(a) of the EIR in the manner that it has because, on the balance of probabilities, it does not hold the requested information. It was also entitled to rely on regulation 13 of the EIR to withhold the name of the expert. The public authority breached regulation 9 of the EIR as it failed to provide adequate advice and assistance.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 23 August 2022, the complainant wrote to the public authority and requested information in the following terms:

"I would like to request any information held about the potential to reduce greenhouse gas emissions from the strategic road network through modal shift, in relation to the following two publications' assertions and policies.

- “[1] Net Zero Highways: Any information held about the professional judgment relied on regarding the statement in the technical annex to your Net Zero Highways plan: Progress Report 2021-2022, about the potential of different measures to reduce emissions: ‘Demand reduction through modal shift 1% emissions reduction across cars and HGVs Source CCC Report and Professional judgement’...
- “[2] Transport Decarbonisation Plan [TDP]: Any information about the applicability of the plan's strategic principle of ‘Accelerating modal shift to public and active transport’ to the SRN [Strategic Road Network], specifically:
- any data held about modal share on the SRN, whether recent trends in the past or future forecasts,
 - the applicability of the TDP's strategic principle that ‘We will use our cars differently and less often’ to the Road Investment Strategies and the preparation of Route Strategies,
 - the potential to reduce SRN user emissions through the commitment to ‘take action to increase average road vehicle occupancy by 2030’, and
 - likewise through the commitment to ‘support and encourage modal shift of freight from road to more sustainable alternatives, such as rail, cargo bike and inland waterways.’”
5. The public authority responded on 20 September 2022. It provided some information within the scope of both elements of the request. In respect of element [1], it stated that part of the request was not clear. In respect of element [2], it stated that it held no further information.
6. On 7 October 2022, the complainant contacted the public authority again and stated the following:
- “Question 1 - Net Zero Highways
- any information, including emails, meeting minutes, modelling, in particular **which** professional experts were engaged whose professional judgement has been relied upon and **what** information they relied upon to make their findings, including any assumptions made. [original emphasis]
 - In case it is not possible to share individual names for data protection reasons, information such as their affiliation

(e.g. organisation) and reasons why they were felt to be of an expert level of seniority (such as director, senior consultant, years of experience) or other information, such as internal emails about whose advice to ask etc.

“Question 2 - Transport Decarbonisation Plan

“NB There is no SRN modal share information either in the TAG data book nor Net Zero Highways that you provided links to. For the avoidance of doubt, your assertion that because your publication (in this case NZ Highways Plan) does not state something means you have no information to share is not a lawful reason to refuse sharing any information that you do hold, for instance internal meeting minutes or emails about whether or not to include or apply a particular DfT policy in your activities. Clearly you need to disclose, or provide lawful reasons for a failure to do so:

- any information, including emails, meeting minutes, modelling about whether or not, or the degree to which to apply different TDP policies to your own activities, plans and strategies.
 - information held about the trajectory in the NZHP both before and after alignment to the TDP.”
7. Following an internal review the public authority wrote to the complainant on 29 November 2022. It provided some further information within the scope of element [1], but relied on regulation 13 to withhold the remainder. It directed the complainant to where information relevant to element [2] could be found, but relied on regulation 12(4)(a) of the EIR to refuse the parts of the request relating to the TDP alignment as it did not hold this information.

Reasons for decision

Is the requested information environmental?

8. The requested information is information on the Transport Decarbonisation Plan. That Plan is a measure affecting factors which in turn affect the elements of the environment. Therefore any information falling within the scope of the request would be environmental.

Element [1] – third party personal data

9. A public authority can rely on regulation 13 of the EIR to withhold information that is the personal data of someone other than the

requester where there is no lawful basis, under data protection legislation, that would allow for the information to be published.

10. In this case, the withheld information is the name of the expert the public authority asked to lead its analysis work ("the Expert") – which is clearly that individual's personal data.
11. In its response and internal review, the public authority provided quite a detailed description of the Expert's CV. The Commissioner asked the public authority whether it was satisfied that the Expert could not be identified from that description alone. The public authority consulted the Expert, who accepted that the description "might" enable other experienced consultants to identify them. However, the public authority's relevant project manager, who was also consulted (and has relevant experience in the field) was adamant that the Expert could not be identified.
12. Whilst the Commissioner is somewhat sceptical that there are many other individuals who would fit the same career description exactly, he has decided to err on the side of caution and proceed on the basis that the personal data (ie. the fact that this particular expert carried out the work) is not in the public domain. This is for two reasons.
13. Firstly, as the regulator of data protection legislation, the Commissioner has a duty to proceed carefully where data protection matters are concerned. The exception is still subject to a balancing test so the mere fact that the information is personal data does not automatically mean it must be withheld.
14. Secondly, it is possible that the description is less specific than it might appear. There may be a considerable body of work that the Expert is responsible for that is not included. Also, even where a particular piece of work has been listed, it is possible that the fact of the Expert's participation in that work is not in the public domain – or even known to the world of consultancy.
15. Several recent (and binding) decisions of the Upper Tribunal have made clear that the question of identification is binary: either a person can be identified or they cannot. It is not sufficient to say that the data subject must be among a group of people – even a very small group. A person must be able to identify the data subject. Whilst the Commissioner considers that a motivated intruder such as an investigative journalist could probably narrow the Expert's identity down to a relatively small number of people, he cannot say definitively that they would be able to deduce the Expert's identity from the description alone.

Lawful basis

16. As the Expert has not consented to their personal data being published, the Commissioner considers that disclosure would only be lawful if publication was necessary to achieve a legitimate interest.
17. Whilst the Commissioner recognises that policy decisions are ultimately made by ministers, he still considers that there is a legitimate interest in understanding the quality of advice given. Where external expertise is sought, there is also a legitimate interest in transparency over the spending of public money (because the experts are likely to have been paid for their services), particularly if there is a possibility of the external advisers having conflicts of interest. The Commissioner is not suggesting that the Expert has any such conflict, only that the possibility always exists – as it would with any external adviser.
18. The Commissioner is not satisfied that these legitimate interests could be met by any less-intrusive means than publication and therefore disclosure is necessary.
19. Where disclosure is necessary to meet a legitimate interest, the legitimate interest must still be balanced against the Expert's rights and freedoms. In assessing the balance, the Commissioner will take into account the Expert's reasonable expectations and the consequences of disclosure – as well as the strength of the interest in disclosure.
20. Whilst the policy decisions that form the TDP will have been made by ministers, the Commissioner recognises that the role of expert advisers will have been important. This will particularly have been the case when modelling the effect of various policies. The outcome of that modelling is likely to have made certain policies more, or less, attractive to ministers and therefore there is a reasonably strong interest in understanding whether that modelling work is robust.
21. There is also, as the Commissioner has noted above, an interest in ensuring that any conflicts (if indeed there are any) are picked up.
22. The public authority's submission demonstrates that the Expert has an expectation that their personal data will not be disclosed. They have confirmed that they have had to take additional security measures to protect themselves previously because of their work. The indication was that they expected publication of their name to lead to similar issues in future.

The Commissioner's view

23. Having considered the matter, the Commissioner is satisfied that the Expert does have a reasonable expectation that their personal data will not be disclosed.
24. Firstly, the public authority's response makes clear that, although the Expert "led" the modelling work, they were supported by a variety of others. Therefore, even if a conflict of interest did exist, it could only have limited effect.
25. Secondly, the data on which the modelling was based and the method used appear to be in the public domain already. Therefore those with sufficient expertise are already capable of analysing the government's data to identify any flaws in the modelling. The name of the expert would have no bearing either way.
26. Finally, whilst informed by the data, the policy decisions taken were ultimately taken by ministers – who are accountable for those decisions. Ministers are not obliged to act only in accordance with the advice they receive – no matter how eminent a source that advice comes from.
27. Disclosing the Expert's name, contrary to their reasonable expectation, is likely to cause them distress – particularly in light of their previous experience. The Commissioner is therefore satisfied that the rights of the data subject outweigh the legitimate interests and thus there is no lawful basis for the information to be disclosed. Regulation 13 of the EIR is therefore engaged.

Element [2] - Held/not held

28. There is no explicit duty under EIR to confirm or deny that particular information is held. However, a public authority can rely on regulation 12(4)(a) to refuse a request to the extent that the request seeks information that the public authority does not hold.
29. Where there is dispute, the Commissioner is required to determine whether it is more likely than not that the information is held.
30. The public authority explained that it had consulted the relevant policy teams who had confirmed that no information was held that would fall within the scope of the request.
31. The public authority did locate correspondence relating to the TDP (which it provided to the Commissioner), but it argued that this correspondence did not fall within the scope of the request.

32. When the Commissioner queried why the provided information did not fall within the scope of the request, the public authority explained that the information concerned how its pre-existing plans and strategy would be built into the TDP – whereas the request sought details of how the TDP impacted on plans and strategy.

The Commissioner's view

33. The Commissioner considers that, whilst the complainant may not have intended this, in seeking an internal review, he (the complainant) narrowed the original request, in limiting the information sought to only information on "how to apply different TDP policies to your own activities, plans and strategies."
34. The public authority's arguments have a certain "chicken and egg" quality to them, however, the request sought details of how the public authority was intending to apply TDP policies to its own plans. The public authority did not need to do this, because its plans **were** the TDP policies in that area.
35. When the government decides that it wishes to formulate a strategy in a particular policy area, it will pick a central theme and then select projects, at various stages of development, from across the various departments and agencies of government, that fit into that theme. Those individual projects are then combined together, along with various pieces of policy analysis, to form the strategy – which is then published.
36. It is this process that is demonstrated by the information the public authority has provided – not, as the revised request envisages, one where the Department for Transport simply announces a strategy and leaves the various agencies to work out how it will apply in their area.
37. The Commissioner is of the view that at least some of the information in question would have fallen within the scope of the original request wording – as this was less precise about how the strategy and the individual plans informed each other. However, he is equally bound to accept that, in phrasing the request for an internal review as described above, the complainant did narrow his request and the public authority was entitled to treat that narrowed request as being for the information of most interest to the complainant.
38. The Commissioner is thus bound to find that the public authority was entitled to rely on regulation 12(4)(a) of the EIR as it did not hold the specific information the complainant sought when seeking an internal review.

Public interest test

39. Technically, regulation 12(4)(a) includes a public interest test, however the Commissioner cannot conceive of a public interest argument that is capable of requiring a public authority to provide information that it does not hold.
40. It is of course open to the complainant to make a fresh request for information, based on the findings of this decision notice.

Procedural matters

41. As the Commissioner is of the view that the public authority held additional environmental information within the scope of the original request, he finds that the public authority breached regulation 5(2) of the EIR in responding to the request.
42. The Commissioner also finds that the public authority breached regulation 9 of the EIR in its handling of the request as it failed to provide reasonable advice and assistance.
43. Whilst the public authority did provide links to publicly available information, it did not explain, in its internal review, that the reason why it held no information was because the revised request was built on an incorrect assumption about the policy process that had been followed. Instead of providing an explanation similar to that provided at paras 31 to 37, the public authority instead stated that it had had "no input" into the TDP – a statement which does not appear to be supported by the information the public authority has provided to the Commissioner.
44. Given the analysis in the decision notice, the Commissioner does not consider that it would be proportionate to order the public authority to take any additional steps. The complainant now has sufficient information to reframe his request – should he wish to do so.
45. Had the public authority properly explained the process, it is possible that this part of the complaint could have been resolved before the complaint came to the Commissioner.

Right of appeal

46. 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

47. 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.
48. 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

Roger Cawthorne
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