

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

**Decision notice**

**Date:** 22 October 2020

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

**Decision (including any steps ordered)**

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1. The complainant has requested Highways England (HE) to disclose information in relation to the A5036 Port of Liverpool Access Scheme. It disclosed some information but refused to disclose the remainder citing regulations 12(5)(e), 12(5)(f) and 13 of the EIR.
2. The complainant raised no concerns in respect of regulation 13, so the Commissioner's investigation has focussed on HE's application of regulations 12(5)(e) and 12(5)(f) of the EIR.
3. With regards to document 3 and HE's application of regulation 12(5)(e), the Commissioner is satisfied that this exception applies and the public interest rests in maintaining this exception. Regarding document 5 and HE's application of 12(5)(f) of the EIR, the Commissioner has decided that this exception does not apply.
4. The Commissioner therefore requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information redacted from document 5 under regulation 12(5)(f) to the complainant.
5. 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**

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6. On 17 July 2019, the complainant wrote to HE and requested information in the following terms:

"Please provide the following information in relation to the A5036 Port of Liverpool Access Scheme:

- 1) Details of any meetings that have taken place between Highways England and Peel Ports Ltd. This should include copies of agendas for those meetings and copies of any minutes.
  - 2) Details of any correspondence between Highways England and Peel Ports Ltd (such as letters and emails) that have been exchanged over the past 5 years in addition to the above.
  - 3) Details of any meetings that have taken place between Highways England and Kier Group plc. This should include copies of agendas for those meetings and copies of any minutes.
  - 4) Details of any correspondence between Highways England and Kier Group plc (such as letters and emails) that have been exchanged over the past 5 years in addition to the above."
7. The HE responded on 8 August 2019. It stated that it may have to refuse to comply due to the significant cost and time that would be involved in responding. It suggested that the complainant narrow down the scope of the request.
8. The complainant responded on 9 August 2019. He confirmed that he would reduce the timeframe from the previous 5 years to the previous 2 years.
9. HE acknowledged receipt of the revised request on 13 August 2019 and confirmed that it would respond by 9 September 2019.
10. HE responded on 10 September 2019. It disclosed some information but refused to disclose the remainder citing regulations 12(5)(f) and 13 of the EIR.
11. The complainant requested an internal review on 10 September 2019. He stated that he felt further information could be disclosed and that the public interest rested in disclosure. He also advised HE that there

appeared to be gaps in the email communications between HE and Peels Ports that needed to be addressed.

12. HE completed the internal review and notified the complainant of its findings on 4 October 2019. It upheld the application of regulation 12(5)(f) of the EIR and confirmed that there was no additional communications held to those already identified.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 25 November 2019 to complain about the way his request for information had been handled. He specifically stated that he considers the public interest rests in disclosure. He commented that the scheme is of huge public interest and the dealings between HE and the other organisation are of vital importance and highly relevant to the progress of this scheme. He advised that he was asking for all communications to be disclosed, with the exception of any personal data.
14. As the complainant has stated that he is not interested in the personal data of individuals, the Commissioner has not considered the application of regulation 13 of the EIR. Instead the Commissioner's investigation has focused on HE's application of regulation 12(5)(f) and a late reliance it made on 12(5)(e) of the EIR for some of the withheld information.
15. During the Commissioner's investigation further information was disclosed; one email that was initially withheld and one email that was later identified as a result of fresh searches. Two documents remain; document 3 and document 5. Document 3 has now been withheld under regulation 12(5)(e) of the EIR. According to HE document 5 remains exempt under regulation 12(5)(f) of the EIR. The Commissioner will consider each document and each exception in turn.
16. The complainant also raised concerns over potential gaps in the communications identified. The Commissioner will also consider whether on the balance of probabilities any further recorded information is held.

### **Reasons for decision**

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#### **Is further recorded information held?**

17. The complainant felt there were gaps in the email communications identified by HE in 2018 and raised concerns that there appears to be no communications at all between 16 February and 11 July of that year. He

also commented that the emails appeared to stop completely in November 2018. Additionally, the complainant noticed there appeared to be no emails in the build up, or aftermath of the meeting of 2 January 2019, for which the minutes have been provided. He believes follow up actions and communications will have resulted from the meeting. However, no information relating to those follow up actions or communications has been disclosed. The complainant is also of the view that there should be communications in 2019 to the present day.

18. The Commissioner referred these concerns to HE once again (as they were first raised in the complainant's request for an internal review) and asked it to carry out fresh searches to ensure that all recorded information has been identified. She asked HE to explain what these fresh searches entailed (which departments and staff were involved for example) and what the results were.
19. HE carried out a fresh search of its filing system, the scheme's email inbox and the project team members' calendars. It stated that the bulk of documents were outside the scope of the request. They were either outside the period covered by the request, duplicate emails of those already identified or simply items sent to HE by a third party with a side copy to Peels Ports. It however managed to locate one further email falling in scope, which was not identified during the first search as it was incorrectly saved to a different folder. HE disclosed this email, together with one other it previously identified in the first search but initially felt it should be withheld, on 18 May 2020.
20. HE confirmed that there is no further recorded information held and it is satisfied that it has now carried out all appropriate searches. It explained that there may appear to be gaps in communications between HE and Peels Ports for two reasons.
21. Firstly, Sefton Borough Council pursued a legal case against HE in respect of the scheme options presented at public consultation in 2017. It stated that, that action started in October 2017 and did not end until November 2018. During that period, external communications were limited partly on legal advice and partly because the scheme was unable to progress so there was little to communicate. Where engagement did take place, as described in the minutes of the meeting on 2 January 2019, this was around stakeholders' perceptions of the scheme and the requirements of the development consent process, rather than about details of the scheme's design or development. It commented that where Peel Ports' representatives offered to provide support in identifying stakeholders, the project team have been largely unable to take them up on that because of the deferment of further public consultation, which it hopes to carry out in 2021.

22. Secondly, HE introduced a new procurement approach in 2018 and, with the scheme stalled by the High Court challenge, it made sense to bring the new Regional Delivery Partner, Kier Highways, on board earlier than originally intended, and to descope the previous supplier from the project. It confirmed that the challenges arising from making these changes have been considerable, causing a considerable additional delay to the scheme. HE stated between the High Court challenge and the change in suppliers the scheme has lost around 30 months and consequently it has had little to communicate with Peels Ports or anyone else.
23. HE commented that it is possible that some verbal communications could have taken place during the timeframe covered by the request. If they did, they were not recorded.
24. The Commissioner is satisfied that thorough searches have now been carried out and that on the balance of probabilities all recorded information has now been identified. It has conducted fresh searches at her request, identified one further email and explained why there will be gaps in communications.
25. She does not require any further action to be taken in relation to this aspect of the complaint.

### **Regulation 12(5)(e) – commercial confidentiality (document 3)**

26. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
27. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the authority must demonstrate that:
  - the information is commercial or industrial in nature;
  - the information is subject to confidentiality provided by law;
  - the confidentiality provided is required to protect a legitimate economic interest; and
  - that the confidentiality would be adversely affected by disclosure.
28. In accordance with regulation 12(2) the public authority should apply a presumption in favour of disclosure. So, a public authority should only refuse to disclose the information if it considers the public interest in

favour of disclosure is outweighed by the public interest in favour of maintaining the exception.

29. Dealing with the first bullet point, the Commissioner is satisfied that the withheld information is commercial in nature. It relates to the tonnage and business data and forecasts of Peels Ports. This information is commercial in nature, as it relates to the commercial activities of Peels Ports.
30. Turning now to the second bullet point, the Commissioner notes that there is no obvious or explicit instruction in the withheld information concerning confidentiality. However, she considers it is not necessary for there to be a formal confidentiality clause or explicit instruction for this element of the exception to be met. If the withheld information has the necessary quality of confidence (more than trivial and not otherwise publicly known) it can be said that it is protected by a common law duty of confidence.
31. The Commissioner notes that the withheld information relates to the commercial activities of Peels Ports. Mersey Docks and Harbour Company, which is part of Peels Ports, has provided a statement to HE detailing how the information is commercially sensitive, not trivial or publicly known. She has read the withheld information, the statement provided and considered the circumstances in which it states the information was imparted and she is satisfied that it is protected by a common law duty of confidence. This element of the exception is therefore met.
32. Turning now to the third and fourth element, the statement provided to HE details how the withheld information contains sensitive commercial information, including actual and projected tonnages and various commodities passing through the port. It confirmed that the information was provided to HE in good faith and on the understanding that it would be kept confidential. If the information was disclosed it would be used by other port operators, including Associated British Ports (ABP), to the disadvantage of Peels Ports. It argued that ABP has a substantial operational footprint within the North West, operating a port at Garstang in South Liverpool and further ports in Fleetwood, Lancashire and Barrow and Silloth in Cumbria. These ports are in direct commercial competition with Mersey Docks and Harbour Company (and thereby Peel Ports), as the owner and operator of the Port of Liverpool. If projected tonnages by commodity classification were made available it would be possible for ABP (and others) to gain a competitive advantage by understanding the quantity of freight passing through the Port of Liverpool, comparing that with other industry based information available and their own operations, obtaining filed accounts and thereafter estimated rates charged to those using the Port of Liverpool,

allowing competitors to potentially undercut Mersey Docks and Harbour Company, or force it to offer discounts or incentives to retain its business.

33. It also argued that the information also forms part of Mersey Docks and Harbour Company's business plan and the release of this information (in the form presented to HE) would allow a competitor to identify and target not only customers but importers and exporters by commodity, harming the commercial operations of the Port of Liverpool and Mersey Docks and Harbour Company.
34. The Commissioner has reviewed the withheld information and considered the statement produced for HE. She is satisfied that the information would be beneficial to Mersey Docks and Harbour Company's (thereby Peels Ports; being its owner) competitors and would be used to either undercut it or force it to offer discounts or incentives to retain business and current commercial edge. The statement has said how the information can be used with other information available to competitors to work out estimated rates charged. Disclosure would therefore adversely effect the commercial interests of Mersey Docks and Harbour Company/Peels Ports and the confidentiality provided in order to protect those legitimate economic interests.
35. For the above reasons, the Commissioner is satisfied that regulation 12(5)(e) of the EIR is engaged.

### **Public interest test**

36. The Commissioner acknowledges the public interest in openness and transparency and in members of the public having access to information to enable them to understand more clearly why certain decisions are made and how these will effect them. She understands the scheme intends to provide improved road access to the Port of Liverpool and a significant element of this plan involves a dual carriageway bypass through Rimrose Valley. The Commissioner notes that such schemes will attract significant public interest; both positive and negative and will effect most those living and working in that area. There is a public interest in sharing information with the public about such schemes to enable them to be fully informed and participate in any decision making that is taking place.
37. She also notes that the scheme will involve a significant amount of public money. There is a public interest in allowing members of the public to fully scrutinise how public funds are spent and to evaluate for themselves whether value for money is being obtained.

38. But despite the weighty public interest arguments in favour of disclosure, the Commissioner has decided that the public interest rests in maintaining this exception. This is because she has concluded that the information is commercially sensitive and would damage the economic interests of Mersey Docks and Harbour Company (Peels Ports) if it were to be disclosed. The statement she received highlights that the withheld information discusses actual and project tonnages of commodities passing through the port and how this information could be used by its competitors to undercut it or force it to lower its prices or offer concessions in order to retain its commercial edge. The Commissioner does not consider it is in the public interest to damage the commercial interests of the company concerned and to place it at a disadvantage to others.

**Regulation 12(5)(f) – interests of the person who provided the information to the public authority (document 5)**

39. In order for this exception to apply, all five elements of the following test must be satisfied:

- Would disclosure adversely affect the interests of the person who provided the information to the public authority?
- Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
- Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
- Has the person supplying the information consented to its disclosure?

40. HE confirmed that document 5 is an email from Peels Ports to HE and the withheld information in it has been withheld on the grounds that the person or body who provided the information (Peels Ports) has not consented to its disclosure. Peels Ports considers disclosure of the withheld information would damage its working relationship with one of its major stakeholders, which in turn could have an adverse effect on Peels Ports' business. The withheld information was shared on the assumption that it would remain confidential, allowing Peels Ports' relationship with the third party to be shared with HE in a free and frank fashion.

41. HE advised that when Peels Ports was consulted about the potential disclosure of this information it warned HE that it would be wary of sharing information with it in future. HE is therefore concerned that disclosure will have a stifling effect on its relationship with Peels Ports to the detriment of the project and any future engagements.



42. The Commissioner considers the threshold necessary to justify non-disclosure, because of adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse. The interests of the public authority are not relevant here; it is the interests of the person who provided the information to it. The public authority must be able to explain the causal link between the disclosure and the adverse effect, as well as why it would occur.
43. In this case, the Commissioner is not satisfied that HE has sufficiently demonstrated a causal link between disclosure of the withheld information and the adverse effect described or how disclosure of the withheld information would, on the balance of probabilities, directly cause the harm identified.
44. It appears to the Commissioner that Peels Ports' concerns focus mainly on how the withheld information would be construed or taken by its stakeholder. The Commissioner does not entirely agree that the withheld information would be taken in such a negative way and certainly not to the extent Peels Ports has described. She therefore considers the likelihood of the stakeholder misconstruing the withheld information and the context in which it was made, thereby damaging its working relationship with Peels Ports, and then Peels Ports interests, to be too remote. She is also of the view that disclosure can be supplemented by an explanation or further statement, which sets out the meaning of the withheld information and the context in which it was made. This would prevent any misunderstanding or misconception.
45. Based on the submissions received, the Commissioner does not consider the first element of the test outlined in paragraph 39 is met. She can therefore only conclude that regulation 12(5)(f) of the EIR does not apply.
46. As 12(5)(f) does not apply, there is no need to go on to consider the public interest test.

## Right of appeal

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47. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

48. 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.
49. 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**