

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

Date: 18 July 2024

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 information about the publication of the Network North project. The above public authority (“the public authority”) relied on section 36 of FOIA (undermining collective responsibility) to withhold the information.
2. The Commissioner’s decision is that the public authority should have dealt with the request under EIR. It has correctly applied regulation 12(4)(e) of the EIR to parts 1, 2 and 3 of the request and the public interest favours maintaining this exception. The public authority is not entitled to apply regulation 12(4)(e) to parts 4 and 5 of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to parts 4 and 5 of the request in accordance with the EIR.
4. The public authority must take these steps within 30 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 5 October 2023, the complainant wrote to the public authority and requested information in the following terms:

“Yesterday (4th October 2023) the Department for Transport published the document NETWORK NORTH: TRANSFORMING BRITISH TRANSPORT (E02997322 -- 978-1- 5286-4481-5). Under the provisions of the freedom of information act I would like to request:

 1. The date that the Department was advised of the need to produce this document.
 2. The date that the work started on this document.
 3. The date that a draft of the document was made available to the Secretary of State of Transport.
 4. The date of the decision to publish this document on the 4th October to coincide with the Prime Minister's conference speech.
 5. The earliest date that this document was sent/shown to other Ministers or their offices (including the Prime Minister), if that was before the publication on the 4th October.”
6. The public authority responded on 6 November 2023. It relied on section 12 of FOIA (costs) to refuse the request.
7. Following an internal review the public authority wrote to the complainant on 4 April 2024. It withdrew its reliance on section 12 and instead relied on section 36(2)(a)(i) of FOIA.

Reasons for decision

Is the requested information environmental?

8. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
9. Network North is a large-scale long term transport plan. That plan will have both short and long term effects on the environment.
10. In the short to medium term, many of the individual projects will involve construction. Construction activities affect the elements of the environment such as soil, landscape and water.
11. In the longer term the individual projects aim to ease traffic congestion and also to encourage more people to switch from using cars to using forms of mass transportation, walking or cycling. These plans, if successful, would reduce pollution – a factor affecting the elements of the environment.
12. The Commissioner is therefore satisfied that the Network North policy is a “measure” affecting the elements of the environment. As the requested information would provide detail about the decision-making processes around this measure, it is information “on” the measure and therefore environmental information.
13. The request should therefore have been dealt with under the EIR.

Regulation 12(4)(e) – internal communications

14. Whilst it maintained that the request should have been dealt with under FOIA, in its submission, the public authority explained that, were the request to fall under EIR, it would rely on regulation 12(4)(e) – for the same reasons it considered section 36 to apply. The Commissioner considers that he therefore has sufficient information to reach a decision without delaying matters by offering the public authority a further opportunity to make submissions.
15. Regulation 12(4)(e) will apply to information that has been generated in and only circulated within, a public authority or, as in this case, only within the government.
16. The Commissioner is satisfied that the requested information is information that would only be known to the public authority or other government departments. That is sufficient to engage the exception.
17. The Commissioner is not satisfied that the exception is engaged in respect of parts 4 and 5. The reasons for this are explained in the confidential annex.

Public interest test

18. Internal communications must still be disclosed under the EIR – unless the balance of the public interest favours maintaining the exception.
19. The public authority, in its submissions, pointed to the need for a safe space in which to deliberate policy decisions and, in particular, the public interest in preserving cabinet collective responsibility:

“Disclosing the information requested by [the complainant], pertaining to the work and knowledge of Government departments and individual Cabinet Ministers in the preparation of a major Government policy announcement, would have a clear prejudicial effect on the maintenance of Cabinet collective responsibility and is not, on balance, in the public interest. The convention of Cabinet collective responsibility requires that agreed Government policy is based on collective decision-making and that the decision-making process is not personalised, which enables Ministers to be frank and candid in their views prior to a collective decision being made.

“Releasing specific dates with limited context risks undermining collective responsibility by giving rise to various inappropriate potential inferences as to the Cabinet decision-making process (e.g. inferring that decisions were / were not made based on when Ministers saw / had not seen specific documents). This is inconsistent with paragraph 2.3 of the Ministerial Code: *‘The internal process through which a*

decision has been made, or the level of Committee by which it was taken should not be disclosed. Neither should the individual views of Ministers or advice provided by civil servants as part of that internal process be disclosed'."

20. In the Commissioner's view, the balance of the public interest, in this case, should favour maintaining the exception in respect of parts 1, 2 and 3 of the request.
21. The Commissioner recognises that the Network North programme is a far-reaching policy that will affect the lives of a large number of people across the north of England. There is a strong public interest in understanding the rationale behind the policy, the reasons specific projects have or have not been included and the analysis that underpins it.
22. The Commissioner also notes that a central feature of the programme is the scrapping of the HS2 line beyond Birmingham. This is a project that has been controversial since it was originally proposed and so there is, once again, a strong public interest in understanding why that decision was made.
23. Whilst that may be the case in theory, the actual information that is being withheld says very little about Network North itself – except at the most superficial level.
24. There will be those that support Network North and those that don't. It is a programme that deserves to have its merits debated and to receive a high degree of scrutiny. However, in the Commissioner's view, that debate and that scrutiny can already take place with the information in the public domain. Adding superficial information such as this will do nothing to improve the quality of the debate or the scrutiny that can be applied.
25. The Commissioner is not persuaded disclosing the information within the scope of parts 1, 2 and 3 of the request is likely to have a severe effect on either the principle or the practice of collective decision-making – as it does not reveal the thoughts of any particular minister. Nevertheless he accepts that the information would give some insight into the degree of input the public authority's ministers may have had into the decision, allowing inferences to be drawn about their level of involvement. To that extent, disclosure of the withheld information may cause the public to draw inferences about the driving force(s) behind the decision.
26. Furthermore, the Commissioner notes that the request was submitted the day after the policy was announced. Although the public authority did not need to respond until twenty working days later, that was still

during a period in which Network North was a freshly-announced policy. The public authority was entitled to a degree of "safe space" in which to promote and explain its policy.

27. Disclosing the requested information at that time would be likely to have distracted from any debates about the merits of the policy in favour of a debate about process. Media focus would likely have shifted to determining which department "won" by getting its preferred policy options announced, rather than whether the policy itself was good or bad for the country.
28. Whilst the Commissioner recognises that this information might be of interest to those within the "Westminster bubble", he is sceptical that it has any wider public value. Consequently he is satisfied that the balance of the public interest favours maintaining the exception.

Procedural matters

29. The Commissioner finds that the public authority breached regulation 14 in three respects.
30. Firstly, no refusal notice, of any kind, was issued within 20 working days.
31. Secondly, the refusal notice, when it was eventually issued, did not cite a valid EIR exception from disclosure.
32. Thirdly, for the reasons set out in the confidential annex to this decision notice.

Confidential Annex

33. The Commissioner has found it necessary to produce a confidential annex as part of this decision notice. This annex will be provided to the public authority only.
34. The reason for this is because there are matters the Commissioner needs to deal with that he cannot, without revealing information that the public authority provided with the explicit expectation of confidentiality.
35. Whilst the Commissioner cannot be unilaterally bound in this way, he does recognise that, in these particular circumstances, placing the matters in the published version of his decision would deny the public authority a meaningful right of appeal against that decision.

36. For the benefit of the complainant, the annex records the Commissioner's reasoning as to why regulation 12(4)(e) is not engaged in respect of parts 4 and 5 of the request. It also records the third reason why the Commissioner considers the public authority's refusal notice to have been inadequate.
37. Nothing in the annex touches on the Commissioner's findings in respect of parts 1, 2 and 3 of the request. Those findings are set out in full above.

Other matters

38. The Commissioner notes that it took the public authority nearly five months to complete its internal review. Although he notes that the outcome of the review was marginally more beneficial to the complainant, he still considers the delay to represent poor practice on behalf of the public authority.
39. The FOIA Code of Practice states that internal reviews should not normally take in excess of 40 working days to complete.

Right of appeal

40. 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

41. 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.
42. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF