

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

Date: 13 October 2021

Public Authority: Transport for the North
Address: 4 Piccadilly Place
Manchester
M1 3BN

Decision (including any steps ordered)

1. The complainant requested details of a specific section of the planned Northern Powerhouse Railway. Transport for the North ("TfN") withheld the requested information and relied on Regulation 12(4)(d) of the EIR (material in the course of completion) in order to do so.
2. The Commissioner's decision is that TfN has correctly relied on Regulation 12(4)(d) to withhold the requested information and that the balance of the public interest favours maintaining the exception. As TfN failed to indicate the date on which it expected the material it was withholding to be completed, it breached Regulation 14 of the EIR.
3. The Commissioner does not require further steps.

Request and response

4. On 20 November 2020, the complainant requested information of the following description:

"[1] Given the passive provision on HS2b for two junctions at High Legh has now been confirmed, to allow the routing of NPR via the Manchester section of HS2, can you confirm the route plan between the junction and Warrington, which has also been confirmed that NPR will serve?"

"In particular can you confirm any considerations of the former Warrington and Altrincham Junction Railway bed as a route for NPR, as this would seem to provide a corridor and crossing point for the MSC through Warrington. If not this route, where?"

"[2] Can you further confirm if there are plans for a NPR station to be located at the 'Lymm Interchange', as identified in the Warrington Local Transport Plan."

5. On 18 December 2020, TfN responded. It denied holding information within the scope of element [2], but confirmed it held information within the scope of element [1]. However, it refused to provide this information and relied on Regulation 12(4)(d) of the EIR in order to do so.
6. The complainant requested an internal review on 20 January 2021. TfN sent the outcome of its internal review on 9 March 2021. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 16 March 2021 to complain about the way his request for information had been handled.
8. As the complainant has not disputed TfN's response to element [2], the Commissioner considers that the scope of her investigation is to determine whether TfN is entitled to rely on Regulation 12(4)(d) of the EIR to withhold the information within the scope of element [1].

Reasons for decision

Is the requested information environmental?

9. 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);*
10. As it is information relating to the construction of a railway line, the Commissioner believes that the withheld information is information on a measure likely to affect the elements of the environment. For procedural reasons, she has therefore assessed this case under the EIR.

Regulation 12(4)(d) – material in the course of completion

11. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that:

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

12. The EIR do not define what “material in the course of completion” actually is, but in *Highways England Ltd v Information Commissioner & Manisty* [2018] UKUT 423 (AAC), the Upper Tribunal laid down the following guidelines:

"The exception must, nevertheless, be applied restrictively. It must not be engaged so widely as to be incompatible with the restrictive approach required by EU law. But it must not be engaged so narrowly that it defeats its purpose of allowing public authorities to think in private.

"It is not engaged when a piece of work may fairly be said to be complete in itself. 'Piece of work' is a deliberately vague expression that can accommodate the various circumstances in which the exception has to be considered...The piece of work may form part of further work that is still in the course of preparation, but it does

not itself require further development. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of a project to another? Another factor may be whether the authority is ready to go public about progress so far. The fact that the project, exercise or process is continuing may also be relevant, although this is probably always going to be a feature when a public authority is relying on this exception...

"...The way that the public authority has treated the material is relevant but not decisive. A public authority cannot label its way out of its duty to disclose. A label like draft or preliminary thoughts may, or may not, reflect the reality. The scope of the exception depends on the substance, not the form in which the material is stored or presented."

13. TfN explained to the Commissioner that, whilst some work had been carried out to select viable routes for the line (including the specific section referred to by the complainant), the strategic outline case for the line had yet to be presented to the Department for Transport (DfT). Furthermore, the DfT had indicated that it would not be considering the strategic outline case for this line until such times as the Integrated Rail Plan had been published.

14. TfN added that the strategic outline case:

"is not yet at Stage 2 of GRIP [Governance of Rail Investment Projects] and TfN are not yet at option selection stage of the scheme..."

"...Due to the delay in publication of the SOC, the material is unlikely to be completed until 2022. Public consultation on route options will be undertaken at the appropriate stage. The scale of the delay is much dependent on the nature of the IRP once it is published and how different that is from the assumptions, NPR network and timings that TfN and the Department of Transport have worked on to date."

15. Having viewed the withheld material within the scope of the complainant's request and some other confidential reports that TfN provided to explain the decision-making progress, the Commissioner is satisfied that the withheld information is material in the course of completion.
16. The documents prepared so far, deal with some of the major project decisions – such as the way in which the line will connect with the major

hub stations – rather than at the more local level that the complainant is interested in. The Commissioner accepts that, until those major project decisions have been made (or, at least, the options narrowed) it is difficult to plot exact route options – as these are likely to be determined to some extent by the nature of those connections.

17. Whilst some work has clearly been done, the Commissioner accepts that, at present, this is largely indicative work, rather than precise plotting of routes.
18. Furthermore, TfN's submission clearly anticipates that the current route maps may well need to change again once the Integrated Rail Plan is published – so the current maps may need re-working accordingly.
19. The Commissioner therefore accepts that the maps TfN holds form part of a larger piece of work where the current stage has yet to be completed. It may well be that, after the Integrated Rail Plan is published, there will be the sort of natural break in TfN's thinking that was envisaged by *Manisty* – however, that is yet to occur and therefore the material has yet to be completed.

Public interest test

20. Even though material may still be in the course of completion at the time of a request, a public authority is still required to disclose it – unless the balance of the public interest favours maintaining the exception.
21. TfN noted that there was a general public interest in transparency and accountability which would be served by disclosure.
22. The complainant argued that there would be a strong local interest in understanding where the route would go. He argued that because of the nature of the decisions already made and the geography of the local area, the possible route options were limited. Therefore there was an interest in early engagement with the local community to rule out unworkable options.
23. In explaining why the balance of the public interest should favour maintaining the exception, TfN drew attention to the need to "protect the integrity of the process" although it did not elaborate on why the integrity of the process would be harmed by disclosure or why this would be harmful.
24. TfN further argued that:

"Having regard to the timing of the request, and the current position in which Transport for the North is awaiting publication of

the Integrated Rail Plan, disclosure of information regarding material in the course of completion would make it difficult to bring the process to a conclusion. There is a public interest in ensuring that public authorities are given space to consider issues, without concern that the public debate could be skewed by the early release of information."

25. In its internal review, TfN also noted that:

"public dissemination of information contained in it at this stage, which is incomplete and potentially open to change could result in confusion, misinformation and uncertainty to both the public and employees, which would be contrary to the overall public interest, and a safe space is required for further development to be completed before it is made publicly available."

26. Having considered the matter, the Commissioner accepts that, in the circumstances of this particular request, the balance of the public interest favours maintaining the exception.

27. This particular exception is designed to protect a public authority's thinking space and to allow it to disseminate information in a controlled manner – where it is necessary to do so.

28. The Commissioner recognises that the Northern Powerhouse Railway is a major infrastructure project which, during its construction, is likely to have major short-term effects on the environment (even if, in the long term, it brings economic and environmental benefits). There is thus a strong public interest in information about this project, the potential route options and the economic analysis that underpins it.

29. Having said that, there is also a very strong public interest in ensuring that the information about this project that is released into the public domain is accurate and up to date. The uncontrolled release of information – particular about route options – can cause significant harm.

30. Once route options are published, some families will discover that one or more of the available options will involve the line either cutting through or passing close by to their property. The value of properties deemed to be affected by one or more of the route options will decline considerably.

31. It is therefore important that the number of properties that would be affected is kept to an absolute minimum. This will not be achieved if TfN is required to publish route options that it is not seriously considering or if the maps it publishes do not accurately reflect the actual course of the route.

32. If TfN were to disclose the maps it is withholding, some property owners would suffer economic damage unnecessarily because either the route map would show their property as being blighted when, in fact, once the route has been properly planned, this would not be the case or because the route option which would affect them is not one which has been taken forward.
33. Equally, some property owners would be encouraged by the release of such information to believe that they are "safe" because the route options do not show their property as being affected – when in fact the finalised route options will affect their property.
34. At some point, TfN will be carrying out a consultation on the route – which will allow different options to be debated and evaluated. Inevitably, that consultation will result in negative economic affects to some properties – but by controlling the release of information in this way, TfN is able to minimise the number of affected properties and ensure that properties are not blighted unnecessarily.
35. When the request was made, those route options were still at a nascent stage of their development. That remains the case today and appears likely to remain so for several months yet.
36. The Commissioner therefore considers that the balance of the public interest favours allowing TfN to complete (or, at least, significantly refine) its route options before any are disclosed.
37. The Commissioner has also considered the EIR presumption in favour of disclosure, but she does not consider that this outweighs the strong public interest in maintaining the exception.

Procedural Matters

38. Regulation 14 of the EIR states that:

- (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.*
- (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.*
- (3) The refusal shall specify the reasons not to disclose the information requested, including—*
 - (a) any exception relied on under regulations 12(4), 12(5) or 13; and*

- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).*
 - (4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.*
 - (5) The refusal shall inform the applicant—*
 - (a) that he may make representations to the public authority under regulation 11; and*
 - (b) of the enforcement and appeal provisions of the Act applied by regulation 18.*
39. The complainant argued that TfN had not provided its refusal notice within 20 working days and that it had not specified the date on which it expected the material to be completed.
40. The metadata on the whatdotheyknow.com website shows the request as having been made on 20 November 2020 and, in the absence of contrary evidence, the Commissioner assumes TfN received the request upon that day.
41. When calculating the deadline by which it must comply with the request, a public authority is entitled to disregard the day on which it received the request: the clock starts on the next working day.
42. 20 November 2020 was a Friday. Therefore the first working day “after the date of receipt” was Monday 23 November 2020 and the twentieth working day was Friday 18 December 2020. As the metadata from whatdotheyknow.com indicates TfN’s response as having been posted on Friday 18 December 2020, the Commissioner is satisfied that TfN issued a timely refusal notice – although she notes that the timeliness of the refusal notice would not have affected TfN’s ability to rely on the stated exception.
43. However, Regulation 14(4) requires TfN to state the estimated time by which any incomplete material will be completed. The refusal notice TfN issued did not give any indication of when the material was likely to be complete.
44. In the course of providing its submissions to the Commissioner, TfN has indicated that it is unable to commit to any particular date. However, the Commissioner notes that the information TfN provided at paragraphs 13 and 14 of this notice do give an indication of the sequence of events

which need to take place and that this would constitute an “estimated time” when the material might be complete. The Commissioner considers that such an estimate might have been useful to the complainant in helping him to decide whether to pursue this particular request or whether to submit a further request at a later date, once the information was more likely to be complete.

45. The Commissioner therefore considers that, in responding to this request, TfN breached Regulation 14 of the EIR.

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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF