

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

Decision notice

Date: 7 August 2023

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 A350 Melksham Bypass scheme. The Department for Transport (DfT) disclosed some information and withheld the remainder under regulations 12(4)(d) and 12(4)(e). These exceptions concern material in the course of completion and internal communications respectively.
2. The Commissioner's decision is that DfT correctly applied regulation 12(4)(d) of the EIR to all of the information it's withholding and the public interest favours maintaining this exception.
3. It's not necessary for DfT to take any corrective steps.

Request and response

4. On 27 March 2023, the complainant wrote to DfT and requested information in the following terms:

"With regard to decisions and communications by both the Dept of Transport and Wiltshire Council on the proposals for a Melksham bypass based on the A350 as part of the M4 to Dorset connectivity study. I would like to see all material relating to this between the dates

18 August 2022 and the end of March 2023. As the budget statement has now been published I would expect that the fiscal based decisions that underpin this project should now have been made, and so it's future can now be made public. Therefore I would also like to see the decision outcome confirmation material."

5. DfT disclosed some relevant information (with personal data redacted), and its final position is that it considers the remaining relevant information is excepted from disclosure under regulation 12(4)(d) and regulation 12(4)(e) of the EIR.

Scope of the case

6. On the basis of their complaint to him, the Commissioner has focussed this investigation on DfT's reliance on regulations 12(4)(d) or 12(4)(e) or both, to withhold some of the information the complainant has requested.

Reasons for decision

7. In its submission to the Commissioner, DfT has provided the following background. The information request relates to a local authority led highway scheme, the A350 Melksham Bypass. This is being taken forward for consideration as part of DfT's Major Road Network/ Large Local Majors programme. Some general information on the programme is available on the GOV.UK website.
8. For schemes promoted for consideration as part of the programme, formal approval from DfT is usually required of the three main iterations of business case development: Strategic Outline Case (SOC); Outline Business Case (OBC); and Full Business Case (FBC). As part of the approval process for each business case iteration, DfT officials will seek a decision through the necessary governance route and from DfT Ministers. They will make a recommendation on whether to approve the business case based on an assessment of its merits, including a comprehensive review of the large amount of analytical work that underpins the business case. That review work is usually assisted by consultants contracted by DfT. If DfT wishes to approve a business case iteration, Treasury approval is usually required before the decision can be issued to the local authority.
9. Prior to the submission by a local authority of an SOC, OBC or FBC document for approval by DfT, typically DfT officials responsible for the programme in both policy and analytical roles will be in regular contact

with them. This is to provide advice and support in developing the business case, in particular on the approach taken with the analytical work. This may include asking the local authority to respond to clarification questions on points of detail following review by DfT analysts of analytical reports that underpin the business case. Questions may be rated as red, amber or green depending on DfT analytical officials' views on the extent to which they are likely to affect their assessment of the business case.

10. As DfT had noted in its response to request, the position with the A350 Melksham Bypass scheme at the time was that an OBC and related documents for this scheme remained in development by Wiltshire Council (WC) and were subject to ongoing comment and review by DfT. At the time, in its programme reporting to the DfT, WC had estimated that the OBC would be submitted to DfT for formal review and approval through DfT governance and Ministerial decision making in March 2023, although had indicated to DfT officials in a meeting on 13 March 2023 that it was then considered unlikely. Since then, WC has indicated in its programme reporting that the OBC would be submitted to DfT for approval in March 2024. This does not change DfT's position with this information request.

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

11. Under regulation 12(4)(d) of the EIR a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
12. DfT has applied this exception to all the material it's withholding, which it has sent to the Commissioner.
13. DfT explains in its submission that it considers that the information relates to officials' incomplete and ongoing review, assessment and advice for WC's ongoing work to develop an OBC for the scheme. It considers that is the case even where individual documents, such as the documents setting out clarification questions, are themselves complete.
14. In line with the process outlined above, if the scheme progresses as expected, DfT says its officials will provide advice on whether to approve the finalised OBC as part of DfT governance and Ministerial decision-making on the basis of their completed review.

The Commissioner's view

15. Approving a project business case to potentially include in DfT's Major Road Network/ Large Local Majors is a three-stage process.
16. At the time of the request WC was still developing the OBC for the road scheme that's the focus of the request. That's the second stage of the process. WC expected the OBC to be submitted to DfT in March 2023; it's now likely to be submitted in March 2024. As such the A350 Melksham Bypass project was, and remains, very much in development.
17. And as DfT has noted, while some documents in scope might themselves be complete, they form part of the wider project that's still ongoing; as such those documents would also be caught by regulation 12(4)(d).
18. The Commissioner has reviewed the information being withheld and he's satisfied that it can be categorised as material in the course of completion for the above reason. He finds that regulation 12(4)(d) of the EIR is engaged and has gone on to consider the associated public interest test.

Public interest test

19. A presumption in favour of disclosure is inherent in the EIR, under regulation 12(2).
20. DfT acknowledges that releasing material about the Outline Business Case which is under development would allow the public an additional opportunity to view information on the scheme. It may also allow people to contribute further to the process for a bypass for the A350 at Melksham.
21. However, DfT also notes that work on the scheme is still live. It says that Ministers and officials need a 'safe space' in which to formulate and develop a government position on the bypass.
22. DfT says that officials would be reluctant to provide their views and comments if the information was routinely placed into the public domain ahead of any final decisions / announcements. Good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure.
23. DfT considers that placing this information into the public domain now whilst the scheme is still live could also lead to misunderstanding.

Balance of the public interest

24. The Commissioner is aware that there is always a general public interest in disclosing environmental information, derived from the purpose of the EIR. He recognises that, as the public interest can cover a wide range of values and principles relating to what is the public good, or what is in the best interests of society, there are always arguments to be made on both sides.
25. In his published guidance 'How exceptions and the public interest test work in the Environmental Information Regulations', the Commissioner notes:

"The factors determining the weight of the arguments for and against disclosure can include: the likelihood and severity of any adverse effect; the age of the information; how far disclosing the information would serve the public interest; and what information is already in the public domain."
26. In the Commissioner's guidance, he also states:

"When dealing with a complaint that information has been wrongly withheld, the Commissioner will consider the situation at the time the authority dealt with the request or internal review."
27. In determining where the balance of the public interest lies in this case, the Commissioner has given due weight to the presumption in favour of disclosure and the specific public interest in transparency and accountability in relation to decisions that may have widespread effects on local communities.
28. In this case the Commissioner considers that the public interest in openness has been met through the proactively published information that's relevant to the request and the information DfT disclosed in response to the request.
29. In the Commissioner's view the timing of the request is key here. WC was still developing the OBC at the time of the request (and that remains the case to date). The Commissioner considers there was greater public interest in WC and the other bodies involved in the Melksham Bypass scheme having the 'safe space' they needed to formulate the OBC and reach decisions away from public scrutiny and distraction. That is particularly the case here when the OBC isn't finalised and may be subject to change.
30. Disclosing the information would frustrate the process of developing the business case and inhibit partners' ability to carry out this work. That's the very activity which the exception is formulated to protect.

31. While he acknowledges the complainant's interest in the bypass, the Commissioner finds the need for a safe space in which to develop the OBC outweighed the public interest in complete transparency in this case.
32. The Commissioner has found that DfT applied regulation 12(4)(d) appropriately and that the public interest in maintaining the exception outweighed the public interest in disclosure. It's therefore not necessary to consider DfT's application of regulation 12(4)(e) to some of the same information.

Right of appeal

33. 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

34. 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.
35. 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

Cressida Woodall
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Information Commissioner's Office
Wycliffe House
Water Lane
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