

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2024

Public Authority: Department for Transport

Address: Great Minister House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested information regarding the history of High Speed 2 (HS2). The Department for Transport ("the DfT") refused to disclose the information, citing regulations 12(4)(d) and 12(4)(e) of the EIR.
2. The Commissioner's decision is that the DfT has correctly applied regulation 12(4)(d) to the requested information.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 14 July 2024 the complainant made the following request to DfT:-
"Please could you send me any reports, documents or drafts written by Yumna Yusuf on the history of HS2 if you have them on file. The dates would be around 2012-17. Thanks so much!"

5. DfT responded to the request on 26 July 2024. It stated that it held the requested information but refused to disclose it, citing regulation 12(4)(e) of the EIR.
6. The complainant sought an internal review of DfT's handling of the request on 27 July 2024. A response to this was provided on 11 September 2024. The reviewer upheld the application of regulation 12(4)(e).

Scope of the case

7. The complainant contacted the Commissioner on 6 October 2024 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to look at how the request has been handled, in particular the application of the exceptions under the EIR. Following correspondence from the Commissioner, the DfT also applied regulation 12(4)(d) of the EIR to the requested information. Therefore the Commissioner's investigation will include both regulation 12(4)(e) and 12(4)(d).
9. The Commissioner notes that the DfT holds an updated (2020) version of the document requested by the complainant which has superseded and overwritten the original 2017 document. This contains information which was partly written by Yumna Yusuf and partly by another author. The DfT has made the complainant aware of this and the complainant has stated in their request for internal review that they would like this document to be disclosed. Therefore the Commissioner has considered the DfT's submissions in relation to the 2020 document.

Reasons for decision

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

10. 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.
11. DfT has now applied this exception to the requested information, which it has sent to the Commissioner.

12. DfT explains in its submission that the 'History of HS2' is an unfinished draft document which is still in the course of completion. Since its inception in 2017, the document has gone through multiple updates, including a substantive one in 2020. It is intended that the document will be updated further in coming years and continue acting as an evolving internal history of the HS2 programme.
13. The DfT notes that the complainant requested information from 2012-17; however it does not hold a version from the period requested, and the document worked on in 2017 was superseded / overwritten by a later version recorded in 2020. The material was still in course of completion at the time and remains unfinished as it awaits an update to cover the programme's history from 2020 onwards.
14. As such, at the time the request was made, the document was and remains in the course of completion and unfinished. Whilst some issues in the document might be regarded as closed by the public, they are still under 'live' discussion particularly as the newly elected government has yet to make certain decisions on how to proceed with the programme.
15. The Commissioner has reviewed the information being withheld and he is satisfied that it can be categorised as material in the course of completion for the above reasons. He finds that regulation 12(4)(d) of the EIR is engaged and has gone on to consider the associated public interest test.
16. A presumption in favour of disclosure is inherent in the EIR, under regulation 12(2)

Public interest test

The complainant's view

17. The complainant's view is that HS2 is a huge rail infrastructure project paid for by the public purse. Therefore it is in the interests of the public to understand the thinking and the narrative of the DfT in developing this project. It is particularly pertinent given the number of decisions taken after 2020 and changing nature of the project from then until now.

The DfT's view

18. When considering applying the public interest test for releasing information under the EIR, that test begins with a presumption in favour of releasing information as set out in regulation 12(2) of the EIR.
19. The DfT accepts that disclosure of the requested information may facilitate transparency and strengthen the accountability of government,

by allowing the public to see how decisions have been made and potentially contribute to the policy-making process. This is particularly relevant in the context of a high-profile and high-value programme such as HS2, which affects a large number of people and incurs a significant amount of public expenditure.

20. The DfT further accepts that disclosure may also promote a greater public awareness of environmental issues in the context of a programme with significant environmental impacts.
21. However, the DfT considers that the public interest in not disclosing the contents of the 'History of HS2' document far outweighs any public interest in disclosure. The document is a highly sensitive, incomplete/unfinished internal communication setting the background to a number of 'live' issues. It is important that the DfT is free to discuss them internally in order to manage the HS2 project as effectively as possible.
22. The DfT is of the view that disclosing the draft document to the public in its current form would risk the information being taken and used out of context. HS2, as a nationally significant infrastructure programme, faces complex issues that need to be carefully considered, worked through, and resolved. It considers that it is important and in the public interest for ministers and officials to have the necessary safe space to develop ideas, debate live issues and reach decisions in private.
23. At the time of the complainant's request, the new government had only just been elected. The DfT is of the view that Ministers and officials require the safe space to discuss and consider issues affecting the programme options available freely, frankly and candidly, without fearing the publication of incomplete/unfinished, sensitive, confidential, internal Departmental materials relevant to that work. This is especially the case in the context of a newly elected government that may wish to review decisions taken by the previous government.
24. The DfT argues that publication of such sensitive information taken out of context would no doubt inhibit the future management and recording of information surrounding live issues, and the candour and effectiveness of internal discussions necessary for the decision-making process. The DfT considers that this would have a chilling effect and would lead to a reduction in the quality and openness of communications between ministers, officials and advisers, and as a result would have a deleterious effect on the quality of government decisions. Clearly this would not be in the public interest.
25. On balance, therefore, the DfT considers the public interest in withholding the information outweighs that for disclosure.

The Commissioner's view

26. The Commissioner accords significant weight to public interest arguments in favour of disclosure, namely transparency and accountability of government in relation to their policy-making processes.
27. The Commissioner considers that civil servants and other public officials are expected to be impartial and robust in meeting their responsibilities, and not easily deterred from expressing their views by the possibility of future disclosure. However, chilling effect and safe space arguments are likely to be at their strongest when closely related to live government policy. Whilst the work on phase 1 of HS2 began in 2017, the Commissioner acknowledges that policy surrounding HS2 is always evolving and with that, the "chilling effects" and "safe space" arguments will evolve with it.
28. Whilst the Commissioner acknowledges that policy development cannot continue indefinitely, he agrees that the information in scope provides the background to live policy issues. For example, at the time of the complainant's request, matters under discussion were live policy issues on the phases and risks following cancelling the HS2 project north of Birmingham. The requested information is still being utilised for decision making in terms of how the policy will develop following the cancellation.
29. The Commissioner is aware that HS2 is a significant infrastructure project which affects a large number of people and it is the Commissioner's view that it is important for the DfT to be able to discuss and exchange views on the issues in private, in order to manage and deliver the project effectively. It is also important for the public to understand and be informed about the thinking behind decisions made as part of the project which affect them. The Commissioner is aware that the government has published several reports and economic analyses, e.g. the Oakervee Review, which he considers would keep the public informed about progress in decision-making around HS2.
30. Therefore the Commissioner is satisfied that the balance of public interest lies in maintaining the exception in this case. As he considers that regulation 12(4)(d) is engaged in relation to the entirety of the requested information, and the public interest in all the circumstance of the case is in favour of maintaining the exception, he has not gone on to consider the DfT's application of regulation 12(4)(e).

Right of appeal

31. 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

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Deirdre Collins
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