

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 June 2013

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested a report prepared by the Major Projects Authority about the plan to develop a high speed rail network (HS2).
2. The Cabinet Office initially refused to disclose this information under FOIA.
3. The Commissioner found that the request should have been considered under the Environmental Information Regulations (EIR).
4. The Cabinet Office had also, in the alternative, cited the exception provided by regulation 12(4)(e) (internal communications) in the EIR.
5. The Commissioner's decision is that the Cabinet Office incorrectly applied regulation 12(4)(e) – the public interest in maintaining the exception does not outweigh the public interest in disclosure.
6. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld PAR report.
7. 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

8. On 14 May 2012, the complainant wrote to the Cabinet Office and requested information in the following terms:

"...the MPA Gateway Review reports for the HS2 rail project [and] the evidence upon which the reports and their conclusions are based."

9. The Cabinet Office responded initially on 1 June 2012 stating that the exemptions provided by sections 33(2) (prejudice to audit functions) and 35(1)(a) (formulation or development of government policy) of the Freedom of Information Act 2000 (FOIA) were engaged, but that further time was needed to consider the balance of the public interest. A second holding response referring to those exemptions was sent on 8 June 2012.
10. The Cabinet Office responded substantively on 27 June 2012. It stated that the Major Projects Authority (MPA) had not carried out any Gateway Reviews in relation to the HS2 project, but that it had carried out 'Project Assessment Reviews' and that it considered information relating to these reviews to be within the scope of the request. The Cabinet Office refused to disclose this information under the exemptions provided by sections 33(2) and 35(1)(a) of the FOIA.
11. The complainant responded on 10 July 2012 and requested an internal review. The Cabinet Office responded with the outcome of the internal review on 17 August 2012 and stated that the refusal under the exemptions cited previously was upheld.
12. When requesting an internal review, the complainant had argued that the information he had requested was environmental and so his request should have been handled under the EIR. In response to this point the Cabinet Office maintained that the information was not environmental and hence it was correct to consider the request under the FOIA. However, it also stated that should any information later be considered environmental, its position was that the exception provided by regulation 12(4)(e) (internal communications) would be engaged.

Scope of the case

13. The complainant contacted the Commissioner on 7 October 2012 to complain about the refusal of his request. The complainant argued that the decision to refuse his request was incorrect and that the Cabinet Office had failed to take fully into account his arguments as to why this

information should have been disclosed. The complainant also maintained that the request should have been handled under the EIR.

14. In correspondence with the ICO the Cabinet Office stated that it held only a copy of a report into a Project Assessment Review; it did not hold any information falling within the scope of the request for *'the evidence upon which the reports and their conclusions are based'*. The analysis below concerns this report.
15. Whilst the Cabinet Office could have made more clear to the complainant what information it held, it did provide some indication on this point in the refusal notice when it stated *"This response is in respect of the PAR reports"*. Also, whilst it is the case that regulation 12(4)(a) of the EIR treats the information not being held as an exception to disclosure, and so requires a response stating that this exception is cited, the Commissioner notes that the view of the Cabinet Office at the time of the refusal notice was that the information was not environmental and so it was not necessary for it to refer to regulation 12(4)(a) at that time.
16. As covered below, the view of the Commissioner is that the information in question is environmental and, therefore, the analysis in this notice covers whether the exception from the EIR cited by the Cabinet Office, namely regulation 12(4)(e), applies, rather than the FOIA exemptions that it cited.

Reasons for decision

Regulation 2

17. The first question for the Commissioner to address here is whether the information is environmental in accordance with the definition given in regulation 2(1). Environmental information is defined within regulation 2(1) of the EIR as follows:

"any information in written, visual, aural, electronic or any other material form on –

(a) the state of the environment, such as air and atmosphere, water, soil, land and landscape and natural sites including wetlands...

(b) factors, such as substances, energy, noise, radiation or waste, emissions...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...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

18. HS2 is a plan which is likely to affect many of the elements and factors referred to in regulations 2(1)(a) and (b). For example, its construction is likely to affect land and landscape, and its construction and operation will be likely to result in environmental factors such as energy and noise.
19. The Cabinet Office argued that the information in question is not environmental on the basis that this information relates to the assessment of the process undertaken by the Department for Transport (DfT) to deliver HS2, rather than relating to HS2 itself. Whilst the Cabinet Office accepted that information directly about HS2 would be environmental, in essence its argument here is that this information is too far removed from the HS2 project to itself qualify as environmental.
20. For information to be environmental according to regulation 2(1), it must be 'on' one of the definitions listed in that regulation. The Commissioner agrees that the content of this information does not immediately appear to be environmental. It is, however, clearly information 'on' HS2, which is a measure likely to affect elements and factors listed in regulations 2(1)(a) and (b). The Commissioner finds that the information in question here is, therefore, environmental information in accordance with regulation 2(1)(c).

Regulation 12(4)(e)

21. Regulation 12(4)(e) provides that a public authority may refuse a request for environmental information if the request involves the disclosure of internal communications. Consideration of this exception is a two-stage process; first it must be considered whether the request would involve the disclosure of internal communications. Secondly, this exception is qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exception does not outweigh the public interest in disclosure.
22. As to whether this request would involve the disclosure of internal communications, regulation 12(8) is specific that internal communications for the purposes of the EIR includes communications between government departments. The reasoning of the Cabinet Office for the citing of this exception was that the report had been prepared by the Major Projects Authority, which the Cabinet Office described as a partnership between it and HM Treasury, and provided to the DfT.

23. The Commissioner accepts that the provision of this report from the Major Projects Authority to the DfT constitutes a communication between government departments and, under regulation 12(8), an internal communication for the purposes of the EIR. The exception provided by regulation 12(4)(e) is, therefore, engaged.

Public interest factors in favour of disclosure

24. The Commissioner has taken into account the general public interest in improving the openness and transparency of the Cabinet Office, the MPA and central government more widely. He has also taken into account the specific factors that apply in this case and in relation to this information. This includes factors suggested by the complainant and by the Cabinet Office.
25. The subject matter of the policy making in question here is highly significant. The HS2 project would clearly be a very major undertaking, involving the expenditure of very significant amounts of public money, over a long period of time. The impacts of this project would be myriad, in particular to the environment and to residents along its route. There is also a significant public debate about the arguments for HS2 in terms of enabling economic growth. Disclosure here would significantly add to transparency about the plans of the Government for HS2. The information would significantly enable the public to take part in the debate about the merits and wide ranging impacts of the HS2 project. The view of the Commissioner is that the subject matter of this information is a valid factor in favour of disclosure and of very significant weight.
26. The complainant argued that there is a public interest in this information being disclosed in order to ensure that MPs and peers are fully informed about HS2. In response to this point the Cabinet Office argued that the National Audit Office provides publicly available reports that scrutinise HS2. The Commissioner notes that the question here is whether universal disclosure is in the public interest, rather than disclosure to specific groups. If further scrutiny is required at Parliamentary level, this should be dealt with through Parliamentary procedures, rather than through the FOIA. However, the Commissioner finds that there is significant public interest in the public being informed about the HS2 project - it is relevant to consider the importance of the public being able to contact and lobby their MP about the issue (for or against) and the MPA report would enable members of the public to do this in an informed way.
27. Thirdly, the complainant referred to the recent controversy over the West Coast Mainline rail franchise and suggested that this demonstrated the strength of the public interest in full disclosure in relation to HS2.

Only those factors that applied at the time of the request can be taken into account here, however. As those issues with the West Coast Mainline had not come to light by the date of this request, this is not a factor that can be taken into account here.

28. The complainant also referred to a previous decision made by the Commissioner in which he had ordered the disclosure of information concerning the Gateway Review of another large government project. In that case the Commissioner found that the public interest favoured disclosure. The OGC case is referred to below.

Public interest in maintaining the exception

29. Turning to those factors that favour maintenance of the exception, the Cabinet Office has argued about the importance of the preservation of a 'safe space' in which to allow policy development to be carried out. According to the argument advanced by the Cabinet Office, this is necessary in order to avoid the creation of a 'chilling effect', whereby participants in the policy making process would be inhibited from participating in a fully free and frank way through concern about the possibility of future disclosure.
30. The argument of the Cabinet Office is that contributors to the approval process for major government projects could be inhibited if they were concerned that details of their contribution could later be disclosed. This could impact specifically on this process in relation to HS2, and more widely to other similar processes in future.
31. The Cabinet Office has described the process recorded within the withheld information, stating that officials from the MPA will interview members of the project team. In order to gain a full picture of the status of the project, the interviewees are encouraged to be fully frank and open about any problems that they perceive exist with the project. These discussions are carried out on a 'Chatham House Rules' basis, whereby a guarantee of confidentiality is given in order that the participants can speak freely and as individuals, rather than solely as a representative of their organisation.
32. In his correspondence with the Cabinet Office and with the Commissioner's office, the complainant advanced a number of specific arguments. First, the complainant suggested that the policy of the Government on HS2 is already finalised and has been announced. In response to this, the Cabinet Office stated that this is not the case and that this policy continues to be in the formulation stage. The Commissioner finds that the timing of the request is a crucial factor.

33. In considering this case the Commissioner has drawn upon a number of relevant Tribunal and High Court decisions. Previously the Tribunal has considered the issue of the disclosure of gateway reviews (the predecessor to MPA PAR review reports) in the case OGC v ICO EA/2006/0068 & EA/2006/0080. This case related to the gateway review of the ID cards programme. The Commissioner has considered the High Court judgment¹ and decision of the Tribunal in the appeal that was remitted back. That case covered the use of the section 35(1)(a) exemption for formulation and development of government policy but has a clear relevance to considerations under the 12(4)(e) exception for internal communications. The OGC appeal was dismissed.
34. In the OGC High Court judgment, on the issue of timing, Burnton J found:

"Having referred to the fact that the Identity Cards Bill had been presented to Parliament, and was being debated publicly, the Tribunal found that it was no longer so important to maintain the safe space at the time of the Requests. I have italicised the adverb because it makes it clear that the Tribunal did not find that there was no public interest in maintaining the exemptions from disclosure once the Government had decided to introduce the Bill, but only that the importance of maintaining the exemption was diminished. I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in the finding that the importance of preserving the safe place had diminished. Accordingly, this ground of appeal is not made out." (Paragraph 101).

35. The remitted OGC Tribunal decision found that:

"It is of course quite true that all the witnesses gave extensive evidence that interviewees in the course of a Gateway Review Process express themselves in an unguarded way and that that aspect of the process would be put at risk on disclosure. On balance, however, the Tribunal is not satisfied that this fear has been made out by the evidence which strongly suggests that the risk even now continues to be minimal and that were disclosure of these two particular Reports to be made, any adverse effect would follow." (para 175)

¹ Office of Government Commerce v Information Commissioner (Rev 1) [2008] EWHC 737 (Admin) (11 April 2008)

36. The Tribunal decision in *DWP v ICO EA/2006/0040* is also relevant. The case concerned a feasibility study for ID cards. The Tribunal identified different stages of policy formulation and development:

"From this evidence we conclude that there were clearly two policy decision stages to the introduction of an ID card scheme. The first was the decision to introduce a scheme. This policy was at a macro level. At the time of the Request we find that this policy had already been formulated and that the policy had been developed to such a stage that a bill had been presented to Parliament for debate and approval. In our view this was a late stage in the policy formulation and development of the decision to introduce an ID card scheme". (Paragraph 54).

"The second policy decision stage related to the detailed implementation of the scheme at departmental level which would require secondary legislation. We find that the policy decisions related to this micro process had not been taken and that it was a very early stage in the formulation and development of these policies." (Paragraph 55).

37. It also relevant to note that gateway reviews have therefore been disclosed by governments in the past – the ID cards review and also gateway reviews following decisions by the Commissioner - FS50171478 (Modernising Medical Careers programme), FS50075956 (Department of Health's Electronic Recruitment project) and FS50130293 (traffic light status (RAG), project titles and recommendations of gateway reviews carried out by a number of government departments).

38. Finally, the Commissioner has drawn upon the Tribunal's decision in *Department of Health v ICO & Healey & Cecil EA/2011/0286 & 0287*. This case related to the disclosure of the risk registers on the governments reforms of the NHS. On the issue of chilling effect and impact of disclosure the OGC case was referred to:

"Also in a previous case, OGC v IC EA/2006/2068 & 80 ("OGC"), where the Information Tribunal ordered the disclosure of Gateway Reviews apparently there has been no evidence of a chilling effect since their release. Mr Healey was the Minister responsible for the Office of Government Commerce at the time and said that there was no evidence that a chilling effect developed as a result of the release of the reviews even after he moved to The Treasury..." (Paragraph 67)

39. On the facts of this case the Commissioner notes that the MPA PAR HS2 report in question was issued in November 2011 and the government's major announcement on HS2 was made on 10 January 2012. The

announcement explained the decision to give the go-ahead to the HS2 project². The Commissioner finds that the decision and the announcement were a major milestone in the policy process related to HS2. A "macro" decision had been made. The request by the complainant was made on 14 May 2012 and the Cabinet Office responded substantively on 27 June 2012, significantly after that milestone.

40. Having considered the withheld report the Commissioner finds that it is most relevant to the substantive policy decision to give the go-ahead. Whilst he accepts that the report does have some relevance to the on-going policy development on HS2 he finds that the need for safe space had significantly diminished by the time of the request. It is also relevant to note that there was a space of nearly 7 months between the report being issued and the response of the Cabinet Office to the request. This was a reasonable amount of time for the report to have been digested and considered across government.
41. When responding to the complainant, the Cabinet Office referred to a timetable relating to HS2 that has been published on the website of the DfT. This sets out the various stages of this project and that a Bill relating to HS2 was due to be introduced by late 2013. The Commissioner accepts that HS2 was not, therefore, a completely finalised policy at the time of the complainant's request. The Commissioner has therefore only accorded a very limited amount of weight to the safe space argument.
42. When considering the likelihood of inhibition resulting from disclosure, it is notable that the content of the withheld information is not attributable to individuals and that this report was finalised by the time of the request. The Commissioner finds that this does reduce the likelihood of inhibition resulting from disclosure.
43. However, whilst the content is not attributable to individuals, the participants are given an undertaking that this report will not be disclosed, at least in the short term. The Cabinet Office has argued that, whilst the content is not specifically attributed to individuals, the participants may be concerned that their colleagues could recognise their contributions.
44. The Commissioner recognises that, even though the content is not specifically attributable, there is still some possibility of a chilling

² <https://www.gov.uk/government/speeches/high-speed-rail-2>

effect on future contributions – to the HS2 project and the MPA process in general. The Commissioner also accepts he should be guided by the comments in Mitting J in the High Court judgment in *ECGD v ICO*³ – that “chilling effect” arguments relate to a legitimate public interest and cases where they can be afforded no weight will be rarer. However, the Commissioner has not given this factor very strong weight in light of his findings about timing and how the withheld information relates to the policy decision announced rather than future development. He finds that any chilling effect would not be particularly severe as the specific evidence advanced by the Cabinet Office is weak and there is no evidence to suggest an impact from previous gateway review disclosures.

45. The Commissioner has recognised the significance of the HS2 project as a factor in favour of disclosure. Having recognised the importance of this project, the Commissioner must also take this into account when considering the public interest in favour of maintenance of the exception. That this is a project of such significance in terms of the impact that it will have and the expenditure of public money that it will entail means that there is a strong public interest in avoiding significant harm to this process.

Conclusion

46. The Commissioner has recognised very significant public interests both in favour of and against disclosure. The timing of the request is a crucial factor that leads the Commissioner to find that the impact of disclosure would not be as severe as the Cabinet Office contends. The Commissioner also finds that the Tribunal and High Court judgments cited above are relevant authorities for this case.
47. The combination of the environmental impact and high costs to the public purse of HS2 are crucial factors in favour of disclosure, whilst still taking account of the balanced finding above in paragraph 39. The Commissioner has also taken the assumption in favour of disclosure set out in regulation 12(2) of the EIR into account.
48. He therefore finds that the public interest in maintaining the exception does not outweigh the public interest in disclosure. The Cabinet Office must disclose the PAR report.

³ *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) (17 March 2008)

Right of appeal

49. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

50. 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.
51. 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

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