

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

Decision notice

Date: 10 March 2014

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant requested from the Department for Transport ("DfT") information about estimates of the effect of HS2, the high speed rail project, on property values near the proposed route for the line. The DfT applied the exemptions in sections 29(1)(a) (prejudice to the economic interests of the UK) and 35(1)(a) (formulation or development of government policy) to the requested information. In the alternative, it applied the exception in regulation 12(4)(d) (incomplete materials, documents or data) if the information was determined to be environmental information under the EIR.
2. The Commissioner's decision is that the requested information is environmental information under the EIR and that the exception in regulation 12(4)(d) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant the withheld information to which it applied the exception in regulation 12(4)(d).
4. 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

5. On 7 March 2013, the complainant wrote to the DfT and requested information in the following terms:

"Could you please provide any estimates or ranges of estimate of the value of HS2 property blight that has, or may have, or maybe expected to occur as a result of HS2 phase 1 (London-West Midlands) and phase 2 (the Y extension to Manchester and Leeds)....

I am not seeking detailed information or copies of reports that could exasperate local blight, but the total or range of total blight values for phase 1 and, separately, if available phase 2 that has or could be expected to occur."

6. The DfT responded on 5 April 2013. It withheld information under sections 29(1)(a) and 35(1)(a). However, it explained that this was information compiled as part of a modelling process to compare different combinations of property compensation schemes and that the information contained a common set of assumptions, for example around property values. It went on to explain that it did not consider the outputs of its models to be predictions of the absolute, real-world cost of any combination of compensation schemes, and nor did it consider the assumptions used in the models as estimates of the real-world effect of HS2 on property markets.
7. The complainant requested an internal review on 9 April 2013. The DfT wrote to the complainant on 3 May 2013 with the outcome of the internal review. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 20 May 2013 to complain about the way his request for information had been handled. Specifically, he raised the following issues:
- i. whether the information contained in the models in the spreadsheet identified by the DfT fell within the scope of his request;
 - ii. whether the DfT held additional information that might fall within the scope of the request;

- iii. whether the requested information was “environmental information” and so whether the request should have been considered under the EIR; and
 - iv. whether the DfT was entitled to rely on exemptions under FOIA or exceptions under the EIR as a basis for refusing to provide the requested information.
9. During the course of the Commissioner’s investigation, the complainant confirmed that he did not wish to pursue the issue as to whether the DfT held additional information that might fall within the scope of the request, issue number (ii) above.
10. The Commissioner considered whether the DfT had handled the complainant’s request correctly in relation to the issues numbered (i), (iii) and (iv) above.

Reasons for decision

(i) Does the information identified by the DfT fall within the scope of the request?

11. The DfT informed the Commissioner that in its view the information it had identified in relation to the complainant’s request in respect of the HS2 project was not within the scope of his request. This was because the information did not contain any estimates or ranges of estimates of the value of HS2 property blight that had, or may have, or might be expected to occur as a result of HS2, either Phases One or Two.
12. The DfT went on to explain that the information contained hypothetical assumptions. To compare different combinations of property compensation schemes, its consultants had created, as a baseline, the common set of assumptions. The assumptions enabled it to compare the cost profiles of different combinations of compensation schemes. In this way, it was able to model the relative cost of different combinations of compensation schemes, as part of its policy development process. However, it emphasised that the outputs of the models were not predictions or estimates of the absolute, real-world cost of any combination of compensation schemes.
13. The Commissioner was informed by the DfT that at no stage had it considered the figures that included in the models to be estimates, i.e. predictions of what would or could happen. They were simply assumptions for the sake of comparing different compensation packages with one another, so it could see the potential relative costs of each. The DfT explained that it could have put any values in the models, and, so

long as the values were comparable from one scheme to another, they would have worked and shown the potential cost differences of various schemes. As it happened, its consultants chose to put in numbers that looked broadly realistic.

14. The DfT went on to explain that, in responding to the complainant's request, its approach had been to assume for the sake of assisting him that the information that it had identified fell within the scope of the request. This enabled it to explain to the complainant the nature of the information held, and why it believed that it must be exempt from release. In doing so it considered that it was attempting to be helpful and constructive in its response and that it was acting in accordance with its duty under section 16 of FOIA to provide advice and assistance to the complainant.
15. The complainant argued that having initially identified the document containing "hypothetical assumptions" as falling within the scope of his request for "estimates or ranges of estimate", the DfT was now taking the position that this document was not covered by his request. He explained that if the DfT had asked him at the time of the request, he would have confirmed that these represented the sort of information he was requesting, indeed he believed that he had referred to the document in his request.
16. The complainant went on to explain that the "hypothetical assumptions" identified by the DfT were prepared by CBRE, consultants commissioned by High Speed 2 Ltd to examine whether the announcement of the HS2 route in March 2010 impacted on local housing market activity. They concluded that:

"Our research found that the housing markets in areas next to the proposed route have weakened since the announcement. Generally we found that in these areas house prices and sales volumes have fallen since the announcement".
17. The complainant informed the Commissioner that their report included a series of detailed estimates of the extent of house price falls that they had discovered. It was therefore difficult to see why in a follow up contract to prepare "assumptions" to evaluate proposed compensation schemes those assumptions would be anything other than a range of realistic estimates based on CBRE's detailed work.
18. The DfT confirmed to the Commissioner that the figures for the reduction of property values contained in its models were arrived at by its consultants, who were specialist property consultants, through professional judgment. It explained that the figures used by the

consultants were not arbitrary figures but were figures that looked broadly realistic.

19. The Commissioner accepts that it may have been possible for the purpose of the exercise that was being undertaken for the DfT's consultants to have entered arbitrary figures, which bore no resemblance to reality, in respect of the percentage diminution in property values in the models for comparing different combinations of compensation schemes. However, it appears that they did not enter arbitrary figures.
20. The Commissioner acknowledges that the figures that were produced by the consultants may not have been intended to have been precise appraisals of the potential impact of the development of HS2 on property prices. However, the figures that were used were clearly an attempt to assign some form of realistic judgment to the impact of HS2 on property values by consultants who had relevant expertise in the property field. Although they may not have been intended to have been precise estimates or predictions of what might happen, they were a form of estimate. Consequently, the Commissioner has determined that the diminution figures contained in the DfT's models constitute estimates which fall within the scope of the complainant's request.
21. Having determined that the information identified by the DfT fell within the scope of the complaint's request, the Commissioner went on to consider whether it constituted "environmental information" under the EIR.

(ii) Is the information "environmental information" under the EIR?

22. The Commissioner notes that "environmental information" is defined in regulation 2(1) of the EIR as:

"...any information in written, visual, aural, electronic or any other material form 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) and (b) 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 elements of the environment referred to in (b) and (c);"*

23. The DfT informed the Commissioner that it did not believe that the information concerned was environmental information under the EIR. It explained that the information consisted of a number of broad assumptions about the potential loss in monetary value to properties in a range of hypothetical distances from the proposed railway. As such it was purely financial information. The information was not related to, for example, the cost of developing or building on land or similar.
24. The DfT pointed out that "environmental information" has the meaning set out in Article 2(1) of the EC Directive (EC Directive 2003/04/EC) which was implemented in the United Kingdom by the EIR. In its view, the requested information was not information about the "state of the elements", or more precisely the "state of the land", under part (a) of the definition of environmental information in Article 2(1). It argued that it was information generated in relation to a policy but it was not a policy affecting the "state of the land" in an environmental sense. It accepted that the policy might have an "effect" on an element covered by the definition (i.e. land) but that effect was purely financial and not a true effect on the "state" of the land. It therefore considered that it was not the type of information that the Directive was aimed at, or was intended to be covered and on a proper reading of the definition as a whole, was not in fact covered.
25. The DfT pointed to a First-tier Tribunal decision in *Montford v The Information Commissioner and the BBC (EA/2009/00114)* in which the Tribunal found information not to be environmental information because there was not a sufficiently close connection with the environment. The DfT explained that the case concerned a request to the BBC for information about an organisation known as the Cambridge Media and

Environment Program ("CMEP"). The requestor asked various questions about the expenditure of the BBC in relation to CMEP, such as who authorised expenditure related to CMEP. The Tribunal found that the fact that the BBC's journalism training involved information concerning the environment was not sufficient to bring it within the definition of environmental information in the EIR and that there was no link between the information sought, which related to training for BBC journalists in relation to the environment, and the environment. The DfT argued that similar considerations applied to the complainant's request.

26. The complainant explained that, as well as the reference within the EIR to economic information, which in his view captured a fall in house prices, in blighted areas there is a direct impact on the environment i.e. caused by blight, not the impact of the infrastructure. This could be seen in his own area by a now vacant restaurant on the route of the proposed line which was becoming dilapidated and over grown and in the property next to his, left vacant when the family made a pre HS2 planned move. The garden had become over grown and the house was falling into disrepair.
27. In the complainant's view, more obviously captured by the legislation was the impact on land use that could be seen in farm land that had lost value due to HS2 plans. In many cases, land that would be cut by the line which had previously been productive arable/pasture, when reduced to a smaller size and with reduced access, resulted in a reduction in farming investment and land use changes.
28. The Commissioner initially considered whether the requested information could constitute "environmental information" under regulation 2(1)(e). His guidance "*What is environmental information*" states in relation to regulation 2(1)(e) that:

"This definition also further clarifies the definition in (c). Including economic and financial information in the definition in the Aarhus Convention stems from the recognition that it is important to integrate environmental and economic considerations in decision-making. This section is qualified by referring back to paragraph (c) measures and activities; so they are the economic and financial aspects taken into account when framing and operating these measures and activities. It ensures that the definition of environmental information extends not only to environmental measures and activities, but also to any of their economic aspects."

29. One of the Commissioner's lines to take, LTT80, provides further guidance. It states that to be defined as "environmental information" under regulation 2(1)(e) :

- the information itself must be **on** "cost benefit and other economic analyses and assumptions"
 - the "cost benefit and other economic analyses and assumptions" must be used within the framework of the measures and activities referred to in 2(1)(c).
30. The DfT informed the Commissioner that the requested information constituted assumptions which enabled it to compare the cost profiles of different combinations of property compensation schemes. This enabled it to model the relative cost of different combinations of compensation schemes, as part of its policy development process. The Commissioner is consequently satisfied that the information is on "cost benefit and other economic analyses and assumptions" within regulation 2(1)(e).
31. The Commissioner then considered whether the information was being used within the framework of the measures and activities referred to in regulation 2(1)(c). Regulation 2(1)(c) refers to:
- "(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) and (b) as well as measures or activities designed to protect those elements".*
32. The Commissioner notes that the information constitutes part of models which were designed to assist with the development of policies in relation to HS2, the high speed rail project, and were therefore used within the framework of that project. He believes that the HS2 project constitutes a "measure" or "activity" which would clearly be likely to affect the elements and factors referred to regulation 2(1)(a) and (b). The Commissioner is consequently satisfied that the requested information falls within the definition of "environmental information" in regulation 2(1)(e).

(iii) Application of exceptions

Regulation 12(4)(d) – material which is still in the course of completion, unfinished documents or incomplete data

33. The DfT argued that if it was determined that the requested information was environmental information under the EIR, it believed that it was exempt from disclosure under the exception in regulation 12(4)(d).
34. Regulation 12(4)(d) provides that 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."*

35. The DfT argued that the exception applied because the information related to material which was still in the course of completion, namely property compensation proposals for HS2. It explained that the information in question was created as part of a policy development process that was far from complete as it was currently in the middle of developing and consulting on a range of compensation measures for HS2 Phase One and it had not yet made any fresh assumptions equivalent to those contained in the spreadsheet in question.
36. The DfT was of the view that releasing the information would be likely to have a serious adverse effect on its ability to complete this process with appropriate robustness.
37. The complainant noted that in their arguments for the application of FOI exemptions, the DfT originally claimed that the documents were no longer relevant as a result of it consulting again on its compensation plans but that they were now arguing that they formed part of policy development work in progress. He believed that there was an obvious disparity in these statements.
38. In the complainant's view, the fact that the DfT was now citing these "assumptions" or "estimates" as fundamental to their current analysis, whilst this might strengthen their argument under section 35(1)(a) of FOIA, this argument substantially weakened their case under regulation 12(4)(d). He argued that a piece of work that provides such information is complete when that information is documented and no longer subject to revision. This appeared to be the case for this information, which was completed in August 2012, even though it was still being used 18 months later.
39. The DfT confirmed to the Commissioner that the information in the spreadsheet in question had not been used in relation to the formulation or development of policy since well before March 2013, when the request was made. It explained that it had been viewed once or twice as part of a review of background literature held by the relevant team, and its assumptions had occasionally been referenced in internal government budgeting discussions, but it had not informed any decisions since 2012. However, it pointed out that the policy development process, to which the spreadsheet made an early contribution, was not yet complete.
40. The DfT also confirmed to the Commissioner that no amendments or changes of any kind have been made to the spreadsheet since it was received in August 2012 from its consultants.
41. The Commissioner notes that the requested information forms part of a spreadsheet containing models of different combinations of compensation schemes which were not subject to any amendment or

change after they was created in 2012. It can therefore be contended that the requested information relates to material, the models in the spreadsheet, which was not still in the course of completion when the request was made as the models were in a completed form. Even if a broader interpretation were taken of what constitutes "material" for the purposes of regulation 12(4)(d), to include information that related to the ongoing policy development process on a range of compensation measures for HS2, the Commissioner is not satisfied that the withheld information, at the time of the request, actively related to that process as it appears that the models contained in the spreadsheet were no longer relevant to the development of policy in that area. Consequently, the Commissioner has determined that the requested information did not relate to material in the course of completion at the time of the request and that the exception in regulation 12(4)(d) was not engaged. He therefore requires the DfT to disclose to the complainant the information to which it has applied regulation 12(4)(d).

Right of appeal

42. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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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