

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

Date: 17 August 2015

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

Decision (including any steps ordered)

1. The complainant has requested a copy of 75 questions which the Major Projects Authority asked High Speed Two (HS2) Limited to address. The Cabinet Office dealt with the request under FOIA and refused it citing section 33 – prejudice to audit functions and section 35 – information relating to the formulation or development of government policy. It later dropped section 33 but maintained its reliance on section 35.
2. The Commissioner's decision is that the requested information is environmental information and that therefore the request should have been dealt with the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To provide a fresh response under the EIR and either disclose the 75 questions under regulation 5(1), or issue a refusal notice in accordance with regulation 14.
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.
5. The Commissioner also finds that by failing to provide an internal review of its decision to withhold the requested information the Cabinet Office breached regulation 11 of the EIR.

Request and response

6. On 19 December 2014 the complainant wrote to the Cabinet Office. He quoted from a response Sir David Higgins, the Non-Executive Chair of HS2, had recently provided to the House of Commons Governance Committee. That response revealed that HS2 had been asked to address 75 questions by the 'MPA' The complainant first asked the Cabinet Office to confirm that the 'MPA' was the Major Projects Authority and then asked for information in the following terms:

"... and secondly I would like to know what these 75 questions are."

7. The Cabinet Office responded on 19 January 2015. It confirmed 'MPA' was a reference to the Major Project Authority and explained that the information had formed the terms of reference for a project assurance review conducted by the Major Projects Authority. However it refused to provide the 75 questions, relying on exemptions under FOIA to do so. In particular it cited section 33 – prejudice to audit functions and section 35 – information relating to the formulation or development of government policy as its grounds for withholding the information.
8. On 5 February 2015 the complainant wrote to the Cabinet Office drawing its attention to an earlier decision notice issued by the Commissioner which found that information in a previous project assurance review constituted environmental information. He therefore asked the Cabinet Office to review its decision under the EIR. The Cabinet Office failed to carry out an internal review.
9. During the course of his investigation the Commissioner asked the Cabinet Office why it considered the information was not environmental information and why it believed the request should instead be dealt with under FOIA. As will be explained in more detail later, the Cabinet Office maintained that the information was not environmental information and that it had been correct to deal with it under FOIA. It did however drop its reliance on section 33 – prejudice to audit functions.

Scope of the case

10. The complainant contacted the Commissioner on 27 March 2015 to complain about the way his request for information had been handled and the Cabinet Office's delay in providing a response to his request for an internal review.
11. The Commissioner considers the first matter to determine is which access regime the request should have been considered under. If the

Commissioner decides the information is not environmental information and that the Cabinet Office was right to deal with the request under FOIA, he will go on to consider the application of section 35.

12. If however the Commissioner finds that the request should have been dealt with under the EIR he will require to the Cabinet Office to issue a fresh response under the EIR.
13. The complainant also raised concerns over the delay in providing him with the outcome of the internal review. The rules regarding internal reviews provided by the two access regimes are different. Therefore the Commissioner's finding on this matter will depend on which is appropriate legislation.

Background

14. HS2 is the company responsible for developing and promoting the UK's new high speed rail network. It is a major infrastructure project and as such is subject to scrutiny by the Major Projects Authority. The Major Projects Authority is part of the Efficiency and Reform Group in the Cabinet Office and works with government departments to provide independent assurance on major projects. As part of that process the Major Projects Authority undertakes a Project Validation Review and a number of Project Assurance Reviews.
15. The requested information consists of 75 questions which the Major Projects Authority asked HS2 to address. The Commissioner understands that this formed part of the process of establishing the terms of reference for the November 2014 assurance review. The Cabinet has explained that the information is included in the resulting project assurance review.

Reasons for decision

Regulation 2(1) – Environmental information

16. The EIR only apply to environmental information. Regulation 2(1) of the EIR states that,

“ “environmental information” has the same meaning as in Article 2(1) of the Directive, namely 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);"
17. The Cabinet Office does not accept that the requested information is environmental information. It has argued that,
- "Though High Speed 2 itself will have an impact on the environment, the information requested was specifically the 75 questions that make up the terms of reference for the November 2014 assurance review of the High Speed 2 project. That review did not consider directly or indirectly the projects implications or relationship with the environment or any administrative measures being taken that concern the environment. The questions are about internal governance and finances of the project and do not themselves concern or reference elements of the environment more broadly."
18. The Commissioner accepts that the questions concern the governance and finance of the project. However this does not in any way divorce the information from the nature of the project itself.
19. The Commissioner has considered requests relating to project assurance reviews carried out by Major Projects Authority in two earlier cases FER0467548 and FER0536325. These can be found on the Commissioner's website at:

<http://search.ico.org.uk/ico/search/decisionnotice>

Both those notices dealt with requests for an actual project assurance review as opposed to just the questions which established the terms of reference of such a review. In both cases the Commissioner found that the review itself was environmental information and the requests fell to be considered under the EIR. This was on the basis that the high speed rail link to which those reviews related was clearly a measure, such as a plan or programme, which would affect the elements of the environment, or factors which themselves would affect the environment, such as noise and waste. Therefore the review was captured by the definition of environmental information provided by regulation 2(1)(c) since it constituted information on that measure.

20. The Commissioner finds that although the information does not detail the actual physical constructions works which would affect the environment it is still information on the project and that project will affect the environment. The questions examine whether the project can be successfully delivered on time and on budget. These are significant issues which are capable of determining the ultimate impact the implementation of the project will have on the environment.
21. The Commissioner finds that the 75 questions constitute information on a measure likely to affect the environment and is therefore environmental information as defined by regulation 2(1)(c). The request should have been dealt with under the EIR.
22. The Cabinet Office is required to provide a fresh response under the EIR and either disclose the 75 questions it identified as falling within the request under regulation 5(1), or issue a refusal notice in accordance with regulation 14.

Regulation 11 – internal review

23. Having found that the request should have been considered under the EIR the Commissioner will now consider the complainant's concerns over the Cabinet Office's failure to provide an internal review.
24. Regulation 11(1) provides that an applicant can make representations to a public authority if they believe the public authority has failed to handle a request in accordance with the Regulations.
25. Under regulation 11(2) a public authority is required to consider any representations made by the applicant and under regulation 11(4) is required to notify the applicant of the outcome of that review within 40 workings days.

26. In this case the complainant wrote to the Cabinet Office on 5 February 2015 explaining that he believed his request should have been dealt with under the EIR and drew its attention to an earlier notice which had found similar information was not only environmental information, but should have been released. In light of this he asked the Cabinet Office to reconsider its decision to withhold the information. The Cabinet Office had not provided a review by the time the complainant contacted the Commissioner about this matter on the 27 March 2015. This was 36 working days after he had requested a review. The Cabinet Office had still not provided the outcome of its review by the time the Commissioner commenced his investigation on the 27 April 2015 and ultimately failed to provide any review.
27. In light of the above the Commissioner finds that the Cabinet Office has failed to provide an internal review in breach of regulation 11.

Other matters

28. Although not forming part of the formal decision notice the Commissioner will highlight areas of concern under 'Other Matters'. There are two issues the Commissioner wishes to raise.
29. The Commissioner originally contacted the Cabinet Office on the 27 April 2015 regarding this complaint, asking it to provide a response to his enquiries by the 27 May 2015. Despite chasing the Cabinet Office for a response on three occasions by email and through messages left on answer phones, it was only after the Commissioner served an information notice on the Cabinet Office on the 3 July 2015 that it finally provided the Commissioner with a response on the 23 July 2015.
30. Secondly the Commissioner recognises that the complainant has already suffered a considerable delay in having his request considered under the EIR. In light of this, in the event that his request is refused by the Cabinet Office under the EIR, the Commissioner would consider accepting a complaint from the complainant without expecting him to exhaust the Cabinet Office's internal review procedures.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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.

Signed

Pamela Clements
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