

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

Decision notice

Date: 29 November 2023

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

Decision (including any steps ordered)

1. The complainant has requested a risk register relating to HS2. The Department for Transport ('DfT') refused to provide the requested information, citing regulations 12(4)(e) (internal communications), regulation 12(4)(d) (material still in the course of completion), regulation 12(5)(b) (the course of justice and inquiries) and regulation 13 (personal data) of the EIR.
2. The Commissioner's decision is that the risk register can be withheld under regulation 12(4)(e). However, the DfT breached regulation 14(3) as it incorrectly issued its refusal under FOIA and not the EIR.
3. The Commissioner does not require further steps.

Request and response

4. On 20 July 2023 the complainant made the following request for information:

 "1) What Risk assessments do you hold for HS2 please?

 2) What Ministerial Directions have been given in reference to HS2 please?"
5. On 15 August 2023 the DfT responded. It refused to disclose the information requested in part 1, citing section 35(1)(a) (formulation or development of government Policy) of FOIA. It confirmed no ministerial directions had been given in relation to HS2, in relation to part 2.
6. The complainant requested an internal review on 16 August 2023.
7. The DfT provided the outcome to its internal review on 14 September 2023. It explained that the request should have been handled under the EIR but maintained that the risk register was exempt under regulation 12(4)(e).
8. During this investigation, the DfT wrote to the complainant and explained it was applying additional exceptions, regulation 12(4)(d), regulation 12(5)(b) and regulation 13 (personal data).
9. The complainant hasn't raised any specific concerns about the personal data contained within the risk assessment, and it's the Commissioner's view that this information would be exempt from disclosure, so he won't consider the DfT's application of regulation 13 any further.
10. The DfT has applied regulation 12(4)(e) and regulation 12(4)(d) to the risk register in its entirety but regulation 12(5)(b) to only specific information within the risk register.
11. The Commissioner has chosen to consider the DfT's application of regulation 12(4)(e) first. Depending on his findings, he may go onto consider the other exceptions as well.

Reasons for decision

Regulation 12(4)(e) – internal communications

12. Regulation 12(4)(e) states that information is exempt from disclosure if it involves 'the disclosure of internal communications'. It's a class-based exception, meaning there is no need to consider the sensitivity of the information to engage the exception. If information represents an internal communication, the exception will apply.
13. For the purpose of regulation 12(4)(e), a 'communication' is meant to be interpreted broadly. It covers any information someone intends to communicate to others, including communications by letter, memo, email and spreadsheet.
14. An internal communication is a communication that stays within the public authority. Once a communication has been sent to someone outside the authority, it is generally no longer captured under this exception.
15. The complainant disputes the DfT's use of regulation 12(4)(e), stating that "A Risk Assessment will involve communications with third parties outside the public authority. These communications on Risk Assessment can be provided as per ICO Guidance."
16. In its submission to the ICO, the DfT has explained:

"The Risk Register is an internal project management tool used by the Department to assess risks to the HS2 project, including financial, timeline and legal risks... the Risk Register is used by the Department to support and initiate frank and free internal conversations on the management of the HS2 project."
17. The Commissioner has seen the withheld information in this instance. It's the risk register which has been exported into Excel format. The Commissioner acknowledges that the risk score the DfT records on its register might rely on communications with other bodies. However, having looked at the risk register itself, which is the information being requested here, he's satisfied it's not been shared outside of the DfT.
18. With the above in mind, the Commissioner is satisfied that the risk register is an internal communication as per regulation 12(4)(e). As a qualified exception, it's also subject to the public interest test.

Public interest test

Arguments in favour of disclosure

19. There is a presumption in favour of disclosure under the EIR. It supports an individual's right to be informed on environmental matters.
20. There is also a legitimate public interest in HS2. It's a controversial project; many individuals oppose the project based on the impact it will have on wildlife, the countryside and homes. It has been made more controversial by delays and increasing budgets and with this comes the need for scrutiny.
21. At the time of requesting their internal review, the complainant stated:

"I believe it is in the Public Interest to provide the answer to the question set. The public is paying for this project and the public needs to be informed of its progress, or otherwise at every stage, so they are properly informed."
22. The Commissioner agrees. Disclosure would provide transparency, accountability and demonstrate that the DfT is exercising due diligence when it comes to the HS2 project.
23. The DfT has also identified that "Disclosure may also promote a greater public awareness of environmental issues in the context of a project with significant environmental impacts."

Arguments in favour of maintaining the exception

24. The DfT is concerned that disclosure of the risk register, at the time when the request was made, would result in a 'chilling effect' which would compromise the 'safe space' in which officials need to be able to discuss HS2, and its associated risks.
25. The DfT has explained:

"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, including in relation to issues such as those identified in the Risk Register..."
26. When considering the public interest, the Commissioner must consider matters at the time that the request was made. The DfT is concerned that:

"At the time of [Redacted] request, live policy decisions were being made in relation to matters set out in the Risk Register, including the best ways to mitigate those risks (including risk of legal challenge),

minimise environmental impacts and how to proceed with the HS2 project in general.”

27. Arguments about “chilling effects” and the “safe space” are at their strongest when the issues involved in the internal communication are still live. 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.

The balance of the public interest

28. In this instance, the Commissioner has determined that the balance of the public interest lies in maintaining the exception.
29. 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 and at the time that the request was made the DfT was actively working to mitigate and manage the issues identified in the risk register.
30. The Commissioner isn't underestimating the public interest in HS2, especially given the Prime Minister's announcement on 4 October 2023 of the cancellation of Phase 2 of HS2.¹ HS2 will now no longer operate in the north of England and instead the government will implement a “Network North” scheme. This deviation will affect a significant amount of people and involve a significant amount of money.
31. However, at the time that the request was made this announcement hadn't been made. Therefore the public interest in the cancellation of phase 2, whilst obviously high, can't be taken into account when considering this request. Furthermore, the withheld information doesn't directly address this issue.
32. Ultimately, the risk register does more than just present a numerical risk for individual stages, policies and projects. It also includes a free and frank analysis of the risk and how to manage and mitigate this risk.
33. The Commissioner considers that disclosure of the risk register would compromise the safe space officials require to consider the development

¹ [Rishi Sunak accused of 'cancelling the future' with climbdown over HS2 | HS2 | The Guardian](#)

of HS2, which could lead to less robust discussions and less considered decision making which isn't in the public interest.

34. Furthermore, the Commissioner believes that disclosure of the risk register would result in DfT having to divert resources and attention to managing queries about the risk register, which is a live working document, at a time when policy discussions about HS2 need to be ongoing.
35. Since the Commissioner has determined that the whole risk register can be withheld under regulation 12(4)(e), he doesn't need to consider any other exception cited.

Procedural matters

36. Because the DfT issued its refusal under FOIA and not the EIR it breached regulation 14(3) of the EIR, which states that a public authority must state, no later than 20 working days after received the request, what exceptions it is relying upon.

Right of appeal

37. 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

38. 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.
39. 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

Alice Gradwell
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