

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

Decision notice

Date: 7 August 2024

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

Decision (including any steps ordered)

1. The complainant has requested information about the calculations and assumptions used to determine train capacity estimates in the 'Network North' paper. The Department for Transport ('the DfT') refused to provide the requested information, citing regulations 12(4)(d) (material still in the course of completion) and 12(4)(e) (internal communications) of the EIR.
2. The Commissioner's decision is that the DfT is entitled to rely on regulation 12(4)(e) to withhold the requested information. 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 18 December 2023, the complainant wrote to the DfT and requested information in the following terms:

"The Network North document states that the current West Coast Main Line plus HS2 phase 1 will provide a capacity of 250,000 seats per day

for the primary long distance operator. Please provide the calculations and assumptions from which this figure of 250,000 seats is derived.”

5. The DfT responded on 15 February 2024. It stated that it held the requested information but, as it related to ongoing policy development, it was relying on section 35 of FOIA to refuse the request.
6. Following an internal review the DfT wrote to the complainant on 23 March 2024. It stated that it was upholding its application of section 35 of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 1 April 2024 to complain about the way their request for information had been handled.
8. When providing its submission to the Commissioner, the DfT advised that it had written to the complainant to update them that it was applying regulations 12(4)(d) (material in the course of completion) and 12(4)(e) (internal communications) of the EIR to the request.
9. The Commissioner considers that the scope of his investigation is to determine whether the DfT is entitled to rely on any of the cited exceptions to withhold the requested information.

Reasons for decision

Is the requested information environmental as defined by the EIR?

10. Regulation 2(1) of the EIR defines environmental information as being information 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)...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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
11. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA are different from the reasons why information can be withheld under the EIR. In addition, there are some procedural differences affecting how requests should be handled.
 12. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
 13. The Commissioner notes that the requested information comprises data and assumptions about train capacity and specification. He is satisfied that the information being requested would fall within the definition at regulation 2(1)(c) and/or 2(1)(e).
 14. The Commissioner is therefore satisfied that the information is environmental.

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

15. Regulation 12(4)(d) of the EIR states 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.

16. As the Commissioner's guidance¹ makes clear, the fact that the exception refers to both "material in the course of completion" and "unfinished documents" implies that these terms are not necessarily synonymous.
17. The explanatory memorandum to the EIR (COM/2000/0402) states that: "...the Commissioner places great importance on public authorities being afforded safe space (thinking space) and drafting space when considering whether, and on what terms, a venture should be entered into."
18. In this case, the DfT has explained that the Network North command paper was published on 6th October 2023. The document refers to the "nearly doubling rail capacity to 250,000" (paragraph 24) and includes an associated Figure 10 on page 19². The DfT added that the complainant's request concerns the underlying analysis for these capacity figures and was received three days after the command paper was published.
19. The DfT explained that the requested information is directly related to ongoing policy development, namely the requirement to develop a new train service specification for HS2 and West Coast Mainline services following the Prime Minister's announcement on Network North. The DfT considers that providing more detail of the assumptions underpinning the illustrative estimate in the Network North document would be likely to paint a misleading picture by suggesting a final decision has been made when a range of options are still under consideration. It stated that this in turn may detract from the time and space required by Ministers and officials to develop and fully consider all potential options.
20. The DfT explained that indicative analysis was undertaken to illustrate the rail capacity that could be achieved on HS2 and West Coast Mainline services under the changes laid out in the Network North command paper. It explained that the analysis was not designed to specify an exact train service pattern but rather that the desired capacity was achievable. The DfT stated that work to define the exact train specification is currently live and added that this was also the case when the complainant submitted their request on 18 December 2023. A

¹ [Regulation 12\(4\)\(d\) - Material in the course of completion, unfinished documents, and incomplete data \(Environmental Information Regulations\) | ICO](#)

² <https://assets.publishing.service.gov.uk/media/65290f8669726000dccb78b/network-north-transforming-british-transport-print-version.pdf>

number of key decisions remain, both from an infrastructure and utility maximisation perspective.

21. The DfT considers that releasing the indicative analysis that underpinned the Network North capacity announcements would, even with context and background information, give the false sense of a final decision having been taken on exactly which end destinations services will reach, how regularly they will run and where they will stop along the way. The DfT has stated that there is significant value in keeping a wide range of options open at this time to ensure it can attain the largest economic and operational benefits possible.
22. The DfT added that there is also the considerable interest to certain local areas of the extent to which HS2 and West Coast Mainline Services will benefit them. It explained that the indicative analysis in question could be misleading as no final decisions have been made at this time on which areas are likely to benefit the most. The DfT considers that there is risk that areas that perceive to have "lost out" relative to others may seek to influence the final outcome, thereby potentially distorting the decision-making process and limiting the ability of the DfT to create a train service specification that maximises economic and operational benefits. It considers that this would clearly not be in the public interest.
23. Having considered the withheld information, and his guidance, the Commissioner is not persuaded that it obviously comprises material in the course of completion. He notes that it must be the material itself which is in the course of completion, rather than any wider 'project' or 'process' and this is not clear from the withheld information provided. He considers therefore that the exception at regulation 12(4)(d) is not engaged.
24. The Commissioner will now consider the DfT's application of regulation 12(4)(e) to withhold the requested information.

Regulation 12(4)(e) – internal communications

25. 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.
26. 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.

27. 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.
28. In its submission to the ICO, the DfT has confirmed that the requested information has not been shared outside of Government and is therefore an internal communication.
29. The Commissioner has seen the withheld information in this instance and is satisfied that it 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

Considerations favouring disclosure

30. The DfT has considered that releasing the requested information would contribute to the Government's wider transparency agenda and strengthen accountability. It added that disclosure may also promote a greater public awareness of environmental issues in the context of a project with significant environmental impacts.
31. The DfT has acknowledged that there is a public interest in understanding the basis on which the capacity numbers quoted in the Network North document have been derived, and in allowing the public to scrutinise the assumptions supporting the figures in the public domain.
32. The complainant has argued that the claimed 250,000 capacity is an increase of 343% and is not credible. They argue therefore that there is a public interest in having access to the calculations and assumptions used to produce this figure. They also point out that it has been quoted by both the Secretary of State for Transport and the Prime Minister to justify the cancellation of HS2 phase two to Parliament and the Liaison Committee.

Considerations favouring withholding the information

33. The DfT has explained that ministers and officials need a private thinking space to consider all of the options without premature disclosure of the information which might close off better options. It considers that officials would be reluctant to provide their free and frank views and opinions if they felt that these would be routinely placed into the public domain ahead of finalising the policy on HS2 and West Coast Mainline Services.

34. The DfT has explained that providing more detail of the assumptions underpinning the illustrative estimate in the Network North document would be likely to paint a misleading picture as it may suggest greater certainty on options for future services than is warranted at this time. The DfT considers that it may also detract from the time and space required by Ministers and officials to develop those options further.
35. The DfT added that: "Once the decision-making process is complete, public scrutiny can take place without undue risk to the project outcomes. The publication of the Phase 1 Update to the business case will include an indicative train service specification and has been committed to be published by Dame Bernadette Kelly during the Public Accounts Committee on the 16 November 2023."

Balancing the Public Interest Test

36. The Commissioner recognises the public interest in promoting accountability and transparency, he also recognises the importance of the public being able to examine the evidence that is being used to shape the future of train services, particularly for a high-profile project like Network North.
37. However, the Commissioner also recognises the need for officials to have the space and security of internal communications being kept out of the public domain when wider development work and decision-making processes are still ongoing.
38. The Commissioner is therefore satisfied that the balance of the public interest lies in maintaining the exception.

Procedural matters

39. 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

40. 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

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Keeley Christine
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF