



Appeal Number: EA/2012/0045

**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

BETWEEN:

Appellant:	Mr Malcolm Griffiths
Respondent:	The Information Commissioner
Second Respondent:	Secretary of State for Transport (DfT)
Decision by:	Robin Callender Smith (Tribunal Judge)
Dated:	27 June 2012

RULING

On consideration to strike out the Appellant's grounds of appeal pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (The Tribunal Rules).

DECISION

The Appellant's appeal is struck out under the provisions of rule 8 (3) (c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

REASON FOR DECISION

Background

1. In January 2009 the Government set up a company called High Speed 2 Limited (HS2) with the predominant purpose of examining the case for a new British high-speed rail route, the High Speed Rail Project (HSRP), between London and the West Midlands.
2. In August 2009 the DfT appointed the company Atkins to consider road and rail improvements as alternatives to the HSRP and a report on the company's findings – *High Speed 2 Strategic Alternatives Study: Strategic Outline Case* – was made available in March 2010.
3. HS2 later began to consider possibilities for extending the original proposals to create a so-called "Y" network as a result of the route heading from London to Birmingham before splitting and heading to Leeds and Manchester.
4. Because of this the DfT re-appointed Atkins in October 2010 to estimate the costs of the alternatives to the "Y" network. The company's analysis of that network was set out in their report – *HSR Strategic Alternatives Study: Strategic Alternatives to the Proposed 'Y' Network* (the Strategic Alternatives Report) – in February 2011.
5. In the Strategic Alternatives Report Atkins considered three different scenarios (A, B and C) which were put forward as alternatives to the HSRP. The Appellant's request related to the 'Scenario B' alternative which was described in outline in the Strategic Alternatives Report as:

increasing passenger capacity and enhancing long-distance service frequency, requiring works to operate a higher frequency of services, including upgrades to stations and junctions, and additional services.

6. Scenario B considered the possibility of improving the train service on the West Coast Main Line (WCML), the Midland Main Line (MML) and the East Coast Main Line (ECML).
7. On 18 March 2011 the Appellant wrote to the DfT asking for or to be directed to various categories of information relating to the HSRP being developed by HS2. The relevant request, for the purposes of this appeal, read:

Atkins Scenario B alternative – Reports, information or data that explains the Atkins Scenario B alternative in a way that individual components (WCML, MML and ECML projects) can be evaluated, I realise that you may not have carried out full analysis of all the combinations projects but there must be interim Atkins reports identifying individual projects capacity increases, benefits and cost/expenditure schedules from which the Scenarios were constructed.

8. On 7 April 2011 the DfT responded stating that all the information that was held by the DfT concerning the alternative to the proposed "Y" network was in the Strategic Alternatives Report. 19 April 2011 the Appellant wrote to the DfT asking to review this response on the basis that "Atkins will have this information, under principles of FOIA legislation this information should be accessible – presumably via DfT".
9. The DfT carried out an internal review of its original response and, in respect of the request in issue, stated:

.... In respect of the work on strategic alternatives to HS2, Atkins was appointed to prepare a high level business case, and the Department's responsibility was to satisfy itself that the work was carried out appropriately and in line with our modelling and appraisal guidance. As part of that work, Atkins carried out the demand forecasts and scheme assessments. In order to satisfy ourselves of the robustness of Atkins' work, we discussed a range of issues – including interim results as Atkins' analysis progressed – however, *we were not provided with and do not hold separate copies of any more detailed data sets which underpin Atkins' work* [emphasis added].

You have asked specifically about the breakdown of individual components of Scenario B. As the [Strategic Alternatives Report] states (para 3.1, page 10), due to the geographic scale of the work, few interventions would be able to, on their own, deliver an equivalent level of functionality, and *it was therefore considered more appropriate to consider packages of interventions. The modelling and analysis of the interventions were therefore carried out at package level. As such it is not possible to identify the benefits or capacity increases in individual components* [emphasis added]. However, it should be noted that (as stated at para 3.1), the work by Atkins takes account of possible interventions described in industry planning documents such as Route Utilisation Strategies, which are publicly available, and Appendix B of the [Strategic Alternatives Report] does distil the cost of each scenario into its individual intervention component costs.

The Decision Notice

10. The Decision Notice of 31 January 2012 stated that the request was a request for environmental information as defined at Regulation 2 of the Environmental Information Regulations 2004 but, having investigated the matter and on the balance of probabilities, the Commissioner concluded that the DfT did not itself physically hold the information requested and also that the information requested was not held by Atkins on behalf of the DfT.

11. In the course of the Commissioners investigation the DfT clarified four points:
 - (A) Atkins was not asked to deliver an engineering report incorporating a final report detailing a final recommendation is the best alternative.

 - (B) The DfT managed the project with Atkins on the basis of regular face-to-face meetings and working groups, and did not require Atkins to supply interim reports as part of its consultancy work.

 - (C) The capacity increases in benefits information that the Appellant sought for the individual elements of Scenario B were not modelled and analysed separately. Instead the estimates the factors such as costs were only considered and arrived at in terms of each complete package.

(D) It was not possible to disaggregate the results to calculate benefits by scheme benefit.

12. At Paragraphs 19 – 24 in the Decision Notice the Commissioner considered the scope of the Appellant's request for information.
13. In particular, he noted that the Appellant argued that in preparing an alternative to the HS2 HSR proposition, he would have expected Atkins (as contractor for the work) to have constructed a number of possible improvement options and then to have combined them to optimise the overall best solution.
14. The Appellant had anticipated Atkins having produced – and provided to the DfT – a wide range of information relating to alternatives. The Appellant surmised that this should include regular reports on both the progress and substance of the work, as well as an engineering report detailing why the scenarios A – C were considered the best alternative options to HS2.
15. The DfT, for its part, contended that the information described above went beyond the scope of the original request which it regarded as only asking for information which allowed the individual components of Scenario B to be evaluated. It concentrated its attention to that interpretation of the request.
16. The Commissioner agreed with that approach on the basis that the request was clear in what it was seeking and the DfT's interpretation was consistent with an objective reading of the request.
17. In addition, the DfT clarified that Atkins was not asked to deliver an engineering report incorporating a final report detailing a final recommendation as the best alternative. The DfT managed the project with Atkins on the basis of regular face-to-face meetings and working groups. The DfT had not required Atkins to provide interim reports as part of its consultancy work.

18. The DfT informed the Commissioner that the capacity increases and benefits information that the Appellant was seeking for the individual elements of Scenario B were not modelled and analysed separately. The estimates for such factors as costs were only considered and arrived at in terms of each complete package as reflected by the information contained in the Strategic Alternatives Report.

19. During the course of the Commissioner's investigation Atkins provided a letter which stated:

All the schemes within the strategic alternative packages were tested together in the PLANET Modelling Framework, to be consistent with HS2 scheme testing. The nature of the model means that the benefits of the package are calculated based on true origin and destinations (i.e. model zones) rather than by rail line or station. It is an essential element of the model as it enables accurate forecasts of mode shift.

However, it is not possible to further disaggregate results to calculate benefits by scheme benefit. The benefits for different persona combinations cannot be allocated to individual schemes as (a) they are often allocated by a number of different schemes which cannot be disaggregated and (b) even by allocating zone pairs manually by scheme would require individual analysis of several thousand zone pair combinations.

20. The Commissioner found that information in the letter from Atkins particularly persuasive – in arriving at his conclusion that the information in the request was not held – given Atkins' involvement with the testing of alternative scenarios.

21. The Commissioner noted that, in order to make his decision, he did not need to be absolutely certain that the DfT did not hold the requested information. The standard of proof was on the balance of probabilities [more likely than not]. He was satisfied to that standard that neither the DfT nor Atkins held the information requested. No evidence or information had been presented that altered his view.

Response of the Second Respondent

22. The DfT noted– from documents submitted in relation to the appeal – that the Appellant appeared either to have modified or clarified the terms of his request so that it appeared that the information that he wished to be provided with was slightly different from that which the DfT understood to have been requested. Specifically, the Appellant appeared to require information relating to the totality of the infrastructure proposals on each of the three lines rather than the individual infrastructure projects themselves.
23. In the light of that the DfT was prepared to consider this as a fresh request for environmental information. That would involve the DfT undertaking a new search for information that might be held by the DfT or on its behalf and considering whether any such information was already in the public domain together with any statutory exceptions in respect of disclosure.
24. It maintained that the Appellant would not be prejudiced by this appeal being struck out. It had indicated that it would be prepared to consider the request for information as now modified/clarified as a fresh request for environmental information and consideration would be given to whether any such information – if it existed – would be disclosable. That process would again be subject to review by the Commissioner and, on appeal, by the Tribunal.

The Appeal and the Appellant's comments in respect of the matter being Struck Out

25. The Appellant, in his document dated 25 April 2012, stated that he believed there was now compelling evidence to show that the DfT held information that should have been made available in respect of his original request in April 2011. The DfT had shifted its position from one of not holding the information to one of claiming that there had been a misinterpretation of the original request.
26. The Appellant had now reviewed the DFT/Atkins report London to West Midlands Rail Alternatives February 2011. That showed a project called

RP2 was modelled and analysed separately and reported to the DfT in February 2011. Reviewing that project report in terms of trains frequency, infrastructure improvements and other parameters that were reported in the Scenarios Report it appeared to the Appellant to be virtually identical to the Scenario B WCML project. He argued that by simple deduction it was possible by subtracting the WCML project benefits, revenues, costs etc from the Scenario B parameters to get results for the combined MML and ECML projects. While that was not all the information he had been seeking it showed that the DfT physically held the information covered by his request.

27. He believed that the DfT case and the Commissioner's decision were based on their being no scope for any misinterpretation of his request and that his appeal in relation to that request should not be struck out because both the DfT and the Commissioner had arrived at unreasonable conclusions in respect of that request.

28. He did not believe that the Commissioner had been sufficiently rigorous in establishing a common interpretation of what was being sought or had established a reasonable case for the decision beyond the fact that the DfT and Atkins told the Commissioner that they did not hold any relevant information.

Conclusion

29. I have set out carefully the background facts and arguments in relation to this matter because – in fairness to the Appellant and in the interests of justice - the process of striking out any appeal requires careful scrutiny and a full consideration of all the relevant elements.

30. The procedure and test adopted by the Tribunal in such situations is set out in the Tribunal's decision in *Tanner v Information Commissioner* EA/2007/0106.

31. In that appeal, the Tribunal concluded there that the appropriate test was analogous to the test under Part 24 of the Civil Procedure Rules 1998. This makes provision for a claim which has no real prospect of success to be summarily dismissed. Guidance on the meaning of this test was provided in *Swain v Hillman* [2001] 1 All ER (CA) by Lord Woolf MR.
32. He said that the words "no real prospect of succeeding" did not need any amplification as they spoke for themselves. The court must decide whether there is a "realistic", as opposed to "fanciful", prospect of success.
33. I have no difficulty, having read all the papers and considered all the arguments in this matter, in concluding that the DfT and the Commissioner were reasonable and objective in terms of their respective interpretations of the Appellant's request.
34. I find that the Commissioner's process for testing whether the information was held by the Second Respondent was both rigorous and objective and that he arrived at the correct conclusions using the relevant standard of proof, the balance of probabilities.
35. The burden of proof in this appeal rests on the Appellant to demonstrate reasons why the appeal should not be struck out. I note that the Second Respondent is prepared to treat the reformulation of the Appellant's information request as a new information request and deal with it accordingly.
36. I find that, on the balance of probabilities, the Second Respondent did not hold the information as formulated in the original request and that the Commissioner's decision on this point is correct.
37. For that reason I am satisfied that there is no realistic prospect of his appeal succeeding in respect of that original request and that this appeal should be struck out.

38. The appeal will be struck out on that basis.

[Signed on the original]

Robin Callender Smith
Tribunal Judge

27 June 2012