

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

**Date:** 31 January 2012

**Public Authority:** The Department for Transport  
**Address:** Great Minster House  
76 Marsham Street  
London  
SW1P 4DR

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to the Scenario B alternative considered by Atkins, an engineering design consultancy appointed by the Department for Transport (DfT) to assess rail alternatives to the High Speed Rail (HSR) project being developed by HS2 Ltd.
2. The Commissioner's decision is that the DfT has correctly claimed that it does not hold any information beyond that which is already accessible to the complainant.
3. The Commissioner does not require the DfT to take any steps as a result of this notice.

**Request and response**

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4. On 18 March 2011, the complainant wrote to the DfT and asked it to provide him with, or point him to, various categories of information relating to the HSR proposition put forward by HS2. However, for the purposes of this notice, the complainant has confirmed that the Commissioner need only consider the DfT's response to the second part of his request. This asked for information in the following terms –

*"2) Atkins Scenario B alternative – Reports, information or data that explain 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 of*

*projects but there must be interim Atkins reports identifying individual projects capacity increases, benefits and cost/expenditure schedules from which the Scenarios were constructed."*

5. The DfT responded on 7 April 2011. It stated that all the information held by the DfT concerning the Scenario B alternative had been published in the report produced by Atkins entitled "HSR Strategic Alternatives Study: Strategic Alternatives to the Proposed 'Y' Network" (February 2011)<sup>1</sup>. This will be referred to as the "Strategic Alternatives Report".

6. The complainant wrote to the DfT on 19 April 2011 to ask it to review its response. Among other points, the complainant argued –

*"None of the Atkins Scenarios are optimal, the details of the sub schemes would be required to establish an optimal alternative and to see if the analysis treatment is consistent with the recently released HS2 data.*

*Atkins will have this information, under the principles of FOI legislation this information should be accessible – presumably via DfT."*

7. Following an internal review the DfT wrote to the complainant on 8 June 2011. It stated that it did not hold information that identified the benefits or capacity increases of individual components of the proposed alternatives to the HSR project.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. In particular, the complainant has claimed that the DfT would be required to hold further information from which the specifications of the Scenario B alternative could be assessed.

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<sup>1</sup><http://webarchive.nationalarchives.gov.uk/20111005090740/http://highspeedrail.dft.gov.uk/sites/highspeedrail.dft.gov.uk/files/hsr-strategic-alternative.pdf>

## Reasons for decision

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10. The Commissioner has initially considered whether the relevant access-regime for the request should be the EIR or FOIA.

### **Is any of the requested information, if held, “environmental”?**

11. “Environmental Information” is defined at regulation 2 of the EIR. In order for it to be environmental, information must fall within one or more of the definitions set out at regulation 2(1)(a) to (f) of the EIR – constituting “information on” any of the subjects covered by those six sub-sections.
12. The requested information in this case relates to the consideration of rail alternatives to the HSR network. The Scenario B alternative refers to a higher frequency of train service on the West Coast Main Line (WCML), Midland Main Line (MML) and East Coast Main Line (ECML). This option is contingent on a number of infrastructure enhancements being carried out (Table 3.3 of the Strategic Alternatives Report).
13. For the reasons set out below, the Commissioner has not had sight of the requested information itself. However, he is satisfied on the balance of probabilities that the information, in the event that it was held, would be on a measure likely to affect the elements and factors cited in regulations 2(1)(a) and 2(1)(b) of the EIR. This is because it is a measure, namely a proposal to upgrade the existing train network, which will ultimately affect the state of the elements of the environment, including the land and landscape and a number of environmental factors arising from this.
14. He has therefore concluded that the requested information, if held, would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR. Both the complainant and the DfT have similarly agreed that the EIR is the relevant access-regime in this case.

### **Regulation 5 – Duty to make environmental information available**

15. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request. A claim that information is not held is covered by an exception under regulation 12(4)(a) of the EIR and therefore requires a formal refusal notice.
16. Where there is any contention about whether or not information is held by a public authority, the Commissioner considers the test to be applied is not one of certainty but rather is the civil standard of the balance of probabilities.

17. The Commissioner considers the question of whether the DfT holds information covered by the scope of the request has potentially three strands –
- Whether the DfT has correctly understood and interpreted the full scope of the request.
  - Whether the DfT physically holds information of the type described by the request.
  - Whether Atkins, as the consultancy charged with considering the Scenario B alternative, holds information relevant to the request. If so, the question then arises as to whether this information was held on behalf of DfT under regulation 3(2) of the EIR and so subject to consideration by the DfT.
18. These elements are addressed below.

*Interpreting the request*

19. The complainant has argued that in preparing an alternative to the HS2 HSR proposition, he would expect Atkins as contractor for the work to have constructed a number of possible improvement options and then combined them to optimise the overall best solution. He therefore anticipated Atkins to have produced, and provided the DfT with, a wide range of information relating to the alternatives. This, the complainant surmised, 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.
20. The DfT has countered this argument by claiming that the information described goes beyond the scope of the original request. Instead, it considers that the request is clear in only asking for information which allowed the individual components of Scenario B to be evaluated. It has therefore confined its attention to this interpretation of the request, claiming that it does not hold information described in these terms.
21. When considering whether it was appropriate for the DfT to act on this particular interpretation of the request, it has been necessary for the Commissioner to refer to regulation 9 of the EIR, which in some ways mirrors section 16 of FOIA. Regulation 9(1) of the EIR says that a public authority shall provide advice and assistance, so far as it would be

reasonable to expect it to do so, to applicants and prospective applicants.<sup>2</sup>

22. In practice, the Commissioner considers that where a public authority is aware that an information request can be objectively read in more than one way and it therefore needs further information in order to identify the information requested, it will have a duty under regulation 9 to assist the complainant in clarifying the request.
23. The Commissioner has taken the view, however, that this duty did not arise in the circumstances of the case. This is because he agrees with the DfT that the request is clear in what it is seeking and that the DfT's interpretation was consistent with an objective reading of the request. He has therefore proceeded on this basis.
24. Nevertheless, for the sake of clarity, the DfT has clarified that Atkins was not asked to deliver an engineering report incorporating a final report detailing a final recommendation as the best alternative. Furthermore, the DfT has informed the Commissioner that it managed the project with Atkins on the basis of regular face to face meetings and working groups. The DfT did not therefore require Atkins to provide interim reports as part of its consultancy work.

*The nature of the information held by the DfT and Atkins*

25. The Commissioner has recognised the controversy surrounding the HS2 proposal for a HSR network, which has resulted in a significant amount of literature being produced, both in favour and against the project. In certain quarters, campaigners against HSR have questioned whether the process of deciding on, and examining, strategic alternatives was sufficiently developed.
26. Atkins was originally commissioned by the DfT in August 2009 to consider road and rail improvement alternatives to the proposed HSR network. At the time, the proposal only covered high speed services between London and the West Midlands. Atkins reported on the outcome of its findings by publishing its "High Speed 2 Strategic Alternatives Study: Strategic Outline Case" (March 2010).
27. Subsequently, HS2 looked at the possibility of extending the HSR through to Manchester and Leeds, known as the 'Y' network. Atkins was

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<sup>2</sup>[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Practical\\_application/INTERPRETING\\_A\\_REQUEST.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Practical_application/INTERPRETING_A_REQUEST.ashx)

therefore re-engaged in October 2010 to report on the potentially viable rail alternatives to the extended HRS, which had been developed by the DfT. Atkins' analysis of the alternatives was presented in the Strategic Alternative Report.

28. In the Strategic Alternative Report, Atkins considers three different scenarios (A, B and C) put forward as alternatives to the HSR network. Scenario B, the focus of the information request, is described in outline as follows:

*"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."*

29. In its introduction to Strategic Interventions (section 3), the Strategic Alternative Report explains that due "to the geographic scale of HS2, few alternative interventions would be able, on their own, to deliver an equivalent level of functionality, whether in terms of journey time improvements or capacity enhancements. It was therefore considered more appropriate to consider packages of interventions."
30. As stated, Scenario B imagines the possibilities of improving the train service on the WCML, MML and ECML. The Strategic Alternative Report addresses the viability of the Scenario by assessing Demand Forecasting, Capital and Operating Costs and providing an Economic Appraisal for the packages of interventions.
31. The DfT has informed the Commissioner that the capacity increases and benefits information that the complainant seeks for the individual elements of Scenario B were not modelled and analysed separately. Instead, as reflected by the information contained in the Strategic Alternatives Report, the estimates for such factors as costs were only considered and arrived at in terms of each complete package.
32. This position has been reinforced by Atkins in a letter compiled in response to the investigation, which the Commissioner has found particularly persuasive given its involvement with the testing of the alternative scenarios. This said that:

*"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 (ie. model zones) rather than by rail line or station. This 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 zone 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 allocating zone pairs manually by scheme would require individual analysis of several thousand zone pair combinations."*

33. It is important to observe, bearing in mind Atkins' comments, that there is no obligation under the EIR to create information in response to a request.

#### *Conclusion*

34. In order to make a decision the Commissioner does not need to be absolutely certain that the DfT does not hold the requested information. Rather, he only needs to find that, on the balance of probabilities, it is reasonable to conclude that this is the case.
35. For the reasons set out above, the Commissioner is satisfied, to the required standard, that neither the DfT nor Atkins hold the information requested. In making this finding, the Commissioner considers that he has not been presented with any evidence or information to alter this view. On the other hand, the Commissioner accepts as reasonable the DfT's rationale which explains why it does not hold the information; an explanation which has been further supported by the assurance provided by Atkins.
36. As the Commissioner has reached this conclusion, it has not been necessary to consider whether records produced and retained by Atkins in relation to the Strategic Alternatives Report would be held on behalf of the DfT.

#### **The Public Interest Test**

37. Regulation 12(1)(b) of the EIR requires that all exceptions, including regulation 12(4)(a), are subjected to a public interest test. However, it is not possible for the Commissioner to do this given his finding that the DfT does not hold the information to which the public interest could apply.

## Right of appeal

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38. 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: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

39. 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.
40. 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 .....**

**Gerrard Tracey  
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