

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

Date: 26 March 2013

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

Decision (including any steps ordered)

1. The complainant requested copies of correspondence and documents concerning the Bexhill to Hastings Link Road that were exchanged between the Department for Transport (DfT) and the Treasury prior to and following the announcement of the decision on Budget day to fund the road.
2. The Commissioner's decision is that most of the redacted information was incorrectly withheld under regulation 12(4)(e) as the public interest favoured disclosing the information. In this respect the DfT did not deal with the request in accordance with the EIR. However, the Commissioner has also concluded that the public interest did favour maintaining the exception in regulation 12(4)(e) in relation to the information specified in the confidential annex to this decision notice. In this respect the DfT was correct to refuse to provide the information.
3. The Commissioner requires the public authority to disclose the information, with the exception of those passages specified in the confidential annex, within 35 calendar days of the date of this decision notice.
4. 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.

Request and response

5. On 2 April 2012 the complainant requested copies of correspondence and supporting documents regarding the Bexhill to Hastings Link Road scheme that were exchanged between the DfT and the Treasury during the Best and Final Bid Funding process and up to and following the announcement of the final decision to fund the road which was announced on Budget day 21 March 2012.
6. On 21 May 2012 the DfT supplied some of the requested information but withheld parts of it under section 35(1)(a) FOIA.
7. On 15 June 2012 the DfT's internal review released some further information and excepted the remainder from disclosure under regulation 12(4)(e) EIR.

Scope of the case

8. On 19 June 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. On 10 October 2012 the Commissioner asked the DfT for a copy of the withheld information in order to determine the appropriateness of the exception that had been applied. The DfT provided the Commissioner with copies of ministerial submissions from officers dated 14 and 19 March 2012. The DfT indicated the sections that had been disclosed to the complainant and those that had been redacted.
10. This decision notice addresses the DfT's redaction under EIR 12(4)(e) of the remaining information from the ministerial submissions.

Reasons for decision

11. Regulation 12(4)(e) EIR states that a public authority may refuse to disclose information if the request involves the disclosure of internal communications.
12. Upon examination of the information the Commissioner determined its content to be environmental information as defined in regulation 2 EIR. This is because it relates to plans and activities that have a direct impact on the use of land and the landscape. The submissions are internal communications between DfT officers and DfT ministers that were also sent to the Treasury. Regulation 12(8) specifies that for the

purposes of the exception in regulation 12(4)(e), "internal communications includes communications between government departments". Accordingly the Commissioner is satisfied that the information falls within the scope of regulation 12(4)(e).

13. Regulation 12(1) EIR states that disclosure of environmental information may be refused if (a) an exception to disclosure applies and (b) if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.
14. The Commissioner has therefore examined the public interest arguments in favour of maintaining the exception and those in favour of disclosure.
15. *The DfT submitted the following public interest arguments in favour of maintaining the exemption:*
 - (a) Disclosure of internal advice to ministers could be likely to prejudice the effective conduct of public affairs.
 - (b) If officers' advice was put into the public domain it would seriously undermine their ability to provide impartial advice to ministers without concern about the possible reactions or pressure from stakeholders.
 - (c) Disclosure of internal advice would have a detrimental impact on the DfT's ability to consider issues in the future and on the free and frank exchange of views.
 - (d) The information comprises options presented to ministers and the timing of announcing the decision to approve funding of the road. The information relates to the formulation and development of policy during which there is a need to maintain private thinking space. If officers' advice was routinely disclosed there is a risk that decision making would become poorer and that it would be recorded inadequately.
 - (e) The DfT said the departmental submissions to ministers were recently made. The decision to approve funding of the road was announced on 21 March 2012 and the information request was made on 2 April 2012.
16. The Commissioner has considered all of the arguments above and notes that (a), (c), (d) and (e) largely relate to the potential chilling effect on candour and the need for a safe space in which to formulate and develop policy and make decisions. With reference to the DfT's submissions in this regard he notes that:

- (i) The DfT did not tell the complainant why disclosure of the information might prejudice the effective conduct of public affairs. The phrase, "prejudice to the effective conduct of public affairs" is taken from section 36 of the Freedom of Information Act but the information was not withheld under that access regime. The Commissioner asked the department to explain why disclosure in this specific instance might cause this particular prejudice. In response the DfT submitted that 'chilling effect' and 'safe space' arguments applied.
- (ii) *Chilling effect.* The DfT said that if officers felt their ability to provide candid and impartial advice was compromised (chilled) by the prospect of disclosure this would likely dissuade them from expressing their views on record in this instance and in other cases involving funding decisions for transport schemes. The DfT said that disclosure would weaken and undermine officers' ability to provide free and frank advice. This is because it would very likely set a precedent that such advice would be disclosable under any request relating to this or other transport schemes. The DfT maintained that in turn this would lead to poorer decision making regarding the country's transport infrastructure and thereby prejudice the effective conduct of public affairs.
- (iii) The Commissioner considers that the chilling effect argument is relevant and that it applies with varied weight to different parts of the withheld information. At the time of the request the decision to grant provisional approval of a funding contribution towards the costs of the Bexhill to Hastings Link Road had been made and publicly announced. The Commissioner understands that separate but related policy decisions were still required prior to full and final approval being given. Whilst he rejects the DfT's argument that disclosure would set a precedent because each case must be considered on its own merits, he nevertheless accepts that some weight should be given to the argument that disclosure is likely to result in a chilling effect on this related policy formulation and on other similar transport scheme decisions. This is in view of the proximity of the timing of the request to the decision and announcement as well as the free and frank nature of the information.
- (iv) The Commissioner notes that the withheld information also contains references to a different transport scheme. This scheme was still under active consideration at the time of the request and the Commissioner understands that no policy decision had been made or announced. In view of this the Commissioner considers that the chilling effect argument deserves additional

weight in relation to information about the other scheme. He has specified the information in question in the confidential annex to this decision notice.

- (v) *Safe space*. The funding that was approved was subject to the usual procurement procedures and certain conditions being met by the local county council. Because of this the DfT submitted that the issue relating to the request was still live. The DfT said that officers would need a safe space to consider whether the conditions had been met before providing the funding that had been approved.
- (vi) The Commissioner recognises the need to confirm that conditions have been met before releasing the funding that had been approved. However, this is not the same as requiring a safe space to consider the decision to approve the funding process itself. That decision has already been made. The process of reaching it no longer requires a safe space for deliberation.
- (vii) The Commissioner does not accept that the safe space argument should be given any weight in relation to the decision regarding the Bexhill to Hastings Link Road given that it had been made and publicly announced by the time of the request. However, he again acknowledges that the information specified in the confidential annex also relates to a different policy decision where safe space was still required at the time of the request. He therefore accepts that the safe space argument deserves considerable weight in relation to the information specified in the confidential annex.

17. With reference to the DfT's submission at 15(b):

- (i) The DfT did not explain to the complainant why disclosure would seriously undermine its ability to provide impartial advice to ministers on account of being concerned about the reactions or pressure from stakeholders. The Commissioner asked the DfT to list who the stakeholders were and to detail the nature of their expected reactions or pressure as a result of disclosure.
- (ii) In response the DfT said stakeholders in opposition included the Campaign for the Protection of Rural England; the Campaign for Better Transport; Hastings Alliance; Combe Haven Defenders and Friends of the Brede Valley. It said it could not predict with certainty the nature of their reactions but that one conservation group had pledged non-violent means to try and stop the scheme. The Campaign for Better Transport had also cited the scheme as an example of its national campaign to oppose road

building plans. The Commissioner is not persuaded by either of the reasons submitted for withholding the information.

Legitimate campaigning is an accepted part of the democratic and consultative process. The DfT has failed to explain why or how disclosure in this instance should give rise to any specific concern about the resulting behaviour on the part of the legitimate campaigners involved.

18. *Public interest arguments in favour of disclosure are as follows:*

- (a) It is important that information about how and why the funding decision was reached is fully transparent when substantial costs to the tax payer are involved.
- (b) Disclosure of the information ensures further transparency and accountability for the transport decisions of government.
- (c) It allows individuals to understand issues which affect their lives and informs public debate on significant decisions which affect them.
- (d) It enables the public to see how policies and procedures are considered within government and government departments.

19. *The Commissioner's conclusion*

- (i) The requirement under article 4(2) of the EU Directive 2003/4/EC from which the regulations derive is that the grounds for refusal of environmental information shall be interpreted in a restrictive way.
- (ii) The Commissioner considers that significant weight applies to the arguments in favour of disclosure, notwithstanding that a lot of background and factual information has already been disclosed. This is in view of the fact that the decision to grant funding has been controversial, will affect large numbers of people and involves cost to the public purse estimated at £86 million. The DfT has approved a funding contribution of £56.85 million.
- (iii) In relation to most of the withheld information the Commissioner does not accept that the safe space argument deserves any weight. Whilst he has attributed weight to the arguments about chilling effect, for the majority of the withheld information, he does not consider this to be sufficient to outweigh the arguments in favour of disclosure, bearing in mind the presumption in favour of disclosure in regulation 12(2).

- (iv) As explained above, the Commissioner accepts that in relation to the information specified in the confidential annex the chilling effect and safe space arguments are relevant and attract substantial weight. This is because the information is free and frank and relates to a policy decision that was still being actively considered at the time of the request and where no decision had been announced. The arguments in favour of disclosure set out in paragraph 18 above also apply to the information detailed in the annex. They also attract significant weight given the number of people affected and the sums of money involved in relation to the policy decision in question. However, in the circumstances, the Commissioner does not consider that they are sufficient to outweigh the substantial weight of the arguments in favour of maintaining the exception. Therefore he has concluded that the DfT was correct to withhold the information specified in the confidential annex on the basis that the exception in regulation 12(4)(e) applied.
20. The Commissioner's decision is that the information withheld under 12(4)(e) EIR should be disclosed with the information specified in the confidential annex redacted.

Right of appeal

21. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

22. 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.
23. 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

Jo Pedder
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