

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

Date: 24 October 2022

Public Authority: Transport for the North
Address: 4 Piccadilly Place
Manchester
M1 3BN

Decision (including any steps ordered)

1. The complainant has requested correspondence with the Secretary of State for Transport and with the Northern Transport Acceleration Council. The above public authority stated that it did not hold some of the information and relied on regulation 12(5)(e) of the EIR (commercial confidentiality) to withhold that which it did hold.
2. The Commissioner's decision is that the information the public authority has identified as being exempt does not fall within the scope of the request. He is also satisfied that, on the balance of probabilities, the public authority holds no information within the scope of elements 2 and 3 of the request. In respect of element 1, the Commissioner is not satisfied that the public authority has complied with its obligations under regulation 5(1) of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to element [1], using the interpretation set out in paragraph 21 of this decision notice. The public authority must either disclose copies of the information that it holds or issue a refusal notice stating the EIR exception it is relying on to withhold information. If the public authority is satisfied that it holds no information, it should issue a refusal notice relying on Regulation 12(4)(a) of the EIR.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. 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 17 May 2021, referring to an earlier telephone conversation, the complainant requested information of the following description:

"[1] can TfN provide the correspondence it holds with the Secretary of State since 1 January 2020 and

"[2] correspondence it holds with the Northern Transport Acceleration Council since its inception, which I understand was around June/July last year.

"[3] Please also provide any agendas and minutes of the Acceleration Council held by TfN, including its board members.

"I got the sense from our conversation that you might have been drawing a distinction between TfN and board members. If that is the case, and TfN were to contend board members have attended Acceleration Council meetings or obtained its papers in their personal capacity or their mayoral or council capacity, I would be grateful if you would clarify as soon as possible."

6. On 29 June 2021, TfN responded. In respect of elements [2] and [3], it denied holding any information as it said that, where TfN members attended the Northern Transport Acceleration Council, they did so in their capacity as representatives of local authorities or mayoral offices – therefore no information was held by TfN for the purposes of the EIR.
7. The complainant requested an internal review on 30 June 2021. TfN sent the outcome of its internal review on 24 August 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 24 August 2021 to complain about the way his request for information had been handled.
9. On 23 May 2022, the Commissioner opened his investigation with a letter to the public authority. He asked it to provide copies of the information it was withholding and to provide explanations as to why it did not hold information within the scope of elements [2] and [3].
10. The public authority, having sought a series of extensions, finally provided its submission on 25 August 2022. The Commissioner, having considered the submission, wished to clarify some elements of the response and had a phone conversation with the public authority on 2 September 2022.
11. During the course of that phone conversation, it became apparent that the public authority had adopted far too broad an interpretation of element (1). The Commissioner therefore asked the public authority to go back and carry out further searches in order to establish whether it did or did not hold any further information, based upon the correct interpretation of the request.
12. The public authority issued a holding response on 12 September, along with further holding responses on 3 October and 13 October. On 14 October 2022, the public authority provided a the Commissioner with a spreadsheet containing metadata from some emails it had identified, but did not indicate which of these emails would be disclosed.
13. The Commissioner considers that the public authority has had adequate time to identify relevant information. He has therefore proceeded to a decision notice determining whether information is held.

Reasons for decision

Is the requested information environmental?

14. 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);
15. As it is information relating to rail projects, the Commissioner believes that the requested information is likely to be information on a measure affecting the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.

Elements (2) and (3)

16. The public authority explained that it had had no communication with NTAC since its exception and so held no relevant information.
17. In relation to minutes from NTAC, it stated that, whilst some of its members were also members of NTAC, if any of them did hold NTAC information, it would be as members of NTAC or in their own personal capacity. It therefore argued that it did not hold this information for the purposes of the EIR.
18. When pushed by the Commissioner, the public authority added that:
- “It would be inappropriate for the sharing of any internal papers that participants in both organisations may have had access to. NTAC was set up to work directly with the Department for Transport (“DfT”) in relation to the Northern Powerhouse Rail project and (arguably) to replace a role previously undertaken by TfN. Any individuals holding roles in both organisations would be in breach of their fiduciary duties

in respect of conflicts of interest should they share information in the manner suggested.”

19. On the balance of probabilities, the Commissioner is satisfied that the public authority holds no information within the scope of this element of the request.

Element [1]

20. During the course of the Commissioner’s phone conversation on 2 September 2022, it became apparent that the public authority had not used the correct interpretation of this element of the request.
21. The request is very specific, it seeks correspondence that was exchanged between the public authority and the Secretary of State for Transport (regardless of which individual held that office at the time of the correspondence).
22. The request does not seek any and all communication that the public authority has had with the Department for Transport more generally – or even correspondence with other ministers in the Department.
23. The Commissioner noted that, in his experience, correspondence that went directly to or from the Secretary of State would be likely to have originated from, or been sent to, the most senior officer within the organisation or, at the very least, someone from the next rank of seniority down. Therefore the searches that would need to be carried out should be relatively limited in scope and easy to carry out.
24. The information that the public authority originally withheld does not fall within the scope of the request as it originates from the Department for Transport, not the Secretary of State personally.
25. The metadata provided by the public authority indicates that there is some correspondence that is held. Having not seen that correspondence, the Commissioner is unable to judge how much would be exempt, or even fall within the scope of the request.
26. However, he is sufficiently confident that the public authority does, on the balance of probabilities, hold further information within the scope of the request.

Right of appeal

27. 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

28. 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.
29. 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

Roger Cawthorne
Senior Case Officer
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