

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 October 2022

Public Authority: National Highways (Highways England)
Address: National Traffic Operations Centre
3 Ridgeway
Quinton Business Park
Birmingham
B32 1AF

Decision (including any steps ordered)

1. The complainant has requested information about the Outline Business Case (OBC) for the Lower Thames Crossing. The above public authority ("the public authority") relied on regulation 12(4)(d) of the EIR (material in the course of completion, unfinished documents and incomplete data) to withhold the information.
2. The Commissioner's decision is that:
 - The information being withheld under regulation 12(4)(d) of the EIR engages that exception but the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld information having first redacted from it the information categorised as personal information under regulation 13(1) of the EIR as appropriate.
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 11 March 2022, the complainant wrote to the public authority and requested information in the following terms:

“Further to email exchanges in November last year between us, this is a formal request by Thurrock Council pursuant to the Environmental Information Regulations 2004 (the EIR Regulations) for the latest Lower Thames Crossing Outline Business Case (OBC).”

6. The public authority refused to provide the information and relied on regulation 12(4)(d) of the EIR as its basis for doing so. At internal review, it noted that the PIT was not included within its original response, therefore included it within the review. The public authority upheld its original position.

Reasons for decision

7. The following analysis sets out why the Commissioner has concluded that the public authority was entitled to rely on regulation 12(4)(d) of the EIR in this particular case.
8. Regulation 12(4)(d) of the EIR allows a public authority to withhold information which is in the course of completion, unfinished documents or incomplete data.
9. The Commissioner is satisfied that the withheld information can be categorised as material in the course of completion. He accepts that the draft in question forms part of the process of assessing options for the Lower Thames Crossing. That process is not yet settled and no final decision on the crossing has been made. As such, the Commissioner has decided the public authority was entitled to apply regulation 12(4)(d) of the EIR to the information it is withholding. He has therefore gone on to consider the associated public interest test.

Public Interest Test

10. The public authority has recognised that there is a public interest in transparency, openness and accountability, as well as the environmental impact and assessment of new road development. However, they argue that the Business Case is currently incomplete and not approved by the Chief Secretary of the Treasury, therefore sharing this may cause confusion.

11. The complainant argues that the OBC submitted to the Treasury sets out the economic case for the project, so it's essential that interested parties have the opportunity to comment, and potentially help to avoid the commitment of funds based on potentially flawed conclusions. They also state that the public authority has said: "There are no scenarios that consider the climate impacts of the project" And that "There is no information on this in the Outline Business Case."
12. They go on to argue that: "residents and businesses will be exposed to the largest share of the Lower Thames Crossing project's disbenefits, and the Council believes that it is entirely reasonable to expect this information to be shared in order that it can understand how the disbenefits have been quantified in the economic case." And "It is understood that National Highways has already gathered and validated its Outline Business Case sufficient to submit it to the Treasury. The Council fails to understand why a safe space is required that exempts it from necessary engagement with the Council on matters crucial to the future health and economic wellbeing of local residents." Also "of concern that National Highways' considers the current Outline Business Case so controversial that it does not want to consult on it as it would take a 'significant' amount of resources. This is in our opinion is a compelling reason for the document to be disclosed. In addition, responding to the Council's legitimate requests now would represent a significant saving of public resources required to challenge the economic case through DCO Examination and future legal mechanisms."

The Commissioner's conclusion

13. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure.
14. The Commissioner has reviewed both the complainants requests and the public authorities responses, and on the evidence presented to him in this case, the Commissioner is not persuaded. The Commissioner considers that the public authority would be able to place the disclosed information in context and deal with any queries that emerge.
15. The Commissioner does not consider the arguments that the public authority has put forward for withholding the information in this case are sufficiently compelling so as to outweigh the EIR's presumption in favour of disclosure. The project will have a major and lasting impact on people living and working in that area. Those people are entitled to take part in the associated decision-making and to be as fully informed as possible before any final planning decisions are made.

Right of appeal

16. 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

17. 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.
18. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
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SK9 5AF