

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

Decision notice

Date: 26 June 2024

Public Authority: National Highways
Address: Bridge House
1 Walnut Tree Close
Guilford
Surrey
GU1 4LZ

Decision (including any steps ordered)

1. The complainant has requested information relating to a development consent order. National Highways disclosed information with redactions made under regulation 12(4)(d) (material in the course of completion), regulation 12(5)(e) (commercial or industrial information) and regulation 12(5)(d) (confidentiality of proceedings) of the EIR.
2. The Commissioner's decision is that National Highways has failed to explain why the withheld information engages any of the exceptions.
3. The Commissioner requires National Highways to take the following steps to ensure compliance with the legislation.
 - Disclose all the withheld information except that withheld under regulation 13 (personal data).
4. National Highways must take these steps within 30 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 13 December 2023 the complainant made the following request for information under the EIR:

“Please would you be kind enough to provide copies of documentation between Nation Highways and the Government as referred to within the community engagement email dated 7th December 2023.

Specifically, documentation and reasoning relating to the decision not to submit the Development Consent Order and the proposed next steps as referred to below. National Highways with the support from Government will not be submitting the Development Consent Order application for the A358 Taunton to Southfields Dualling Scheme as planned this year and we are working with Government on the next steps.”

6. National Highways responded on 12 January 2024, disclosing a letter with redactions under regulation 12(4)(d) (material in the course of completion), regulation 12(5)(e) (commercial or industrial information) and regulation 12(5)(d) (confidentiality of proceedings).
7. The complainant requested an internal review on the same day.
8. Following an internal review, National Highways wrote to the complainant on 11 March 2024. It upheld its previous position.

Scope of the case

9. The complainant contacted the Commissioner on 11 March 2024 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to consider whether the information redacted from the letter has been done so appropriately.
11. The Commissioner will begin by considering National Highway’s application of regulation 12(4)(d). Depending on his findings, the Commissioner might go onto consider regulation 12(5)(e) and regulation 12(5)(d).

Reasons for decision

Regulation 12(4)(d) – material in course of completion

12. Regulation 12(4)(d) states:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.”

13. The exception can be split into the three possible limbs. Information which is, or which relates to:

- material which is still in the course of completion;
- unfinished documents; or
- incomplete data.

14. If the requested information falls within any of these limbs, the exception will be engaged. There can be overlap between the limbs.

15. The complainant is concerned that the decision to which the letter relates has been made, and therefore the withheld information can't be said to be in the course of completion.

16. However, the National Highways has explained that, whilst information about the project had been put into the public domain, as the complainant has indicated, the work has since been interrupted by the announcement of the upcoming general election.

17. National Highways has explained:

“NH would like to make it clear that a final cross-government decision on the scheme was not made, as the election was called before this could happen... it will be for a new Government post the general election to make a decision on the future of this project. It is likely to be some time before the new government is in a position to make a final policy decision on the status of this scheme.”

18. The Commissioner has considered whether the withheld information falls under the definition of material in the course of completion. The fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception.

19. The information that's actually being withheld must be the material itself which is in the course of completion, rather than any wider 'project' or 'process.' The letter isn't in draft, it's complete and has been exchanged between National Highways and the Department for Transport.
20. Therefore, the exception is not engaged and there is no requirement to consider the public interest test. The Commissioner will go onto consider the other exceptions cited.

Regulation 12(5)(e) - commercial or industrial information

21. Regulation 12(5)(e) states:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."

22. When considering whether regulation 12(5)(e) has been applied appropriately, the following four criteria must be met:
 - The information is commercial or industrial in nature.
 - Confidentiality is provided by law.
 - The confidentiality is protecting a legitimate economic interest.
 - The confidentiality would be adversely affected by disclosure.
23. For information to be commercial or industrial in nature, it will need to relate to a commercial activity. Usually, it will involve the sale or purchase of goods or services for profit. Information about planning, including developing lands of infrastructure, will be commercial information. The withheld information represents information about planning, and so the Commissioner is satisfied that it's commercial.
24. If the information is not trivial nor in the public domain, it has the necessary quality of confidence and so confidentiality is provided by law.
25. Again, the Commissioner acknowledges that information about the project was previously put into the public domain, as per the

complainant's concerns. However, since then, the work has been paused.¹

26. The last update, which is available on National Highway's website, states:

"National Highways, with the support from Government, will not be submitting the Development Consent Order application for the A358 Taunton to Southfields Dualling Scheme and we are working with Government on the next steps."

27. The withheld information goes beyond this update, and isn't trivial or in the public domain, and therefore has the necessary quality of confidence.

28. Moving on, the confidentiality must be maintained in order to protect a legitimate economic interest. This means disclosure of the withheld information must have an adverse affect on legitimate economic interests. It's not enough that disclosure might cause some harm to an economic interest. The public authority needs to establish that disclosure **would** cause harm, i.e. the adverse affect is more probable than not.

29. National Highway's refusal notice provides a link to the Commissioner's guidance on regulation 12(5)(e) and the public interest considerations. However, the notice doesn't demonstrate a causal link between disclosure and the adverse affect and neither does its internal review outcome.

30. During this investigation, the Commissioner specifically asked National Highways to explain how disclosure of the withheld information would adversely affect the particular economic interest that has been identified.

31. National Highways has only reiterated that:

"Releasing this information at the time of request or now, when no final decision has been made on the scheme would affect the safe space for a decision to be made away from scrutiny and distracting public debate, as well as prejudicing NH, its suppliers and the wider decision-making parties, as set out in the arguments put forward in the PIT."

¹ [A358 Taunton to Southfields - National Highways](#)

32. The Commissioner doesn't consider the above argument strong enough, or specific enough. Also, looking at the withheld information, and, without any further steer from National Highways, the Commissioner doesn't see how its disclosure would adversely affect a legitimate economic interest.
33. Since the third criteria has failed to be met, the exception is not engaged and there is no requirement to consider the public interest test. The only remaining exception for the Commissioner to consider is regulation 12(5)(d).

Regulation 12(5)(d) – confidentiality of proceedings

34. Regulation 12(5)(d) states:

“For the purposes of paragraph (1)(a) a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.”

35. 'Proceedings' can cover a range of activities; however, the Commissioner considers that the word implies some formality, i.e. proceedings don't cover every action, decision or meeting of a public authority. It will include, but isn't limited to:
 - formal meetings to consider matters that are within the public authority's jurisdiction;
 - situations where an authority is exercising its statutory decision making powers; and
 - legal proceedings.
36. It is the role of National Highways to manage and improve England's motorways and major roads. The Commissioner is satisfied that any decision, and any improvement work carried out to the road(s) in question, will be taken in line with National Highway's statutory duty and follow a formal process.
37. A public authority cannot simply decide for itself that the proceedings of a particular meeting are confidential; there must be a legal basis for this. The confidentiality may be provided in statute or derived from common law.

38. Again, National Highway's refusal notice, internal review outcome and submission to the Commissioner all fail to explain on what legal basis the requested information must be kept confidential. Without this information, the Commissioner cannot find the exception appropriately engaged.
39. Since National Highways has failed to answer satisfactorily any of the Commissioner's specific questions in relation to regulation 12(4)(d), regulation 12(5)(e) and regulation 12(5)(d), and has failed to persuade the Commissioner that any of the exceptions have been appropriately engaged, the information must be disclosed.

Right of appeal

40. 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

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF