



Mr Rupert Moss-Eccardt

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27 January 2016

Dear Mr Moss-Eccardt

### **Level crossings in Queen Adelaide**

**Internal Review reference number: FOI2015/01338**  
**Original request reference number: FOI2015/01105**

I refer to your e-mail of 24 December 2015 which requested an internal review of the handling of your request for information, reference number FOI2015/01105.

I note that this request was itself the result of the clarification of a previous request FOI2015/01097. I will therefore include the details of both requests in the 'Request History' section below.

I have considered this matter, and my conclusion is that your request has been handled in accordance with the requirements of the Environmental Information Regulations 2004 (EIR) in respect of part of the information requested. However, this review has concluded that some of the information which you requested should be disclosed; this is explained in the body of this letter. I provide the information to you in the attached disclosure documents.

### **Request History**

#### Request FOI 2015/01097

On 31 October 2015, you made the following request:

*'There has been a lot of coverage for several years about the upgrade of Ely North Junction.*

*In the last year there has been mention by local politicians and MPs of challenges around level crossings in the area, particularly those in Queen Adelaide (there are three in the village itself).*

*Please could you provide any correspondence, plans and emails that mention these crossings and, particularly, what the problems are and any proposals being considered. Note you do not need to send the 'improving connectivity' paper from last year.'*

Network Rail replied on 3 November 2015, seeking clarification of this request in relation to the timeframe which was required for the information and in relation to the specific level crossings to which your request related.

#### Request FOI 2015/01105

You replied on the same day as follows:

*'In terms of time frame, anything from the beginning of this year (2015) will probably suffice.*

*The following news articles may be of assistance:*

*<http://edp24.co.uk/1.4166910> (where a Network Rail spokesman is said to mention closure) and <http://www.elizabethtruss.com/news/candidates-press-improvements-key-rail-crossing> where SoS for DEFRA says Network Rail told her there were issues with the road crossing*

*The Ely North upgrade is still in CP5 so the paperwork for that should mention the crossings*

*The three road/rail crossings in question are the three on the B1382 in Queen Adelaide. The middle one has featured in your safety campaign for university students and all three have enforcement cameras as they are in the top 20 most dangerous crossings, apparently. They are the three called 'Queen Adelaide' as a result of this search:*

*<http://www.networkrail.co.uk/transparency/level-crossings/> with postcode CB7 4UQ and a radius of one mile.*

*I think they are  
Crossing 2529  
Crossing 2530 and  
Crossing 2531'*

Network Rail responded to your request on 24 December 2015; the response disclosed two letters from Network Rail to the Department for Transport dated 31 August 2015 and 22 September 2015, relating to improvements to Cambridge to Kings Lynn services. The response also explained that other information was being withheld under regulations 12(4)(e) (internal communications) and regulation 12(5)(e) (for information considered confidential in nature and protecting a legitimate economic interest, the disclosure of which would adversely affect confidentiality).

In considering the public interest test, Network Rail concluded that the factors in favour of disclosure (accountability and transparency of decisions and spending of public money; and the public interest in the Ely North Junction scheme) were outweighed by the factors in favour of withholding the information (the need for a 'safe space' for internal consideration of options; and the risk that disclosure would harm the legitimate economic interests of Network Rail and third parties).

You replied on 24 December 2015, requesting a review of Network Rail's decision.

## **Decision**

I consider that Network Rail's response was correct to withhold the majority of the requested information under regulations 12(4)(e) and regulation 12(5)(e) of EIR. This is because this information consists of the analysis and considerations undertaken to date in respect of the level crossings. Full explanation of the reasons why we are withholding this information is provided in the Annex which follows this letter.

As part of this review I have identified some information which, while it refers to the level crossings, does not contain the analysis or considerations mentioned above; I consider that this information can be disclosed. This information is provided in the attached disclosure documents.

## **Disclosure of additional information**

I attach the following emails:

1. Email exchange dated 7 May 2015 at 16.50 and 18.44, subject line Kiln Lane and Queen Adelaide Crossings
2. Email exchange dated 1 July 2015 at 08.43 and 16.56, subject line Ely North Junction Level Crossings work

3. Email dated 17 July 2015 at 13.11, subject line Ely North Junction Level Crossing Work Package Supporting Information - Transport Assessment. This email contains two links to online documents which are provided below:

Ely Southern Bypass Transport Assessment:

<http://planning.cambridgeshire.gov.uk/swift/MediaTemp/36646-4896.pdf>

Ely Southern Bypass Planning Application Documents:

[http://planning.cambridgeshire.gov.uk/swift/apas/run/WPHAPPDETAIL\\_DISPLAYURL?theApnID=E/03005/13/CC&theTabNo=3&backURL=%3ca%20href=wphappcriteria.display?paSearchKey=19007%3eSearch%20Criteria%3c/a%3e%20%3e%20%3ca%20href=wphappsearchres.displayResultsURL?ResultID=33577%26StartIndex=1%26SortOrder=APNID%26DisplayResultsAs=WPHAPPSEARCHRES%26BackURL=%3ca%20href=wphappcriteria.display?paSearchKey=19007%3eSearch%20Criteria%3c/a%3e%3eSearch%20Results%3c/a%3e](http://planning.cambridgeshire.gov.uk/swift/apas/run/WPHAPPDETAIL_DISPLAYURL?theApnID=E/03005/13/CC&theTabNo=3&backURL=%3ca%20href=wphappcriteria.display?paSearchKey=19007%3eSearch%20Criteria%3c/a%3e%20%3e%20%3ca%20href=wphappsearchres.displayResultsURL?ResultID=33577%26StartIndex=1%26SortOrder=APNID%26DisplayResultsAs=WPHAPPSEARCHRES%26BackURL=%3ca%20href=wphappcriteria.display?paSearchKey=19007%3eSearch%20Criteria%3c/a%3e%3eSearch%20Results%3c/a%3e)

Please note that Network Rail has withheld some information within these emails under regulation 13(1) of EIR as this information constitutes the personal data of third parties. The information that has been withheld includes the names, work email address and work telephone numbers of Network Rail employees and the names of third party employees; the individuals involved do not hold public-facing jobs and do not hold jobs at the highest level of seniority within Network Rail.

Under regulation 13(1), personal data is exempt if disclosure to a third party would breach one or more principles in the Data Protection Act 1998. The individuals concerned would not expect their personal data to be disclosed to a third party. To do so would be unfair and therefore, disclosure would breach the first data protection principle (fair and lawful processing).

#### Further advice and assistance

I note that in your request for an internal review, you included the following:

*'...that notwithstanding I can't believe there aren't statements of facts that were used in briefing the LEP, the local councillors and MPs that are still exempt.'*

In order to provide advice and assistance, I can advise you that Network Rail does hold correspondence with MPs and King's Lynn Town Centre Partnership relating to the Ely North upgrade. However, this correspondence does not contain any reference

to the level crossings in Queen Adelaide and is therefore outside the scope of the wording of your request.

In relation to your question about 'what the problems are' at the level crossings, information already in the public domain indicates the issues involved, I can provide a further general explanation. If the level of rail traffic through the Ely North Junction was increased due to improvements to the line, then this would increase the levels of risk at level crossings; Network Rail therefore needs to consider whether the crossings should be altered and, if so, how they should be altered. However, the crossings in Queen Adelaide are also in close proximity to dwellings, businesses and Sites of Special Scientific Interest and these factors will need to be taken into account as part of the process of appraising options.

I hope you find this information useful.

Yours sincerely

Colin Bendall  
Information Officer – Compliance & Appeals

### **Next steps**

If you are not content with the outcome of this internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

Please remember to quote the reference number at the top of this letter in all future communications.

## Annex I

### Withheld information

The requested information has been withheld under three exceptions – regulation 12(4)(e) (internal communications), regulation 12(5)(e) (commercial confidentiality) and regulation 12(4) (d) (material in the course of completion). This is because the information consists of the analysis and considerations undertaken to date regarding the level crossings.

The key reason that I consider that this information should be withheld at this time is because these considerations have not been completed and are still ongoing at this time; Network Rail has not yet made a decision about how to proceed. This Annex provides further explanation of our reasons for withholding this information.

### Regulation 12(4)(e)

Regulation 12(4)(e) provides that:

*‘12.—(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*

*(e) the request involves the disclosure of internal communications.’*

The Information Commissioner’s guidance explains that: <sup>1</sup>

*‘10. The underlying rationale behind the exception is that public authorities should have the necessary space to think in private. The original European Commission proposal for the Directive (COM(2000)0402) explained the rationale as follows:*

*“It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns [...] internal communications.”*

In relation to the need to preserve a ‘safe space’ to debate issues away from external scrutiny, the guidance explains that:

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf)

*'49. The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases.*

*50. The need for a safe space will be strongest when the issue is still live... The timing of the request will therefore be an important factor. This was confirmed by the Information Tribunal in DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072, 29 April 2008): "This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public."*

I have made further enquiries as part of this review and I understand that the development work undertaken to date is not yet sufficiently advanced for Network Rail to decide on a course of action. At the time of this review, Network Rail has not reached a decision on how to proceed and no work to the level crossings has been committed. I consider that the issue is therefore still live because the issue is at the early stages of consideration. As Network Rail has not yet made a decision, it is important to allow safe space for further deliberation and consideration of the options.

In relation to regulation 12(4)(e) and the need for a 'safe space', the Information Commissioner supported a similar argument in one of his decision notices (FS50266169):

*'34. There is a need for a "safe space" to formulate policy, debate "live" issues", and reach decisions without being hindered by external comment and/or media involvement. The Commissioner's view is that, whilst part of the reason for needing a "safe space" is to allow free and frank debate, the need for a "safe space" exists regardless of any impact on the candour of debate of involved parties, which might result from a disclosure of information under FOIA. Several Tribunals have accepted as valid, public interest arguments about the loss of a safe space, specific to the policy debate to which the information relates. This is on the basis that:*

- there is a public interest in preserving a "safe space" for policy formulation, and*
- that to release information relating to a particular policy, whilst that same policy is still in its formulation and development stages might erode that "safe space".'<sup>2</sup>*

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<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2010/539714/FS\\_50266169.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2010/539714/FS_50266169.pdf)

I consider that these arguments apply in the current case, due to the timing of your request and the current situation in relation to Network Rail's current and ongoing consideration of options for the level crossings in Queen Adelaide.

### *Public Interest Test*

In relation to the public interest test in respect of regulation 12(4)(e), the Information Commissioner's guidance explains:

*'42. Although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision making processes.*

*43. This reflects the underlying rationale for the exception: that it protects a public authority's need for a 'private thinking space'. As set out above, this rationale was made clear in the proposal for the European Directive which the EIR are intended to implement.*

[...]

*48. Arguments about protecting internal deliberation and decision making processes will often relate to preserving a 'safe space' to debate issues away from external scrutiny, and preventing a 'chilling effect' on free and frank views in future. The weight of these factors will vary from case to case, depending on the timing of the request and the content and context of the particular information in question.'*

I have reviewed the requested information in the light of this guidance and on this basis, I consider that our response of 24 December 2015 correctly set out the factors in favour of disclosure and against disclosure. I therefore consider that the exception was correctly applied.

### Regulation 12(5)(e)

This regulation provides that:

*'12. (5) 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'*



The guidance issued by the Information Commissioner on 'Confidentiality of commercial or industrial information' explains that, for this exception to be engaged, the following elements must be fulfilled:

- *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.'*<sup>3</sup>

I consider that the information is commercial in nature because the information was created in order to consider possible options for alterations of the railway infrastructure. The work was informed by advice from external contractors, who carried out work on the basis of a commercial agreement with Network Rail. The requested information is not trivial and, at the time of your request and this internal review, was generally not in the public domain. The Information Commissioner's guidance explains that:

*'33. Public authorities will therefore need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors...'*

As indicated above, at the time of your request and at the time of this review, Network Rail had not made any decisions in relation to the level crossings in Queen Adelaide. I have concluded that disclosure of the information at the time of your request and at the time of this review would harm the legitimate economic interests of Network Rail. A reason for this is that future development of options for the level crossings is dependent on a commercial agreement being brokered with a suitable designer. As disclosure of information under EIR is effectively disclosure to the "world at large", this information could adversely affect a competitive process between suppliers bidding for the work.

#### *Public Interest Test*

I have reviewed our response of 24 December 2015 and consider that the response correctly set out the public interest factors in favour of disclosure and against disclosure.

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<sup>3</sup> See [https://ico.org.uk/media/for-organisations/documents/1624/eir\\_confidentiality\\_of\\_commercial\\_or\\_industrial\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf)

Regulation 12(4)(d)

In addition to the exceptions mentioned above, I consider that regulation 12(4)(d) also applies to the information. The regulation provides:

*'12.—(4) 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'*

The Information Commissioner's guidance explains that:

*'8. The fact that the exception refers to both **material** in the course of completion and unfinished **documents** implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy...'*<sup>4</sup>

I consider that Network Rail is currently in the process of formulating and developing its approach to the level crossings in Queen Adelaide. Network Rail uses a process called Governance for Railway Investment Projects (GRIP) to manage and control projects that enhance or renew the national rail network. GRIP divides a project into eight distinct stages. The overall approach is product rather than process driven, and within each stage an agreed set of products are delivered.<sup>5</sup> In this case, Network Rail has not yet selected a single option (stage 3 of the GRIP process) or submitted formal proposals for consideration for funding.

As you correctly stated in your request for an internal review, work to the Ely North junction has been postponed to Control Period 6, which will cover the period 2019-2024 – i.e. a period which will not commence for approximately three years. I therefore consider that the circumstances of the case are similar to those cited in two of the Information Commissioners' decision notices (FER0491258 and FER0569340), as the information relates to the formulation and development of Network Rail's position in relation to the level crossings in Queen Adelaide, a process which is likely to be ongoing for some time. In this case then, the requested information forms part of a continuing process and as such, is material in the course of completion.

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1637/eir\\_material\\_in\\_the\\_course\\_of\\_completion.pdf](https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf)

<sup>5</sup> <http://www.networkrail.co.uk/asp/4171.aspx>

### *Public interest test*

This exemption is subject to a public interest test. I consider the factors in favour of disclosure are that there is a general presumption in favour of openness and the accountability and transparency of public authorities' decision-making process. In addition, there is a general public interest in the Ely North Junction scheme and the options being considered by Network Rail.

However, it is important that, at this stage, no final decision has been made by Network Rail in relation to the level crossings, and the decision-making process is still ongoing. The Information Commissioner addresses these circumstances in his guidance, again highlighting the need for a 'safe space' at this time:

#### ***'Safe space and the timing of the request***

*15. A public authority may well produce the types of material described in regulation 12(4)(d) as part of the process by which it formulates policy and reaches decisions... In such cases the public authority may argue that it needs a 'safe space' in which to do this away from public scrutiny, and that disclosing this material would harm that safe space. This is an argument about protecting the integrity of the decision making process. Whether it carries any significant weight in the public interest test will depend very much on the timing of the request. If the process of formulating policy on the particular issue is still going on when the request is received, it may be that disclosure of drafts and unfinished documents at that stage would make it difficult to bring the process to a proper conclusion...'*

These factors are very relevant to the present case. As explained above, at the time of your request and at the time of this internal review, the GRIP process is ongoing; Network Rail has made no announcement in relation to the level crossings in Queen Adelaide and has not reached its final conclusions in relation to this matter.

I therefore consider that the strongest public interest is in preserving the safe space for Network Rail's consideration of options for the level crossings. Disclosure of the information at this time would be potentially misleading as Network Rail has not reached its final conclusions, and no decision has been taken regarding possible options for the crossings. On this occasion, the greater public interest lies in maintaining the 'safe space' in which Network Rail may continue to consider the options in order to reach a conclusion.