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22 August 2019

Dear J Davies

Information request

Reference number: FOI2019/00708

Thank you for your email of 26 June 2019, in which you requested the following information:

'I would like to know how much money has been spent to allow Network Rail to be able to close Pitmedden Level Crossing (Pitmedden Road) as part of their works in Dyce.

If possible please break this down to:

- Land Purchase Costs
- Property Purchase Costs
- Network Rail administration Costs
- Legal Costs (External)

Relevant legislation

I have processed your request under the Environmental Information Regulations 2004 (EIR) as the information requested is environmental according to the definition in regulation 2(c)¹ of the EIR (which refers to measures and activities affecting or likely to affect elements of the environment).

Summary of decision

I can confirm that we do hold the information relevant to your request. However, I am withholding this information from disclosure under regulations 12(5)(e) and 12(4)(d) of the EIR.

¹ Please note section 39 of the Freedom of Information Act 2000 (FOIA) exempts environmental information from the FOIA but requires us to consider it under the EIR.

I will explain more about each of these exceptions and consider the public interest factors for each exception below. In the interests of clarity, I will first set out why I believe each of the exceptions applies and then the public interest factors I have considered in reaching my decision.

Exceptions

Regulation 12(5)(e) - commercial confidentiality

Regulation 12(5)(e) of the EIR states:

'a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.'

The Information Commissioner's guidance sets out four requirements necessary for this exception to apply. These are:

1. The information is commercial or industrial in nature.
2. Confidentiality is provided by law.
3. The confidentiality is protecting a legitimate economic interest.
4. The confidentiality would be adversely affected by disclosure.

In this instance we are of the view that all four requirements are met because:

1. The information is commercial in nature because it relates to the purchase of land which constitutes a commercial transaction.
2. Confidentiality is provided by common law and negotiations are taking place with an agreed understanding of confidence. The information is not trivial in nature as it concerns payments for a major Network Rail scheme which is considered to be financially sensitive by the parties concerned. Additionally, the information is not in the public domain and has not been previously disclosed.
3. Confidentiality is protecting a legitimate economic interest because the requested information relates to live, ongoing matters and the request has been made at a time when negotiations are still current. Confidentiality is therefore required to protect Network Rail's commercial bargaining position. To explain, it is likely that Network Rail will need to negotiate similar agreements elsewhere on the railway network in the future. Disclosing the information in this case would allow third parties to adjust their negotiating position for future similar agreements and this would result in higher costs for any similar agreements elsewhere on the network. As Network Rail receives funding from taxpayers, any increased costs would result in greater demands on taxpayers' money. In addition, any increased costs would affect Network Rail's ability to maintain and renew the railway network within the funding limits determined by the Office of Rail and Road.
4. On consideration of the above comments I have concluded that disclosure of the withheld information would adversely affect the confidential nature of the documents. The ICO guidance provides that:

*"Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied."*²

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf
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Regulation 12(4)(d) - materials in the course of completion

In addition to regulation 12(5)(e), the information requested is also exempt under regulation 12(4)(d). Regulation 12(4)(d) of the EIRs can be applied when the request relates to material which is still in the course of completion, unfinished documents or incomplete data.

The Information Commissioner's guidance explains that examples of incomplete or unfinished documents can include the following:

'Material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete.'

In the case of your request, Network Rail is still in live and ongoing negotiations to purchase land adjacent to Pitmedden level crossing as part of our works in Dyce, which forms part of the Aberdeen to Inverness Improvement Project. The cost to purchase all land at Pitmedden has not yet been finalised and the project as a whole is not yet complete. Disclosure under EIR is ultimately a matter of timing and disclosing this information while negotiations are continuing would make it difficult to bring the process to a proper conclusion because all parties involved require a safe space to have open and frank discussions as well being able to explore different ideas and options without external scrutiny.

The public interest test

For all of the exceptions to the duty to provide information listed above, information can only be lawfully withheld if the balance of public interest favours doing so. I have considered the following factors to determine where the public interest lies:

There is a general presumption in favour of disclosure as it promotes openness, transparency and accountability. Regarding this request, there is a specific benefit to providing the information since to do so would be informative to those who currently own land which may need to be sold to Network Rail in order for us to be able to complete our works to upgrade the line.

Set against this, putting commercially confidential information into the public domain while negotiations are still ongoing would lead to our commercial bargaining position being undermined and would hinder us negotiating the best possible price for the public purse. This would reduce the competitiveness of the negotiations and also affect our reputation as a trustworthy commercial partner.

Additionally, disclosure of information material to a current negotiation would deny the safe space required by those taking decisions, which could potentially adversely affect their deliberations and have a detrimental effect on the overall outcome.

I consider that the greatest public interest lies in protecting the economic interests of public authorities legitimately engaging in commercial activities in order to deliver high quality improvements to public services. While we recognise the force of the arguments in favour of increased transparency and accountability, we are ultimately of the view that the public interest is best served by protecting our revenues (and taxpayers' money) and ensuring that we are able to operate commercial enterprises within the standard bounds of commercial confidentiality. This position is reinforced by the fact that a proportion of the information you have requested will eventually be published on Registers of Scotland (ROS) in accordance with standard land transaction procedures – this will go a significant distance to satisfying the interest in transparency outlined above.

In the coming months you may wish to check ROS here <https://www.ros.gov.uk/> for this information.

If you have any enquiries about this response, please contact me in the first instance at FOI@networkrail.co.uk or on 01908 782405. Details of your appeal rights are below.

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

Yours sincerely

Anisha Pandya
Information Officer

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Appeal Rights

If you are unhappy with the way your request has been handled and wish to make a complaint or request a review of our decision, please write to the Head of Freedom of Information at Network Rail, Freedom of Information, The Quadrant, Elder Gate, Milton Keynes, MK9 1EN, or by email at FOI@networkrail.co.uk. Your request must be submitted within 40 working days of receipt of this letter.

If you are not content with the outcome of the 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