



Mr Ryan Fox

By email:

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Dear Mr Fox

Civils Strategic Asset Management Solution (CSAMS) programme

Internal Review reference number: FOI2018/00386

Original request reference number: FOI2018/00261

I refer to your e-mail of 28 March 2018 which requested an internal review of the handling of your request for information made on 27 February 2018.

Issues on review

The purpose of the internal review procedure is to provide a fair, thorough and independent review of the handling of the applicant's request, and of decisions taken pursuant to the Environmental Information Regulations 2004 (EIR).

In this instance, your request for a review indicates that the EIR did not apply to the requested information and that regulation 12(4)(d) of the EIR did not apply to the information.

I will therefore consider:

- whether the information is 'environmental information' as defined in regulation 2 of EIR and, therefore, whether your request should have been processed under the EIR and/or FOIA;
- if the information is environmental information, whether regulation 12(4)(d) of the EIR applies to the information;

- if the information is environmental information, whether any other exceptions in the EIR apply.

I will consider each of these questions in turn in the Analysis section below. Due to the complexity of the subject matter, particularly concerning the definition of 'environmental information', I have tried to set out my considerations in some detail, and I have referred throughout to the guidance from the Information Commissioner which I have followed to reach my decision.

This reply is set out in the following sections:

- Request history;
- Decision: Summary
- Analysis –

Whether the information is environmental information;
 The CSAMS programme;
 Whether regulation 12(4)(d) applies to the information;
 Whether regulation 12(5)(e) applies to the information;
 Whether any exemptions in FOIA apply to the requested information

Request history

Your request was as follows:

'Freedom of Information request – CSAMS

Please could you tell me:

- 1) The cost to date of the CSAMS programme*
- 2) The projected delivery date of the CSAMS programme*
- 3) A copy of the latest plan for the CSAMS programme'*

Network Rail acknowledged your request on 2 March 2018 and explained that it was being processed under the Freedom of Information Act 2000 (FOIA)/the Environmental Information Regulations 2004 (EIR). Network Rail responded to your request on 28 March 2018 under the EIR and withheld the information under regulation 12(4)(d) of the EIR, which relates to material that is in the course of completion, unfinished documents or incomplete data.

Network Rail stated that the requested information was in draft form and subject to discussion within Network Rail and between Network Rail and third parties; i.e. the information related to an ongoing process (delivery of a programme of work) which has not yet reached a conclusion. The response stated that disclosure of the information prior to it being formally agreed would be misleading to the general public and – most importantly – negatively impact on the robustness of the ongoing process that is necessary for the development of this significant infrastructure programme.

In considering the public interest, Network Rail identified the factors in favour of disclosure as being a general presumption in favour of disclosure and that disclosure would demonstrate accountability and transparency about the considerations related to the CSAMS programme. The factors in favour of maintaining the exception were identified as protection of internal deliberation and decision-making processes and the need for preserving a 'safe space' to develop thinking away from external scrutiny. The response also identified that the timing of your request as relevant, due to the current nature of the CSAMS programme and ongoing considerations. Network Rail concluded that the balance of the public interest favoured maintaining the exception.

You replied on 28 March 2018 as follows:

'I would like to request an internal review in to the handling of my request as I do not believe that Network Rail have made a reasonable attempt to answer all elements of my request.

Item 1 in my request was "The cost to date of the CSAMS programme"

Network Rail cannot apply Regulation 12(4)(d) here as it is a request for factual information up to and including the date of my request. The cost to date of the CSAMS programme cannot be in draft, as either Network Rail has an accurate accounting of their programme costs to that date, or they do not. The status of the programme in question is irrelevant to item 1 of my request.

To illustrate my point, if I were requesting costing information of a business as usual operational nature I would not expect Network Rail to decline the request as operations never complete.

Would you also be able to set out the rationale for processing this request under the EIR?

The CSAMS programme itself will not have any direct effect on (as per 2(a) and 2(b)) "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", or "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);" and therefore I am not convinced section 2(c) applies. Any changes of this nature will be as a result of unrelated standard changes, not an IT transformation programme.'

On 29 March 2018, Network Rail acknowledged your request for an internal review.

Decision: Summary

I have concluded that:

- the information is 'environmental information' as defined in regulation 2 of the EIR; this is because case law indicates that 'environmental information' should be interpreted widely, with reference to the 'bigger picture' of the impact of a measure on the elements of the environment;
- regulation 12(4)(d) of the EIR (which relates to material in the course of completion, draft documents and incomplete data) applies to some of the information;
- in addition, regulation 12(5)(e) of the EIR (which relates to confidentiality of commercial or industrial information) applies to the information; and
- to the extent that the information is not environmental information, FOIA would apply to the information and the exemption under section 43(2) of FOIA applies to the information; this exemption applies to information where disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority itself).

Analysis

Whether the requested information is environmental information

I will first set out my considerations in respect of whether the EIRs apply. I should first note that guidance on the term 'environmental information' in the EIR indicates that it should be interpreted broadly. I will explain this in more detail below.

The EIR are derived from European law; they implement the European Council Directive 2003/4/CE on public access to environmental information in the UK. The source of the

EC Directive is an international agreement known as the Aarhus Convention.^{1 2 3} The document 'The Aarhus Convention: An Implementation Guide'⁴ identifies the broad scope of the term 'environmental information' :

'The clear intention of the drafters, however, was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation.'

The Information Commissioner's guidance on 'What is environmental information' also emphasises a broad interpretation of 'environmental information'.⁵ In relation to the definition in regulation 2, the guidance advises that:

'15. 'Any information' means environmental information covers any information about, concerning or relating to the various factors, elements and other items stated.'

16. Public authorities should interpret 'any information on' broadly. Information that would inform the public about matters affecting the environment or enable them to participate in decision making, and help to achieve that purpose is likely to be environmental information, even if the information itself does not directly mention the environment.'

17. The test that public authorities should apply is whether the information is on or about something falling within the definitions in regulations 2(1)(a)-(f), and not whether the information directly mentions the environment or any environmental matter.'

Decisions made by the Information Commissioner and tribunals indicate that the definition of 'measure or activity' in the EIR should be identified broadly; for example, correspondence about a planning application in decision notice⁶; assessment reports on

¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

² <http://ec.europa.eu/environment/aarhus/>

³ <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

⁴

https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

⁵ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

⁶ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014864/fer0666632.pdf>

HS2 ⁷; a housing options appraisal ⁸; an independent review of roll-out of smart meters ⁹; and inspection and management of highways. ¹⁰

The Information Commissioner's guidance goes on to apply the same broad interpretation to its discussion of information about 'measures':

'Information about a measure or activity is environmental information if the measure or activity:

- affects or is likely to affect the elements of the environment;*
- affects or is likely to affect a factor affecting or likely to affect an element of the environment; or*
- is designed to protect the elements of the environment.*

The effect need not be detrimental or large scale; it may be small and beneficial. "Affecting" can be assessed by reference to the balance of probabilities; "likely to affect" suggests a lower test, but it must be more substantial than a remote possibility.

Although there are a number of examples in the EIR to help identify measures, there are no examples of what would be an activity. There would appear to be no reason to limit the normal use of the word. "Information on activities likely to affect the elements of the environment" suggests a very broad category of environmental information.'

The Information Commissioner's guidance also advises that:

'39. Again the regulation gives 'such as' examples of measures or administrative measures: policies, legislation, plans, programmes and environmental agreements. This covers a broad range, and will include steps taken to ensure something happens and the methods, processes or instruments used to implement the measure.

[...]

⁷ <https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1625559/fer0641545.pdf>

⁸ https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1624501/fs_50621014.pdf

⁹ http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1449/24-12-14_Decision%20EA-2014-0103.pdf

¹⁰ <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2172554/fer0659853.pdf>

42. It can sometimes be difficult to decide which parts of large projects fall within this definition. It is often clear that the main project itself constitutes a measure that will affect the environment: eg building a bridge. Questions often arise when sub-projects or connected projects are considered as separate projects or measures, eg IT projects. Is the information on these projects information on the overall measure and therefore environmental information? The key test in this situation is how integral the additional project or measure is to the overall measure; eg if an IT system was integral to an automatic floodgate system, then this would still be information about the measure of the floodgate system...”

A number of decisions by tribunals confirm this broad interpretation of the meaning of ‘environmental information’ and measures or activities which affecting or likely to affect the elements of the environment as defined in EIR.

For example, in *Omagh District Council v Information Commissioner* (EA/2010/0163, 20 May 2011¹¹), the Tribunal decided that ‘environmental information’ included the names of individuals involved in making a decision about the location of a memorial on Council-owned land. In *Rudd v Information Commissioner and The Verderers of the New Forest* (EA/2008/0020, 29 September 2008), the Tribunal concluded that ‘environmental information’ included a request for correspondence about the Countryside Stewardship Scheme, which provided an annual payment in relation to animals grazing in the New Forest.¹²

In *Mersey Tunnel Users Association (MTUA) v Information Commissioner and Halton Borough Council* (EA/2009/0001, 24 June 2009), the MTUA had requested information about a proposal to introduce tolling on an existing bridge and a proposed bridge across the River Mersey. Although the mechanism of tolling may initially not appear to have a direct link to the environment, in this case due to the circumstances and wider context of the project, the Tribunal agreed that tolling information fell within the definition of ‘environmental information’. The Tribunal agreed at paragraph 69 that tolling information fell within the definition of a measure in regulation 2(1)(c) of the EIR because:

‘...there is no dispute that the Mersey Gateway Project will have a significant impact on the state of elements of the environment, such as, at least, the land and the

¹¹

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i521/20110520%20Decision%20EA20100163.pdf>

¹²

[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i254/J%20Rudd%20v%20ICO%20%20Verderers%20of%20New%20Forest%20\(EA-2008-0020%20%5BFER0148337%5D\)%20Decision%2029-09-08.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i254/J%20Rudd%20v%20ICO%20%20Verderers%20of%20New%20Forest%20(EA-2008-0020%20%5BFER0148337%5D)%20Decision%2029-09-08.pdf)

landscape, and on factors such as emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to...

The decision by the Upper Tribunal (Administrative Appeals Tribunal) in 2015 UKUT 671 AAC¹³ related to a request for information about a review of the roll-out of smart meters. At paragraph 92 of the decision, the tribunal stated that when deciding whether information is 'environmental information', it is permissible to consider the 'bigger picture' in deciding whether the information is environmental information. In that case, the tribunal concluded that the information was 'environmental information' as defined in the EIR because the smart meters programme would have an impact on energy policy and the environment (for example, carbon dioxide emissions created in power generation).

The examples above confirm that the terms 'environmental information' and 'measures' have a broad interpretation; furthermore, these terms can include information such as a viability assessment in connection with a housing development (see *London Borough of Southwark v Information Commissioner and Lend Lease*, EA/2013/0162¹⁴) and reports about the acquisition of a property next to a school (see decision notice FER0595460¹⁵).

The next section of this discusses the nature of the CSAMS programme.

The CSAMS programme

The CSAMS programme is a systems integration programme, under which information from existing systems will be transferred into a new system, including information such as defect history; work history; examination reports and structural assessments; and incident responses. The programme focuses on civils assets on the railway network, such as embankments; culverts; coastal defences; tunnels and mines; bridges; retaining walls; and ancillary structures such as signal posts and gantries for overhead lines. CSAMS aims to consolidate the many systems that are currently used for the management of civils assets and support enhanced planning in relation to these assets, for example enabling engineers to determine a maintenance policy which is best aligned to business options, moving to a 'predict and prevent' methodology for maintenance rather than 'find and fix'.

¹³ <http://administrativeappeals.decisions.tribunals.gov.uk/judgmentfiles/j4735/GIA%200804%202015-00.doc>

¹⁴ [http://informationrights.decisions.tribunals.gov.uk/dbfiles/decision/i1279/london%20borough%20of%20southwark%20ea.2013.0162%20\(09.05.14\).pdf](http://informationrights.decisions.tribunals.gov.uk/dbfiles/decision/i1279/london%20borough%20of%20southwark%20ea.2013.0162%20(09.05.14).pdf)

¹⁵ <https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1623633/fer0595460.pdf>

In this case, I consider that the information requested concerns the delivery of a project which will effect the elements of the environment as defined in the EIR. I consider that the CSAMS programme meets the definition of a measure given in regulation 2(1)(c) of the EIR because:

1. CSAMS is intended to improve civil asset management (management of bridges, tunnels and mines, retaining walls, culverts, coastal defences, embankments and ancillary structures such as signal posts and gantries).
2. Delivery of the CSAMS programme would affect Network Rail's management of assets - moving from 'find and fix' approach to faults to 'predict and prevent'.
3. The civil assets are composed of elements of the environment, or interact with elements of the environment as defined in the EIR – for example, railway embankments are composed of soil; culverts transport water; coastal defences prevent flooding. Management of other assets – for example, gantries, tunnels, retaining walls and bridges – may affect the landscape, which is an element of the environment as defined in the EIR (for example, if part of a bridge has to be re-built, or a new gantry installed).

This project therefore effects the environment and the requested information about the delivery of the project relates to measures and activities affecting, or likely to affect, the elements of the environment.

I also consider that information about the CSAMS programme falls within the definition in regulation 2(1)(f) of the EIR because it relates to a programme concerning Network Rail's inspection and management of civil assets to ensure that they are safe. Regulation 2(1)(f) provides that environmental information includes (emphasis added):

*'(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);'*

The Information Commissioner's guidance on 'What is environmental information' gives the following example of information which would fall under regulation 2(1)(f):

'Information on how a building has been affected by subsidence of the land it stands on is environmental information. This is because it is information on the state of a built structure inasmuch as it is affected by the state of the land, as an element of the environment.'

I therefore consider that, as the CSAMS programme relates to management of civil assets and how those assets have been affected by the state of the elements of the environment, the requested information also falls within regulation 2(1)(f) of the definition of environmental information.

As the requested information is environmental information, the next section of this letter considers whether regulation 12(4)(d) applies to the information.

Whether regulation 12(4)(d) applies to the information

It may be helpful if I first explain that prior to your request, the company contracted for delivery of the CSAMS programme had submitted a revised programme plan to Network Rail. At the time of your request, the revised programme plan was the subject of continuing discussion within Network Rail and between Network Rail and the company and had not been agreed.

Regulation 12(4)(d) of the EIR provides that:

*‘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 has published guidance on the regulation ¹⁶ which explains that:

‘Material which is still in the course of completion

*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.*

[...]

The need for public authorities to have a ‘thinking space’ for policy development was recognised in the original proposal for the Directive on public access to

¹⁶ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

environmental information, which the EIR implement. The proposal explained the rationale for both this exception and the exception for internal communications:

“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 material in the course of completion or internal communications. In each such case, the public interest served by the disclosure of such information should be taken into account.” (Explanatory memorandum to COM/2000/0402 final)’

In this case, at the time of your request, the revised programme plan for CSAMS – which includes a revised project delivery date – was in draft form and subject to discussion between Network Rail and relevant third parties; the programme plan and delivery date have not yet been agreed. I therefore consider that it is appropriate to apply regulation 12(4)(d) to the information sought in parts 2 and 3 of your request (i.e. the projected delivery date of the CSAMS programme and a copy of the latest plan for the CSAMS programme).

I consider that this position is supported by the Information Commissioner’s decision notice FER0668007 ¹⁷, where the Information Commissioner stated that:

‘...She accepts the principle that there is often a value in a public authority being able to develop a project in private. In order to explore all available options it may be necessary to look at many alternatives, some of which may be radical or impractical and be dismissed as other information is gathered or other options proposed. Nevertheless it is necessary to explore these options in order to ensure the final plans represent the best way forward. To make information on early options public could hinder proper consideration of later options and the full array of options. It is reasonable to allow a public authority time to develop its thinking to a stage where its proposals are more firm and dependable before it is placed in front of the public for scrutiny.’

To assist, I can provide the following further information about the status of the project. On 27 March 2018, Network Rail published its Safety, Health & Environment Performance (SHEP) Report for period 12 of the 2017-18 financial year.^{18 19} This report includes a section on CSAMS as follows:

¹⁷ <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2014429/fer0668007.pdf>

¹⁸ A period is a 28-day period which is used by Network Rail for operational and reporting purposes; there are 13 periods in a calendar year.

¹⁹ <https://safety.networkrail.co.uk/wp-content/uploads/2016/03/201718-P12-National-SHEP-Reduced.pdf>

- *“MS0966 – ORBIS CSAMS – Asset hierarchies established and Ellipse designated as master system for civils” milestone is currently shown as ‘tbc’ as no revised forecast date is currently available for delivery. Significant supply chain difficulties are being worked on by ORBIS, prior to re-baselining. CSAMS for Structures is currently on pause while the Professional Head (Structures) carries out a full review with the programme team of the delivered product. Checks for compatibility with the design intent will be carried out to allow a new programme to be put together however this is likely to involve some reduction in scope. There is an indicative date for go live of April 2019 however this remains to be confirmed by the Professional Head community. The Programme Director is providing regular updates to the steering board regarding progress in resolving the supply chain challenges concerning CSAMS and articulating the remaining risks to its delivery.;*

The applicability of regulation 12(4)(d) to part 1 of your request, for the cost of work done, is less clear cut. I consider that this information is complete and finite; while aspects of the programme are still subject to change, and it is accepted that the cost of work done will change at future points in time, this does not change the cost of work done at the point in time when your request was made. However, I do consider that other exceptions may apply to this and other parts of your request, and I will consider this in the next section.

Whether regulation 12(5)(e) applies to the information

Regulation 12(5)(e) of the EIR 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 Information Commissioner’s guidance on the regulation ²⁰ advises that:

‘9. The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality.

10. The exception can be broken down into a four-stage test, which was adopted by the Information Rights Tribunal in Bristol City Council v Information Commissioner

²⁰ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

and Portland and Brunswick Squares Association (EA/2010/0012, 24 May 2010). All four elements are required in order for the exception to be engaged:

- ☐ *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.'*

In this case, I consider that regulation 12(5)(e) applies to the information sought in each of the three parts of your request. This is because the information relates to the delivery of an IT programme under contract between Network Rail and a commercial company.

The following sets out my considerations for each stage of the test.

For the first stage, I agree that the information is commercial in nature as it relates to a programme being carried out by a commercial company under contract to Network Rail.

Moving to the second stage, the Information Commissioner's guidance provides that there is no need for public authorities to have obtained the information from another party. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. In this case, the programme plan and projected delivery date for CSAMS was created by a third party and provided to Network Rail, while the cost of the programme was created by Network Rail.

For this case, I have considered whether the confidentiality is provided by the common law of confidence. The Information Commissioner's guidance explains that the key factors are whether the information has the necessary quality of confidence, and whether the information was shared in circumstances creating an obligation of confidence:

- *Does the information have the necessary quality of confidence? This will involve confirming that the information is not trivial and is not in the public domain. Information may still keep its quality of confidence if it has been shared with a limited number of people, as long as it has not been disseminated to the general public. It is also possible for information to keep its quality of confidence even if it is all in the public domain, if it would take time and effort to find and collate it from multiple sources.*
- *Was the information shared (or provided to employees) in circumstances creating an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information. A useful test is to*

consider whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.

In this case, the contract between Network Rail and the company which is delivering the CSAMS programme includes provisions in relation to confidentiality and information relating to the CSAMS programme plan is marked as confidential. I also consider that there would be an implicit expectation that a draft programme plan and projected delivery date would be treated in confidence and not disclosed to 'the world' under the EIR and/or FOIA. In this case, I consider that the programme plan has been shared between Network Rail and the company which is delivering the CSAMS programme with an explicit understanding that the information should be treated as confidential. I also note that the information is not trivial, and is not in the public domain. I therefore conclude that the common law of confidence applies, and that this meets the requirements of the second stage of the test.

The third stage of the test requires that the confidentiality is protecting a legitimate economic interest. The Commissioner's guidance explains that:

'32. ...to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.'

In order to satisfy this stage of the test, it is necessary to consider the sensitivity of the information at the date of the request and, particularly, the nature of any harm that would be caused by disclosure. This is very closely related to the fourth stage of the test, which focuses on whether confidentiality would be adversely affected by disclosure. The Commissioner's guidance explains this close relationship:

'... once the first three elements are established the Commissioner considers it is inevitable that [the fourth] element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified.'

Therefore, as both the third and fourth stages of the test require consideration of the 'harm' in disclosure, I will discuss these stages together.

To identify if disclosure would cause harm, I have made enquiries with business experts within Network Rail to seek their views. At the time of your request, the CSAMS programme plan had been put forward by the company delivering the programme and this plan was the subject of discussion within Network Rail and between Network Rail and third parties; i.e. the information related to current and live discussions about delivery of the programme and these discussions had not yet reached a conclusion. I therefore

consider that, at the time of your request, disclosure of the programme plan and projected delivery date would harm the commercial interests of Network Rail because the programme plan and delivery date had not yet been agreed by the parties concerned and these discussions were being conducted in confidence. I consider that third parties would be deterred from tendering for future work with us, if they believed that delivery plans or work programmes would be disclosed to 'the world' under EIR, prior to discussion and formal agreement with Network Rail and where these delivery plans or work programmes were provided with an implicit or explicit understanding that the information would be treated in confidence.

Additionally, when Network Rail advertised the tender for the CSAMS programme a number of companies submitted proposals. Network Rail anticipates going to tender for other systems integration programmes in future; I consider that it is likely that disclosing the requested information would provide an unfair advantage to any third party seeking to prepare pricing information or programme plans for other systems integration work, as the programme plan and delivery date would reveal how the company delivering the CSAMS programme had approached that programme. I consider it is likely that third parties would adjust their approach to future tenders, thus impairing the integrity of the tendering process.

On this basis, I consider that sufficient harm has been identified to support the conclusion that the confidentiality of this information is protecting a legitimate economic interest, and that the confidentiality would be adversely affected by disclosure. I therefore consider that regulation 12(5)(e) is engaged for the information in all three parts of your request.

Public interest test

The exceptions under regulation 12(4)(d) and regulation 12(5)(e) are subject to consideration of a public interest test. I consider that the factors in favour of disclosure are that the information would provide a degree of insight and transparency into the CSAMS programme and spending by Network Rail on a programme which will deliver one of the regulated outputs set by the Office of Rail and Road, which regulates Network Rail and holds it to account.

I consider that the factors in favour of withholding the information are that, at the time of your request, the information was subject to discussion between the company delivering the programme and Network Rail and agreement had not yet been reached on the planned delivery date and programme plan. The Information Commissioner's guidance on regulation 12(4)(d) highlights that the timing of a request is particularly important when considering the public interest:

'Safe space and 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. 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.'

In decision notice FER0668007, the Information Commissioner stated that ²¹:

'...She accepts the principle that there is often a value in a public authority being able to develop a project in private. In order to explore all available options it may be necessary to look at many alternatives, some of which may be radical or impractical and be dismissed as other information is gathered or other options proposed. Nevertheless it is necessary to explore these options in order to ensure the final plans represent the best way forward. To make information on early options public could hinder proper consideration of later options and the full array of options. It is reasonable to allow a public authority time to develop its thinking to a stage where its proposals are more firm and dependable before it is placed in front of the public for scrutiny.'

In this case, I consider that if Network Rail were to disclose a programme plan which had not yet been agreed with the company delivering the programme and where the necessary quality of confidence applied to the information, it is likely that this would harm the working relationship between Network Rail and a third party and would hinder proper consideration and agreement of the programme plan.

In addition, I consider that disclosing the requested information would be misleading. The Information Commissioner's guidance explains that:

'20. The argument [that information could be misleading] would only carry some weight if the information would create a misleading or inaccurate impression and there were particular circumstances that would mean it would be difficult or require a disproportionate effort to correct this impression or provide an explanation....'

²¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014429/fer0668007.pdf>

As explained above, as the programme plan was subject to discussion and agreement between Network Rail and the company which is delivering CSAMS, I consider that providing suitable context and explanation would require a disproportionate effort as, at the time of your request, the programme plan has not been formally agreed and is subject to ongoing discussion and agreement between Network Rail and its supplier.

Furthermore, as previously mentioned, the CSAMS programme aims to deliver one of the regulated outputs set by the Office of Rail and Road (ORR). As our regulator, it is part of the ORR's role to hold Network Rail to account. Consequently, I consider that the scrutiny of the programme by the ORR as part of its Network Rail Monitor²² reduces the public interest in disclosing the requested information. The Network Rail Monitor is published twice a year, reviewing performance for two quarters of each financial year.²³

I therefore consider that regulation 12(4)(b) applies to parts 2 and 3 of your request, that regulation 12(5)(e) applies to all three parts, and that the requested information should be withheld at this time.

I hope that this further explanation is helpful.

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.

²² For example, the ORR's Network Rail Monitor on 4 December 2017:
http://orr.gov.uk/_data/assets/pdf_file/0005/26159/network-rail-monitor-2017-18-q1-2.pdf

²³ <http://orr.gov.uk/rail/economic-regulation/regulation-of-network-rail/monitoring-performance/network-rail-monitor>