



Department for Transport

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By e-mail

19 October 2017

To: Joe Rukin

<request-421642-984c6feb@whatdotheyknow.com>
<request-421643-02201a20@whatdotheyknow.com>
<request-421641-6c864116@whatdotheyknow.com>

Dear Mr Rukin

Re: FOI Request F015048 - Internal Review

I am writing in response to your emails of 22 September 2017 in which you requested an internal review of the Department for Transport's (DfT) handling of your requests for information. This review will look at whether those requests were handled in compliance with the requirements of the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIRs). I have conducted this review as a member of the Department's Information and Security Division who was not involved in the original consideration of your request and my findings are set out below.

Background

On 28 July 2017, you made three information requests for the following information:

- all redacted parts of original HS2 Development Agreement, as signed on 8th December 2014;
- all redacted parts of the HS2 Development Agreement, as amended on 17th July 2017; and
- part One of Annex 4 of the HS2 Development Agreement, titled 'Baseline delivery schedule for Phase One', as amended on 17th July 2017.

On 25 August 2017, DfT responded to your request as follows:

I have considered your request for the publication of all redacted parts of the HS2 Development Agreement signed in 2014 and the subsequent version (updated in 2017), including the 'Baseline Delivery Schedule for Phase One'. Following this request, I am disclosing Annex 6 to the Development Agreement (2014 version), the "Non-Routine Advice and Policy Support Functions Table". This Annex was previously redacted from the Development Agreement when it was published in December 2014, on the basis of section 35 (Formulation of Government Policy etc.) of the FOIA and 12(4)(d) (incomplete material) of the EIR. However, this is no longer the case, therefore I have attached this as Annex A to this letter.

The following sections of the Development Agreement that you have requested to be published are being withheld in reliance on the exemption in section 43(2) (Commercial Interests) of the FOIA because publishing such information would prejudice the commercial interests of the Department for Transport and HS2 Ltd (and ultimately the taxpayer):

- *Budget Envelope Definition (2017 version only)*
- *Protective Provisions Agreements*
- *Baseline Delivery Schedule for Phase One*
- *Baseline Cost Model for Phase One*
- *Budget Envelopes and Target Prices (2017 version only)*
- *Operational Delegations Letter*

Alternatively, should this information be considered environmental information under the EIRs, this information is being withheld in reliance on the exception at regulation 12(5)(e) (commercial confidentiality) of the EIRs. These exemptions / exceptions require a public interest test to be conducted.

The response went on to explain DfT's complaints procedure and included two annexes – one in which information was disclosed and another in which public interest tests were set out in relation to the qualified exemptions applied in relation to your request.

On 21 September 2017, you sent three emails requesting an internal review of your requests. You requested that the internal review be carried out under both FOIA and EIRs and referred to Tribunal decisions Ewing/Rukin (No. 2) EA/2016/0278 and EA/2017/0001. As confirmed above, this review will consider the request under both sets of legislation.

In a further email of 15 October 2017, you requested an internal review for a second time and stated that the following part of your request for 'Part One of Annex 4 of the HS2 Development Agreement' had been missed by DfT in its original response.

Timeliness

Section 10(1) FOIA states that, in most circumstances, authorities must respond to requests 'promptly, and by the twentieth working day following the date of receipt of the request'. Regulation 5(2) EIRs similarly obliges information to be provided 'as soon as possible and no later than 20 working days after the date of receipt of the request'.

Your request was received on 28 July 2017 and responded to on 25 August 2017. I am therefore satisfied that your request was responded to in a timely manner and in line with the requirements of both sets of legislation.

Exemptions applied

Section 43(2) FOIA and Regulation 12(5)(e) EIRs

The exemption at section 43(2) FOIA applies to information whose disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The exception at regulation 12(5)(e) applies to information whose disclosure would adversely affect 'the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest'.

I will consider these two provisions in tandem as the public interest test that applies is relevant to both information access regimes.

In its response of 25 August 2017, DfT set out the following arguments as part of its public interest test:

Public interest test factors for disclosure

The factors in favour of publishing the redacted parts of the Development Agreement are that this would:

- *Promote accountability and transparency in the spending of public money. Releasing detailed cost and schedule would reassure the public that tight controls are being placed on the programme and that it is on a trajectory to be completed within the overall budget allocation and on time.*
- *Reassure the public that the DfT promotes accountability and transparency for decisions that it takes and that the Development Agreement does not include any information that contradicts recent announcements.*
- *Promote accountability and transparency of HS2 Ltd.*

Public interest test factors against disclosure

The factors against publishing the redacted parts of the Development Agreement concern the effect of disclosure of commercially sensitive confidential information:

- *Detailed cost and schedule information is redacted as the construction of the railway and delivery of the rolling stock will be undertaken by private suppliers, to be determined by competitive procurements, some of which are underway for Phase One. The HS2 Development Agreement contains the Department for Transport and HS2 Ltd.'s view of the cost of various assets and delivery schedule which has been developed for planning purposes. Releasing this information to the market could affect the outcome of this procurement by causing suppliers to adjust their bids. The best value for money for the tax payer is achieved when cost and schedule are determined as the outcome of competitive process.*
- *Publishing the risk provision and annualised budgets would allow the market to understand how much contingency is held by the Department and HS2 Ltd. Some of the procurements, such as the Main Works Civils Contracts, are two stage contracts such that the winning bidder conducts design work before a Target Price is formally agreed. Releasing information on how much contingency is held could affect the incentives on suppliers to realise efficiencies and bear down on costs.*

I have consulted with the relevant policy officials and they have confirmed that your request for 'Part One of Annex 4 of the HS2 Development Agreement' was refused under this exemption. This information was described as follows in DfT's response:

- *Baseline Delivery Schedule for Phase One*
- *Baseline Cost Model for Phase One*

In reaching my decision, I have reviewed the DfT's response to your request and the information which has been withheld from you. I have also taken into account the fact that

in its response to you, DfT disclosed information which it decided no longer attracted the exemption at section 35 FOIA and the exception at regulation 12(4)(d) EIRs. I have also considered the views of both DfT and HS2 on the potential effects of disclosure on their commercial interests.

I have reviewed the information which was withheld from you and am satisfied that the section 43(2) FOIA exemption and regulation 12(5)(e) EIRs exception are engaged in relation to it. I will therefore go on to consider the public interest test.

In addition to those arguments set out in DfT's response of 25 August, I can confirm that the following additional arguments apply to the public interest test, which weigh in favour of non-disclosure:

- During construction of the railway various third parties will be affected by the construction works. Where appropriate, the Secretary of State has entered into Protective Provisions Agreements with affected third parties. Informing the market of who we have, and have not, entered into these agreements with may affect the commercial position of those companies we have not yet entered into an agreement with.
- Publishing a detailed breakdown of HS2 Ltd's operational delegations from DfT would reveal information to the marketplace about the negotiating position of HS2 Ltd. Suppliers could use this to inform their bids during the procurement process. This would not allow bids to be competitively assessed and tested to ensure value for money was obtained for the public purse. This is likely to result in increased expenditure of taxpayer's money during the procurement process.

The commercial interests which risk being prejudiced here belong to DfT and HS2, but also those private suppliers with which they are currently negotiating, and those they may negotiate with in the future. The argument that disclosure could increase overall costs, and so result in additional expense to the taxpayer, is a convincing one and key to the balance of public interest weighing in favour of non-disclosure. I am satisfied that the disclosure of the requested information would be likely to prejudice the commercial interests of one or more party.

Furthermore, I am satisfied that the confidentiality of the information requested is protecting a legitimate public interest. The redacted information is commercial in nature as it relates to a commercial activity of HS2 Ltd. This information is contained within the Development Agreement, a contract between the Department and HS2 Ltd, and so imposes a contractual obligation. It is information provided by the Department in the Agreement and would fall within paragraph (B) of the definition of confidential information. It is information that ought reasonably to be considered to be confidential (whether or not so marked) which comes to HS2 Ltd in connection with the Agreement.

DfT takes the view that this information has the necessary quality of confidence. It is commercial information which underlays the funding arrangements for the delivery of the railway and so is not to be regarded as being trivial. In redacting the information from the published version of the Agreement, DfT has ensured the information is not in the public domain. It is DfT's view that this information is caught by the confidentiality provisions contained in clause 34 and so creates an explicit obligation of confidence. The confidentiality protects a legitimate economic interest in relation to the position of HS2 Ltd in the commercial market and its negotiation position within that market. The public interest in maintaining the confidentiality of this commercial information is that disclosure would affect the ability of HS2 Ltd to operate effectively within the commercial market place to

ensure the effective delivery of the project within its designated funding envelope, so protecting the public purse.

In taking all the above into account, I maintain the application of the section 43(2) FOIA exemption and regulation 12(5)(e) EIRs exception in this case.

Conclusion

For the reasons set out above, I have concluded that your information requests were dealt with in a legally compliant manner. I do not uphold this complaint.

If you are not content with the outcome of this internal review, you have the right to apply to the Information Commissioner for a decision. The contact details are:

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

Yours sincerely

Aimee Gasston
FOI Advice Manager