



Network Rail
Freedom of Information
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Mr P Barker

By email: [REDACTED]

11 February 2016

Dear Mr Barker

Internal review reference: FOI2015/01289

Original request reference: FOI2015/00665

I am writing in response to your email of 11 December 2015, where you asked for an internal review of the handling of your information request FOI2015/00665.

I have separated the review into two sections: the first sets out the history of the request; the second part contains my decision in this case.

Request history

On 27 July 2015, you made the following request:

"As discussed please consider this under freedom of information act.

We had a meeting in Rye town hall in March with network rail. They a detail plan and cost analysis was under way to run javelin services from ashford in kent to bexhill in east sussex.

This would mean total electrification of marshlink line (Ore to Ashford) upgraded signaling and points changes at ashford to connect to HS1 train line.

Plesse publish on web as much information on costs and timescales for this project on web.

Can I have detail plan and costs for project to electrify Ore to Ashford. Tto enable javelin trains to to travel down this section of track."

Network Rail logged this request as FOI2015/00628 and responded on 3 August 2015, seeking further clarification of the information you were requesting. In this

response, Network Rail advised that *“you could limit your request to reports, cost breakdowns, risk assessments or risk analysis, or pre-feasibility studies.”*

You replied on the same day:

“Please limit my request to to reports, cost breakdowns, risk assessments or risk analysis, or pre-feasibility studies.”

This request was logged as FOI2015/00665.

Network Rail interpreted the request as asking for any reports, cost breakdowns, risk assessments, risk analyses and pre-feasibility studies which concerned the subject of the electrification of the Marshlink line from Ore to Ashford, to enable high speed Javelin services to run from Ashford in Kent to Bexhill in East Sussex.

Network Rail’s response confirmed that the requested information was held, but refused to provide the information:

“However, this information is exempt from disclosure under section 36(2)(b)(i),(ii) and (c) of the FOIA. To the extent that some of the information requested is environmental information, we are also withholding it under regulations 12(4)(d) of the Environmental Information Regulations 2004 (EIR).”

You appealed against this decision on 11 December 2015:

“I would like to appeal this on grounds that reasonable person should not be link to current government.

The decision should be made by some one independent of current government and having no political agenda.”

I contacted you by telephone to discuss the scope of the internal review and wrote to you on 25 January 2016 to confirm the points that the review would be able to look at:

“As we discussed on the telephone, the Qualified Person is identified in the FOI Act itself, so I will not be able to address that point; however, I will be able to look at whether the process for seeking the Qualified Person’s opinion was followed correctly, and I will review the factors that were considered in the public interest test for the section 36 exemption. I will also be able to conduct a review of regulation 12(4)(d) which was also applied to the environmental information.”

Decision

I have now reviewed the requested information and considered the circumstances and factors relevant to this case.

It is my view that all of the requested information is environmental, and that your request should have been dealt with under the Environmental Information Regulations (EIR) rather than under FOIA. I now confirm that exceptions under EIR apply to the requested information, and that it is correct to withhold the information at this time. I will explain the reasons for this below.

Environmental information

Network Rail's response to you had indicated that some of the requested information was environmental information. The first point that I have considered is whether all of the information you have requested falls within the definition of 'environmental information'; regulation 2(1)(c) of the Environmental Information Regulations defines environmental information as *"measures...such as policies, legislation, plans, programmes...and activities affecting or likely to affect" the state of the elements of the environment.*

In this case, the requested information concerns Network Rail's preliminary consideration of the options for future improvements to a part of the railway network; information which is about the management and planning of enhancements to the railway infrastructure falls within the definition of measures which will or will be likely to affect the environment. I therefore consider that all of the information you are seeking is environmental. To reach this decision, I have followed the Information Commissioner's guidance on environmental information¹ and considered a number of the Commissioner's decisions in previous cases concerning similar requests.²

When the requested information is environmental, the request cannot be dealt with under FOIA, it can only be dealt with under the Environmental Information Regulations. As all of the information you have requested concerns the same subject, all of the information should be considered under the Environmental Information Regulations.

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

This means that the section 36 exemption under FOIA no longer applies. However, Network Rail's response also applied regulation 12(4)(d) to the part of the information that it considered to be environmental. Regulation 12(4)(d) can be applied when the request relates to material that is in the course of completion, unfinished documents or incomplete data.³ The Information Commissioner's guidance explains that *"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."* I should explain here that many of the factors which are relevant to the section 36 exemption are also relevant to regulation 12(4)(d). This is because section 36 and regulation 12(4)(d) are very similar and are both used to protect information in particular circumstances when the requested information is part of a process for formulating and developing policy, and when that process is ongoing at the time of the request.⁴

¹ <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/what-are-the-eir/>
'Is the information 'environmental information'?' For more detailed guidance, please see https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

² See, for example, https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1043543/fer_0536325.pdf

³ The Information Commissioner's guidance on this exception can be found on this link:
https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

⁴ The Information Commissioner has considered several cases where a public authority initially applied section 36, but the Commissioner decided that the information was environmental and that regulation 12(4)(d) applied because the information was material in the course of completion or unfinished material:
https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1560197/fs_50582869.pdf

I have therefore looked at whether this exception should be applied to all the requested information in this case.

As I mentioned earlier, the information that you have requested forms part of Network Rail's preliminary work on the options for future improvements to a part of the railway network. The information is part of the Kent Route Study; this is one of a series of Route Studies that Network Rail is conducting as part of our Long Term Planning Process (LTPP).⁵ This Route Study will examine priorities across the Kent network and will examine options to extend the high speed rail network to Hastings alongside other rail solutions. Network Rail is currently in the process of formulating the options for this Study.

The addition of the proposal to extend the high speed rail network to Hastings via Ashford to the Kent Route Study was announced in the Budget in July 2015; this announcement also set out the time scale for the Study:⁶

"The Department for Transport has asked the rail industry to include extending High Speed 1 services to Hastings and Rye in the forthcoming Kent Route Study. The outputs from this study will be presented to the government for consideration in 2016, with a view to this work being an option for funding after 2019".

At the time of your request and at the present time, the information held by Network Rail consists of our initial scoping of the options and our preliminary work on the feasibility of these options. This is the very first stage in the Study and work on the Study will continue for some time to come. At this time, we anticipate that a draft for consultation purposes will be published in autumn 2016 and a final document in spring 2017, following agreement from all parties concerned.⁷ It is important to stress that no decisions have been taken at the present time and even when it is complete, the Kent Route Study will not 'make a decision' about what options may go forward; rather, once Network Rail's Study is completed later in 2016, it will then be presented to the Department for Transport for consideration.

On this basis, I consider that the information you have requested is material still in the course of completion, and that regulation 12(4)(d) applies. This is because the requested information consists of the initial analysis and preliminary considerations undertaken by Network Rail to date; these considerations have not been completed and this work is still ongoing.

Regulation 12(4)(e) – internal communications

https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1431869/fer_0573801.pdf

⁵ Further information on Network Rail's Long Term Planning Process can be found on our website: <http://www.networkrail.co.uk/Long-Term-Planning-Process/>

Route Studies are published here when they are complete: <http://www.networkrail.co.uk/long-term-planning-process/route-studies/>

⁶ The process was also explained in a speech by Claire Perry MP at the Hastings Rail Summit in January 2015: "Network Rail is including the proposal as part of its Kent route study. The study will influence the rail industry's advice to the government on future spending priorities. And when the government has received that advice, we can decide the best way forward." <https://www.gov.uk/government/speeches/hastings-rail-summit>

⁷ Please note that at this early stage, these timings remain provisional.

I have also considered whether regulation 12(4)(e) – the exception for ‘internal communications’ – also applies to the requested information. As mentioned above, Network Rail has not yet completed the Kent Route Study for presentation to the Department of Transport; at the time of your request and at the present time, the information you have requested is being shared internally between those working on the Study and has not been shared outside Network Rail. I therefore consider that the requested information does constitute ‘internal communications’.

The reasons for applying the exception for internal communications in this case are very similar to those for the exception for material in the course of completion. The Information Commissioner’s guidance on the two exceptions explains that, in these circumstances, a public authority can refuse a request when it needs a ‘safe space’ or private ‘thinking space’ in which policy can be developed. The guidance says:

The need for public authorities to have a ‘thinking space’ for policy development was recognised in the original proposal for the Directive⁸ on public access to 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.⁹
(COM(2000) 402 final p.13)

The guidance explains the importance of preserving a ‘safe space’ to debate issues without external scrutiny:

‘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.”¹⁰

The Information Commissioner supported a similar argument for ‘safe space’ in a previous decision notice concerning these two exceptions (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... 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

⁸ Proposal for a Directive of the European Parliament and of the Council on public access to environmental information

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0402:FIN:EN:PDF>

¹⁰ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

- 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”.¹¹

I consider that these arguments are very relevant to your request because, as described above, Network Rail’s process for the internal consideration of the Kent Route Study is only in the preliminary stages. The timing of your request is important here, as the Study is currently ‘live’ and in the early stages of a process which will ultimately lead to policy development. As Network Rail has not yet completed this work, it is important to use these exceptions at this time to maintain the safe space for further deliberation and consideration of the options.

Again, the Information Commissioner points out that the reasons for using the exception for internal communications are similar to those for the section 36 exemption under FOIA:

12. The exception has no direct equivalent in the Freedom of Information Act 2000 (FOIA). However, many arguments about protecting a private thinking space will be similar to those made under section 35 (formulation of government policy) and section 36 (prejudice to effective conduct of government affairs) of FOIA.

I therefore consider that the exception for internal communications also applies to the requested information.

The public interest test

These exceptions are subject to a public interest test to determine whether the public interest favours disclosure or maintaining the exception. The Commissioner’s guidance for each exception highlights that the public interest arguments should be focussed on the protection of internal deliberation and decision making processes, and that these arguments relate to protecting the need for a ‘private thinking space’ and preserving a ‘safe space’ to debate issues away from external scrutiny. The guidance goes on to say that the timing of the request is particularly important in considering the public interest, as 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, work on the Kent Route Study is ongoing; Network Rail has made no announcement in relation to the possible options and has not yet reached the stage of drawing any conclusions about the options.

I consider the factors in favour of disclosure are that there is a general presumption in favour of openness and disclosure would make some contribution towards accountability and transparency in the decision-making process. There is also a recognised public interest in the Kent Route Study and the options being considered by Network Rail. However, I consider this public interest is satisfied to a significant

¹¹ https://ico.org.uk/media/action-weve-taken/decision-notice/2010/539714/FS_50266169.pdf

degree by the ongoing consultation and engagement exercises that Network Rail has undertaken with the local community and rail user groups to discuss the early development work and to seek comment from stakeholders and interested parties.¹²

However, it is most important that, at this stage, the considerations of the options in the Study have not been completed, and that this process is still ongoing. Indeed, it should also be noted that the decision as to whether to proceed with one or more of the options under consideration will not be made by Network Rail; rather it is the case that Network Rail will provide their considerations on options for the project to the Department for Transport. The information held by Network Rail at this time therefore is not sufficiently developed to shed any light on eventual outcomes of the Study.

I therefore consider that the strongest public interest is in preserving the safe space in which Network Rail's consideration of options for the Study can continue. Disclosure of the information at this time would be potentially misleading as Network Rail has not reached its final conclusions, and we have not yet reached the stage where a decision has been taken regarding possible options for the Study. On this occasion, the greater public interest lies in maintaining the 'safe space' in which Network Rail may complete the Study. On this basis, I consider that the public interest favours maintaining the exceptions, and that the requested information should be withheld.

I understand that this is not the response you will be hoping for, however, I do hope that you will find this further explanation useful.

Should you have any further queries in relation to your request please contact me on the number provided above. Please remember to quote the reference number at the top of this letter in all future communications.

Yours sincerely

Dr Lou Lander
FOI Manager, Compliance & Appeals

Appeal rights

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

¹² At the time of the request, this included the Kent Rail Summit on 30 January 2015, the Marshlink Community Rail Partnership Annual Meeting on 3 February 2015, the Marshlink Action Group AGM on 20 March 2015, and the Kent Rail Summit on 8 May 2015. A report by the Marshlink Action Group on a later meeting in October 2015 can be viewed here under the heading 'Recent MarshLink activity': <http://www.mlag.org.uk/>

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