



Mr Rupert Moss-Eccardt

By email: request-381961-3f129379@whatdotheyknow.com

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14 February 2017

Dear Mr Moss-Eccardt

Information request
Reference number: FOI2017/00123

Thank you for your request of 28 January 2017. You requested the following information:

Request on 15 January 2017:

'Please provide me with the risk assessments and, supporting data used for such assessment for each and every of the three level crossings that cross the B1382 in the village of Queen Adelaide, Cambridgeshire.'

Clarification on 17 January 2017:

*'...could I have the risk assessments and supporting data for the last couple of years, please?
So from the start of 2015? I imagine that won't be more than one or two for each crossing.'*

Clarification on 28 January 2017:

'If it is feasible within the resources you have reasonably available I should like all the support material you have indicated. However if that would take this request beyond the resources you must or choose to expend then I should like them in the following order of priority (first one mentioned being the highest):

All Level Crossing Risk Model (ALCRM) risk assessment results for various options
Gap Analysis Summary Note
Traffic flow analysis technical note
Phase 2 Gap Analysis Report
Traffic censuses
Scheme Sketch

I see that you mention ALCRM. If other risk assessments have been performed they should also be included.'

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 of the EIR (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 confirm that we hold some of the requested information. Since the start of 2015, risk assessments were carried out in November 2015 for the crossings in Queen Adelaide. These were the only risk assessments prepared for the crossings in this timeframe. The assessments include information from the traffic censuses. We also hold a gap analysis summary note and a phase 2 gap analysis report. Following searches, we have been unable to locate a traffic flow analysis technical note or a scheme sketch; I understand that design work was not progressed far enough to require a scheme sketch.

This information is being withheld under regulations 12(4)(d) and 12(5)(e) of the EIR and these exceptions are explained below.

I can advise you that funding has recently been agreed to further progress work in relation to this area of the rail network, as recently reported in the media.¹ The current proposals are much larger than the scope of the project which was being considered in 2015. The documents which you have requested contain information which will be updated to cover the current scope of the scheme and therefore the information in the documents from 2015 is rendered obsolete and is likely to lead to misunderstanding if it is disclosed.

1

http://www.elystandard.co.uk/news/cash_boost_could_mean_improvements_to_ely_north_could_begin_in_three_years_time_conference_called_by_liz_truss_mp_told_1_4867849

As explained in the newspaper report, we are still investigating the various parameters and possible options concerning the crossings and have not made a decision on how to proceed. Whilst significant funding (£8.8m) has been found for further development, we are yet to receive the funds and then go through the investment and procurement processes to start the development of the programme of works. This further development work will be combined with the risk assessments and Cambridgeshire County Council's work on a possible solution for the roads, in order to work out what the overall solution will look like. As the County Council are still in the process of assessing the implications for roads, we consider that it would not be appropriate to disclose the risk assessments from 2015 and the supporting material, which has been superseded by these subsequent developments.

Regulation 12(4)(d)

Regulation 12(4)(d) of the EIRs provides an exception to the duty to make environmental information available when the request relates to material which is still in the course of completion, unfinished documents or incomplete data.

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 ² 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...'*

As explained above, we are currently in the process of formulating and developing our approach to the level crossings in Queen Adelaide. Although the requested risk assessments and the supporting information are in themselves finished documents, since they were finished we have continued to formulate our approach to the Ely North

² https://ico.org.uk/media/1637/eir_material_in_the_course_of_completion.pdf

junction and the level crossings in Queen Adelaide. As explained above, the situation has recently changed since 2015 and the assessments and supporting information no longer reflect our current approach to the crossings.

Public Interest Test

The exception can only properly be applied in circumstances where the public interest favours withholding the information. The factors in favour of disclosing the information are a general presumption of transparency in public authorities' decision-making processes. There is also legitimate public interest in the options for alterations to the level crossings in Queen Adelaide.

However, I consider that these factors are outweighed by the fact that the development of the current scheme is likely to take a number of years, as indicated in the newspaper report. At the time of your request, we have made no decisions on how to proceed and need 'safe space' to consider possible options; disclosing the requested information at this time would harm our ability to consider the options and decide how to proceed. Disclosure of the requested information would also be misleading as no final decision has been made on how to proceed.

Regulation 12(5)(e)

The information is also excepted from disclosure under regulation 12(5)(e) of the EIR, which provides:

'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 four-part test 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.'*³

³ See https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

I will consider the four elements of the test below.

The information is commercial or industrial in nature.

The information is commercial in nature because the information was created in order to consider possible options for alterations of the railway infrastructure.

Confidentiality is provided by law

In relation to confidentiality, the Information Commissioner's guidance explains that:

'19. ...there is no need for public authorities to have obtained the information from another. 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.'

The requested information is not trivial and, at the time of your request, was not in the public domain. The risk assessments have been shared by us with Cambridgeshire Council on a confidential basis. I therefore consider that the information retains its quality of confidence.

The confidentiality is protecting a legitimate economic interest

The Information Commissioner's guidance explains that:

'33. Public authorities will...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. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient if disclosure would not actually impact on those interests at the time of the request.'

*34. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish (on the balance of probabilities – ie more probable than not) that disclosure **would** cause some harm.'*

I have concluded that disclosure of the information would harm the legitimate economic interests of Network Rail. This is because future development of options for the level crossings is dependent on a commercial agreement being reached with a

suitable designer. The information sets out our initial thinking and possible solutions and costings, which we consider are only preliminary thinking until a tendering process is completed.

As disclosure of information under EIR is effectively disclosure to the “world at large”, the information would adversely affect a competitive tendering process between suppliers bidding for the work.

The confidentiality would be adversely affected by disclosure

The Information Commissioner’s guidance explains that:

‘The confidentiality would be adversely affected by disclosure

49. 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. 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.’

I consider that disclosure of the information at this stage would adversely affect the confidentiality of the information and harm our legitimate economic interests, particularly as a tendering process has not yet commenced but is expected to do so in the near future.

Public interest test

This exception is subject to a public interest test. I consider the factors in favour of disclosure are the 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 options which are being considered.

I consider that the greatest public interest lies in protecting our ability and that of third parties to discuss and exchange information about commercial proposals in confidence, particularly when the proposals remain at an early stage and where significant funding (totalling £8.8 m) has recently been committed by stakeholders to develop a feasibility plan. I also consider that disclosing the requested information for this particular location would have a wider impact on other projects where we share information in similar circumstances with third parties, or where third parties have agreed to commit funding to develop proposals or a feasibility plan for particular areas of the railway network. This would impair our ability to consider similar options in future

and to achieve the desired benefits and results from third parties' participation in any similar projects.

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

Colin Bendall
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 FOI Compliance and Appeals Manager at Network Rail, Freedom of Information, The Quadrant, Elder Gate, Milton Keynes, MK9 1EN, or by email at xxx@xxxxxxxxxxxx.xx.xx. 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