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Mr R Moss-Eccardt
By email: request-378559-326c072c@whatdotheyknow.com

10 March 2017

Dear Mr Moss-Eccardt

Internal review reference: FOI2017/00060
Original request reference: FOI2016/01418

I am writing in response to your email of 15 January 2017, where you asked for an internal review of the handling of your information request FOI2016/01418.

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

Request history

On 21 December 2016, you made the following request:

Cambridgeshire County Council are currently considering closure of level crossings on the B1382 in Queen Adelaide.

They refer to a number of documents in their RFQ for the consultants involved. These are

- Risk Assessment of Strategic Options for Ely North Junction (Nov 2015)
- Suitable and Sufficient Risk Assessments
 - o Queen Adelaide- Kings Lynn Level Crossing (Nov 2015)
 - o Queen Adelaide- Norwich Level Crossing (Nov 2015)
 - o Queen Adelaide- Peterborough Level Crossing (Nov 2015)
- Ely Area Constraints- Draft Briefing Note (Aug 2016)

I requested them from the County Council but they say they can't as they are your documents so I am now requesting them from you. My request to the County is here:
<https://www.whatdotheyknow.com/request/q...>

To save time, if you baldly assert commercial confidentiality I will seek an internal review. To help with the public interest test, this will significantly affect the lives of several residents and reduce property values. At the same time there is the assertion this will save lives so there is clearly a great deal of public interest.

Network Rail logged this request as FOI2016/01418 and responded on 11 January 2017. The response confirmed that the requested information was held, but refused to provide the information, citing the exceptions under Regulations 12(4)(d) (material in the course of completion) and 12(5)(e) (confidentiality of commercial or industrial information).

You appealed against this decision on 15 January 2017:

I am writing to request an internal review of Network Rail Limited's handling of my FOI request 'Queen Adelaide Survey Procurement Support Documentation'.

Although I acknowledge that documents in preparation can be exempt, cannot believe that applies to risk assessments. If the risk assessments of each of the crossings are incomplete, please confirm that explicitly, for each crossing.

Similarly the strategic options risk assessment from 2015 - if it is still in preparation then providing it to inform the policy development at the County Council would make any proposals, for which the County is spending good money, unsafe. Again can you explicitly confirm that that risk assessment is incomplete and also describe what is missing or what makes it unsuitable.

I am able to believe a document described as 'draft' is incomplete. Can you say what is missing in the process to no longer make it a draft, please?

In summary, can you please consider each document in turn for the tests you seem to have applied in one go and, also, confirm for each document that it is incomplete and describe its current state and what would need to happen to make it complete?

Decision

I have now reviewed the requested information and considered the circumstances and factors relevant to this case. I have noted the points you have raised in your request for review, and I have considered these points in reaching a decision in this case.

Following my review, I conclude that the exception under Regulation 12(4)(d) is engaged for the requested information, and that it is correct to continue to withhold that information.

I will explain the reasons for my decision below. As I consider that Regulation 12(4)(d) is engaged for all of the requested information, and your request for review specifically appealed the application of this exception, I have not considered Regulation 12(5)(e) in this review.

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

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. I note that the

points raised in your appeal concerns the status of the risk assessments and whether they are 'unfinished' or 'incomplete'. However, I should explain that it is not necessary for information to be unfinished, incomplete **and** material in the course of completion for Regulation 12(4)(d) to be engaged – these three elements of the exception are entirely separate and the exception will be engaged if any one of the three elements applies. My colleague, Mr Bendall, correctly noted this point in his response to your request, where he drew attention to the following guidance from the Information Commissioner:

Material which is still in the course of completion

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...¹

The Information Commissioner's guidance further 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.²

I consider that Regulation 12(4)(d) applies in this case because the withheld information is material in the course of completion. It is not claimed that the risk assessments are 'unfinished' or 'incomplete'; only the Ely Area Constraints document is marked as a 'draft'. However, each of the documents specifically concerns Network Rail's preliminary work on the identification and initial consideration of constraints and possible options for the future development of a part of the railway network – this is part of the process of formulating and developing a policy in this area, and is the key point in engaging Regulation 12(4)(d) here.

The Information Commissioner accepts that regulation 12(4)(d) can apply to information which is part of the policy making process, where a specific policy in the process of formulation and development can be identified, and where it can be demonstrated that the information relates to that policy.³ To explain, the specific policy in development is the proposed Ely Area Capacity Enhancement scheme, which is intended to address a number of existing constraints on rail capacity in the Ely area. Included in the scope of the scheme are headway reductions, the doubling of Ely North Junction, track layout changes at Ely, bridge strengthening and level crossings. The Queen Adelaide level crossings are a fundamental constraint on freight and passenger capacity, as well as journey time, over the cross-country corridor via Ely between Norwich, Ipswich and Peterborough, and the West Anglia Main Line for services from Liverpool Street station and Kings Cross. The Queen Adelaide crossings therefore form one of a number of interdependent elements within this wider scheme.

¹ 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

² See Footnote 1.

³ ICO Decision Notice FER0641545, para. 66

As such, the withheld information is clearly closely related to the ongoing process of formulating and developing the specific policy in respect of the future of the crossings and the broader Ely Area Capacity Enhancement scheme, as each of the documents concerns details and initial considerations in respect of constraints and possible options for those crossings. It is particularly important to note that the withheld information does not contain any decision about what options may go forward for further consideration; rather, this information represents an extremely early point in a process which is still ongoing at the present time, and which is expected to continue to develop over a period of time before any selection of agreed options can take place.

Following the Information Commissioner's guidance, I conclude that the withheld information is indeed 'information created as part of the process of formulating and developing policy, where the process is not complete'. On this basis, I consider that the withheld information is material in the course of completion, and that regulation 12(4)(d) applies.

The public interest test

This exception is subject to a public interest test to determine whether the public interest favours disclosure of the information or maintaining the exception.

I consider that the factors in favour of disclosure are that there is a general presumption in favour of disclosure, and I agree that disclosure in this case would demonstrate accountability and transparency in the decision-making process; there is also a recognised public interest in providing information which sheds light on the future of the Queen Adelaide crossings, particularly for those who would be affected by any changes to the crossings. However, disclosure in this case cannot inform the public on the future of the crossings, as the options contained in the withheld information are not yet sufficiently developed to provide information on which option or options may progress in time, and as noted above, no decision has yet been made with regard to the future of the crossings. I therefore give less weight to these factors.

In considering the public interest factors favouring maintaining the exception, I have referred to the Information Commissioner's guidance, which highlights that the public interest arguments in respect of regulation 12(4)(d) 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 and develop thinking away from external scrutiny.

The Information Commissioner's guidance explains the importance of a 'safe space' or private 'thinking space' in which policy can be developed:

The need for public authorities to have a 'thinking space' for policy development was recognised in the original proposal for the Directive⁴ 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:

⁴ Proposal for a Directive of the European Parliament and of the Council on public access to environmental information

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.⁵ (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."⁶

The Information Commissioner supported a similar argument for 'safe space' in a previous decision notice concerning Regulation 12(4)(d) (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
- 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".⁷

I consider that these arguments are very relevant to your request because, as described above, consideration of options for the Queen Adelaide crossings are only in the preliminary stages. At the time of this review, we are not yet at the stage where any decision about the initial options can be made, and work is currently being undertaken to inform the development of these options. It is therefore important to protect the safe space for further deliberation and consideration of the options currently being formulated and developed. I therefore consider that a safe and private space is required in order to allow Network Rail to consider and develop the options for the crossings, and that there is a strong public interest in protecting this safe space.

The timing of your request is a relevant factor here due to the 'live' nature of these ongoing considerations. The Information Commissioner's guidance advises that the timing of the request is particularly important in considering the public interest – if the process of formulating policy on the particular issue is still going on when the request

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0402:FIN:EN:PDF>

⁶ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

⁷ https://ico.org.uk/media/action-weve-taken/decision-notice/2010/539714/FS_50266169.pdf

is received, it may be that disclosing information at a preliminary stage would make it difficult to bring the process to a proper conclusion. It is important here that information pertaining to the Queen Adelaide crossings cannot only be evaluated in a local context – in terms of impact on local residents – but also needs to be considered in terms of the crossings' wider fundamental role in facilitating socio-economic growth in the Anglia region, and ultimately enabling an increase in both freight and passenger capacity in the Anglia Route. As noted previously, the Queen Adelaide crossings are one of a number of elements within the broader scheme; this means that any distraction from the ongoing process in respect of the crossings would therefore have a greater effect on the wider Ely Area Capacity Enhancement scheme. This increases the public interest in protecting the safe space for deliberations to take place.

In these circumstances, while there is recognised public interest in providing information which informs the public and Queen Adelaide residents of these initial considerations, it is my view that, due to the timing of the request and the position of the Queen Adelaide crossings within the Ely Area Capacity Enhancement scheme, the strongest public interest lies in protecting the safe space required for Network Rail and its partners to further investigate and develop options for the Queen Adelaide crossing and the wider scheme.

On this basis, I consider that the public interest favours maintaining the exception, and that the requested information should be withheld at this time.

I understand that this is not the response you will be hoping for, however, I do hope that you will find this explanation gives some further insight into our reasoning in this case.

Should you have any further queries in relation to your request please contact me on the number provided above. Please 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
Cheshire SK9 5AF