

By email

Cabinet Office
1 Horse Guards Road
London
SW1A 2HQ

Attn: Head of Freedom of Information

Direct Dial: [REDACTED]

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Your Ref: FOI2023/00150

Our Ref: RGA/RGA/00239263/13

Date: 9 March 2023

Dear Cabinet Office

Lower Thames Crossing stage gate assessment review (reference FOI2023/00150)

We act for Laura Blake. On 6 January 2023, our client sent the following request for information to the Infrastructure and Projects Authority (“IPA”):

“Please can you kindly provide copies of the IPA stage gate assessment review in November 2021 and also the follow-up IPA independent peer review in June 2022 as detailed in the Lower Thames Crossing Accounting Officer Assessment - <https://www.gov.uk/government/publicatio...>”

“Please could you also provide clarity of whether the follow-up IPA independent peer review in June 2022 was a review based on new info of that time, or if it was a review of the Nov 2021 review?”

On 9 January 2023, the Cabinet Office responded on behalf of the IPA indicating that the request was being handled in accordance with the Freedom of Information Act 2000 (“FOIA”) and that a response would be provided by 3 February 2023.

A substantive response was subsequently provided by the Cabinet Office on 3 February declining to provide the IPA stage gate assessment review dated November 2021 or the independent peer review dated June 2022 (the “Reviews”) on the basis of

sections 33, 41 and 43 of the FOIA. Our client has asked us to request an internal review of the Cabinet Office's refusal to provide the Reviews.

Applicability of Environmental Information Regulations 2004

As an overarching issue, the Cabinet Office's response to our client's request for information was addressed under FOIA and not under the Environmental Information Regulations 2004 ("EIR"). As we will explain below, the information in the Reviews is "environmental information" for the purposes of the EIR and for that reason the request should have been addressed under the EIR and not the FOIA. The two regimes are mutually exclusive of each other in accordance with section 39 of the FOIA, so that if the EIR apply then there is an exemption to disclosure under the FOIA. For that reason, it was incorrect for the Cabinet Office to deal with the request for information under the FOIA.

"Environmental information" is defined in Regulation 2(1) of the EIR. It includes information on:

- a) *"the state of the elements of the environment, such as 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";*
- b) *"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)";*
- c) *"measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements";*
- d) ...
- e) *"cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)".*

The Lower Thames Crossing ("LTC") would if constructed affect the state of elements of the environment referred to in (a). Both its construction and its use as an operational scheme would involve emissions to the air and atmosphere, of carbon dioxide and other pollutants. At a more fundamental level, the construction of the project will effect a change in the state of the land on which it is to be constructed. The project itself, the substances involved in its construction and the emissions from its

construction and operation are therefore clearly likely to affect the elements of the environment referred to in (a).

It is furthermore acknowledged in the Lower Thames Crossing: accounting officer assessment dated December 2022¹ that:

“There are recognised environmental challenges involved in the construction of a scheme of this type, including an internationally protected wetland (Ramsar site) close to the tunnels’ southern portal. The Ramsar site is one of the key drivers for the route choice selection via a tunnel and the design development that has moved the tunnel portal 350m further south has further reduced adverse effects on the wetland. Additional habitat is being created on both sides of the river Thames in recognition of the impact of construction.”

The project is therefore also likely to involve impacts to biodiversity, another element of the state of the environment referred to in (a).

The LTC will therefore affect factors in (a) and information regarding the LTC and its environmental impacts falls within (a) and (b).

Because information regarding the LTC and its impacts falls within (a) and (b), the Review must fall within (c) and (e). The gate review process is described as follows by the IPA²:

“The Infrastructure and Projects Authority’s (IPA) Gate Review process is designed to provide a realistic view on a programme and project’s ability to deliver agreed outcomes to:

- *time;*
- *cost;*
- *benefits; and*
- *quality.”*

Gate reviews such as the Review look first and foremost at whether the business case for a project stands up to scrutiny having regard to the costs and benefits of the

¹ <https://www.gov.uk/government/publications/government-major-projects-portfolio-accounting-officer-assessments/lower-thames-crossing-accounting-officer-assessment-december-2022#feasibility>

² *Gate Review Process, Gate Review 1: Business Justification.*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002669/1174-APS-1-CCS0521656666-001_IPA_Gateway_Web1.pdf

scheme and the scheme's feasibility. It also assesses compliance with the net zero target under the Climate Change Act 2008.

Dealing first with category (c) above, the Review is an administrative measure which will affect factors listed in (a) and (b). It is part of the assurance review process by which the IPA assesses whether infrastructure projects promoted by government should proceed. If the project were to fail this review then it might not obtain funding from HM Treasury or continue to have ministerial support from the relevant minister, in this case the Secretary of State for Transport. The outcome of such reviews therefore has a bearing on the factors in (a) and (b). Furthermore, because the review includes assessment against the net zero target, it is in part a "measure to protect" the elements in (a), i.e. the state of the environment which will be severely affected by climate change.

Turning to category (e), the Review is par excellence a "cost-benefit" and "economic" analysis used within a category (c) framework. A very significant part of the purpose of the Review is to provide a cost-benefit analysis for the purposes of the administrative decision as to whether to proceed with the LTC. It is precisely the type of document that category (e) envisages will be produced for a potentially environmentally destructive project such as the LTC.

For those reasons, it was inappropriate for the request to be addressed under the FOIA. The EIR should instead have been applied, including the narrower exceptions to disclosure and in particular the presumption in favour of disclosure in Regulation 12(2).

We turn to consider the exemptions to disclosure on which the Cabinet Office has sought to rely on and explain why each would not be available as an exception to disclosure under the EIR (without further comment on whether they would have been applicable had it been correct to apply the FOIA).

Audit functions

The section 33 FOIA exemption applies to information which would or would be likely to prejudice the exercise of an audit function by a public authority tasked with carrying out such functions. No such exception to disclosure is available under the EIR and it is therefore inappropriate to seek to rely on it.

Information provided in confidence

Similarly, there is no completely analogous exception to disclosure in the EIR mirroring section 41 FOIA. The only partially analogous exception is that in EIR Regulation 12(5)(f), applying to information the disclosure of which would adversely affect:

*“the interests of the person who provided the information where that person—
(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
(iii) has not consented to its disclosure”.*

Explaining why the section 41 exemption is relied on, the Cabinet Office says that:

“IPA Assurance Review Reports are conducted solely on the basis that the information reviewed and received via interview with various programme and project stakeholders, is given under the explicit undertaking that the views expressed by the interviewees are confidential. To release the report would breach that confidentiality.”

We accept that, in principle, information gathered from interviews with third parties conducted in confidence might be subject to the Regulation 12(5)(f) exception. However:

1. the “stakeholders” would need to be bona fide third parties, i.e. individuals and bodies which are separate from Department for Transport (“DfT”) or National Highways (“NH”);
2. the interviews must have been conducted in confidence;
3. it is extremely doubtful that all of the information in the Reviews is confidential information gathered from such interviews. Most of the information is likely to have been prepared by NH as promoter of the scheme. Furthermore, even if some information in the Reviews ultimately derives from such interviews, a view must be taken as to whether any summary of interviews in the Review would actually adversely affect the interests of the relevant stakeholders.

While information in the Review which meets these three criteria might be subject to the relevant EIR exception, there is no reason why such information could not be redacted.

Commercial interests

The section 43 FOIA exception has an analogue in Regulation 12(5)(e), which allows the disclosure of information to be withheld where it would adversely affect the “*confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest*”. The Cabinet Office response says that the “*IPA Assurance Review reports requested contain commercially sensitive information, which could harm some of the project or programme’s commercial negotiations*”. The suggestion is that commercial interests of the promoter of the scheme, i.e. NH, might be affected by the disclosure of the information because its negotiating position will be undermined by the disclosure of the information.

The First-tier Tribunal has adopted³ a four-stage test for applying the Regulation 12(5)(e) exception:

1. The information must be commercial or industrial in nature.
2. Confidentiality must be provided by law.
3. The confidentiality must protect a legitimate economic interest.
4. It must be the case that the confidentiality would be adversely affected by disclosure.

We turn to each in turn.

1. The information must be commercial or industrial in nature

We accept that certain information relating to the LTC may be commercial or industrial in nature, for example anticipated costs for specific construction tenders. However, it is unlikely that *all* the information in the Reviews is likely to be of this nature (for example, information used in the assessment of compliance with the net zero target) and there is therefore no reason why such other types of information could not be redacted.

2. Confidentiality must be provided by law

It is incumbent on the Cabinet Office to be satisfied that confidentiality is provided by law (i.e. under the common law of confidence, contractual obligation or statute). Again, it is extremely doubtful that all information in the Reviews, or even all of the costing

³ *Bristol City Council v Information Commissioner* (EA/2010/0012)

information in the Reviews, is confidential for these purposes and appropriate redactions could therefore be made.

3. The confidentiality must protect a legitimate economic interest

We accept that to the extent that certain information relating to the LTC is confidential, the confidentiality may protect the legitimate economic interests of NH or other stakeholders, for example costs estimates or descriptions of likely negotiating positions. However, other information is unlikely to meet this criterion. In order to meet this criterion it must be demonstrated that the disclosure of the information *would*, and not simply *might*, affect the relevant legitimate economic interest⁴. That may be the case for certain confidential information, for example costs estimates for individual aspects of the project, but not others, for example a cost estimate for the project as a whole (even if such an estimate were to be confidential, which is unlikely). Such an overall cost estimate is unlikely to affect NH's negotiating position with an individual contractor and so it cannot be said that the disclosure of such information *would* affect NH's legitimate economic interests. Nor could such overall costing information be used to calculate cost estimates provided by individual contractors and therefore affect their legitimate economic interests.

It is therefore extremely unlikely that the information in the Reviews as a whole would meet this criterion. To the extent that any individual item of information does do so then such element can be redacted.

4. It must be the case that the confidentiality would be adversely affected by disclosure

It is generally the case that if the first three criteria are established then the fourth will too by default. We therefore do not discuss this criterion further.

Conclusions on Regulation 12(5)(e)

It is possible that there is some information in the Reviews which meets all four criteria for the commercial interests exception, but it is highly doubtful that all or even most of the information would. In those circumstances, appropriate limited redactions should be applied to allow the disclosure of the remaining information in the Reviews.

⁴ *Elmbridge Borough Council v Information Commissioner* (EA/2010/0012).

Information on emissions

Finally, to the extent that the Reviews contain information regarding emissions, which is likely given the requirement to assess compliance with the net zero target, the exceptions in Regulation 12(5)(d) and 12(5)(e) are not available.

The public interest test

In determining whether any of the exceptions in the EIR applies to any of the information in the Reviews, it is necessary for the Cabinet Office to come to a judgement as to whether “*in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information*” (Regulation 12(1)(b)). The Cabinet Office has referred to the following factors which weigh in favour of disclosure:

1. “*transparency and accountability so there can be public scrutiny of whether the assurance process is effective*” in the context of section 33 FOIA;
2. “*having information made available, together with other factors in favour of disclosure*” in the context of section 41 FOIA; and
3. “*the efficient use of public resources*” in the context of section 43 FOIA.

There are a number of additional factors which weigh in the favour of disclosure.

The Lower Thames Crossing is of significant public interest as it is the largest and most expensive road scheme ever proposed, with a significant environmental impact. The scheme costs more than half of the entire capital enhancements budget in the second road investment strategy (RIS2). The scheme is the largest carbon emitting project in RIS2, causing an additional 6.6 million tonnes of carbon over its lifetime. The development consent application estimates the cost of the scheme to be £9 billion of public expenditure, and for the adjusted benefit cost ratio (BCR) to be 1.22, putting it in the “low value for money” bracket of the Government's value for money framework.

The environmental impact is significant as it impacts on protected landscapes and habitats, including the Kent Downs Area of Outstanding Natural Beauty and several internationally and nationally important sites such as the Thames Estuary and Marshes Ramsar site, and the South Thames Estuary and Marshes SSSI. As impacts to these protected habitats cannot be ruled out, the scheme can only go ahead if there are imperative reasons of overriding public interest, which the requested information will be key to assessing. As the scheme is in the low value for money bracket it is far from clear that the purported benefits outweigh the significant financial and

environmental costs. It is in the public interest to be able to effectively assess the costs of the scheme, and to understand how assessments have been conducted and whether they are accurate.

Progress on the project has been justified partly on the basis that independent assurance has been provided by the IPA. It is vital that the public has trust and faith in the scrutiny provided by the IPA. This can only be achieved through greater transparency. The IPA's "Principles for project success"⁵ says that one of the principles for project success is to "foster an open project culture" and to "tell it like it is".

Section 4.13 of HM Treasury's "Managing Public Money" guidance⁶ also contains a strong presumption in favour of transparency.

The Cabinet Office response says that "transparent information about the delivery of Government's major projects can be accessed through the IPA's Annual Report". However, there is no information on the review of the cost or deliverability of the Lower Thames Crossing in the IPA's Annual Report 2021-22⁷, only a promotional description of the scheme which appears to be written by National Highways itself.

Finally, it is unclear why a stage gate assessment was carried out in November 2021 with a follow-up independent peer review in June 2022. Why was a follow up assessment required, particularly given that the Accounting Officer Assessment uses data from August 2020? There is public interest in understanding whether the need for a follow-up review was because there were concerns in the initial assessment.

Conclusion

For the reasons set out above, please reconsider the decision to refuse to disclose anything in response to our client's request for information. Please treat this as a

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901126/IPA_Principles_for_Project_Success.pdf

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1075006/MPM_Spring_21_without_annexes_040322_1.pdf

7

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092181/IPA_AR2022.pdf

representation for the purposes of Regulation 11 of the EIR and respond as soon as possible and within the statutory deadline of 40 working days, i.e. by 9 May 2023.

Yours faithfully

A solid black rectangular box used to redact the signature of Leigh Day.

Leigh Day