

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 20 February 2024

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Complainant: Leigh Day obo Laura Blake & Thames Crossing
Action Group

Address: [REDACTED]

Decision (including any steps ordered)

1. The complainant has requested information regarding the Lower Thames Crossing project.
2. The Commissioner's decision is that the appropriate legislation is the EIR and that the Cabinet Office is not entitled to rely on regulation 12(4)(e), internal communications, or 12(5)(f), interests of the person who provided the information, to withhold this information.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation:
 - Disclose the requested information.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Freedom of Information Act 2000 (FOIA) and may be dealt with as a contempt of court.

Request and response

5. On 6 January 2023, the requester wrote to the Cabinet Office and requested information in the following terms:

“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/publications/government-major-projects-portfolio-accounting-officer-assessments/lower-thames-crossing-accounting-officer-assessment-december-2022#feasibility>

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?”

6. The Cabinet Office provided its response on 3 February 2023. It confirmed that it held the requested information. In relation to the second element of the request, the Cabinet Office confirmed that the Infrastructure and Projects Authority (IPA) independent peer review in June 2022 looked at the progress on recommendations of the assurance review held in November 2021.
7. The Cabinet Office handled the request under FOIA and confirmed that it was withholding the two requested reviews on the basis of section 33, audit functions, section 41, provided in confidence and section 43, commercial interests. The Cabinet Office provided its reasonings and associated public interest considerations.
8. On 9 March 2023, the complainant wrote to the Cabinet Office on behalf of the original requester and requested an internal review of the handling of the request. They considered that the request should have been handled under the EIR rather than FOIA as they believed the requested information was environmental. They also disputed that the information should be withheld and provided their reasons for this.
9. The Cabinet Office provided the outcome of its internal review on 7 June 2023 following the Commissioner’s intervention. With regards to whether the request should have been handled under FOIA or EIR, the Cabinet Office stated that it had not reached a conclusion on this issue and it had therefore reviewed the handling of the request under both regimes.
10. The Cabinet Office confirmed that it was maintaining its position that the reviews should be withheld and confirmed that it considered that regulation 12(4)(e), internal communications, and regulation 12(5)(f),

interests of those providing the information, were engaged in the event that the EIR was the appropriate legislation. The Cabinet Office maintained that, if FOIA was the appropriate legislation, sections 33 and 41 would be engaged but concluded that section 43 was not engaged.

Scope of the case

11. The complainant originally contacted the Commissioner on 31 May 2023 to complain about the Cabinet Office's failure to conduct an internal review and its refusal to disclose the requested information.
12. Following the Cabinet Office providing the outcome of its internal review, the complainant confirmed that they wished to dispute that the Cabinet Office was entitled to withhold the requested information. They also considered that the EIR was the appropriate legislation.
13. The Commissioner confirmed to the complainant in a letter dated 20 July 2023 that it was his opinion that the second element of the request was not a request for recorded information. The Commissioner explained that both FOIA and EIR give a right of access to recorded information already held by a public authority at the time of the request and neither obliges a public authority to provide explanations or create information to answer a request. The Commissioner confirmed that he considered that the second element of the request was a request for clarification of the status of the June review rather than recorded information already held. The complainant did not dispute this position.
14. Having reviewed the withheld reviews, the Commissioner confirmed to the Cabinet Office that he considered the appropriate legislation to handle the request under was the EIR. The Cabinet Office disputed that the entirety of the reports fell under the EIR and considered that some of the information fell to be considered under FOIA.
15. The Commissioner therefore considers that the scope of his investigation is to first determine the correct legislation and then whether the Cabinet Office is entitled to withhold the two named reviews under regulations 12(4)(e) and 12(5)(f).

Reasons for decision

Regulation 2(1): Is the information environmental?

16. Regulation 2(1) of the EIR defines environmental information as:

"...any information in written, visual, aural, electronic or any other material form 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) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);"

17. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has produced guidance¹ to assist public authorities and requesters. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Directive 2003/4/C² which the EIR enact.

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-2-1-what-is-environmental-information/>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0004>

18. In his consideration of this case, the Commissioner is assisted by the Court of Appeal's findings in *Department for Business, Energy and Industrial Strategy v Information Commissioner and Henney*³ ([2017] EWCA Civ 844). The Court of Appeal commented that the EIR must be construed purposively, in accordance with the Directive and the Aarhus Convention⁴:

"48. My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at [15] above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as "on" a given measure".

19. The disputed information in *Henney* related to a Project Assessment Review (PAR) which concerned the communication and data component (CDC) of the Smart Meter Programme (SMP). The key issue for the Court of Appeal was whether information on a measure which did not in itself affect the state of the elements of the environment, or the factors referred to in regulation 2(1), could be information "on" another measure which did. The Court of Appeal found that information on the PAR was environmental information on this basis, even though it was not, in itself, a measure likely to affect the elements or factors of the environment. Rather, information on the PAR was information on the SMP, which was such a measure.
20. The Commissioner understands that interpretation of the phrase "any information...on" will usually include information concerning, about, or relating to the measure activity, factor, etc. in question. With specific regard to regulation 2(1)(c), the Court of Appeal in *Henney* commented that:

"It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned. It may be relevant to consider the purpose for which the information was produced, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in

³ <https://www.bailii.org/ew/cases/EWCA/Civ/2017/844.html>

⁴ <https://ec.europa.eu/environment/aarhus/>

a better way. None of these matters may be apparent on the face of the information itself”.

21. The Commissioner notes that the withheld information in this case comprises two reviews of the Lower Thames Crossing between November 2021 and June 2022.
22. The Cabinet Office confirmed that the Lower Thames Crossing⁵ is a proposed crossing of the River Thames connecting Kent and Essex downstream of the Dartford Crossing. It is proposed to connect the A2/M2, the A13 and the M25. The Cabinet Office also explained that the Infrastructure and Projects Authority (IPA) works with government and industry to ensure that major infrastructure projects are delivered successfully and to improve performance over time⁶.
23. The Commissioner considers that the Lower Thames Crossing is clearly a measure likely to affect the elements and factors referred to in regulation 2(1)(b) and the reviews are information on this measure.
24. The Commissioner therefore considers that the requested information is environmental information and the appropriate legislation is the EIR.
25. The Commissioner will proceed to consider whether the Cabinet Office is entitled to withhold the requested information on the basis of the cited exceptions.

Regulation 12(4)(e): Internal communications

26. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves disclosure of internal communications. It is a class based exception meaning that there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
27. Regulation 12(8) of the EIR states that for the purpose of regulation 12(4)(e) internal communications includes communications between government departments.

⁵ <https://nationalhighways.co.uk/our-roads/lower-thames-crossing/>

⁶

https://assets.publishing.service.gov.uk/media/605df955e90e073ba52ffd8e/About_the_IPA_2020_12.03.21.pdf

The complainant's position

28. The complainant acknowledged that a communication within the IPA and the Cabinet Office would be an 'internal communication', however, they considered that the reviews had been shared externally with National Highways and could not therefore be considered internal communications. They stated that:

"Our client is aware that the Reviews were also shared with National Highways to inform cost decisions in relation to road schemes.⁷ National Highways is a private limited company⁸, and is the highway, traffic and street authority for England's strategic road network, describing itself as an "arms-length company"⁹ with its own staff. It therefore should not be treated as an executive agency. Instead, based on the ICO guidance, National Highways would fall within the definition of a non-departmental public body ("NDPB"). The ICO guidance defines NDPBs as any public authority "created to carry out a specific government function at arm's length from ministers and ... usually set up as separate legal entities"¹⁰ and makes clear that communications between a government department and NDPBs are not internal communications which fall within the remit of regulation 12(4)(e)".

29. The complainant considered that it is not possible to rely on regulation 12(4)(e) where the reviews were communicated externally.

The Cabinet Office's position

30. The Cabinet Office maintained that the reports were excepted from disclosure under regulation 12(4)(e) on the grounds that it involves the disclosure of internal communications.

31. The Cabinet Office set out that in the Commissioner's guidance on regulation 12(4)(e), it refers to the underlying rationale of the provision,

⁷ "As evidenced by the Accounting Officer Assessment produced by National Highways in January 2023 which referred directly to the conclusions of the Reviews, please see here [<https://www.gov.uk/government/publications/government-major-projects-portfolio-accounting-officer-assessments/lower-thames-crossing-accounting-officer-assessment-december-2022>]"

⁸ <https://find-and-update.company-information.service.gov.uk/company/09346363>

⁹ <https://nationalhighways.co.uk/about-us/corporate-governance/>

¹⁰ "ICO Detailed Guidance, 'Regulation 12(4)(e) – internal communications: what are internal communications', see here under "What about executive agencies, non-departmental public bodies and wholly-owned companies" [<https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/what-are-internal-communications/#executive>]

expressed in the European Commission proposal for the Directive which the EIR was derived from:

"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 ... internal communications."

32. The Cabinet Office considered that the necessity of there being a private space in which officials can deliberate forms the basis for the reasoning as to why the information requested should not be disclosed.
33. The Cabinet Office confirmed that it was satisfied that the November 2021 IPA stage gate assessment review and the June 2022 IPA independent peer review are internal communications for the purposes of regulation 12(4)(e). It set out that both were communicated and the Commissioner has acknowledged the broadness of the term, including "any information someone intends to communicate to others". The Cabinet Office considered that they were communicated internally (within the IPA and Cabinet Office) and therefore within the definition of internal communications for the purposes of regulation 12(8).
34. The Cabinet Office noted the Commissioner's guidance states:

"Internal communications include communications between an executive agency and its parent department. Communications between executive agencies, or between an executive agency and another central government department, are also internal communications".
35. The Cabinet Office considered that this would include transmission of the requested information between the IPA and the Cabinet Office.
36. The Commissioner raised with the Cabinet Office that the reports had been shared with National Highways which describes itself as an "arms-length, government owned company" and the Commissioner's guidance on this exception states that wholly-owned companies are separate legal entities and separate public authorities under the EIR. It states that communications between a public authority and its wholly-owned company are not internal communications. The Commissioner asked the Cabinet Office to set out why it considers that the reviews comprise internal communications in light of this.
37. The Cabinet Office considered that the question of whether a communication between a government department and National Highways is 'internal' for EIR purposes must be answered by reference to the particular facts of the case, and in particular the nature and purpose of the communications in question.

38. The Cabinet Office confirmed that it does not suggest that every communication between a government department and National Highways will constitute an 'internal' communication. They explained that there may be many matters in respect of which the Government and National Highways communicate in ways that are very firmly arms-length and separate. However, it considered that there is no basis in the EIR, Directive 2003/4/EC or elsewhere in law for an inflexible rule to the effect that, because National Highways is a company wholly owned by the Government, communications between a government department and National Highways can never be 'internal' for EIR purposes.
39. The Cabinet Office considered that such a rule would not fit with a purposive interpretation of the Aarhus Convention or Directive 2003/4/EC, both of which clearly envisage the need to preserve a safe space for internal communications without qualification by reference to technical distinctions, for example between a government department and a government owned company. The Cabinet Office considered that such distinctions are matters of form rather than substance and there is no indication that the EU instruments from which the EIR stem hinge on such matters of form.
40. The Cabinet Office also considered that an inflexible rule that communications between government departments and National Highways can never be 'internal' does not fit with Parliament's intentions. The Cabinet Office stated that as Parliament chose to draft regulation 12(8) of the EIR on an inclusive basis rather than an exhaustive basis there was no basis for thinking that Parliament intended to preclude arrangements such as that between the IPA and National Highways from the protection the legislation affords for a safe space for internal thinking. The Cabinet Office considered that Parliament would clearly not have had any such intention.
41. The Cabinet Office considered that such an inflexible rule would be inconsistent with previous Tribunal decisions. It directed the Commissioner to *Thornton v Information Commissioner & High Speed 2 (HS2) Ltd*¹¹ in which communications with HS2, a government-owned company, were held to be 'internal' and *Department for Transport v Information Commissioner*¹² in which communications with an

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2641/Thornton,%20Paul%20\(Dr\)%20EA.2018.0111%20\(14.02.20\)-%20\(Amended%20Under%20Slip%20Rule%2040%2024.04.20\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2641/Thornton,%20Paul%20(Dr)%20EA.2018.0111%20(14.02.20)-%20(Amended%20Under%20Slip%20Rule%2040%2024.04.20).pdf)

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<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i307/Sec%20of%20Sta>

independent consultant were also held to be 'internal'. In particular, the Cabinet Office considers that paragraphs 93-94 of the latter judgement provide that there is no basis for any technical lines or distinctions and that the engagement of regulation 12(4)(e) depends on the facts.

42. The Cabinet Office provided detailed explanations of the role of the IPA, and its close relationship with National Highways, to demonstrate why the reviews should be considered 'internal' communications. These included:

- The reports contain numerous recommendations from the IPA which National Highways were invited to implement for the benefit of the project. The Cabinet Office considered it was therefore inevitable that the reports would be shared with National Highways. It set out that the very purpose of the process was to enlighten National Highways as to how the Lower Thames Crossing project could be better administered.

- The Cabinet Office set out that the key role of the IPA in monitoring the progress of a project can come in the form of carrying out an assurance review. The Cabinet Office explained that the review is a firmly collaborative effort between the IPA and the Senior Responsible Officer (SRO) of the project authority. It explained that the IPA briefing note for use by the IPA review team and SRO notes explicitly that the SRO is the 'primary client' of the IPA in the conduct of a project. It set out that the briefing note also observes that:

"The review is a partnership between the SRO and the Review Team to increase the programme's/project's chances of success".

- The Cabinet Office further set out that the reviews are:
"...jointly owned by the [project authority] and the IPA, or other delegated authority".
- The Cabinet Office considered that how reviews are conducted demonstrate how the IPA and the project authorities work hand in glove from the beginning of the process.

- The Cabinet Office considered that the degree of control which is exercised by the IPA is such that communications between it and the project authority can be said to be internal.
43. The Cabinet Office considered that it is also significant that the report is provided personally to the SRO. The briefing note observes that it is for the SRO, not the project authority, to “ensure that appropriate action is taken to address the recommendations”. The Cabinet Office considered that the process recognises the sensitivity of the reports by limiting their circulation within the project authority to the SRO. The Cabinet Office explained that while the SRO is encouraged to “onwardly share” the report within the project authority, the IPA does not oblige them to. The Cabinet Office considered that this serves to emphasise the limited circulation of the reports and make apparent the closeness of the relationship between the IPA and the project authority through the review process.
44. The Cabinet Office noted the view of the Commissioner that:
- “Internal communications include communications between an executive agency and its parent department. Communications between executive agencies, or between an executive agency and another central government department, are also internal communications”.
45. The Cabinet Office also noted that however the Commissioner considers that:
- “Wholly-owned companies are separate legal entities and separate public authorities under the EIR. Communications between a public authority and its wholly-owned company are not internal communications”.
46. The Cabinet Office set out that while regulation 12(8) provides that communications between central government departments are to be regarded as internal communications, the Commissioner’s guidance continues:
- “The availability of the exception should not depend on the exact structure and divisions of responsibility within central government”.
47. The Cabinet Office explained that it has no difficulty with the proposition that – without more – a communication between a Government department and a Government-owned company will generally not be ‘internal’. To that extent, it had no difficulty with the above proposition from the Commissioner’s guidance. The Cabinet Office considered that that proposition, however, cannot be applied inflexibly, or imposed as if it were a legislative rule.

48. The Cabinet Office explained that it understood the above proposition in the Commissioner's guidance is derived from the Aarhus Convention Implementation Guide,¹³ which provides that:

"... once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an "internal communication"¹⁴.

49. The Cabinet Office considered that this point is not supportive of an inflexible proposition that a company wholly owned by the Government is always to be treated as an external 'third party'. The Cabinet Office considered that there is no basis for concluding that this is what the drafters of the Aarhus Convention, its implementation guide or Directive 2003/4/EC intended. The Cabinet Office stated that there is no warrant for such a rule in the legislation, nor is there any basis for concluding that legislators (whether at EU or UK level) intended any such rule.

50. The Cabinet Office considered that in short, it would be wrong in law to conclude that communications between Government departments and wholly-owned companies can never be internal. The Cabinet Office stated that the correct approach is to consider all the facts of the case.

51. The Cabinet Office considered that it is this approach that was taken in relevant decisions of the First Tier Tribunal that the question of what constitutes "internal communications" should be decided on its own facts, taking into account the nature of the relationship (as context) and the communications themselves. The Cabinet Office noted that, in the case of Thornton v Information Commissioner & High Speed 2 (HS2) Ltd, the Tribunal noted at paragraph 22 that the relationship between the Secretary of State for Transport and HS2 was 'crucial':

"HS2 is formally separated from the Secretary of State, however the intensity of control exercised means that HS2 is very far from being independent".

52. The Cabinet Office explained that the Tribunal continued at paragraph 23 on the subject of wholly-owned companies that:

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https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

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https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

"...the provision which brings HS2 within the scope of EIR is not intended to create greater access within one structure than another, but to ensure comparable access irrespective of structure".

53. The Cabinet Office referred to paragraph 24, which states that the Tribunal's view is that regulation 12(4)(e) should:

"...given the neutrality of the Convention with respect to Governmental structures, apply to a wholly-owned and controlled entity such as HS2. Similarly the structure of the decision-making means that the [Department for Transport (DfT)] asks questions of HS2, which in turn carries out analysis and provides answers to the [DfT]. That material leads to decision-making within the [DfT] which results in a decision to change the procurement activities to be carried out."

54. The Cabinet Office considered that the relationship between the IPA and the project authorities that it reports upon is every bit as crucial as the relationship between DfT and HS2 explored in 'Thornton'.

55. The Cabinet Office noted that in paragraph 23 of Thornton, the Tribunal stated that the provision bringing wholly-owned companies within the scope of the EIR was not intended to create greater access within one structure than another, but to ensure comparable access irrespective of structure. The Cabinet Office considered that this follows in respect of the IPA and National Highways. The Cabinet Office considered that it would not be logical for communications between the IPA and the DfT about the Project to be subject to the exception but for communications between the IPA and National Highways to be beyond it.

56. The Cabinet Office noted that the Commissioner states in his guidance that a central government department is able to rely on regulation 12(4)(e) of the EIR in respect of communications with a different department's executive agency. It contended that it should logically follow that a central government department, ie the Cabinet Office or its executive agency, the IPA, should also be able to rely on regulation 12(4)(e) of the EIR in respect of another department's wholly-owned company if it is accepted (as in Thornton) that communications between a central government department and a wholly-owned subsidiary can be considered to be "internal". The Cabinet Office explained that, in other words, its view is that the difference between an executive agency and National Highways as considered by reference to the IPA review process, is one of form and not substance. The Cabinet Office considered that both deserve the protection afforded by regulation 12(4)(e).

The Commissioner's position

57. The Commissioner has carefully considered the Cabinet Office's detailed submissions. Whilst he understands the arguments in favour of a safe space to develop projects, he is not persuaded that the withheld information is an 'internal' communication.
58. Regulation 12(8) requires the Commissioner to consider the Government as a whole when deciding whether a particular communication is internal. That means that communications between government departments will be internal, as will communications between an executive agency and a government department. Although the IPA sits underneath the Cabinet Office and HM Treasury rather than DfT, the Commissioner recognises that it still forms part of central government and therefore its communications with DfT remain internal for the purposes of this exception.
59. However, the Commissioner does not accept that communications between DfT, or central government, and National Highways are internal communications. National Highways is not part of the DfT; it is a company, wholly owned by the Secretary of State for Transport, but with its own separate legal personality. The Commissioner does not therefore consider that National Highways falls within the scope of central government.
60. Once a communication is shared outside the public authority that holds it (or in the case of central government, outside of central government) it loses its status as an internal communication. As the Commissioner has found that the withheld information was shared outside of central government, it follows that regulation 12(4)(e) cannot apply.
61. The Commissioner acknowledges the First Tier Tribunal's findings in Thornton, however, he is not bound by the First Tier Tribunal and he does not consider that this judgement sets a precedent to be followed in the specific circumstances of this case.
62. The Commissioner considers that communications between two separate legal entities cannot be viewed as internal communications, even though the two organisations involved may have a very close relationship.
63. Regulations 2(2)(c) and (d) of the EIR explicitly provide that those organisations delivering outsourced public service functions or services are classed as public authorities in their own right, subject to them meeting certain criteria. They therefore have obligations with respect to information rights but not because they are part of the public authority which established them.

64. The Commissioner considers that it is important to consider the intention behind regulation 12(8). In providing that communications between different central government departments (including Crown Bodies) and their executive agencies are treated as internal, regulation 12(8) is also making a distinction between these departments and agencies and other independent bodies which are set up at arms-length from central government. The Commissioner considers that this is an important distinction and maintaining the constitutional independence from central government of arms-length bodies and upholding proper transparency and scrutiny of the relationship between the two is an important policy factor.
65. The Commissioner considers that had it been considered important that information between National Highways and Central Government should stay internal, this could have been factored into the set up of National Highways, so that it was constituted as an executive agency or Crown body, or could have made specific provision that, for the purposes of regulation 12(4)(e) internal communications includes communications between a body and its sponsoring department.
66. The Commissioner therefore finds that regulation 12(4)(e) is not engaged.

Regulation 12(5)(f): The interests of the person who provided the information

67. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

“(f) 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”
68. The Aarhus Convention Implementation Guide suggests that the purpose of the exception provided at Regulation 12(5)(f) is to protect and encourage the voluntary flow of information to public authorities from third parties.

69. There are many situations where public authorities rely on the voluntary provision of environmental information in order to perform their functions. However, the Commissioner's guidance on this exception states that the starting point must always be the effect on the party that originally provided the information.
70. As with all the regulation 12(5) exceptions, the Commissioner considers that, in order to demonstrate that disclosure "would adversely affect" a confider's interests, a public authority must demonstrate that the adverse effect is more likely than not.

Would disclosure adversely affect the interests of the person who provided the information to the public authority?

71. At internal review, the Cabinet Office confirmed that it considered that disclosure would adversely affect the interests of those who provided the information. The Cabinet Office cited the Commissioner's guidance which sets out:

"In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (ie more than trivial), and to explain why disclosure **would**, on the balance of probabilities, directly cause the harm" [original emphasis].

And

"Generally where the disclosure of information would harm the interests of the person that provided it and the other requirements within the exception are met, a public authority will owe that person a duty of confidence".

72. The Cabinet Office confirmed that it was satisfied that it owed individuals who were interviewed as part of the IPA review process a duty of confidence. It confirmed that the IPA notes in its briefing note for review teams that:

"Interviews should be open and frank discussions. The Review Team should not have preconceived ideas about the outcomes of the review. Views expressed by interviewees should be non-attributable and confidentiality should always be maintained".¹⁵

¹⁵ The link provided by the Cabinet Office appears to no longer work. However, the Commissioner has located the quoted information at

73. The Cabinet Office explained that the briefing note also refers to the Code of Conduct adopted by review teams which stresses that the review team will:

“maintain confidentiality and allow interviewees to speak freely without ramification (comments will be non-attributable)”.¹⁶

74. The Cabinet Office considered that this demonstrates that interview participants will have understood that their frankly expressed views would be treated as having been confidentially imparted to the review team.

75. The Cabinet Office explained that if those views were prematurely disclosed then it would be possible to determine with a degree of accuracy that certain views had been expressed by certain individuals, therefore undermining the confidentiality of the process. The Cabinet Office stated that the consequence for the individuals concerned would be to undermine their position on the ongoing project in question and compromise their working relationships with others on the project, including senior individuals. The Cabinet Office considered that it would render it more difficult for them to work harmoniously with colleagues about whose work they talked of critically and this would negatively affect the career prospects of those individuals and constitute definite harm to them.

76. The Cabinet Office confirmed that it considered the interview participants to be third parties for the purposes of regulation 12(5)(f). The Cabinet Office set out that the supply of information was by employees of the Department for Transport and National Highways to the IPA, ie from individuals from one authority to another authority.

77. The Cabinet Office cited the Commissioner’s guidance, which states:

“Environmental information will be voluntarily provided by a third party to a public authority in a variety of circumstances and could be provided by individuals, charities and private companies... It is possible for an employee of a public authority to provide information to his employer on a voluntary basis. This will usually arise where a staff member

<https://www.gov.uk/government/publications/rtm-briefing-note-relevant-documentation> and the relevant document is “RTM: undertaking project assurance reviews”

¹⁶

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1025023/code_of_conduct_3.odt

volunteers information outside the terms and conditions of their employment is therefore 'provided' to the employer authority".

78. The Cabinet Office therefore considered that even if the supply of information was to their employer, an interview participant who works for Department for Transport or National Highways could be regarded as a third party for these purposes.
79. In its submissions to the Commissioner, the Cabinet Office expanded on its arguments.
80. The Cabinet Office explained that the IPA relies on the voluntary disclosure of information by those who are involved in the projects it reviews. It also considered that those individuals did not supply the information in circumstances such that the Cabinet Office was entitled to disclose it.
81. The Cabinet Office confirmed again that the IPA conducts interviews confidentially and does not attribute views expressed by interviewees. It considered that those undergoing interview will be fully aware of that confidentiality as it encourages them to be as frank as possible about the status of a project. The Cabinet Office considered that, having provided such assurances, it is not entitled to disclose the information imparted to it as those who participated in interviews for the review by the IPA will not have consented to the disclosure of the information provided.
82. The Cabinet Office provided the Commissioner with submissions regarding the consequences of disclosing the candid opinions of the interviewees. The Commissioner has not set these out in detail as to do so would negate the purpose of the exception, however, they expand on the arguments set out at internal review regarding the identification of comments made by the interviewees.
83. The Cabinet Office explained that the interviewees participated because they appreciated the value of the IPA in helping the project better achieve its objectives. The Cabinet Office considered that they would not have anticipated the "premature disclosure" into the public domain of information which they will have provided in confidence. The Cabinet Office contended that disclosure would not be fair on the interviewees.
84. The Cabinet Office confirmed that it was withholding the entirety of both reviews as it would be extremely difficult, perhaps impossible, to differentiate "factual information", the assessment of the reviewing officials and information supplied by the interviewees. The Cabinet Office explained that the information which had been provided by the

interviewees suffuses the whole of the reports to the extent that it is impossible to separate it from other information.

85. The Cabinet Office considered that factual information could include confidential information such as board minutes or internal correspondence which would provide relevant information to an IPA review team. However, it considered that once such information is reflected in its final form in the reports it would not be possible to distinguish it from the information provided by the interviewees.
86. The Cabinet Office explained that the information which is procured during the interview process from interviewees is, to an extent, filtered through the perception of the IPA review team which takes records of the interviews and such information reflected in the final reports is never attributed in order to preserve anonymity of particular statements.
87. The Cabinet Office explained that the conclusions and recommendations of the review team will inevitably be based upon, to a varying degree, the information that they will have procured during the review process, both in the form of documentation and interviews.
88. The Cabinet Office explained that these factors combine to make it exceptionally challenging to extract the information which comes from the interviewees. The Cabinet Office considered that the exception contained in regulation 12(5)(f) should therefore be taken to apply to the entirety of the reports. The Cabinet Office considered that it would be possible to pick out a statement in either of the reports and to speculate within reasonable bounds that it had been made by a particular person who was interviewed.
89. The Cabinet Office also considered that the interests of National Highways itself would be affected by disclosure as it has a separate legal personality.
90. The Cabinet Office explained that the interviewees who provide information to the IPA do so in their capacities as employees of the project authority. It set out that in supplying that information, they do so on its behalf. The Cabinet Office stated that the interviewees who were interviewed on the subject of the Project did so on behalf of National Highways and provided the IPA with information on its behalf.
91. The Cabinet Office confirmed that it was satisfied that disclosure would adversely affect the interests of National Highways. The Cabinet Office considered that disclosure would, at the very least, undermine the important Development Consent Order process through which National Highways is undergoing with respect to the Project. The Cabinet Office considered that if that process were undermined and the Project

undermined in consequence, it would call into question the capability of National Highways to oversee the Project and other strategic road projects.

The Commissioner's position

92. In his published guidance on regulation 12(5)(f), the Commissioner explains that in considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (ie more than trivial), and to explain why disclosure would directly cause the harm.
93. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than "might adversely affect" which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
94. Where information is caught within the scope of the exception, refusal to disclose is permitted only to the extent of the adverse effect. The Tribunal illustrated how this applies in practice in the case of *Archer v the Information Commissioner and Salisbury District Council* (EA/2006/0037, 9 May 2007) concerning a request for the whole of a report. It found that the adverse effect only arose in respect of part of the report and that the cited refusal could not therefore be applied to the whole document.
95. The threshold necessary to justify non-disclosure, because of the adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse. There is no requirement for the adverse effect to be significant but the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.
96. Having reviewed the withheld information, the Commissioner is not persuaded that the adverse effects set out by the Cabinet Office would occur with disclosure.
97. With regards to the adverse effect on National Highways, the Cabinet Office has not provided any explanation of the causal link between disclosure of the information and the adverse effect, ie undermining the project. The Cabinet Office has simply asserted that disclosure would undermine the Development Consent Order process. Having reviewed the withheld information, it is not apparent to the Commissioner why this would be the case.

98. With regards to the adverse effect on the individuals who participated in the review, the Commissioner is not persuaded that disclosure would cause the adverse effect set out by the Cabinet Office. As the Cabinet Office confirmed in its submissions, comments by individuals are not attributed to individuals and having reviewed the information the Commissioner is unable to locate any information that could potentially identify an individual's comments. The Commissioner notes that the Cabinet Office has concerns that disclosure could lead to speculation regarding the identity of the source of the comments, however, the Commissioner does not consider that the possibility of speculation is sufficient to meet the threshold of would adversely affect.
99. As set out above, public authorities cannot withhold a report in its entirety on the basis that some information engages the exception. The Commissioner notes the Cabinet Office's position that the information provided by the individuals interviewed cannot be separated out from the remaining information. However, it is not sufficient that the information was provided by a third party, the public authority must be able to identify the information that would have an adverse effect should it be disclosed.
100. As the Commissioner is unable to locate specific information that would have an adverse effect on the persons providing the information, he finds that regulation 12(5)(f) is not engaged. The Commissioner will not therefore proceed to consider the balance of the public interest.
101. The Commissioner requires the Cabinet Office to disclose the requested information.

Procedural matters

102. Regulation 11(4) of the EIR requires a public authority to complete a reconsideration (internal review) of its response within 40 working days of being asked to do so. The public authority failed to inform the complainant of the outcome of its internal review within 40 working days and consequently breached regulation 14 of the EIR.

Right of appeal

103. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

104. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

105. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed 


Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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Cheshire
SK9 5AF