

**By email**

Information Commissioner's Office  
Wycliffe House  
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Wilmslow  
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SK9 5AF

Direct Dial: [REDACTED]

Email: [REDACTED]

Your Ref: FOI2023/00150

Our Ref: RGA/RGA/00239263/13

Date: 3 July 2023

[REDACTED]

Dear Information Commissioner's Office

**Re: Request for internal review to Cabinet Office in relation to FOI/EIR**

**Cabinet Office FOI reference: FOI2023/00150**

**Cabinet Office Internal Review reference: IR2023/03115**

**ICO reference: IC-235971-D4C0**

We write on behalf of our client, Laura Blake, to make a complaint in relation to an internal review response received from the Cabinet Office on 7 June 2023.

## **Background**

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 (the "FOI Response").

On 9 March 2023, this firm made a request for an internal review to the Cabinet Office (the “IR Request”) in relation to the FOI Response and explained that our client’s request for information should properly have been treated under the Environmental Information Regulations 2004 (“EIR”) instead of FOIA. The IR Request was acknowledged but no response was received in the required statutory time frame. On 31 May 2023, we made a complaint to the ICO regarding the Cabinet Office’s failure to respond to our client’s request for an internal review (the “First Complaint”).

On 7 June 2023, 60 working days after making the IR Request, and 5 working days after making the First Complaint to the ICO, the Cabinet Office provided a substantive response to the IR Request (the “IR Response”).

## **The complaint**

The IR Response fails adequately to deal with the points raised in the IR Request in the following ways:

- (i) Failure to apply the relevant statutory regime correctly;
- (ii) Failure to correctly apply exceptions to disclosure under the EIR
- (iii) Delay.

We address each in turn below.

### **Relevant statutory regime**

Surprisingly, the IR Response reached no conclusion as to whether the request should properly have been dealt with in accordance with EIR or FOIA and “review[ed] the handling of [our client’s] request under both statutory regimes”. As explained in the IR Request (**attached**) the requested information falls within the broad definition of “environmental information” in Regulation 2(1)(a)-(c) and (e) of the EIR. 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. It continues to be our view that FOIA was not the appropriate statutory regime to deal with this request and should not have been considered in the IR Response. As such, this letter only deals with the points raised in respect of the EIR.

### **Failure to correctly apply the EIR**

The IR Response relies on the below exceptions to disclosure under the EIR:

#### ***Regulation 12(4)(e) – disclosure of internal communications***

The IR Response stated that the information requested should be excepted from disclosure under EIR on the basis that it involves disclosure of internal communications between an executive agency and its parent department and therefore falls under regulation 12(4)(e).

The Cabinet Office suggests 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) as both were communicated internally within the IPA and Cabinet Office) and would therefore be “internal communications” for the purposes of regulation 12(8) of the EIR.

While that may be the case, our client is aware that the Reviews were also shared with National Highways to inform cost decisions in relation to road schemes.<sup>1</sup> National Highways is a private limited company<sup>2</sup>, and is the highway, traffic and street authority for England’s strategic road network, describing itself as an “arm’s-length company”<sup>3</sup> 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”<sup>4</sup> 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).<sup>5</sup>

It is not possible to rely on the Regulation 12(4)(e) exception where the Reviews were communicated externally.

### ***The public interest test and Regulation 12(4)(e)***

Where exceptions are engaged under EIR, 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)).

In relation to Regulation 12(4)(e), the rationale for this exception, as explained in the original European Commission proposal for the Directive COM(2000)0402, is that public authorities should have the necessary space to think in private. The IR Response states that the “necessity of there being a private space in which officials can deliberate forms the basis of the reasoning as to why the information you requested should not be disclosed.” In explaining this conclusion, the IR Response appears to rely on three factors (i) the impact on the safe space for decision making of a live matter; and (ii) the chilling effect on frank and open internal discussions.

#### *(i) Safe space for decision making*

As stated in the IR Response, on 9 March 2023 the Secretary of State for Transport announced the rephrasing of the delivery of the Lower Thames Crossing by two years. The IR

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<sup>1</sup> 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](#).

<sup>2</sup> <https://find-and-update.company-information.service.gov.uk/company/09346363>

<sup>3</sup> <https://nationalhighways.co.uk/about-us/corporate-governance/>

<sup>4</sup> 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”.

<sup>5</sup> 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”.

Response also acknowledged that the matter “shall remain live for a considerable time”. Whilst we understand this means the matter is live, this does not mean the public interest always favours maintaining the exception. It cannot be acceptable that the lengthy duration of the decision making prevents disclosure during the entirety of that process. The ICO explains that a safe space only lasts for a short time, and once you have made an initial announcement, there is likely to be increased public interest in scrutinising and debating the details of the decision.<sup>6</sup> In these circumstances, the public interest disclosure to promote more effective public participation in environmental decision making, the free exchange of views and transparency and accountability of public authorities should outweigh the “safe space” argument.

(ii) *Chilling effect*

The IR Response puts paramount weight on the argument made in the FOI Response that *“...maintaining the integrity of the assurance process as an effective and prompt peer review process that produces reports based on candid interviews for the benefit of programme Senior Responsible Owners and Accounting Officers...Effective reviews have a demonstrable value for money to the taxpayer and support the successful delivery of project outcomes. Reports must be prompt and based on candid interviews and full and frank disclosure from project teams. Fear of immediate publication could hamper this disclosure and have a negative impact on the effectiveness of future IPA reviews, weakening the peer review process, which would not be in the public interest.”*

The IR Response further emphasises that the Reviews are not intended to be published and the intention of undertaking the Reviews is to provide an evidence-based snapshot of the status of a project. It also states that it would not be possible for important projects to be reviewed as effectively and relevant issues to be identified as readily without the uninhibited views of project participants.

We note that the ICO does not consider that chilling effect arguments, such as these, automatically carry much weight.<sup>7</sup> The weight accorded to such arguments instead depends on: (a) the circumstances of each case, including the timing of the request; (b) whether the issue is still live; and (c) the content and sensitivity of the information in question.

In respect of (a), in the circumstances of this case disclosure of the Reviews would not inevitably have the effect stated. The narrow evidence base which currently appears to be used by the IPA, mainly based on information provided by National Highways, cannot provide an accurate snapshot of the project. As explained in the IR Response, the potential environmental impact of the Lower Thames Crossing is significant, and the estimated cost from public funds is significant (£10 billion). In this context it is clearly in the public interest that an accurate and complete evidence base is used for any assessments made by HM Treasury and the Cabinet Office. It is not possible for the public to scrutinise, advise, or participate in this process in the absence of any information as to what is relied on as the evidence base.

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<sup>6</sup> ICO Detailed Guidance, ‘Regulation 12(4)(e) - internal communications: the public interest test’, see [here](#) under “Safe space arguments”.

<sup>7</sup> ICO Detailed Guidance, ‘Regulation 12(4)(e) - internal communications: the public interest test’, see [here](#) under “Chilling effect arguments”

Considering the timing of the request, as the interviews have now concluded, we do not consider there can be a chilling effect on decision making in relation to the Reviews. In relation to a potential chilling effect on future decisions, contrary to the conclusion reached by the Cabinet Office, it is submitted that disclosure would have the opposite effect of encouraging better advice and more robust, well considered decision making in the future. We also note the ICO's guidance which states civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Disclosure of the Reviews should therefore not have a chilling effect on the present decision making or any future decision making on this issue.

The fact that the Reviews were not intended to be published is irrelevant. The question is whether the public interest favours disclosure and the intention of the authors of the documents is irrelevant to answering that question.

Regarding (b), please see above. In respect of (c), we respectfully wish to draw your attention to the point raised in pages 8-9 of the IR Request. As these arguments are simply "noted" in the IR Response, it is not clear how they have been taken into account or applied in balancing the public interest test.

***Regulation 12(5)(f) – Interests of the person who provided the information to the public authority***

The IR Request clearly explained the criteria that would need to apply for the exception under Regulation 12(5)(f) of the EIR to apply, namely: (i) the stakeholders are bona fide third parties, i.e. individuals and bodies which are separate from the Department for Transport (DfT) or National Highways (NH), (ii) the interviews are conducted in confidence; and (iii) a view has been taken as to whether all of the information in the Reviews derives from such interviews, and if so, whether a summary of the interviews could be provided without engaging the exception. Whilst the IR Response has confirmed the interviews were conducted in confidence it has not adequately dealt with the following points:

In relation to (i) the IR Response explains that in this instance the supply of information was by employees of the Department for Transport and the National Highways to the IPA. Although it is noted that where a staff member volunteers information outside the terms and conditions of their employment, this can be considered to be voluntarily provided by a third party, there is no evidence in this case that the information from staff members at DfT or NH was provided voluntarily such that the exceptions to disclosure by reason of harm being caused to a "third party" should be applicable in this case.

The IR Response wholly fails to deal with point (iii). We reiterate that it is very unlikely that all the information in the Reviews is confidential information gathered from interviews which may fall under the Regulation 12(5)(f) exception, bearing in mind the criteria above. If parts of the information do fall within the exception, no reason has been provided as to why a summary of the contents could not be given or confidential information and data redacted such that the information could still be disclosed without adversely affecting the interests of the relevant stakeholders.

In this respect we also note the point made in the IR Request (albeit in reference to a different exception) that, 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 Regulation 12(5)(f) exception is not available.

### ***Presumption in favour of disclosure***

Regulation 12(2) specifically states that public authorities should apply a presumption in favour of disclosure when considering any exceptions to disclosure of environmental information. Neither the FOI Response or IR Response refer to the presumption at all or indicate that it informs any of the decision making made. This is despite the ICO's guidance that "when relying on an exception, you should make it clear to the applicant that you have taken it into account when making your decision" and the ICO's view that the presumption in favour of disclosure should inform all public authority's decisions under the EIR, including in determining the exception is engaged in the first place and to provide the default position in the event that interests are equally balanced.<sup>8</sup>

The ICO guidance also states that:

- in practice, the presumption in favour of disclosure is likely to be most relevant where the outcome of the public interest test is not clear cut and in these situations, the presumption in favour of disclosure will be the deciding factor that tips the balance in favour of disclosing the information;
- In relation to the application of Regulation 12(4)(e), the ICO has stated this "means [public authorities] are likely to have to disclose some internal communications, even if disclosure has a negative effect on your internal deliberation and decision-making processes."
- In relation to Regulation 12(5)(f), the ICO states "This means that on occasion a public authority should disclose information even though this would adversely affect the interests of the information provider."

Taken together, the presumption is of clear relevance to consideration of our client's request and should have been properly considered.

### Delay in responding

Public authorities are required to respond to a request for an internal review within 20 working days, or 40 working days maximum. Per the government's FOI Code of Practice 2018, para 5.5 5.5, if an internal review is complex, requires consultation with third parties or the relevant information is of a high volume, public authorities may need longer than 20 working days to consider the issues and respond. In these instances, the public authority should inform the applicant and provide a reasonable target date by which they will be able to respond to the internal review. As evidenced in the **enclosed** correspondence, no target date was ever provided by the Cabinet Office FOI team either when the IR Request was received or after further correspondence from this firm seeking an update.

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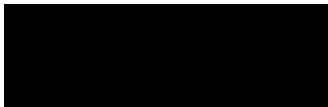
<sup>8</sup> *Vesco v Information Commissioner and the Government Legal Department* [2019] UKUT 247 (AAC) 1 August 2019, para 19.

## **Conclusion**

The ICO states that internal reviews should consider how the request was handled and the initial response<sup>9</sup>. The IR Response fails to do this and has not adequately dealt with the points raised in relation to the relevant statutory regime; the application of exceptions under the EIR; or the presumption in favour of disclosure.

We gratefully request the points raised above and in the enclosed disclosure are considered and look forward to receiving the ICO's response.

Yours faithfully

A solid black rectangular box redacting the signature of Leigh Day.

**Leigh Day**

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<sup>9</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>