



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2017/0155

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FER0661512
Dated: 3 July 2017**

Appellant: Henry Manisty

First Respondent: The Information Commissioner

Second Respondent: Highways England Company Limited

Date of hearing: 30 January at Field House

Date of decision: 24 April 2018

Before

**Anisa Dhanji
Judge**

and

**David Wilkinson
Dave Sivers
Panel Members**

Subject matter

EIR - Reg 12(4)(d) whether material is still in the course of completion.

DECISION

The appeal against the Commissioner's Decision Notice No: FER0661512, is allowed.

The requested information must be disclosed to Mr Henry Manisty within 35 days of this decision being promulgated.

Signed

Anisa Dhanji

Judge

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr Henry Manisty (the “Appellant”), against a Decision Notice issued by the Information Commissioner, on 3 July 2017.
2. It concerns an information request made by the Appellant to Highways England Company Ltd (‘Highways England’), formerly known as the Highways Agency, under the Environmental Information Regulations 2004 (“EIR”), regarding the proposed route of the Oxford to Cambridge Expressway.

The Request for Information

3. On 3 December 2016, the Appellant wrote to Highways England, requesting information in the following terms:

“I have read your new Oxford to Cambridge Expressway Strategic Study Stage 3 Report with great interest.

...I wondered whether you have developed more detail on the proposed Southern Route (Option A) and the Oxford Sub-Option 54, both shown on Page 39 of your report.

It would be really interesting to see more detailed proposed route maps if they exist, particularly as they relate to the areas around Wheatley and Thame.”

4. Highways England replied on 16 December 2016, stating that detailed plans of the routes shown on page 39 of the Oxford to Cambridge Expressway Strategic Study Stage 3 Report (‘the Report’), had been produced to enable further work on the study to be carried out. It refused to disclose the plans to the Appellant, relying on the exception in Reg 12(4)(d), on the basis that the information requested formed part of its decision-making process which was still in the course of completion.
5. Following an internal review, Highways England maintained its position.
6. The Appellant complained to the Commissioner. He questioned whether the exception in Reg 12(4)(d) could apply to information prepared for the purposes of a published report, where that report was a completed stage in an ongoing process.
7. The Commissioner undertook an investigation. She wrote to Highways England, asking why it considered that the information came within the scope of Reg 12(4)(d), and which limb of the exception it was relying on. The Commissioner also asked Highways England to set out why it believed that the public interest in maintaining the exception outweighed the public interest in disclosure.

8. In response, Highways England explained that it relied on the exception in Reg 12(4)(d) on the basis that the information requested was “material still in the course of completion”. It explained that the Report was an initial stage in its Oxford to Cambridge Expressway Study, and it set out why it considered the public interest favoured maintaining the Reg 12(4)(d) exception.
9. For the reasons set out in her Decision Notice, the Commissioner decided Highways England had correctly applied Reg 12(4)(d) and dismissed the Appellant’s complaint.

Appeal to the Tribunal

10. The Appellant has appealed against the Commissioner’s Decision Notice. Highways England has been joined as the Second Respondent in this appeal.
11. Regulation 18 of the EIR provides that the enforcement and appeals provisions of the Freedom of Information Act 2000 (“FOIA”), shall apply for the purposes of the EIR (save for the modifications set out in the EIR).
12. Under section 58(1) of FOIA, if the Tribunal considers that a Decision Notice is not in accordance with the law, or to the extent that the Decision Notice involved an exercise of discretion by the Commissioner, if the Tribunal considers that she ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
13. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.
14. The parties have lodged an open bundle. We have considered all the material before us, and will refer to it as needed, but will not attempt to refer to all of it, nor to every turn of argument.
15. The Appellant has requested that this appeal be determined on the papers without an oral hearing. Both Respondents have agreed. Having regard to the nature of the issues raised, and the nature of the evidence, we were satisfied that the appeal could properly be determined without an oral hearing.

The Disputed Information

16. The Appellant has explained that the information he is seeking was produced for the purposes of the Report which was published in December 2016. His request relates to disclosure of one of the route maps that Highways England has confirmed it had produced for the Report, and in respect of which an overview appears at page 39 of the Report.
17. We have not been provided with the Report. We have also not been provided with the route maps requested by the Appellant (the “Disputed Information”).

It is of course the case that the parties seeking to rely on an exception must prove its case, albeit to a civil standard.

Statutory Framework

18. The EIR implements Council Directive 2003/4/EC on public access to environmental information (the “Directive”). There is no dispute that the Disputed Information constitutes “environmental information” as defined in Reg 2(1), and therefore comes within the scope of the EIR.
19. A public authority which holds environmental information must make it available on request: Reg 5(1). It must make the information available as soon as possible, and no later than 20 days after receiving the request.
20. Under Reg 12(1), a public authority may refuse to disclose information in certain circumstances. In the present case, it has said that it is relying on the first limb of Reg 12(4)(d), namely that “*the request relates to material which is still in the course of completion*”.
21. There are 3 further provisions to note. First, even if the request comes within the scope of an exception, the public authority is only exempt from its obligation to provide that information if “*in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information*”: Reg 12(1)(b). This balancing exercise must take place as at the date of the refusal.
22. Second, pursuant to Reg 12(2), there is an express presumption in the EIR in favour of disclosure.
23. Third, Reg 14 (4) provides that in cases of refusals under Reg. 12(4)(d), the public authority should specify “*...the estimated time in which the information will be finished or completed*”. It appears that this was not done in the present case. If so, then Highways England is in breach of Reg 14(4).

Issues

24. The key issue in this appeal is whether Reg 12(1)(b) is engaged at all. Does the Appellant’s request relate to material which is still in the course of completion? If not, we need go no further.
25. If it is engaged, then we must consider the public interest balance under Reg 12(1)(b).

The Parties’ Positions

26. The two Respondents’ positions are aligned.
27. Highways England say that at the start of a major road scheme, it carries out an initial appraisal study to consider if there is a case for change, and the potential viability of different proposals. This is the stage at which the Report was produced in respect of the Oxford to Cambridge Expressway Strategic Study, which it had been asked to carry out on behalf of the Department for Transport. The Report outlined the high-level case for a strategic Oxford-Cambridge link, and would inform further work on the development of

options, and the next Road Investment Strategy to be commenced in 2020. Highways England also explain that the three options identified in the Report were at a very early stage of development. If the Government consider there would be merit in further analysis, it would investigate and assess route options and carry out public consultations. If it decided to go ahead with a particular option, it would announce that route, together with its reasons, which would trigger the statutory regime under the Town and Country Planning Act 1990.

28. The Respondents contend that Reg12(4)(d) applies because the Disputed Information is "*material still in the course of completion*". The Commissioner argues that "*material*" in this context, is broader than "*information*" or "*documents*", and that the exception may be engaged where the specific information requested is complete, if it relates to material which is incomplete. The Commissioner says that although the Disputed Information is contained in the Report, and although the Report itself is complete, since the Report is intended to form part of a policy process which is still ongoing, the request properly attracts the exception. She further says that this distinguishes the first limb of the Reg12(4)(d), from the second limb ("*unfinished documents*").
29. In relation to the public interest balance under Reg 12(1)(b), the Respondents say that the balance lies in maintaining the exception. The Disputed Information was being used to inform Highways England's work in developing broad options for use in further stages of the project. It was important that Highways England had the ability to objectively and robustly assess the options and formulate strategy away from public scrutiny, at what was an early and formative stage. Release of the information could mislead the public into believing land or property would be adversely affected, which could result in a disproportionate volume of enquiries to Highways England, and the diversion of its resources. Also, Highways England would take proposals to public consultation and that would address the public interest in the information.
30. The Appellant contends that the Disputed Information does not engage the exception in Reg 12(4)(d). He says that the completed maps prepared for the purpose of a published and completed report are not "*material in the course of completion*". He argues that the Commissioner has misinterpreted Reg 12(4)(d) as applying to material which though itself complete, relates to a policy process that is still in the course of completion. The Appellant also argues that the Report made it clear it would be followed by further reports, so it would be unlikely that anyone reading it would be confused into believing there could be no further variations.
31. The Appellant further submits that the Commissioner's approach shifts the focus from whether "*material*" is complete, to whether the "*process*" is complete, and introduces uncertainty and delays into the application of Reg 12(4)(d), because it will often be difficult to determine when a policy process is complete and even those that are seemingly completed, can from time to time reopen.
32. The Commissioner accepts that in some cases, it may be less straightforward to identify when a policy process is complete, than when a specific document is complete. However, she says that this difficulty is inherent in the language

of Reg 12(4)(d), which applies where “material”, rather than specific documents, remain in the course of completion. While she accepts that this may give rise to a need for detailed analysis of the material and policy process in a given case, she says that this is not a basis on which to narrow the scope of the exception.

Findings and Reasons

33. It may be helpful to begin by setting out the specific words of Reg.12(4)(d):

Exceptions to the duty to disclose environmental information

12. - (1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if -*

(a) *an exception to disclosure applies under paragraphs (4) or (5); and*

(b) *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

(2) *A public authority shall apply a presumption in favour of disclosure.*

(3) ...

(4) *For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*

(d) *the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;*

34. Does the Appellant’s request engage Reg.12(4)(d)? Only the first limb of the exception has been relied upon, so the question for us is whether the request “*relates to material in the course of completion*”.

35. It is not in dispute that that the proposed route map comprising the Disputed Information is itself complete, and that the Report is also complete, and indeed it has been published. It is further not in dispute that the Report is one step in Highways England’s study into the proposed Oxford-Cambridge Expressway, and that that process is on-going.

36. The issue we must decide, therefore, is whether the exception is engaged where, as here, the specific information requested is complete, but it is part of a process which is not complete.

37. More specifically, the questions are:

(a) what “material” does the Appellant’s request relate to?

(b) is that material “still in the course of completion”?

38. The EIR does not define “*material which is still in the course of completion*”, nor even “material”. The Directive uses the expression “*material in the course of completion*”, but also contains no definitions.

39. The Commissioner argues that the term “material” is broad, that it is not synonymous with “documents”, and may include a variety of work products. She further says that to determine whether “material” is complete, it is necessary to consider whether the policy process to which the information requested relates, is ongoing. If it is, then it is likely that material relating to that process will remain “in the course of completion”. In the present case, while the Report is complete, the study to which it relates is part of a wider policy process. Since that process is ongoing, the Report is “*material still in the course of completion*”.
40. The Appellant says that when the Commissioner asserts that “material” is broader than “information” or “documents”, she may be conflating the “*information*” with the “*material forms*” in which the *information* appears. He says that “*material*” and “*documents*” are not opposed as the Commissioner suggests; rather “*document*” is one type of “*material*”.
41. On the facts of the present case, there are 2 possibilities as to what the “material” comprises:
- (a) The route maps comprising the Requested Information; or
 - (b) The Study in respect of which the Stage 3 Report forms a part.
42. If the request relates to the route maps then since, like the Report, those are complete, the request does not relate to material which is “*still in the course of completion*”. However, if the request relates to the process as a whole that the Report is part of, then since that is not complete, the request relates to material which is “*still in the course of completion*” and the exception is engaged.
43. In deciding this question, we have considered the Commissioner’s Guidance Note from May 2016 on “Material in the course of completion, unfinished documents and incomplete data (regulation 12(4)(d))”. This states (*inter alia*), 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 that process is not complete.
44. We have also considered the Tribunal’s decision in **Ames v Information Commissioner & Department for Transport** (EA/2015/0283) in which the Tribunal considered whether information relating to an ongoing policy process engaged the Reg.12(4)(d) exception. The request there was for proposals relating to the terms of reference (“ToR”), of the Independent Airports Commission. That information was complete. The Tribunal did not reject the Commissioner’s general proposition that a finished document may relate to material that is in the course of completion, but stated that:

“...it is artificial on the facts of this case to regard information on finalising the ToR as information relating to material which was still in the course of completion. The request did not relate to government aviation policy material; it related to the particular matter of the formulation of the ToR, and the disputed information concerns that topic. An ongoing policy process is not in and of itself ‘material’ within the meaning of reg 12(4)(d). (paragraph 38):

45. The Appellant has also referred us to the United Nations Economic Commission for Europe's interpretative guidance on the Aarhus Convention, which states that:

“... the expression ‘in the course of completion’ relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared ...”.

46. In addition, the Appellant points out that the Commissioner's decision in FER0349127 is aligned to the Appellant's own view in the present case. In rejecting a local authority's refusal to disclose a complete document on the grounds that its overall policy proposals were still at an early stage, the Commissioner explained its approach as follows:

“It is the Commissioner's view that the relevant consideration here is the information contained within each document and the purpose for which it was created not the overall project or development proposal it relates to. The Commissioner considers the fact that the proposal to develop affordable housing was still at idea stage at the time of the request and therefore an unfinished project is not a relevant consideration for the application of this exception.”

47. None of the guidance, or decisions we have referred to above, are binding on us, and we have not been referred to any Upper Tribunal or higher court decision on point.

48. However, we accept, as did the Tribunal in Ames, that a particular document that has itself been finished, *may* still be part of “material which is still in the course of completion”. Whether it is, does not depend, in our view, on any forced interpretation of “documents” versus “material”. Rather it depends, in our view, on the facts of the individual case, and the terms of the request. The request here clearly relates to route maps. In our view it would be artificial to regard the request as relating to any wider or other policy questions concerning the Report or the study more generally. Such an interpretation would, in our view, also be contrary to the presumption in favour of disclosure enshrined in the EIR.

49. For all these reasons, we find that Reg. 12(4)(d) is not engaged. Having reached this finding, it is not necessary to go on to consider the public interest balance. We would say, however, that we consider that the public interest favours disclosure. We agree with the Appellant that a project of this size and nature is of considerable public interest, given its impact on the environment and those who live in the areas that may be affected.

50. Highways England says that “to release the information now will mislead land and property owners into believing they will be adversely affected when this may not be the case”. Highways England also refers to the disproportionate and burdensome number of inquiries it might receive which would lead to a diversion of resources.

51. However, the Report has already been published. If the release of the route maps comprising the Disputed Information generates public debate, and

leads to inquiries being made, that furthers the case for not against disclosure. Also, any burden on Highways England from such enquiries or potential misunderstandings, can, it seems to us, be dealt with by a pro forma response or notice on its website explaining that the development of the proposals will of, necessity, evolve over time. We have no doubts that the public are sufficiently aware that large scale public initiatives of this nature, can twist and turn its way to a conclusion, if indeed a conclusion comes at all.

52. For all these reasons, we allow this appeal. Our decision is unanimous.

Signed
Anisa Dhanji
Judge

Date: 24 April 2018