

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 28 April 2022

Public Authority: East-West Railway Company Ltd
Address: One Grafton Mews
Midsummer Boulevard
Milton Keynes
MK9 1FB

Decision (including any steps ordered)

1. The complainant requested costings of several route options. East-West Rail Company Ltd ("EWRC") initially refused to provide the requested information and relied on Regulation 12(4)(d) of the EIR (material in the course of completion) to withhold it.
2. The Commissioner's decision is that EWRC does not in fact hold the requested information. As EWRC failed to issue a refusal notice relying on Regulation 12(4)(a) of the EIR (information not held) within 20 working days, it breached Regulation 14 of the EIR.
3. The Commissioner does not require any further steps.

Request and response

4. On 10 May 2021 the complainant requested information of the following description:
 - "[1] The costs in £bn (2019 prices) for Sections C, E and F of the overall Bedford-Cambridge proposal
 - "[2] Provision of Bedford Midland Cost Drivers 0.9 and 0.11 BBC versions"
5. On 2 June 2021, EWRC responded. It provided information within the scope of element [2] of the request but refused to provide the

information within the scope of element [1]. It relied on Regulation 12(4)(d) of the EIR as its reason for doing so.

6. The complainant requested an internal review on 15 June 2021. EWRC sent the outcome of its internal review on 8 July 2021. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 15 July 2021 to complain about the way his request for information had been handled.
8. At the outset of the investigation, the Commissioner wrote to EWRC to ask it to justify its reliance on Regulation 12(4)(d). In line with his usual practice, he also invited EWRC to reconsider its stance in respect of the request.
9. EWRC responded to the Commissioner on 8 February 2022. As well as explaining why it considered Regulation 12(4)(d) was engaged, it also noted that the burden it would need to incur in order to compile the requested information was one which was manifestly unreasonable. Accordingly it informed the Commissioner that it now additionally wished to rely on Regulation 12(4)(b) of the EIR and set out its estimate of the likely burden of complying with the request.
10. Having analysed EWRC's estimate of the burden of responding to the request, the Commissioner considered that it was unclear whether EWRC in fact held the information for the purposes of the EIR. He therefore sought further submissions from EWRC as to how it might go about complying with the request – in the event that it was required to do so.
11. Having considered EWRC's responses carefully, the Commissioner is now of the view that EWRC does not hold the information that has been requested. The following analysis explains how that decision has been reached.

Background

12. EWRC was set up to oversee planning, preparation and construction of a new railway line linking Oxford and Cambridge. EWRC is a limited company, but it is wholly owned by the Secretary of State for Transport and is therefore a public authority for the purposes of the EIR.

Reasons for decision

Would the requested information be environmental?

13. Regulation 2(1) of the EIR defines environmental information as being 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)...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);
14. Although he has not seen the requested information, as it is information on a cost-benefit analysis relating to the construction of a railway line,, the Commissioner believes that the requested information would be information on a measure affecting the elements of the environment (namely landscape and soil). For procedural reasons, he has therefore assessed this case under the EIR.

Does EWRC hold the requested information?

15. Regulation 5(1) states that: "a public authority that holds environmental information shall make it available on request."
16. Regulation 12 of the EIR states that:
 - "(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.
 - (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
 - (a) it does not hold that information when an applicant's request is received;"
17. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
18. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
19. The Commissioner's guidance on determining whether information is held states that a public authority will be deemed to "hold" information if that information can be collated from other data which the authority

holds.¹ This would include, for example, collating a list of documents that it held (if no such list existed) or calculating an average from a dataset.

20. However, if the raw data a public authority holds can only be converted into the requested information by the skill and judgement of officials, then the requested information will not be held as the public authority is being asked to create new information that it does not already possess.

EWRC's position

21. In its first submission, EWRC noted that the task of compiling the necessary data would fall upon its estimates team. It noted that, in order to produce robust cost figures, there would need to be a considerable amount of checking and cross-checking to ensure that the assumptions used were reasonable.
22. Following this development, the Commissioner asked EWRC to take a step back and consider the extent to which it could actually compile the requested information and the extent to which it would need to create it. In particular, the Commissioner asked EWRC to explain the process of converting the raw data (such as labour costs, materials costs, legal costs etc. – which are likely to be known) into a full cost estimate.
23. EWRC explained that:

“The approach changes from estimators due to the interpretation of the assumptions that are produced for the basis of the estimate, for example the level of productivity assumed will alter the rate produced for that activity. Another example is what the estimator would deem is included or excluded within a data point, that is why an important aspect when comparing rates or estimates is to ensure it is like-for-like comparison as the basis for the rates could be different. You would expect the estimators to have similar levels of quantification driven by using a standard method of measurement (Rail Method of Measurement) but rate apportion could differ based on aspects such as the aforementioned. In terms of acquiring and utilizing rates, what is key is to understand the core assumptions, inclusions, and exclusions of the rate from that project. It is important as there will be underpinning assumptions that drive the rate, whether that's the working window, level of productivity, access to site, what is

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-environmental-information/>

excluded, etc. This is why ensuring we understand what is included in the rates taken from previous projects is applied is important before we apply that rate to a current project. In respect to consistency on EWR we ensure that our deliverables undergo a three line of defence assurance process. This assurance process drives consistency, accuracy, and compliance to EWR expectations from cost estimates. First line of defence is an internal peer review check within the estimating team, the second line of defence is a peer review with divisional heads who sit outside of the cost team, and the third line of defence is review from an external party outside of EWR Co...

"...The above answers provide a high-level approach, however the Department for Transport's Should Cost Modelling and IPAs Cost Estimating Guidance documentation are points of reference to understand cost estimating principles we work towards in our industry. In addition the RICS Cost Prediction Professional Statement gives an industry wide view on cost estimating best practice. The production of a cost estimate firstly starts with the level of design detail, the less mature the design the more assumptions will need to be qualified, where we have a high level design we then match that with high level rates to be produced against the activities. We wouldn't have had design maturity in 2019 so the team would have produced activities and rates that included materials, labour and plant for direct construction cost within those rates, it is unlikely to have been a 3-line split break down. Whereas, if you have maturity in the design, e.g. detailed design, then you are able to build up rates for those activities with a build up included for labour, material, and plant. We would then have a rate for track which has a breakdown with additional aspects such as prelims, design, OH&P, land and property costs sitting separately in the estimate."

24. EWRC also explained that it had not produced specific cost figures for any of the route options specified in the request and that previous cost figures had related to larger route sections.

The Commissioner's view

25. In the Commissioner's view, EWRC does not, on the balance of probabilities, hold the requested information.
26. As EWRC's responses demonstrate, the process of arriving at a cost estimate is not a straightforward mathematical formula guaranteed to always produce the same answer when the same set of variables are inputted. Rather the process involves a range of assumptions and forecasts being made about price fluctuations, engineering challenges and so.

27. Because of the involvement of so many assumptions, it seems likely to the Commissioner that two estimators, of roughly equal skill and experience, could be presented with the same set of raw data and reach different conclusions as to the final estimation. One would hope that the two estimates would not be wildly different, but the estimate each person reached would involve that person exercising a certain amount of discretion in deciding what weight to assign to each variable and what range of assumptions ought to be used.
28. In the Commissioner's view, such a process amounts to the creation of new information because any estimate that EWRC was able to produce would rely on the skills and judgement of its estimators – not just on a mathematical manipulation of raw data to present it in a different way.
29. As EWRC has explained that it has not already produced these figures, it would be unable to comply with the request without creating new information that it does not already hold. Therefore in the Commissioner's view, EWRC does not hold the information that has been requested and would have been entitled to rely on Regulation 12(4)(a) of the EIR to refuse the request.
30. Strictly speaking, Regulation 12(4)(a) is subject to a public interest test. However, the Commissioner cannot conceive a public interest that would compel a public authority to disclose information if it does not hold. A public authority is not required to create information to satisfy the public interest test.
31. The Commissioner is therefore satisfied that the requested information is not held by EWRC.

Procedural matters

32. Regulation 14 of the EIR states that:

- “(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.
- (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
- (3) The refusal shall specify the reasons not to disclose the information requested, including—
 - (a) any exception relied on under regulations 12(4), 12(5) or 13; and
 - (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation

12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3)."

33. There is no explicit provision in the EIR which requires a public authority to confirm or deny that it holds information – although the Commissioner considers it good practice to do so.
34. However, where a public authority does not hold the particular environmental information that has been sought, the correct course of action is to inform the requestor that it is relying on Regulation 12(4)(a) of the EIR to refuse the request as the information is not held.
35. Whilst EWRC did issue a refusal notice within 20 working days, that refusal notice did not cite Regulation 12(4)(a) and was premised on the (incorrect) assumption that the requested information was held. At the date of this notice EWRC had not informed the complainant that it did not hold the requested information.
36. The Commissioner therefore finds that EWRC breached Regulation 14 of the EIR in responding to the request.

Right of appeal

37. 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

38. 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.
39. 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

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