

High Speed Rail and Public Information Requests.

Summary

Information requested from public authorities about the High Speed Rail proposals is “Environmental Information”. As a consequence requested information should be published under the requirements of the “Environmental Information Regulations”ⁱ. Under those regulations, much information that they might otherwise have been allowed to withhold from the public under the provisions of the Freedom of Information Act, must be published.

Introduction

When information is requested from a Public Authority, the Public Authority is generally obliged to provide that information. The Freedom of Information Act (FOIA) applies in respect of most information. The public authority can only withhold some information if it meets certain criteria, termed “exemptions”, that are set out in the FOIA.

However, when the information requested is “Environmental Information” the exemptions under the Freedom of Information Act do not apply. A different set of exemptions apply and these are set out in the “Environmental Information Regulations” (EIRs). The exemptions under the EIR are more limited in their scope. The public authority has fewer allowed justifications for withholding the information.

The EIRs require the release of some information that might be withheld from the public under the Freedom of Information Act.

What is “Environmental Information”?

Regulation 2 of the EIR provides the interpretation of terms in the EIR. It confirms at paragraphs (a) and (b) that it includes what might be regarded as very obviously “environmental information”.

(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);

But regulation 2 then goes on from the natural sciences to include what might be regarded as related political and administrative information.

(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);

Given those broad inclusions within the interpretation of “environmental information”, any information to do with the high speed rail proposals would be expected to fall under the category of “environmental information.”

Helpful extensive guidance available on the website of the Information Commissionerⁱⁱ provides extensive helpful elaboration, and confirms a wide application of the definitions based upon the phrase “any information ...on”. It will extend to any information “about, concerning, or relating” to the various definitions of environmental information. That view has subsequently been supported in case adjudications.

The further scope of EIRs in relation to “emissions”.

In addition, both the construction and the operation of the High Speed Rail service will result in the creation of “emissions” which means that EIR Regulation 12(9) applies.

When Regulation 12(9) is applied, four of the EIR “exemptions” can no longer be used by the authority to withhold the information.

Guidance from the ICO’s on-line “knowledge base” is helpfulⁱⁱⁱ.

In regulation 2b above, “Emissions” is one of several factors included in a list. The Aarhus Convention Implementation Guide refers to Council Directive 96/61/EC on integrated pollution prevention and control (“the IPPC Directive”), which defines “emissions” as a “direct or indirect release of substances, vibrations, heat or noise from individuals or diffuse sources in the installation into air, water or land”.

Whilst regulation 2(1)(b) provides that **information on emissions** is environmental information, regulation 12(9) is broader in scope and covers **information relating to information on emissions** (rather than just **on**). Requested information does not have to be specifically information **on** emissions for regulation 12(9) to apply, but extends to information that **relates to** information on emissions.

The key point is that the information held by the public authority (or the initial request) does not necessarily have to specify or even mention any particular form of emission for section 12(9) to apply.

Further “Knowledge base” advice from the ICO^{iv} confirms that the emissions referred to at 12(9) are **not** limited to emissions that have already taken place and could include past, present and future emissions. The clarification in IC Decision Notice FER0168409 Dept. for Energy and Climate Change dated 25 January 2010^v is helpful.

The construction and subsequent operation of the High Speed rail proposals would inevitably and unavoidably result in the generation of a myriad of various and substantial “emissions” (as defined above) by multiple different mechanisms. Given the broad application of section 12(9), information that relates to the high speed rail proposals must also be “information relating to information on emissions.”

The application of EIR’s and “emissions”; Key consequences.

A comprehensive attempt to compare and contrast the effects of the EIR’s with those of the Freedom of Information Act is beyond the scope of this paper. Guidance from Friends of the Earth^{vi} is particularly helpful. In summary;

- A. The EIR’s have a different definition of the “public authorities” who must provide information on request. An organisation may be obliged to provide information under the EIRs but not under FOIA.
- B. Under FOIA there is a specific absolute exception (not subject to the public interest test) that allows a public authority to withhold information where any other law prevents the authority from disclosing it.

By contrast, the EIR states explicitly that any prohibition on releasing information that is contained in any other law does not apply to environmental information. What that means is that even if another law makes it illegal to release environmental information that provision is overridden by the EIR.

- C. There are fewer “exemptions” under the EIR’s than under the FOIA. The public authority has fewer reasons allowing it to with hold environmental information. Those exemptions are listed below.
- D. Under the EIR’s, all the exemptions are subject to the Public Interest Test. i.e. the authority cannot with hold the information where it is in the public interest for it to be published. The exemption is over ridden by the public interest. Some equivalent exemptions under the FOIA may not be over ridden by the Public Interest test.
- E. Because of Section 12(9) the public authority cannot with hold the information using the exemptions shown in red from the list below.

The EIR exemptions

12. (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;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

12. (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (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; or
- (g) the protection of the environment to which the information relates.

It should be particularly noted that if Section 12(9) is engaged, information that has been provided to other public authorities by HS2 Ltd, or by the DfT, is no longer protected simply because a confidentiality agreement exists.

Conclusion

The Environmental Information Regulations are the appropriate tool in respect information requests submitted to public authorities about the High Speed Rail project. The public authorities should process such enquiries accordingly. Against that standard, the ability for an authority to lawfully withhold information about the High Speed Rail provisions is substantially restricted. The withholding of such information should be a very rare event.

ⁱ <http://www.legislation.gov.uk/uksi/2004/3391/contents/made>

ⁱⁱ “What is environmental Information?” ICO Guidance – Environmental Information Regulations
http://www.ico.gov.uk/for_organisations/environmental_information/~media/documents/library/Environmental_info_reg/Introductory/EIR_WHAT_IS_ENVIRONMENTAL_INFORMATION.ashx

which is linked off

http://www.ico.gov.uk/for_organisations/environmental_information/what_is_it.aspx

ⁱⁱⁱ <http://www.ico.gov.uk/foikb/PolicyLines/Commissionersapproachtoinformationrelatingtoemissions.htm>

^{iv} <http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyPastpresentfutureemissionsunder129.htm>

^v http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FER_0168409.ashx

^{vi} The Right to Know. Friends of the Earth
<http://www.foe.co.uk/community/resource/17459.htm>