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Dr James Conboy
By email: HS2@chilternsociety.org.uk;
office@chilternsociety.org.uk

19 November 2020

Dear Dr Conboy

Information request
Reference number: FOI2020/01249

Thank you for your email of 22 October 2020, in which you requested the following information:

This society has had misgivings regarding the safety of the proposed Chiltern Tunnels – in the absence of a third service tunnel – dating back to the Select Committee hearings, when the non-incident tunnel was described by the HS2 witness [name provided] as a ‘place of relative safety’. We understand that you have been awarded a contract to provide safety assessments for HS2 infrastructure, and so may be able to help us with these concerns.

Could you please provide us with documents relating to the evacuation procedures proposed, in the event of an incident affecting a train which results in it being halted while passing through the Chiltern Tunnel?

I have processed your request under the Environmental Information Regulations 2004 (EIR) as this type of information is environmental according to the definition in regulation 2(c) of the EIRs; in this case, the development and construction of High Speed 2 (HS2).¹

We hold some information in response to your request; however this is exempt from disclosure under regulation 12(4)(d) of the EIR (material in the course of completion). We also consider that some of the information contained within the document supplied by

¹ Section 39 of the Freedom of Information Act 2000 (FOIA) exempts environmental information from the FOIA and requires us to consider it under the EIR.

HS2 Ltd and the Network Certification Body (NCB)'s views on this information are also withheld under regulation 12(5)(a) (public safety) and regulation 13(1) (personal information)².

I will explain why these exceptions apply and also set out some information that may be useful to you.

Regulation 12(4)(d) – materials in the course of completion

This regulation of the EIRs can be applied when the request relates to material which is still in the course of completion, unfinished documents or incomplete data.

The Information Commissioner's guidance explains that examples of incomplete or unfinished documents can include the following:

'Material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete.'

Draft documents are unfinished even if the final version has been produced.'

In the case of your request, the information we hold is a document produced by HS2 Ltd, which sets out some initial plans for evacuation from the Chiltern Tunnel, as well as reports that contain our initial assessment on the information presented to us at this time. At this time, the information held by us represents the early stages of considerations on this matter - the details of the evacuation process is still under design within HS2 and no final conclusions or designs have been presented to the NCB by HS2 Ltd at this present time; it is possible that the plans in this current HS2 Ltd document will change prior to construction. We believe it would be misleading to disclose the information we hold while this matter is still a work in progress and before final designs have been made and the NCB, a subsidiary company of Network Rail³, has had the opportunity to review and assess

² This EIR regulation allows us to withhold personal data, where its disclosure would breach the data protection principles set out at s.35 of the Data Protection Act 2018 and Article 5 of the General Data Protection Regulations. In this instance, the public disclosure of employees' details at NCB and HS2 Ltd would breach the first principle which ensures that data is processed fairly and lawfully. The individuals in question would have had no reasonable expectation that their personal information would be provided to the world at large through the EIR and it would not be fair processing of their data to go against their reasonable expectations.

³ In this case, the NCB is the Assessment Body as defined in Common Safety Method for Risk Evaluation and Assessment (CSM-RA (EU regulation 402/2013) definition (14)):
the independent and competent external organisation which undertakes investigation to provide a judgement, based on evidence, of the suitability of a system to fulfil its safety requirements.

You can read more about this on the Office of Rail and Road website using the following link:
<https://www.orr.gov.uk/guidance-compliance/rail/health-safety/laws/european-railway-safety-legislation/common-safety-method-risk-evaluation-assessment>

the compliance of the plans and design with the Common Safety Method regulation. On this basis, we consider that the information held is material that is in the course of completion, and that regulation 12(4)(d) applies.

The public interest test

To apply this regulation, I must also consider whether the public interest favours disclosure of the information or supports withholding it. I have considered the factors on both sides.

Factors in favour of disclosure

- There is a general presumption in favour of disclosure under the regime of the Environmental Information Regulations;
- This information is likely to be significant to individuals who will use the new HS2 railway once constructed, to understand that safety measures and evacuation procedures have been appropriately considered and implemented. There is a public benefit in promoting access to this type of information as it instils confidence in the passenger that their safety has been actively considered and adequate measures have been taken to make sure they are safe when using the railway.
- Disclosure of this information, even if it's still under active consideration and subject to change, would allow the public to see the designs and procedures currently being considered.
- HS2 Ltd's activities, like Network Rail's, are publicly funded and disclosure of the early designs and considerations that may have an impact on lineside neighbours and passengers makes us more accountable.

Factors against disclosure

- The disclosure of documents that show early designs and discussions of the possible procedures would be likely to have a negative impact on the 'safe space' required by HS2 Ltd's experts to consider the initial data and designs and review the information fairly. As the ICO guidance states,

*'In such cases the public authority may argue that it needs a 'safe space' in which to do this away from public scrutiny, and that disclosing this material would harm that safe space.'*⁴

- A disclosure of documents setting out information for consideration, for a process that is not finalised could lead to a potential 'chilling effect', where experts within HS2 Ltd, NCB and other key stakeholders, as well as Network Rail, may feel that

⁴ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

they cannot freely supply considered views or concepts for future rail improvements and procedures without the necessary time and space to fully formulate and test their approaches before the public are able to scrutinise their considerations and opinions. It is not in the public interest to dampen down the advice and opinions of any experts, whether they work for Network Rail or another railway organisation.

- Consideration must also be given to the timing of the request and whether disclosure of the information held by the NCB, including that supplied to them by HS2 Ltd directly, would be appropriate at this present time. A similar request, asking for very similar information, was received by HS2 Ltd and resulted in a Decision Notice, FS50841518, being issued by the Information Commissioner's Office in July 2020. In this case HS2 Ltd explained that:

*'...while the withheld information in this case is contained in documents which are finished, they can be categorised as material which is still in the course of completion. It explained that the design is not finalised and many of the decisions still need to be made before any of the issues deliberated in the documents will be concluded.'*⁵

In this case, the Commissioner agreed with HS2 Ltd that:

*'...the Commissioner is satisfied that there is greater public interest in the ability of HS2 Ltd to be able to discuss, consider and plan the works in question without this process being frustrated through the release of the withheld information. At the time of the request the information was subject to change and is still considered 'live' at this point.'*⁶

Given that this ICO Decision Notice was only issued in the last few months, considering the findings made by the Commissioner and the fact that this work is still ongoing, it would still not be appropriate at this current time to disclose this information while it is still under active review and designs and plans are likely to change.

- Given that HS2 Ltd has an intention to make public general information regarding safety in this tunnel, it is not in the public interest to publish detailed information prior to that time - making the outcome of final decisions publicly available already goes some way to addressing the public interest, at the point where the details are finalised. Disclosure of detailed information while designs are likely to change and the considerations used to inform decisions may be adapted would only confuse the issue and would not better help the travelling public to understand the plans or to reassure them.

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617939/fs50841518.pdf>, paragraph 21

⁶ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617939/fs50841518.pdf>, paragraph 42

In conclusion, we recognise the strength of the factors above which favour disclosure, however, this must be balanced against the strong public interest in protecting a safe space in which the appropriate experts can seek and provide views and advice to complete final designs and processes that will be integral to public safety.

Regulation 12(5)(a) – public safety

I am also withholding the information you are seeking under regulation 12(5)(a) of the EIR, which allows us to withhold information where we consider that its disclosure would adversely affect public safety.

The Regulations do not specify the meaning of ‘public safety’ but the Information Commissioner’s Office (ICO) makes it clear that the term is to be understood as having broad implications:

‘Public safety’ may be interpreted widely. The exception covers information that, if disclosed, would adversely affect the ability to protect the public, public buildings and industrial sites from accident or acts of sabotage; and where disclosing information would harm the public’s health and safety.

We do understand that there is a public interest in transparency and openness and Network Rail is committed to providing information where appropriate. However, on this occasion we consider that disclosure of the information the NCB has received from HS2 would cause a greater concern for the security of the rail network, not just at this location but at other locations where similar evacuation procedures to those being designed are likely to already be in use. If we were to provide the detailed technical information in response to your request, it could be used by individuals who may wish to disrupt, interfere with or attack the workings of the infrastructure where these systems are already in place. We believe that the consequences of such activity would then also be likely to adversely affect public safety and endanger individuals.

When assessing the harm that a disclosure would be likely to cause, it is necessary to take into account the fact that disclosures made under the FOIA and the EIRs are public disclosures which are made to the ‘world at large’; any information disclosed is released into the wider public domain rather than simply to the person making the request. Because of this, we have to consider the wider impact of making a piece of information available to ‘the world’ and whether any individual could then use the information to cause harm.

Public Interest Test

We are required to consider whether the public interest in disclosure outweighs the public interest in maintaining the exception. In this case, the detailed information currently held, that could be subject to change, is technical and, while it is subject to change, the level of

detail being considered is only of value to those working on the railway. However, we do recognise that disclosure would contribute to increasing openness, public knowledge and understanding about the evacuation procedures currently under consideration, which would encourage reassurance within the public, to show that procedures and plans are in progress at this specific location, to protect those using and working on the railway.

However, there are strong arguments in favour of maintaining the exception in this case - these arguments are based on assessment of the risks associated with disclosure of this type of information and on the likelihood and severity of potential harm to the security of the rail network and wider public safety if this information is made publicly available through disclosure under the EIR.

Having considered all the circumstances relevant to this case, we consider that these factors outweigh all others at this time. We therefore consider that the greatest public interest lies in preventing harm to the security of the infrastructure and in ensuring the safety of those individuals who work and travel on the network. On this basis, our decision is that the public interest favours withholding the information in response to this aspect of your request at this time.

I am sorry that we are unable to provide the information requested but hope the explanations provided in this letter are helpful. If you have any enquiries about this response, please contact me in the first instance at FOI@networkrail.co.uk. Details of your appeal rights are below.

Please remember to quote the reference number at the top of this letter in all future communications.

Yours sincerely

Emma Meadows
Information Officer

Appeal Rights

If you are unhappy with the way your request has been handled and wish to make a complaint or request a review of our decision, please write to the Head of Freedom of Information at Network Rail, Freedom of Information, The Quadrant, Elder Gate, Milton Keynes, MK9 1EN, or by email at FOI@networkrail.co.uk. Your request must be submitted within 40 working days of receipt of this letter.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner (ICO) can be contacted at Information Commissioner's Office, Wycliffe House, Water

Lane, Wilmslow, Cheshire, SK9 5AF or you can contact the ICO through the 'Make a Complaint' section of their website on this link: <https://ico.org.uk/make-a-complaint/>

The relevant section to select will be "Official or Public Information".