

11 December 2023

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Your reference	Our reference
202300263	SFIT/1001174320

Network Rail
Freedom of Information
The Quadrant
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Milton Keynes
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By email only

Attention: Jonathan Mantle (FOI Manager)

Dear Sirs,

FOIA request - Old Oak Common Lineside Logistics Compound – Reference Number 202300263

We refer to your letter of 4 December 2023 which responds to our email dated 3 November 2023.

In our email, we once again requested that Network Rail provides the information detailed in our original FOIA request of 22 December 2022, i.e. “1. In relation to the “extensive research” described in the Consultation Document, specifically, any optioneering studies, constructability reports, assessments of options produced in the year prior to, and since HS2 published the public consultation document entitled “Old Oak Common Station Design” on 5 February 2019, which provide the basis for NR’s conclusion that the Site is “the only suitable area” for the Lineside Logistics Compound.” This followed an earlier request dated 26 October 2022.

Our request of 22 December 2022 also requested:

“6. Any reports, assessments, consultations or communications with depot operators Agility/ Hitachi and / or with the Department for Transport, which show their views on the lineside logistics compound at the North Pole Depot, as set out in the penultimate paragraph on page 10”

“7. Supporting documentation that provides the basis for the assessment of available locations for the lineside logistics compound as shown at figure 8, page 11”

On 28 February 2023, Network Rail declined to provide the requested information, the response being as follows: “[...] we hold reports relevant to your request, including an option selection report, within the central folder referenced in response to FOI2022/01512. However, it is my view that this information is exempt from disclosure under regulation 12(4)(d) of the EIR (material in the course of completion). I will explain this exception and how it applies in the remainder of this response letter [...]”.

The letter then goes on to explain that:

“In the case of your request, while this particular document is finished, it has bearing on a larger piece of work still in progress, specifically our application for a Transport and Works Act Order (TWAO).”

And

“As final decisions have not yet been made and there are intentions to publish information on option development in the future, we believe it would not inform public debate (and may potentially damage such

debate) to disclose the documents we have produced and hold at this time. It is primarily the need for a safe space for Network Rail to reach decisions on the basis of evidence and expertise that has led us to consider that the information we hold constitutes material that is in the course of completion, and therefore regulation 12(4)(d) applies.”

It was therefore clear that Network Rail’s position as at 28 February 2023 was that since its application for a TWAO was still in preparation and presumably since the evidence that would accompany that application had not been finalised, but was in the ‘course of completion’, that it would be premature to publish the information that it held that was the subject of the information request. This position was noted.

By the 3 November 2023, not only had the TWAO application been made (on 17 April 2023), but Network Rail’s statement of case to the public inquiry (4 August 2023) had also been published as well as its evidence to the Inquiry (16 October 2023), and rebuttal evidence (3 November 2023). Accordingly by the date that we again requested disclosure of information, all of Network Rail’s evidence had been published and it was no longer credible for Network Rail to maintain a position that any information relating to the TWAO application was ‘still in progress’ or that it needed a ‘safe space’ to prepare its evidence and expertise.

In our email of 3 November 2023, we noted that the Inquiry relating to Network Rail’s TWAO application would commence on 14 November 2023. We explained the central importance of Network Rail’s optioneering exercise and appraisal of alternative sites as a major issue at the Inquiry and that failure to disclose material information would raise issues of natural justice.

In your response of 4 December 2023, you refer to reg. 7(1) of the Environmental Information Regulations 2004 (**EIR 2004**). Reg 7(1) provides that a public authority may extend the period of time of 20 working days to 40 working days “*if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so*” [underlining added]. You explain that “*While I have been working towards providing a substantive response by today, it has become apparent that this is not possible. This is because we are still in discussions with our colleagues about the potential prejudice that might stem from releasing the information in question meaning that it is impracticable to provide a substantive response today.*” [underlining added]

The reason you give for relying on this extension of time does not fall within the scope of what reg. 7(1) envisages, that regulation states that:

“the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so”.

You will note that the ‘potential prejudice’ to Network Rail which you state might arise from releasing the requested information clearly has no relationship whatsoever to the information we have requested being potentially complex or voluminous. Your reason for refusing to release the information is therefore outside the legislation and the information should accordingly be released immediately.

It appears to us that Network Rail is simply looking for excuses not to release the information, the excuse of 28 February 2023 not being tenable, so a new one has been asserted.

In relation to prejudice, the prejudice which arises from Network Rail refusal to disclose material information is to significantly prejudice BPL’s position as the party whose land is subject of the TWAO, and the inability of BPL to effectively test Network Rail’s case submitted to the Inquiry and to Secretary of State. Furthermore, we consider that such failure compromises the Inspector’s ability to effectively report to the Secretary of State, and for the Secretary of State to make a properly informed decision on the TWAO, thereby raising concerns relating to procedural fairness, natural justice and the legality of the decision.

Further, it is difficult to see what prejudice would arise to Network Rail, unless Network Rail is withholding material information that is contrary to the evidence that it has presented to the Inquiry. Is this the reason Network Rail are alleging prejudice? If not, please articulate the nature of the alleged prejudice. If yes, to this question, then such information must be disclosed. It is wholly inappropriate for Network Rail to withhold

information in those circumstances. The Inspector and the Secretary of State must be able to fairly assess all the evidence relating to the propriety of using BPL's site for Network Rail's proposed purposes, and make a judgement relating to whether it is the 'only' suitable site or on Network Rail's current evidence the 'only viable' site, or whether there are indeed alternative sites that are suitable, and / or viable.

Failure to disclose this evidence only adds to BPL's existing concerns relating to the fairness of the proceedings, especially in light of information disclosed during the course of the Inquiry which relates to Network Rail's engagements with the Department for Transport relating to the North Pole/Hitachi Depot being considered an alternative site, and risk assessments relating to assessments of alternative sites. It is noted how quickly Network Rail managed to produce this evidence during the course of the Inquiry, when it suited them to do so, yet it has taken Network Rail in excess of 12 months to respond to this information request. This is simply inequitable and unfair.

We therefore urgently request that Network Rail provides the information requested as it has now been over a year since the request was originally made. BPL reserves its right to seek an order for disclosure from the Inspector should Network Rail fail to provide the information requested.

Yours faithfully

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