



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

**Appeal No: EA/2020/0088V**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FER0848129**

**Dated: 6 January 2020**

**Appellant: Sarah Green**

**First Respondent: The Information Commissioner**

**Second Respondent: High Speed Two (HS2) Ltd**

**Before**

**HH Judge Shanks**

**and**

**Suzanne Cosgrave and Paul Taylor**

**Hearing by CVP on 4 March 2021**

**Representation:**

**Appellant:** in person

**Commissioner:** did not appear

**HS2:** Carl Bird (Briefings, Correspondence and FOI Manager)

**Subject matter:**

Environmental Information Regulations 2004 (EIR)

Regulation 12(4)(d) (incomplete data)

Regulation 12(5)(a) (public safety)

**DECISION**

**For the reasons set out below, the appeal is allowed and the Tribunal issues the following substitute decision notice.**

**Substitute Decision Notice**

**Public authority:** High Speed Two (HS2) Limited

**Complainant:** Sarah Green

**Decision**

The Complainant's request for environmental information dated 21 January 2019 was not dealt with in accordance with the EIR in that the Public Authority was not entitled to rely on the exceptions provided by regulations 12(4)(d) and 12(5)(a) to withhold any part of the three reports identified by the Public authority as answering the request and they ought to have been made available to the Complainant subject only to the redaction of personal data in accordance with regulation 13.

**Steps to be taken**

The Public Authority must by 1600 on 21 May 2021 make available to the Complainant copies of the three reports in full unredacted form save for the redaction of personal data in accordance with regulation 13.

## **REASONS FOR DECISION**

### **Factual background**

1. As it heads north-west out of London the HS2 rail line will cross the Colne valley in Hertfordshire on a 3.4 km long viaduct before entering a 15.75 km tunnel through the Chiltern Hills. HS2's contractors on this section of the line are a joint venture called Align.
2. The Colne valley area is underlain by a chalk aquifer which is used extensively for groundwater abstraction to supply water to the public. Affinity Water Ltd, the local water supply company which has a total of about 3.2 million customers, has six groups of abstraction boreholes in the area which take water from the aquifer. In its Petition to Parliament relating to the High Speed Rail (London-West Midlands) Bill which made provision for the HS2 line in May 2014 Affinity stated:

**[23] ... Your Petitioner has significant concerns that the proposed railway passes close to six of its groundwater sources which will give rise to operational issues relating to water quality, quantity and ground water levels. Your Petitioner and its customers could be severely affected as the proposed works have the potential to reduce the quality and/or quantity of water abstracted to the extent that supply could be entirely jeopardised. Due to the nature of the chalk and fissures within it, it cannot be known prior to construction and operation what the effects on the sources will be; as such substantial and careful monitoring will be imperative.**

...

**[26] Pollution of the groundwater (temporary or permanent) during or following construction may reduce your Petitioner's ability to abstract from these sources [ie the chalk aquifer]. There is also the risk that pollution will occur as a result of the existence of the railway as the capability of the chalk to filter the water may be reduced by the railway's positioning. In addition, pollutants from further afield may be able to transit more easily to the sources as a result of piling/tunnelling processes ...**

3. Much of the floor of the Colne valley has been subject to sand and gravel extraction and comprises a series of lakes. There is thought to be some continuity between the water in these lakes and that in the chalk aquifer. To the north-east of the valley there is a landfill site at Newyears Green which has been formally designated as contaminated land. A stream called Newyears Green Bourne (which runs under the landfill site and then south to a point where it will be crossed by the Colne valley viaduct at its south-eastern end) has been identified by the London Borough of Hillingdon as a significant pollution pathway.
4. The viaduct across the Colne valley will be supported by 58 piers. The piers will be supported by concrete pile caps constructed on groups of piles (numbering between four and nine) made of reinforced concrete with a diameter of about 1.8 metres which will be sunk to a depth of 50 to 80 metres into the ground.
5. This appeal is particularly concerned with a load test pile site to the south-east of the Colne valley adjacent to Harvil Rd UB9 6JW which is 500m to the south-west of the Newyears Green landfill site; this load test pile site is referred to throughout the papers as “location 2”. There is no dispute that it was planned that the load test pile works at location 2 would be completed in the course of 2019; Ms Green states that it was originally to take place in the Spring (see: A59 in original open bundle) and as far as we are aware this has not been challenged. In the event, the load testing at location 2 was delayed for over a year. HS2 applied to the Environment Agency for permission to carry out the test piling on 2 July 2019 and consent was granted on 11 October 2019 (see EA letter to Ms Green dated 1 June 2020). An application for a variation “... to increase the groundwater monitoring ...” was received on 11 March 2020 and varied consent issued on 2 April 2020. The load test piling was actually done between June and September 2020, with the load test piles being installed between 13 July and 6 August 2020 and tests being carried out between 17 August and 18 September 2020.

6. We understand from press reports that work on constructing the viaduct itself has recently begun during March 2021.

### **Request and Commissioner's decision**

7. The Appellant, Ms Green, is a local resident and a customer of Affinity Water. She greatly appreciates the fresh drinking water drawn from the chalk aquifer and is very concerned about the effects of HS2's work in the Colne Valley on the water supply and more generally. On 21 January 2019 Ms Green made a request to HS2 under the Environmental Information Regulations (EIR) in the following terms:

**What risk assessments have taken place, of the potential increased risk to controlled waters as a result of imminent works by HS2 contractors along the Newyears Green bourne and surrounding wetland?**

**Are any of the risk assessments independent from the developers (HS2) and where are the risk assessment (sic) accessible to the public?**

It is common ground that the "imminent works" referred to by her were the load test piling works planned at location 2.

8. HS2 responded to Ms Green's request on 22 March 2019 stating that they held some information relevant to the request but were not required to release it by virtue of EIR regulation 12(4)(d) (incomplete data). The refusal was upheld on a review requested by Ms Green in a letter dated 28 May 2019. That letter stated towards the end:

**Please note that the risk assessments themselves are only a part of the process, and that oversight for this work is with the Environment Agency. Only when they are satisfied with the mitigation measures proposed, will they grant consent for the works to take place ...**

9. On 4 June 2019 Ms Green complained to the Information Commissioner that her request had not been dealt with in accordance with the EIR. On 6 December 2019 HS2 wrote to the Commissioner providing substantive responses to the

Commissioner's enquiries and setting out their case in relation to Ms Green's request. They sent the Commissioner what were described as "three relevant risk assessments" stating that none of them was directly related to the geographical area indicated in the request but that they had been identified as the most relevant data held in respect of the request. The title pages of these reports each bore the name "ALIGN working on behalf of HS2" and recorded the following:

**[1] Options for mitigation of the effects of piling on groundwater**

Revision	Date	Revision details
C01	30/04/18	First Draft
C02	08/05/19	Affinity Water and EA comments

SECURITY CLASSIFICATION: OFFICIAL

Handling instructions: None

**[2] Groundwater Assessment for Construction Tasks – Piling at the Colne Valley Viaduct**

Revision	Date	Revision details
P01	10/05/2018	First issue
C01	26/07/18	Second issue
C02	23/04/19	EA comments addressed

SECURITY CLASSIFICATION: OFFICIAL

Handling Instructions: None

**[3] Groundwater Assessment for Construction Tasks – Tunnel and Cross Passages**

Revision	Date approved	Reason for revision
C01	12 September 2018	First issue

C02	14 December 2018	Addressed HS2 comments
C03	4 June 2019	Addressed EA/Affinity comments

Security classification: OFFICIAL

Handling instructions: None

HS2's email of 6 December 2019 also stated that they relied on EIR regulations 12(5)(a) (public safety) and 13 (personal data) to withhold parts of the documents and set out HS2's position on the public interest balance in relation to regulations 12(4)(d) and 12(5)(a).

10. In a Decision Notice dated 6 January 2020, the Commissioner decided that regulation 12(4)(d) applied to the information in the reports and that the public interest in maintaining the exception provided by that regulation outweighed the public interest in disclosure and that HS2 had therefore complied with their obligations under EIR. She recorded that she did not therefore need to consider the applicability of regulations 12(5)(a) and 13.
11. Ms Green appealed to this Tribunal against the Decision Notice on 22 February 2020. On such an appeal it is open to the Tribunal to carry out a full review of the facts and of the Commissioner's conclusions and, as often happens, we have been supplied in the course of the appeal with far more evidence and argument than was before the Commissioner.
12. Before turning to the procedural history of the appeal, it is also relevant to record that on 12 March 2020 Ms Green made an EIR request to the Environment Agency in similar terms to the one made over a year before to HS2 with which we are concerned. On 1 June 2020 she was provided with a redacted version of a report and appendix prepared by Align in similar form to those referred to above which was entitled "Hydrogeological and Surface Water Risk Assessment for Load Test Piling Location 2". The first issue date for this

report was shown as 25 October 2019. The second revision date was shown as 22 January 2019 but it is clear that this was an error and it should have said 22 January 2020. The Environment Agency's letter of 1 June 2020 recorded that the original application for test piling at location 2 had been made on 2 July 2019 (as we record above at para 5) and that "a risk assessment" had been provided "with the applications (sic)". In making the redactions to the report supplied the Environment Agency stated that they were relying on EIR regulations 12(5)(a) and 13.

### **The procedural history**

13. No application was made to join HS2 as a party to the appeal and the original parties, Ms Green and the Commissioner, agreed that it could be determined on the papers. The appeal came before us in that way on 14 October 2020 and we were provided with copies of the three reports referred to above in the form in which they had been provided by HS2 to the Commissioner. On reviewing the material supplied we did not feel that we had a full or clear enough picture to decide the appeal and in particular we were not clear whether the closed material supplied to us in fact included the requested information or, if so, all of it. Given the case's clear importance and sensitivity, we considered that we should seek further information and, notwithstanding that the parties had consented to the matter being determined without one, hold a hearing to properly determine the appeal.
  
14. We issued directions on 16 October 2020 joining HS2 as Second Respondent to the appeal and requiring them to answer various questions in writing. We also made provision for HS2 to serve a Response and required them to do so if they intended to rely in the appeal on regulations 12(5)(a) and/or 13 in addition to regulation 12(4)(d). We required HS2 to attend the proposed hearing "by a representative and ... to organise a witness with suitable knowledge of the issues who is able to provide oral evidence to the Tribunal in response to questions".



15. HS2 served a full Response signed by their solicitors dated 27 November 2020. At para 4 they described the three reports as "... the three documents that fell within the scope of the Request". At paras 10 to 20 they answered the questions the Tribunal had asked. At paras 21 to 24 it was stated that HS2 had now disclosed the three reports to Ms Green (redacted only to the limited extent that they sought to rely on regulations 12(5)(a) and 13) because they considered that the material no longer comprised "incomplete information" under regulation 12(4)(d) and they wished to save costs and narrow the issues; the reports which had been disclosed to Ms Green were the same versions as those which had been disclosed to the Commissioner in December 2019 which we refer to above. At paras 28 to 35 of the Response HS2 made clear that they still considered that they had been entitled to withhold the reports in their entirety on the basis of regulation 12(4)(d) as at the date of Ms Green's request and set out their case in relation to the applicability of the exception and the public interest balance. At paras 36 to 54 HS2 set out their case on the applicability of regulation 12(5)(a) in detail and at paras 55 to 71 they dealt with the public interest balance in relation to it including, at paras 57 and 58, the public interest in disclosure of the reports (in their entirety). At para 86 HS2 stated that they considered that the Response and the documents referred to therein "... are sufficient for the Tribunal to reach its decision in this Appeal".

16. In her Reply to that document dated 9 December 2020 Ms Green stated at para 3:

**The Appellant recognises the recent efforts made by [HS2] in providing the Updated information. This has informed the Appellant in this reply to state the reasons why the non-disclosure of some of the Updated Information at the time of the [request] was not in the public interest.**

17. In due course the hearing of the appeal was fixed for 4 and 5 March 2021. In an email to the Tribunal sent on 8 February 2021 HS2 sought directions as to whether they needed to file a witness statement or skeleton argument, whether

they would need to deal with opening and closing submissions at the hearing and whether the time estimate could be reduced from two days to one.

18. In response to that email and others from Ms Green and the Commissioner the Tribunal emailed the parties with further directions made by Judge Shanks on 16 February 2021. Ms Green was directed to clarify whether she was seeking disclosure of the redacted parts of the reports disclosed to her and whether she sought disclosure of any further material coming within the terms of her request and to identify it if possible. HS2 was directed to clarify which exemptions they were relying on in relation to the redactions and to respond in writing to various questions which had been raised by the Commissioner in an email of 12 February 2021. It was indicated that HS2 did not need to file a witness statement or skeleton argument and that the format of the hearing would be informal, but that they would need to be represented by someone (preferably a lawyer) who could make submissions of their behalf and that a witness should attend who could answer factual questions. The email ended by saying that although the hearing may well be finished within a day HS2 should remain prepared for the hearing to occupy a second day. In the context of dealing with Ms Green's position the email stated:

**The only real issue for the Tribunal will be to identify whether there is any material held by HS2 which should have been disclosed under FOIA [it should have referred to EIR] at the time of her initial request which has not yet been disclosed.**

19. Ms Green responded on 17 February 2021 stating that she was continuing to seek disclosure of the redacted material, in particular in the first ("Options") report. She also stated that she was not seeking any further undisclosed material regarding the water risk assessments for the load test piling at Harvil Rd but (she said) if HS2 were relying on other undisclosed assessments they ought to disclose them.

20. HS2 responded on 26 February 2021. They indicated that they were relying only on regulations 12(5)(a) and 13 in relation to the material redacted from the

three reports; they confirmed that there were no other relevant risk assessments in existence at the date of Ms Green's request in January 2019; and they answered some detailed questions raised by the Commissioner. At the end of the email HS2 referred to the Tribunal's statement about "the only real issue" for the hearing and stated that their responses above had therefore focussed on "... records held by [HS2] ... as at the date [of the request] ... and ... whether or not it had disclosed all the requested environmental information held by it except where that environmental information falls under one or more exceptions under EIR (and where this is the case, whether or not those exceptions were validly applied)".

21. The hearing was held remotely by CVP on 4 March 2021 and in the event only lasted that morning. The Commissioner did not attend as she had indicated she would not. Ms Green spoke on her own behalf. Mr Bird, HS2's Briefings, Correspondence and FOI Manager, who has experience of freedom of information but no legal qualifications, spoke on behalf of HS2.
22. At the outset of the hearing Ms Green made clear that she continued to seek a decision on whether HS2 had been entitled to rely on regulation 12(4)(d) to withhold the reports at the time of her request although it was now accepted by HS2 that that exception would no longer apply and the reports had (subject to the regulation 12(5)(a) and 13 redactions) been disclosed to her. Mr Bird said that he was taken by surprise by this and had not anticipated that the hearing would cover this issue. We decided to continue with the hearing and heard what the parties had to say on regulation 12(4)(d) but we consider further below whether it is appropriate to decide the regulation 12(4)(d) issue now.
23. The only oral evidence given at the hearing, other than from Ms Green and Mr Bird, was from Dr James Talbot, an expert in water quality, who had prepared a report dated July 2020 commissioned by Ms Green which was included in our

papers and which related to the risk assessment report we refer to above at para 12. Dr Talbot told us that in his view the conclusion at para 7.2.13 of the first (or “Options”) report that the decay of the steel piles to be used below the water table in connection with a temporary jetty may take 1,000 years or more was based on a false assumption which had fed through into the risk assessment report referred to at para 12. This false assumption was that the water causing decay would be clean water; in Dr Talbot’s view, the water coming into contact with the steel piles would potentially be contaminated by vertical leak of polluted water. Clearly we are in no position to form any view on the merits of Dr Talbot’s evidence but, having heard him, we have no reason to doubt his expertise or good faith in raising issues about the contents of the reports we are concerned with.

24. In the aftermath of the hearing, the Tribunal received a number of emails from Ms Green and Mr Bird on 4 and 5 March 2021. Both sides included material which went beyond that which the Tribunal had strictly contemplated but we have taken it all into account so far as relevant. In his email of 4 March 2021 Mr Bird specifically drew our attention to the parts of HS2’s submission to the Commissioner, her decision notice and their Response document which related to regulation 12(4)(d).

### **The legal framework and the issues in the appeal**

25. The relevant parts of the EIR are as follows:

#### **Duty to make available environmental information on request**

5.—(1) Subject to ... Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

...

### **PART 3**

#### **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) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
- (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 the applicant’s request is received;
  - ...
  - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;
  - ...
- (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) ... public safety;
  - ...

26. The following issues remain for our determination on the appeal:

- (1) whether HS2 correctly identified the three reports as being the environmental information which Ms Green requested and whether there was further material held which came within the request;
- (2) whether at the time of Ms Green’s request the three reports were “still in the course of completion” or comprised “unfinished documents” and, if so, whether the public interest in maintaining the regulation 12(4)(d) exception outweighed that in disclosure;
- (3) whether disclosure of those parts of the three reports which have been redacted in reliance on regulation 12(5)(a) would have adversely affected “public safety” and, if so, whether the public interest in maintaining the regulation 12(5)(a) exception outweighed the public interest in their disclosure.

There was no issue that the parts of the reports which were redacted on the basis that they comprised personal data were properly withheld under regulation 13.

**(1) Has the “environmental information” requested been properly identified?**

27. It seems likely that much of the material HS2 supplied to the Commissioner and, in due course, to the Tribunal and (in redacted form) to Ms Green, was not, strictly speaking, within the terms of her request. None of the reports related specifically to the imminent test piling work at location 2. As HS2 themselves told the Commissioner, none of them was directly relevant to the geographical area referred to in the request; indeed the third report was concerned with the effect on ground water of the Chiltern tunnel, several kilometres away from location 2. Further, the three documents supplied were all versions of the reports which came into existence several months after the request, following input from Affinity and/or the Environment Agency. (In this connection it is notable that at no stage has HS2 sought to supply the versions of the three reports which would have been current at the time of the request and, when this issue was raised at the hearing, Mr Bird explained that at the relevant time HS2 did not have a system whereby earlier versions of a document were “locked” before a new version came into existence, so that it would be difficult if not impossible to find the versions current in January 2019).

28. On the other hand, we are still not entirely satisfied that there was no other material held by HS2 which did come within the terms of the request. In particular, as we note above, the Environment Agency appear to be saying in their letter of 1 June 2020 that a water risk assessment relating specifically to test piling at location 2 was provided with the application made on 2 July 2019; we have not seen this risk assessment (although what looks as if it must be a later version of it was supplied to Ms Green by the EA on 1 June 2020) and, given that we understand that it had been contemplated that the test piling was going to take place much earlier than it in fact did, we still wonder whether there might have been an earlier version of such a risk assessment in existence in January 2019.

29. In spite of our doubts, HS2 resolutely maintained through Mr Bird at the hearing that there was no other material to disclose, pointing out that the location 2 risk assessment (as well as various other documents referred to in the papers which gave rise to questions) was dated after Ms Green's request. For her part, Ms Green had indicated in her email of 17 February 2021 to the Tribunal that she was not seeking any further material "... regarding the water risk assessments for the load test piling at Harvil Rd [as she] believed that this [had] now been released ..." and she did not really press the point at the hearing.

30. Given the stance taken by the parties, we have come to the view that the Tribunal cannot really take this matter any further. We will therefore proceed on the basis that the three reports in their entirety comprise the relevant material for our consideration, notwithstanding that they cover wider issues than those raised by the original request and technically they did not come into existence in their current form until after the request. There has been, and could be, no issue that they comprise "environmental information" for the purposes of the EIR.

**(2) Regulation 12(4)(d) (incomplete data)**

*Should we decide the issue now?*

31. As we describe above, Mr Bird expressed surprise at the hearing when Ms Green made clear that she was still seeking a determination from the Tribunal in relation to regulation 12(4)(d). In his email dated 4 March 2021 sent after the hearing he stated that HS2 had not instructed counsel, lodged a skeleton argument, or made opening and closing statements in the light of their understanding that regulation 12(4)(d) would not be in issue at the hearing and (in effect) he invited the Tribunal not to consider the issues arising without giving HS2 the opportunity to seek further input from their legal team.

32. We consider that Ms Green is entitled to seek a determination of this issue notwithstanding that by the time of the hearing she had received substantially all

the material. It is very well established that the relevant date for deciding whether information ought to be disclosed and the applicability of any exemptions under EIR (and indeed FOIA) is the date of the original request so that, even if there is a subsequent disclosure, there remains a potential issue. Given the importance that we attach to this request and the fact that HS2 may face similar requests under EIR over the coming years we consider that there is good reason to resolve the issue in this case. Furthermore, technically, in order to resolve the issue whether the redacted material should be disclosed we need to consider not only regulation 12(5)(a) but also regulation 12(4)(d) which, if it entitled HS2 to withhold the reports in their entirety as at January 2019, would have prevented her obtaining the redacted material even if regulation 12(5)(a) did not apply; we note that HS2 appear to accept this analysis at paras 35 (last sentence) and 71 of their Response.

33. So, the question arises whether in fairness to HS2 we ought to allow them a further opportunity to make representations on the issue to the Tribunal through lawyers before we decide it.
34. It is fair to say that in the Tribunal's email of 16 February 2021 Judge Shanks characterised the "only real issue" as being whether there was any material held by HS2 which should have been disclosed at the time of the original request " ... which has not yet been disclosed" and that he did not require HS2 to provide a witness statement or skeleton argument in response to their solicitor's request for guidance in the email of 8 February 2021.
35. However, it is clear that HS2 had understood the scope and potential importance of the appeal in relation to regulation 12(4)(d) even after they had supplied the redacted reports to Ms Green and continued to maintain that they had been entitled to withhold the entirety of the reports at the time of the request on the basis of that regulation (see: their Response at paras 28 to 35). Ms Green's Reply made clear that she was continuing to maintain her original stance and at no stage did she indicate that she had in some way abandoned the issue. Judge Shanks's characterisation of the "real issue" was made in the context of a consideration of points being made by Ms Green about the quality of HS2's risk



assessments. It was made clear in the Tribunal's email of 16 February 2021 that the Tribunal's preference was that HS2 should be legally represented and that the hearing might still last two full days. HS2 could easily have sought an express indication from Ms Green and/or the Tribunal as to whether regulation 12(4)(d) remained a live issue and prepared for the hearing accordingly: plainly they are a large, well-resourced organisation undertaking a major infrastructure project and they have the benefit of advice from a highly reputable firm of solicitors.

36. Looking at the overall picture, we consider that if HS2 had really wanted to say more about the regulation 12(4)(d) issue and to say it through lawyers they could and should have made sure they did so before and/or during the hearing. We also consider that it would be disproportionate for there to be further delay and expense incurred before a decision is made on regulation 12(4)(d). We have therefore gone ahead and decided the issues in relation to regulation 12(4)(d) taking into account, of course, what was said at the hearing and in the subsequent emails as well as all the material placed before us earlier in the process.

***Did regulation 12(4)(d) apply?***

37. HS2 say in their Response at paras 29 and 30 that at the time of the request the information in the reports was incomplete and the documents were unfinished. In their response to the Commissioner dated 6 December 2019 they also stated that Align were still undertaking ground investigations and that the relevant works had not started and the information formed part of wider considerations as to how to undertake them and therefore related to continuing decision-making process (see: D269 of the original open bundle prepared for the Tribunal's paper consideration).

38. It is plain from the documents themselves that as at January 2019 when Ms Green made her request for information none of the reports was in its final form since, as we know from the subsequent history, they were to be subject to revision following input from Affinity and the Environment Agency. On this

basis alone it seems to us that we can be satisfied that the regulation 12(4)(d) exception applied to the reports in January 2019, notwithstanding that we have not been supplied with the versions which were current at that time. Having said that, however, we consider it is likely that the versions which were current in January 2019 would have been reasonably self-contained as documents (ie they would not have been half-finished first drafts) and, based on HS2's response at D269, it appears that the versions of the reports which were produced for the Commissioner in December 2019 were indeed the final versions of the reports.

***Public interest balance***

39. Since we are satisfied that the regulation 12(4)(d) exception applied to the three reports in January 2019 it is necessary for us to consider the balance of the public interest in their disclosure as against that in maintaining the exception. The relevant date for our consideration is January 2019 but, since we have not been told what the state of the reports was in January 2019, we can only consider them in the form supplied to us. Further, we are bound to consider the public interest in disclosure of the reports in their entirety; the fact that Ms Green's request was focussed on risks arising from the proposed test piling at location 2 does not limit our considerations; and on any view the fact that the load test piling was carried out successfully between June and September 2020 is irrelevant.

40. The general public interest served by disclosure of environmental information is summarised in recital (1) of Directive 2003/4/EC which is the origin of the EIRs:

**Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.**

It is clear from this statement that the purpose of making environmental information public is not only to give the public greater awareness and reassurance but also so that they can take part in decision-making about environmental matters.

41. The reports in question in this case concern a major infrastructure project which gives rise to substantial and legitimate environmental concerns. They specifically relate to the risks of contamination to the drinking water supplied to up to 3.2 million people resulting from the construction of the HS2 line. This is clearly environmental information of a fundamental nature of great public interest, as amply demonstrated by Affinity's Petition and the letter from HS2 to the local MP, Nick Hurd, dated 10 July 2019 which Ms Green produced for the Tribunal.
  
42. At the time of the request the test piling at location 2 was "imminent" (as HS2 accept at para 12 of the Response document) and work on the viaduct itself was presumably intended to start within a few months thereafter. Disclosure of the reports would clearly have contributed to the transparency of the process and would possibly have alleviated concerns on the part of the public at that stage. Furthermore, if the public were to have an opportunity for any meaningful participation in decision-making relating to the risks associated with the work and the way it was to be done, it seems to us that such disclosure needed to take place well before that work began, and on any view January 2019 was getting close to the start of the work. We therefore consider that the public interest in disclosure of the reports as at January 2019 was very substantial.
  
43. HS2's case on the public interest in maintaining the exception as at January 2019 is set out in their response to the Commissioner at pages D270-272 and their formal Response document at paras 33 to 35. In short, HS2 appear to rely on three points: first, the need for a "safe space" in which to undertake further investigations and discussions with relevant third parties (in particular the Environment Agency) in a highly technical area; second, that any proposals for

works were to be submitted to and approved by the Environment Agency and would be subject to on-going monitoring; and third, that if “inchoate information” was released to the public it could be misleading and would involve HS2 in expending public money to correct false impressions.

44. As far as we can see the main reason for HS2 maintaining that there was a need for a “safe space” appears to be a concern that if the versions of the reports current in January 2019 were made public they “... could have been used to try and impact work undertaken in finalising the information” (see: Response at para 33). This theme is reflected in a statement at D271 where HS2 said to the Commissioner:

**In this case a final decision on the measures for this area have not been taken. Once final decisions have been made the information will be made public and the public will be afforded the opportunity to review and comment on the proposed measures.**

It seems to us that such an approach almost entirely negates the possibility of the public having any input on the decision-making process in this kind of case, which goes against a large part of the reason for allowing public access to environmental information.

45. The suggestion that public officials concerned in making enquiries and freely discussing options to mitigate environmental problems might be discouraged or undermined by early disclosure of their work seems to us rather fanciful and was not supported by any kind of evidence; the case is not comparable in our view to that of senior officials indulging in “blue sky” thinking about policy options. We accept that the material is “highly technical” but we cannot see why a lack of understanding on the part of the public would have any negative impact on HS2’s work; if a member of the public or a pressure group wanted to contribute to the debate in a way that was likely to have any effect on the decision-making process they would no doubt have to engage the services of someone like Dr Talbot, who would be able to enter the debate in a well-informed and helpful way.

46. HS2's second main point, that the Environment Agency will be approving and supervising everything, does not seem to us of great weight. Of course the Environment Agency is there to act in the public interest in relation to the environment but its involvement cannot be any kind of answer to the need for public knowledge of and involvement in environmental decisions. The EA is itself fallible and should be open to scrutiny. If the public could simply entrust everything to it there would be no need for the EIR.
47. HS2's third main point is that if inchoate information is released it could be misleading and they would incur unnecessary expense correcting false impressions. We were not presented with any specific evidence or examples to illustrate how this problem might have been encountered in practice. It does not seem to us a very compelling point.
48. Taking account of all the relevant circumstances, and bearing in mind the statutory presumption at regulation 12(2), we are of the clear view that, as at January 2019, the public interest in disclosure of the three reports identified by HS2 substantially outweighed that in maintaining the regulation 12(4)(d) exception. It was not therefore open to HS2 to rely on the exception to withhold the reports.

**(3) Regulation 12(5)(a) (public safety)**

49. The regulation 12(5)(a) exception was not relied on by HS2 in refusing the original request or at the review stage and it was not considered by the Commissioner but it is nevertheless open to HS2 to rely on it on appeal. HS2's case on its applicability is set out at paras 36 to 53 of their Response document. They say that they are entitled to withhold the redacted parts of the three reports on the basis that their disclosure would adversely affect "public safety". They say at para 40 that the redacted information is information which "... identifies the specific location of [their] sites in the Colne Valley area ... and, more specifically, the detailed information of ground water access points"; if such information was disclosed, they say, it could be misused by protestors or

terrorists to trespass on HS2 sites and cause damage and danger to HS2 workers and to themselves and enable them to infect the groundwater and thus the local water supply by introducing chemicals and other poisonous substances.

50. We accept that, if indeed disclosure of the redacted information would reveal sensitive locations and if those locations were likely be used in the way suggested, “public safety” would be adversely affected and the exception would apply. However, we have looked at the reports and the proposed redactions and have some difficulty in seeing how disclosure of the redacted material would have these effects.

51. We have not been able to find anything in the reports which specifically identifies the position of any of the HS2 worksites. But even if the positions of the worksites are identified somewhere in the reports, we consider that they are likely to be of considerable size and very obvious on the ground and that if anyone was determined to trespass on them and cause damage they would not need any of the information in the reports in order to do so. We note that at paras 44 and 45 of the Reply HS2 refer to the numerous instances of protestors already causing trouble at their worksites. We also note that a map showing the position of Load Test Piling location 2 formed part of the open evidence presented to us.

52. As to the site of ground water access points, the evidence was very unsatisfactory. Most of the redactions sought are instances where one or other Affinity ground access point is simply named in the text in a way that did not seem to us to raise any particular danger to public safety. We were not specifically directed to anything that could be described as a “detailed diagram or location information” (see para 46 of Reply) although we did ourselves note the maps at Figures 1, 2 and 3 in the second (“Groundwater Assessment”) report produced by HSL: the only redactions that appeared to be sought in these maps were on Figure 3 which shows the position of some private abstraction points which are apparently “... pre-dominantly used for non-potable activities” (see

para 4.3.10 of the report). We noted that the Environment Agency stated in their letter to Ms Green of 1 June 2020 that they had withheld data relating to the location of Affinity pumping stations and supply abstraction points on grounds of public safety; but Ms Green also drew our attention to a newspaper advertisement published by the EA which gave detailed national grid references for one of the relevant abstraction points.

53. Further, our confidence in the reliability of the case being advanced by HS2 in this connection was substantially undermined by their redaction of a reference at footnote 4 on page 16 of the first (“Options”) report. We could not see any basis for withholding this reference; at best the redaction may have been the result of a rather rushed approach to the redaction exercise and the fact that it appears to relate to some abstraction boreholes; at worst it arose from a desire not to publicise the existence of the subject matter of the reference for some reason.
54. In the course of the hearing we specifically sought Mr Bird’s assistance as to how disclosure of the redacted material would cause the problems HS2 rely on but he was not able to assist in any substantial way. We offered him the opportunity to address us in closed session so that he could explain in detail what exactly would be revealed by the redacted information and how it might be misused but he declined that offer.
55. We are therefore not satisfied that the regulation 12(5)(a) exception applied to the relevant redacted material. In case we are wrong about that we have considered the public interest balance in any event. We have considered the general public interest in disclosure of the reports at paras 40 to 42 above. The redacted sections of the reports are of course only a part of the material in them but they seem to us of some importance to an overall understanding of what the reports are saying. On the other hand, we consider that if regulation 12(5)(a) did apply to the redacted material it certainly only applied to some of the redactions and that the net effect of disclosure in terms of public safety would

have been minimal. Overall, we are quite satisfied that the public interest in disclosure of this material would have outweighed that in maintaining the exception provided by regulation 12(5)(a).

56. One way or another, we do not consider that HS2 has established that they were entitled to rely on regulation 12(5)(a) to withhold the redacted material and we will accordingly allow this part of the appeal and direct HS2 to disclose the reports in their full unredacted form.

### **Conclusions and disposal**

57. For all those reasons, notwithstanding the less than ideal procedure, we have decided to allow Ms Green's appeal both in relation to regulations 12(4)(d) and 12(5)(a) and to issue the substitute decision notice set out above.

58. This is a unanimous decision.

**HH Judge Shanks**

**(First Tier Tribunal Judge)**

**Date of Decision: 19 April 2021**

**Date Promulgated: 20 April 2021**