

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 6 January 2020

Public Authority: High Speed 2 Limited
Address: 1 Canada Square
London
E14 5AB

Decision (including any steps ordered)

1. The complainant has requested risk assessments from High Speed 2 Limited (HS2). HS2 withheld the requested information under regulation 12(4)(d) of the EIR (material still in the course of completion) and said that the public interest favoured maintaining this exception.
2. The Commissioner's decision is as follows:
 - HS2 correctly withheld the requested information under regulation 12(4)(d) and the public interest favoured maintaining this exception.
 - HS2 breached regulation 14(2) as it did not refuse the request within the required timescale.
3. The Commissioner does not require HS2 to take any remedial steps.

Request and response

4. On 21 January 2019 the complainant wrote to HS2 and requested information 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 accessible to the public?"

5. HS2 responded on 22 March 2019. It withheld the requested information under regulation 12(4)(d) of the EIR and said the public interest favoured maintaining this exception.
6. The complainant requested an internal review on 17 May 2019 and HS2 provided one on 28 May 2019. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 4 June 2019 to complain about the way her request for information had been handled.
8. In its submission to the Commissioner, HS2 has advised that, while it considers that regulation 12(4)(d) applies to the withheld information in its entirety, it considers that some of the information is also exempt under regulation 12(5)(a) (public safety) and regulation 13 (personal data).
9. In the first instance, the Commissioner's investigation has focussed on HS2's reliance on regulation 12(4)(d). She has been prepared to consider its reliance on regulations 12(5)(a) and 13 if necessary.

Reasons for decision

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

10. Regulation 12(4)(d) of the EIR says that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
11. The explanatory memorandum to the EIR (COM/2000/0402) states that *"...the Commissioner places great importance on public authorities being afforded safe space (thinking space) and drafting space when considering whether, and on what terms, a venture should be entered into."*
12. Regulation 12(4)(d) is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into

one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception. However, regulation 12(4)(d) is a qualified exception so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

13. The fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion.
14. HS2 has provided the Commissioner with a copy of the information that it is withholding under this exception. It has noted that none of the material is related to the specific geographical area indicated in the request, but HS2 considers that it is the most relevant information it holds in respect of the request. The withheld information comprises: one 'Options' document and two 'Assessment' documents.
15. In its submission to the Commissioner, HS2 has said that "*The withheld information is contained in a document which in itself is finished, but it is part of material which is still in the course of completion.*" This was because ground investigations were still being undertaken.
16. HS2 has described the three documents as technical papers, specifically prepared to outline the options for mitigating the effects of piling at the Colne Valley viaduct on Affinity Water abstractions. HS2 said that as these works have not yet been started, the information [in the documents] forms part of wider considerations on how to undertake these works. In HS2's view the information therefore directly relates to the continuing development of policy and the process of making decisions regarding works and mitigation measures in this area.
17. The Commissioner has reviewed the 'version' information given in the Options document. Revision 'Co1' of this document is dated 30 April 2018 and is detailed as 'First draft'. Revision 'Co2' is dated 8 May 2019 and is detailed as including particular parties' comments.
18. Similarly, three revisions that are noted on the first of the Assessment documents are dated: 10 May 2018, 26 July 2018 and 23 April 2019. There are also three revisions noted on the second Assessment document and these are dated 12 September 2018, 14 December 2018 and 4 June 2019.
19. The complainant submitted her request on 21 January 2019. That the three documents continued to be revised after the request was

submitted indicates to the Commissioner that, at the time of the request, these documents were unfinished documents.

20. The Commissioner therefore queried with HS2 its position at paragraph 15. In correspondence to her on 16 December 2019 HS2 agreed that, at the time of the request, the three documents were, in fact, all unfinished and were not 'approved' until much later. HS2 went on to advise though that the risk assessments are still 'live' documents and, if necessary, it will amend them to reflect any final changes to detailed design or to situations that arise during the works in question. This will continue to be done collaboratively with the regulator and the water company involved. However the current accepted versions were deemed effective now ie at 16 December 2019.
21. In her published guidance on regulation 12(4)(d) the Commissioner advises that the fact that the exception refers to both material in the course of completion and unfinished documents implies that these terms are not necessarily synonymous. As has been noted, while a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy. In that case, an officer may create an 'aide memoire' note which is not intended to be a formal record but is nevertheless part of the on-going process of developing a particular policy. If this aide memoire note is within the scope of a request, the exception may be engaged because the request relates to material which is still in the course of completion.
22. The Commissioner considers a similar situation exists here and that HS2 is correct when it says, at paragraph 15, that the document(s) was part of material in the course of completion. This is because even if the requested information had been contained in finished documents at the time of the request, the documents are part of material that was still in the course of completion, namely final policies and approaches relating to particular ground investigations and associated works.
23. The Commissioner has therefore decided that HS2 was correct to withhold the information the complainant has requested under regulation 12(4)(d) of the EIR. She has gone on to consider the public interest test.

Regulation 12(1)(b) – public interest test

Public interest in disclosing the information

24. In her original complaint to the Commissioner, the complainant said that she is concerned that the HS2 project in the Mid Colne Valley has the potential to increase the transit of pollutants into the water bearing

aquifer, which supplies 3.2 million Affinity Water Ltd customers with daily drinking water. The complainant has detailed her concerns as follows:

- The risk was outlined in an Affinity Water Ltd petition to parliament in 2013 and in the London Borough of Hillingdon's (LBH) response documents.
 - The existence of a historic landfill site is evidenced by the declaration of Newyears Green Landfill as a Special Site of contamination in 2011.
 - The report states that LBH is satisfied that pollution of controlled waters is taking place. Leachate is entering the aquifer vertically down and travelling in a southerly direction, although 2008 reports indicate the pollution moving in a westerly direction.
 - Levels of contaminants recorded since 1997 have caused the closure of Ickenham Pumping station on an ongoing basis due to the mix of contaminants.
 - A surface water body, the Newyears Green Bourne has been identified as a significant pollution pathway. This travels in a culvert under the landfill site then down gradient across wetland fields before entering the Hillingdon Outdoor Activity Centre Lake. HS2 plans, which were released in November 2018, show a Load Test Pile Site constructed on the wetland field adjacent to the Newyears Green Bourne.
25. The complainant considered it is now essential, and in the public interest, that risk assessments HS2 holds be made public and, until this happens, activities with the potential to deteriorate the aquifer must be halted. She argues that it is difficult for the local area's elected representatives to call a halt without knowing the size and precise nature of the risk being taken.
26. In subsequent correspondence to the Commissioner, the complainant has said that joint work has been taking place for some years between HS2, the Environment Agency (EA) and Affinity Water Ltd about impacts of HS2 works on the Blackford Group of water abstraction points in the Mid Colne Valley. Sufficient assessments of risk have been completed for Affinity Water to apply to the EA to vary their abstraction regime in the Colne Valley. The complainant has said that further research has shown that the basis of the need to change the abstraction regime is due to HS2 works. But, she says, there is no detail of the assessments of impacts on the Blackford Group, available to the public.

27. The complainant has referred the Commissioner to a 'Pumping Test Appraisal' document. She notes that the executive summary states: *"The HS2 route in the Colne Valley, Hertfordshire passes very close to several Affinity Water (AW) groundwater abstractions. It has been identified that certain HS2 construction activities pose a temporary risk to abstracted water quality at these supplies."*
28. The complainant says that the area concerned is the Blackford Group of water abstraction points, approximately 11 miles south of Watford - partly in Hertfordshire but primarily in Hillingdon. She considers that an important water source for London is under threat and that it is therefore in the public interest to know where the documentation exists that identifies "the certain risk", and how the nature of 'temporary' has been identified.
29. In its submission to the Commissioner, HS2 has acknowledged that there are general public interest arguments in favour of greater transparency and accountability around the progress of the HS2 programme.
30. It has noted that, in this case, disclosing the information would help to facilitate public understanding of the programme and increase understanding of the alternatives being considered in the area in question. Releasing the information would also help the public to understand the alleviation measures which HS2 is considering in relation to specific risks.

Public interest in withholding the information

31. HS2 has first argued that the information relates to policy development, advice and proposals that are still in the course of completion and as such the information will be subject to change as the assessment continues.
32. HS2 has then noted that in a number of her previous decisions, the Commissioner has acknowledged that *"there is a strong likelihood that the integrity and effectiveness of the decision-making process would be harmed by the disclosure of inchoate information"* (ICO Decision Notice FS50571592, paragraph 27).
33. In this case, HS2 says, a final decision on the measures for the area in question has 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. This is different from the public being provided with unfinished information which is in the process of being developed, debated and approved. Releasing the documents at this time and in their present form would

present an inchoate picture to the public which, in turn, would misinform and distract debate. According to HS2, disclosure would therefore create further confusion and would fuel controversy over an aspect of its planning policy that is already complex and controversial.

34. HS2 Ltd argues that it needs the opportunity to consider all available option (a "safe space"). It says this "safe space" is required to operate candidly and freely when developing policy and planning the measures that may be undertaken in specific geographical areas. Releasing information too early could discourage public officials from such a free and frank discussion of all available options and would therefore be detrimental to the decision-making process. HS2 considers that it is in the public interest therefore that public officials are allowed a thinking space in which to appraise and assess all available options and considerations before a decision is made.
35. HS2 says that, furthermore, it is important that it is provided the opportunity to engage with the relevant effected parties and convey this information to the appropriate people at the appropriate time and receive relevant feedback on the proposals. Releasing the information at this time would undermine the engagement process and consequently diminish the decision-making process.
36. The withheld information is highly technical and is, says HS2, essentially concerned with analysing and alleviating risks and providing accurate information through which policy can be formulated. HS2 argues that it is important that its staff have the "safe space" to conduct this ongoing development work free from concern about the need to justify and explain their work before it is complete, and free from concern that their work might be undermined or distracted by debating evolving methodologies and data in public.

Balance of the public interest

37. The Commissioner accepts that, at the time of the request, the works with which the withheld information is concerned were still under discussion and ways forward, including any associated risks and the mitigation of these risks, were being considered. The Commissioner acknowledges the complainant's concerns about these works, which appear to be valid concerns with some public interest. Furthermore, the particular works in this case are part of the wider transport project – the HS2 project – that has a great deal of wider public interest. She is satisfied, however, that there is greater public interest in the ability of HS2 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. In addition, having

reviewed the information being withheld, the Commissioner agrees with HS2 that it is of a complex and technical nature which the majority of the general public is unlikely to fully understand. Fielding any questions about the content of the information, and addressing any misconceptions or misunderstandings about it, would also be likely to interfere with the 'safe space' that HS2 needs to progress and finalise this particular piece of work.

38. Finally, HS2 has stated that it intends to make public its final decisions on the measures for the area in question and that the public will be able to review and comment on the proposed measures at that point. In the Commissioner's view, this step will address the general public interest in these works and the complainant's concerns. The Commissioner is therefore satisfied that the public interest favours maintaining the regulation 12(4)(d) exception on this occasion.
39. Because the Commissioner has found that the requested information engages the regulation 12(4)(d) exception and that the public interest favours maintaining this exception it has not been necessary for her to consider whether regulation 12(5)(a) and/or regulation 13 are also engaged.

Regulation 14 – refusal to disclose information

40. Under regulation 14(2) of the EIR, if a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal must be made as soon as possible and no later than 20 working days after the date of receipt of the request.
41. In this case, the complainant submitted her request on 21 January 2019 and HS2 did not refuse her request under regulation 12(4)(d) until 22 March 2019. HS2 therefore breached regulation 14(2).

Right of appeal

42. 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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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

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