

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 2 June 2020

Public Authority: High Speed Two Limited
Address: Two Snowhill
Snow Hill Queensway
Birmingham
B4 6GA

Decision (including any steps ordered)

1. The complainant has requested environmental assessments associated with Phase 1 of the HS2 high-speed rail project at Packington Moor Farm and Flats Lane, near Lichfield. High Speed Two Limited (HS2 Ltd) has withheld the information under regulation 12(4)(d) of the EIR (material still in the course of completion) and regulation 13(1) (personal data). HS2 Ltd considers the public interest favours maintaining the former exception.
2. The Commissioner's decision is as follows:
 - The requested information engages the exception at regulation 12(4)(d) and the public interest favours maintaining the exception
3. The Commissioner does not require HS2 Ltd to take any remedial steps.

Request and response

4. On 27 August 2019, the complainant wrote to HS2 Ltd and requested information in the following terms:

"...Can you let [sic] HS2 Ltd please let us have the detailed environmental assessments that show that additional mitigation will not be required in this location, despite the height of the line increasing by nearly 2 metres, from below ground level to above ground level. This assessments should include all assumptions, calculations and all other materials to arrive at this conclusion."

5. HS2 Ltd provided a refusal notice on 24 September 2019. It withheld the requested information under regulation 12(4)(d) and advised that it considered that the public interest favoured maintaining this exception.
6. Following an internal review HS2 Ltd wrote to the complainant on 31 October 2019. It upheld its position.
7. In its submission to the Commissioner HS2 Ltd has advised that it considers that some of the requested information is the personal data of third persons and that this is therefore also excepted from release under regulation 13 of the EIR.

Scope of the case

8. The complainant contacted the Commissioner on 2 November 2019 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on HS2 Ltd's reliance on regulation 12(4)(d) of the EIR to withhold the information the complainant has requested, and the balance of the public interest. If necessary, the Commissioner has been prepared to consider whether some of the requested information engages regulation 13(1).

Reasons for decision

Regulation 12(4)(d) – material still 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 Ltd's position is that, while the information requested in this case is a finished document, it can be categorised as material which is still in the course of completion because it forms part of a wider project that is still ongoing. This is the work on aligning the HS2 high-speed rail track and, ultimately, the HS2 high-speed rail project as a whole.
15. By way of background HS2 Ltd has explained that, in order to help develop the HS2 rail project, a number of options for aligning its rail track have been investigated. One area which was identified was in Swinfen Cutting. An opportunity has been developed there, the principal aim of which is to lower the track level of the HS2 line in the south of Swinfen Cutting to mitigate highway works required to the A5 trunk road. An appraisal report was completed, which summarises the implications of such work. It is this report that is captured by the complainant's request and HS2 Ltd has provided the Commissioner with a copy of it.
16. HS2 Ltd has noted that in July 2019 its Community Engagement team gave a presentation to those people directly affected by the above proposal and that the complainant had attended that meeting.
17. In its submission to the Commissioner HS2 Ltd has described the report as a technical paper that was specifically prepared to assess a proposed change to vary the alignment of the HS2 track. As these works have not yet been started, the information forms part of wider considerations on how to undertake these works. The assessment report examines an alignment opportunity that has not been subject to any level of design other than a high-level feasibility assessment. HS2 Ltd notes that it is stated in the report that: "*in the absence of a confirmed detail programme, traffic volumes, detailed emission studies, all these assessments are qualitative, not quantitative.*"

18. HS2 Ltd considers that the requested information therefore directly relates to the continuing development of policy, and the process of making decisions regarding works and mitigation measures in this area. It has referred to paragraph 15 of the Commissioner's published guidance on regulation 12(4)(d) which advises: *"If the process of formulating policy on the particular issue is still going on when the request is received, it may be that disclosure of drafts and unfinished documents at that stage would make it difficult to bring the process to a proper conclusion"*.
19. In his complaint to the Commissioner, the complainant has disputed that the information he has requested can be categorised as material in the course of completion. He considers that the information, ie the report, must have been completed because HS2 Ltd had advised that environmental assessments it had carried out showed that additional mitigation would not be required in the location in question.
20. As explained above, while the report itself may be a finished document, it is part of a wider project that was not completed at the time of the request, or currently. The Commissioner has noted her decisions in FER0668007 from July 2017, FS50698523 from May 2018 and FER0848129 from January 2020. These three decisions concerned HS2 Ltd's reliance on regulation 12(4)(d). The information requested in the three complaints concerned: the HS2 route at Meadowhall, information associated with a House of Commons Public Accounts Committee hearing and risk assessments associated with a particular locality. The Commissioner considers that that requested information in the July 2017 and January 2020 decisions is broadly similar to the requested information in this case – it concerns HS2 Ltd projects, in particular localities on the proposed HS2 high-speed rail route. The Commissioner found that regulation 12(4)(d) was engaged in all three cases.
21. As in those earlier cases, the Commissioner is satisfied that the information the complainant has requested in this case can be categorised as material still in the course of completion and that it engages the exception at regulation 12(4)(d).
22. The complainant has also referred the Commissioner to a decision she had made in 2014 about a previous complaint he had submitted to her about HS2 Ltd: FER0535668. He had appealed the Commissioner's decision and has noted that the FTT had allowed the appeal in part: EA/2014/0220. The Commissioner has reviewed her decision and notes that she had considered HS2 Ltd's reliance on regulation 12(4)(a)(information not held), regulation 12(5)(b) (course of justice) and regulation 13(1) (personal data). The Commissioner had not considered regulation 12(4)(d) on that occasion and so she has not

considered the relevance of that decision and appeal further. She has gone on to consider the public interest test.

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

Public interest in disclosing the information

23. The Commissioner has reviewed the complainant's request to HS2 Ltd, his request for an internal review and his complaint to her. She has not identified any public interest arguments for the release of the requested information, in this material. This may be because the complainant's position is that the information does not engage regulation 12(4)(d) – had the Commissioner found that to be the case, it would not have been necessary to consider the public interest.
24. In its submission to the Commissioner, HS2 Ltd has acknowledged that there are general public interest arguments in favour of greater transparency and accountability around the progress of the HS2 programme. HS2 Ltd says that in this case disclosing the information would help to facilitate general public understanding of the HS2 programme and increase understanding of the alternatives being considered in this [geographic] area. Release would also help the public to understand the design options and the mitigation measures which are being considered in relation to any impacts.

Public interest in maintaining the exception

25. In its submission, HS2 Ltd has noted that the information relates to the vertical alignment of the track in a particular location, and that this is a matter which remains under consideration/in development. The requested information forms part of a set of wider materials about this vertical alignment - such materials are still in the course of completion and as such the information will be subject to change as the assessment continues.
26. HS2 Ltd has referred to the fact that in a number of previous decisions, the Commissioner has acknowledged that "*there is a strong likelihood that the integrity of and effectiveness of the decision-making process would be harmed by the disclosure of inchoate information*" (FS50571592, paragraph 27).
27. In this case, HS2 Ltd says, the design process is still ongoing. HS2 Ltd has been sharing information with the community when it is sufficiently progressed and finalised and will continue to do so. This is not the same as the general 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, HS2 Ltd argues, would in turn misinform and distract debate.

28. HS2 Ltd has noted the FTT decision EA/2011/0269&0285 (Uttlesford District Council vs the Information Commissioner). Here, the Tribunal referred back to the recitals to the Directive 2003/4/EC, which underpin the EIR and noted that release of the incomplete information in that case, *"would have defeated the intent behind recital 20 in that the information disclosed would not have been accurate"* (paragraph 50).
29. HS2 Ltd says the withheld information is highly technical and is, essentially, concerned with analysing the effects of design proposals and providing information through which policy can be formulated. HS2 Ltd says it is important that HS2 Ltd 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.
30. 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. HS2 Ltd argues that 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. 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.
31. HS2 Ltd argues 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. HS2 Ltd considers that releasing the incomplete information into the public domain at this time would interfere with this engagement process.

Balance of the public interest

32. The Commissioner appreciates that there is always a general public interest in disclosing environmental information and that there is a presumption in the EIR in favour of disclosure.
33. It could also be argued that because the wider issue – the HS2 high-speed rail project – was 'live' at the time of the request, and currently, releasing information which could add to the public debate on an issue associated with the project is in line with the purpose of the EIR. This is

particularly so given the local and national significance of the HS2 project.

34. However, she agrees with HS2 Ltd that there is greater public interest in this case in HS2 Ltd being able to consider proposals for Packington Moor Farm and Flats Lane away from the probable distraction of fielding questions from the public about those proposals which may, in any case, be subject to change or refinement.
35. There is without doubt a great deal of public interest in the HS2 high-speed rail project. However, the Commissioner notes that HS2 Ltd has given one presentation of summarised information from the withheld report to those people affected by the proposed work at Packington Moor Farm and Flats Lane. HS2 Ltd has told the Commissioner that the presentation was given directly to those affected in order to help progress wider discussions about the design of HS2 in that particular geographic area. It says that those discussions are part of an iterative design and community engagement process and that, importantly, each design iteration takes a substantial period of time to complete. HS2 Ltd maintains that it is difficult to provide a continual overview of the ongoing design process and the associated assessments, as it would inevitably lead to confusion rather than clarity. Instead, HS2 Ltd says it shares information with the local community as and when the design and related assessments are sufficiently complete. This is so HS2 Ltd can provide the necessary level of detail and certainty to the community.
36. HS2 Ltd has advised the Commissioner that, once the analyses are complete, the majority of the information will be shared with the affected parties and released into the public domain.
37. In the Commissioner's view, the measures that HS2 Ltd is taking and which are described above adequately satisfy the public interest in the matter of the proposed works at Packington Moor Farm and Flats Lane. She is therefore satisfied that the public interest favours maintaining the exception in this case.
38. Because the Commissioner has found that regulation 12(4)(d) is engaged and that the public interest favours maintaining the exception, it has not been necessary to consider whether some of the withheld information engages the exception under regulation 13(1).

Right of appeal

39. 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

40. 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.
41. 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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