

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

Decision notice

Date: 11 February 2021

Public Authority: High Speed 2 Ltd
Address: Two, Snowhill
Snow Hill
Queensway
Birmingham
B4 6GA

Decision (including any steps ordered)

1. The complainant has requested information associated with the HS2 high speed rail project. High Speed 2 Ltd ('HS2 Ltd') released some information and has advised it does not hold other information the complainant has requested. The complainant is not satisfied with HS2 Ltd's response to two parts of his request.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, HS2 Ltd does not hold information falling within the scope of Q3 and Q4(ii) of the complainant's request and its response to those parts complied with section 1(1)(a) of the FOIA.
 - To the degree that any of the information within scope of the above two parts of the request can be categorised as environmental information, the Commissioner is satisfied that regulation 12(4)(a) of the EIR is engaged because HS2 Ltd did not hold that information at the time of the request.
3. The Commissioner does not require HS2 Ltd to take any remedial steps.

Request and response

4. On 9 October 2019 the complainant wrote to HS2 Ltd and requested information in the following terms:

“(1.) In a press article dated 8 Sep 2013, (<https://www.independent.co.uk/news/people/profiles/douglas-oakervee-i-think-the-name-hs2-is-unfortunate-8803430.html>) the then-chairman of HS2 Ltd, Douglas Oakervee, was quoted as saying

"It would be catastrophic for the UK actually [if HS2 were cancelled]. What it is going to mean is that the services on the West Coast Mainline initially and East Coast Mainline will rapidly deteriorate. We estimate on the mainline up to Birmingham that for every 10 people seated there will be 10 standing, and you get the same pattern having developed to Manchester by the mid- 2020s or 2030."

(Q1.) Could you provide the supporting information and analysis held by HS2 Ltd, regarding the statement that 'on the mainline up to Birmingham that for every 10 people seated there will be 10 standing and you get the same pattern having developed to Manchester by the mid-2020s or 2030.'

(2.) According to Railnews (30th October 2013)<https://www.railnews.co.uk/news/2013/10/30-threat-to-hs2-is-a.html>

"Douglas Oakervee, the outgoing chairman of HS2 Ltd, said the budget for phase one of the line from London to Lichfield, including a spur line to Birmingham city centre, was set at £17.6 billion, and he was 'not interested' in any of the £14.4 billion contingency that the Treasury had insisted should be added."

(Q2.) What information is held by HS2 Ltd regarding correspondence with the Department for Transport and HM Treasury on the level of contingency of the HS2 project, and 'pushback' from HS2 Ltd on Treasury imposed contingency.

(3.) In the 'HS2 Chairman's Stocktake' (dated August 2019, and published 3 September 2019)

(https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/828771/-chairmans-stocktake.pdf)

it is stated that:

'Each intercity train removed releases capacity for 11 new fast commuter or freight trains, by reducing the disparity in speed between different services. The most efficient use of capacity is where all trains operate at the same speed—as is the case on HS1 and traffic on a managed motorway.'

The words 'Each intercity train removed' would presumably refer to the existing West Coast Main Line railway.

(Q3.) Could you provide the information held by HS2 Ltd, on how and where removing one intercity train would release capacity for eleven new fast commuter or freight trains on existing track.

(4.) According to the HS2 Ltd description of the video 'Upgrading Britain's railways' at <https://www.youtube.com/watch?v=xwOxwG-od6E>

'Britain's new high speed railway, High Speed 2, is a game changer for our rail network and will improve your journey, even if you don't use our trains. Building HS2 frees up a massive amount of space on the existing railway by placing high speed services on their own pair of tracks. Once HS2 is operating, services can run much closer together, there will be space for future growth in passenger numbers and more freight can travel by rail.'

(Q4.) As the PFM v7.1 models fewer (rather than more) passenger trains on West Coast South, could you provide the information held on the exact meaning of trains running 'much closer together', and where on the classic network this would happen. What is the quantification of 'much closer together' on the sections of line (a) Birmingham New Street - Rugby, and (b) Willesden - Rugby, with more freight services operating."

5. HS2 Ltd wrote to the complainant on 5 November 2019 and asked him to clarify Q1, Q2 and Q4 of his request, which he did on 6 November 2019 as follows:

"In 'The Independent' news article written by Mark Leftly (8 September 2013)

<https://www.independent.co.uk/news/people/profiles/douglas-oakervee-i-think-the-name-hs2-is-unfortunate-8803430.html>

HS2 Ltd then-chairman Douglas Oakervee is quoted as saying [if HS2 were cancelled] "We estimate on the mainline up to Birmingham that for every 10 people seated there will be 10 standing, and you get the same pattern having developed to Manchester by the mid-2020s or 2030."

Presumably, "We" in this case, is a reference to "HS2 Ltd".

Query Q1 could be satisfied by a release of the corroborating analysis behind the estimates mentioned in the above quote from Mr Oakervee."

"Query Q2 may be taken as a request for: (i) correspondence in 2013 between HS2 Ltd and the government departments Department for Transport and HM Treasury regarding the level of contingencies attached to the HS2 project

(ii) material held by HS2 Ltd at that time (i.e. the year 2013) regarding HS2 contingency levels, used to inform correspondence with government departments on that topic."

"Query Q4 can be taken as

(i) a request for an exposition of the term "much closer together" and
(ii) a quantification of the HS2-enabled closer-togetherness on the
(a) Birmingham New Street - Rugby, and
(b) Willesden - Rugby sections of the West Coast Main Line."

6. On 4 December 2019 HS2 Ltd responded to the request. It advised that it does not hold information within the scope of Q1, Q2 and Q4(ii) of the request. In response to Q3, HS2 Ltd discussed a drafting error in a (Chairman's) Stocktake report and advised that an updated version of the Stocktake had now been published. In response to Q4(i) of the request, HS2 Ltd discussed how the term "much closer together" had been used and advised that how service patterns and other factors would be optimised would be analysed further, before eventual ministerial decisions.
7. The complainant asked HS2 Ltd to review its response to Q3 and Q4. With regard to Q3, the complainant said that he did not understand the capacity claims made in the updated 4 December 2019 version of the Chairman's Stocktake and went on to discuss the relative speeds of different kinds of train, including High Speed 1's Eurostar service. He concluded by referring to the updated Chairman's Stocktake and said:

"It is unclear how there could be 'extra space for more trains' in the comparison given (i.e. 11 new fast commuter or freight trains per hour) given the performance characteristics of these trains."
8. The complainant advised that he did not consider that HS2 Ltd had provided any relevant information in its response to Q4.

9. Following its internal review HS2 Ltd wrote to the complainant on 16 January 2020. It confirmed that it considered its responses to Q3 and Q4 had been appropriate. Regarding Q3, HS2 Ltd gave a narrative explanation as to how transferring inter-city services from the existing network would release capacity. It said it was not responsible for decisions about how network capacity is utilised, however, and therefore did not hold any information on that particular matter. With regard to Q4, HS2 Ltd confirmed that it does not hold information on the quantification of 'much closer together' and that it had provided a clear explanation of what was meant by that phrase.

Scope of the case

10. The complainant contacted the Commissioner on 6 March 2020 to complain about the way his request for information had been handled.
11. The focus of the FOIA is purely information held in recorded form and it does not oblige a public authority to provide explanations. In Q4(i) of his request the complainant has asked HS2 Ltd to explain the phrase "much closer together" and, in its response of 4 December 2019, HS2 Ltd did so. The Commissioner considers this question to have been a request for an explanation rather than a request for recorded information. As such, she has not included Q4(i) in the scope of her investigation.
12. The Commissioner has considered, first, the information regime under which HS2 Ltd considered the request. She has then considered whether, on the balance of probabilities, HS2 Ltd holds recorded information within the scope of Q3 and Q4(ii) of the complainant's request.

Reasons for decision

Is the requested information environmental information which should be considered under the EIR rather than the FOIA?

13. In its submission to the Commissioner HS2 Ltd has noted that in her published guidance on 'Determining whether information is held' the Commissioner has advised that she can see no practical value in applying the test (ie considering whether or not information is environmental information) where information is not held, and that the Commissioner does not expect public authorities to do so.

14. Having considered the request and the circumstances, HS2 Ltd says that it considers that, even acknowledging the differences between the two regimes, in this particular instance there would be no material difference to its response if it were treated under the EIR rather than the FOIA.
15. The requested information being considered in this case concerns information to support a statement made about increased train capacity on existing track, and the use of the term 'much closer together', as applied to the running of trains on particular lines.
16. In this case, the Commissioner has accepted HS2 Ltd's handling of the request under FOIA. However, for the sake of completeness she has also considered the situation under regulation 12(4)(a) whilst acknowledging that, in cases where information is found not to be held, there is no material difference in the outcome.

Section 1 – right of access to information held by public authorities

17. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to them if it is held and is not exempt information.
18. In its submission to the Commissioner, HS2 Ltd has first discussed Q3 of the complainant's request. This is for information on how and where removing one inter-city train would release capacity for 11 new commuter or freight trains on existing track.
19. HS2 Ltd has noted that this question concerns evidence to back up a statement that was contained in a Chairman's 'Stocktake' report. The statement, as HS2 Ltd acknowledged in its response to the complainant, was due to a small drafting error and it says that a corrected report was very quickly published. Early draft text for the report – "each intercity train removed releases more than one path for commuter or freight trains" – had been erroneously changed to "Each intercity train removed releases capacity for 11 new fast commuter or freight trains". The updated version of the report now published states:

"Intercity trains removed from the West Coast Main Line (WCML) release capacity for up to 11 new fast commuter or freight trains per hour, by reducing the disparity in speed between different services" (page 6)
20. HS2 Ltd says it approached the Infrastructure Management Director, the Model Development Lead and the Sponsorship Directorate, as they

would be responsible for any analysis that would have supported statements made in the Stocktake report. It also consulted the Chairman and the CEO's Office who oversaw the production of the report. The above drafting error had quickly become apparent. HS2 Ltd notes that the request is asking for evidence to support an error in drafting. It says it is therefore logical that there would be no information held, or that *could* be held, on "how and where removing one intercity train would release capacity for eleven new fast commuter or freight trains on existing track". Removing one intercity train does *not* release capacity for 11 other trains. The statement that it does had been a drafting error and so HS2 Ltd cannot hold evidence that supports such a statement. HS2 Ltd notes that the drafting mistake was corrected and that this had been explained to the complainant in its response.

21. In correspondence to the Commissioner the complainant suggests that information in support of the 'replacement paragraph' inserted into the revised version of the Chairman's Stocktake would fall within scope of his request. The Commissioner put this to HS2 Ltd.
22. In correspondence to her dated 5 February 2021, HS2 Ltd argued that the amended statement could not have been the subject of the complainant's original question because the corrected statement had not been written when he first submitted his request. Furthermore HS2 Ltd says that it does not consider that the complainant went on to request information about the corrected statement. In any case, HS2 Ltd says, in its original response to the request it had advised the complainant that "The 2013 HS2 Strategic case confirms that intercity trains occupy 11 of the 14 hourly train paths on the West Coast Main Line fast lines. These 11 paths will become available for new services following the introduction of the HS2 services." As such, HS2 Ltd considers it has already provided the complainant with the basis for the amended statement.
23. The Commissioner notes that in his request for an internal review, the complainant had again referred to the Stocktake report's reference to "...11 new fast commuter or freight trains" although HS2 Ltd had explained in its response that this statement had been a drafting error. The Commissioner agrees that the complainant did not submit a clear, new request for information to support the corrected statement in the Stocktake report. As such, the Commissioner considers that it was reasonable for HS2 Ltd to consider only what information it might have held that was relevant to the original request. And she notes the explanation HS2 Ltd gave in its response to the request, which HS2 Ltd has referred to above.

24. The Commissioner is satisfied with the submissions that HS2 Ltd has provided to her. As HS2 Ltd had acknowledged to the complainant, capacity for 11 commuter or freight trains would not be released but capacity for *up to* 11 such trains would be released. Its reference to capacity for 11 new trains on existing track being released – which is the subject of Q3 of the request - had been a drafting error and the statement in the Stocktake report had been amended to reflect this. The Commissioner is therefore satisfied that HS2 Ltd could not have held information about the release of “capacity for 11 trains” at the time of the request and complied with section 1(1)(a) of the FOIA with regard to this part of the request.
25. In Q4(ii) of his request the complainant has requested a quantification of the “HS2-enabled closer-togetherness” on two specific train lines. The phrase “much closer together” had been used in the description of a video about HS2 on YouTube. From an FOIA perspective, HS2 Ltd would need to hold recorded information on this quantification of “much closer together”.
26. In its submission, HS2 Ltd says that this question appears to be based on an assumption on the complainant’s part that such quantification exists. HS2 Ltd says that such analyses have never been produced by HS2 Ltd as they are not required to support the statement regarding additional capacity. It says that the additional capacity is derived from train service planning – balancing variation in speed and stopping patterns against maximum capacity – rather than by quantification of ‘closer togetherness’.
27. HS2 Ltd notes that in its internal review of its response to Q3, it had explained that HS2 Ltd is not responsible for decisions regarding capacity utilisation on the existing network. It had explained why specific quantification for the lines in question had not been undertaken by HS2 Ltd, that it has no business purpose for such quantifications and therefore no relevant information was held.
28. HS2 Ltd says that, nonetheless, it has approached the Infrastructure Management Director, the Model Development Lead and the Sponsorship Directorate, as they would be responsible for any analyses or production of such quantification, if it was required by HS2 Ltd. They confirmed that they have not undertaken any analyses of the sort the complainant has requested. HS2 Ltd confirmed that the information has not been created, is not held and no searches would uncover any relevant data.
29. The Commissioner is satisfied that HS2 Ltd has adequately considered Q4(ii) of the complainant’s request, how it is phrased and whether it would hold any relevant information. This has included consulting the

relevant areas of the organisation. It has confirmed that it does not hold any relevant information and, having considered the circumstances, the Commissioner accepts this is the case. She has decided that, on the balance of probabilities, HS2 Ltd does not hold recorded information within the scope of Q4(ii) of the request and HS2 Ltd's response to this part complied with section 1(1)(a) of the FOIA.

30. As has been discussed, for the sake of completeness the Commissioner has also considered regulation 12(4)(a) of the EIR. This says that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received. To the extent that the requested information can be considered to be environmental information, and for the reasons given above, the Commissioner is satisfied that the Q3 and Q4(ii) engage the exception under regulation 12(4)(a) because HS2 Ltd did not hold the requested information at the time of the complainant's request.
31. Technically, regulation 12(4)(a) is subject to the public interest test (PIT). The Commissioner's position, however, is that it is not necessary to consider the PIT as applied to regulation 12(4)(a) as to do so would be illogical – it is not possible for the public interest to favour disclosure of information that is not held.

Right of appeal

32. 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

33. 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.
34. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF