

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 23 August 2022

Public Authority: High Speed Two (HS2) Ltd
Address: Two, Snowhill
Snow Hill
Queensway
Birmingham
B4 6GA

Decision (including any steps ordered)

1. The complainant has requested information from HS2 relating to the HS2 project and in particular meetings with Greensill Capital. HS2 initially considered the exemption at section 12 of FOIA and requested the search term be narrowed to 'Greensill' in order to enable them to proceed with the request. The requester reluctantly agreed to the term of reference for searches.
2. After some delay HS2 responded citing Section 43 of FOIA (commercial interests) and section 40 (personal information) of FOIA to withhold the requested information. At internal review, HS2 considered the information was classed as environmental information, and therefore responded under the EIR citing regulations 12(4)(d), 12(5)(e) and 13 of the EIR to refuse the request.
3. The Commissioner's decision is that HS2 was entitled to rely on both Regulations 12(4)(d) and 12(5)(e) of the EIR and that the public interest favours maintaining these exceptions both individually and in aggregate. Therefore, he has not gone on to consider whether regulation 13 of the EIR applies in this case.
4. The Commissioner does not require the public authority to take any steps.

Request and response

5. On 10 June 2021, the complainant wrote to HS2 and requested information in the following terms:

“I wish to see full copies all minutes, agendas and briefing materials for the meetings held with Greensill Capital on:

 - 1 June 2016
 - 13 October 2016
 - 10 January 2017

Along with any other meetings held with Greensill Capital.

Please also include any other materials that were handed out or received during the meetings, such as presentations, brochures, reports, and leaflets etc.”
6. HS2 responded on 7 July 2021 stating that their data was not held in such a way to allow them to provide information within the appropriate cost limit, saying they had identified six employees whose email accounts would need to be searched to identify any relevant information, and that numerous other accounts would need to be reviewed to establish if other information was held within scope of the request. They suggested to the requester that narrowing the search term would assist them in their search for relevant information.
7. The requester reluctantly agreed to the use of the specific search term suggested by HS2 to help establish the information held, and in scope of their request.
8. On 5 August 2021 HS2 informed the requester that they would require more time in order to consider the Public Interest Test (PIT) and any subsequent response. They cited section 43 (commercial interest) and section 40(2) (personal information) of FOIA as the specific exemptions that applied to the request. On 13 October 2021, HS2 confirmed their reliance on section 43 and 40(2) of FOIA to withhold the information.
9. At internal review, on 10 November 2021, HS2 revised their response and the access regime they were relying upon as they considered the requested information was classed as environmental and therefore should be dealt with under the EIR. They cited regulation 12(4)(d) (course of completion), 12(5)(e) (commercial or industrial information) and 13 (personal information) of the EIR to withhold the information.

Scope of the case

10. The complainant contacted the Commissioner on 11 November 2021 to complain about the way their request for information had been handled.
11. The Commissioner's investigation has focussed on whether HS2 is entitled to rely on regulations 12(4)(d) and 12(5)(e) of the EIR to refuse to disclose information within scope of the request.

Reasons for decision

Is the requested information environmental as defined by the EIR?

12. Regulation 2(1) of the EIR defines environmental information as being information on:
 - a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape, and natural sites including wetlands, coastal and marine areas, biological diversity, and its components, including genetically modified organisms, and the interaction among these elements;
 - b) factors, such as substances, energy, noise, radiation, or waste, including radioactive waste, emissions, discharges, and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - d) reports on the implementation of environmental legislation;
 - e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
13. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA are different from the reasons why information can

be withheld under the EIR. In addition, there are some procedural differences affecting how requests should be handled.

14. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
15. The Commissioner notes that the requested information comprises information about policies, legislation, plans, programmes, and environmental agreements. He is satisfied that the information being requested would fall within the definition at regulation 2(1)(c) and/or 2(1)(e).
16. The Commissioner is therefore satisfied that the information is environmental, and HS2 was correct to consider the request under the EIR.

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

17. Regulation 12(4)(d) of the EIR states 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.
18. As the Commissioner's guidance¹ makes clear, 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.
19. *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."*
20. In this case, HS2 has described the requested information as working documents, "a series of estimates of saving on various different aspects of the design of the new railway. These estimates will develop as the design of the railway is refined. The information also discusses options

¹https://ico.org.uk/media/for_organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

on different variations in the actual design which at the time of the request were not decided on. The estimates and design details are therefore part of material which is still in the course of completion." HS2 does not dispute that it needs to make information available in the public domain. However, it goes on to say, it has a duty to ensure that the information it releases is accurate, reliable, comprehensive and above all, is complete.

21. It add: "The information directly relates to the continuing development of policy and the process of making decisions regarding the design of the railway. The cost saving estimates and the impact on specific design aspects are applicable to the detailed design of those stations where stage one of the design contract is already awarded, up-coming stations, rail systems and the way HS2 Ltd interacts with its supply chain. ICO Guidance on Regulation 12(4)(d) states "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" (paragraph 15)."
22. Having considered the withheld information, and his guidance, the Commissioner is satisfied that the documents comprises of material in the course of completion, and that the exception at regulation 12(4)(d) is engaged. He has therefore considered the balance of the public interests.

Regulation 12(1)(b) - the balance of the public interests

23. Regulation 12(4)(d) is subject to the public interest test. This means that, when the exception is engaged, public authorities also have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Even where the exception is engaged, the information should still be disclosed if the public interest in disclosing it is not outweighed by the public interest in maintaining the exception.
24. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019): "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure... the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).

Factors in favour of disclosure

25. *HS2 has said*, "There are general public interest arguments in favour of greater transparency and accountability around the progress of the HS2 programme." It added "In this case disclosure of the information would provide an insight into costs and how these are managed across the HS2 programme."
26. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding, a free exchange of views, and more effective public participation, particularly in relation to environmental matters.

Factors in favour of maintaining the exception

27. In considering whether an EIR exception should, on the balance of the public interests, be maintained, as explained above the Commissioner will focus on matters which are inherent to that exception: here, the effects of disclosing materials in the course of completion.
28. HS2 has said: "In this case aspects of the design of the railway are still being developed. HS2 Ltd continues to refine the railway and releasing this information at this time would present an inchoate picture to the public which, in turn, would misinform and distract debate. Providing information prematurely can lead to confusion rather than clarity. In addition to elements of the design, the information discusses commercial policies which have since been implemented. It is unfair for the public to rely on outdated information which has potential to mislead and cause further confusion rather than providing clarity."
29. They argue that "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. HS2 Ltd states further that "this "safe space" is required to operate candidly and freely when developing policy and planning the measures that may be undertaken regarding specific design aspects of the railway. 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. "Furthermore, it is important that HS2 Ltd and the other organisations involved are provided the opportunity to examine the possibilities for cost savings and convey their findings to the appropriate people at the appropriate time and receive relevant feedback on the proposals. Releasing the incomplete information into the public domain at this time would interfere with this process."

The balance of the public interests

32. The Commissioner understands that the local and wider communities would wish to be kept apprised of financial considerations in a project of this size and significance, in order to be as fully informed as possible. He also notes the importance of transparency.
33. However, he also considers that any public authority needs to be able to keep working documents on which to record estimates, carry out calculations and make draft assessments, and considers that publishing this type of information does not necessarily inform public debate in a useful way.
34. Furthermore, publication of this type of information can at times lead to confusion, and some disruption to the public authority if a subsequent conversation develops around figures and estimates which were only intended as a draft or an assumption, and a work in progress.
35. In this case, the Commissioner is not persuaded that the public interest in disclosing the documents is sufficient to outweigh the public interest in maintaining the exception at regulation 12(4)(d).
36. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced.
37. The Commissioner's decision has been informed by the presumption provided for in regulation 12(2) and the Vesco decision, but he has concluded that the balance of the public interests favoured maintaining the exception and that the exception provided by regulation 12(4)(d) was applied correctly.

Regulation 12(5)(e) – adverse effect on commercial confidentiality

38. Regulation 12(5)(e) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information, where

such confidentiality is provided by law to protect a legitimate economic interest.

39. The Commissioner has published guidance² on the application of this exception. As the guidance explains, the exception can be broken down into a four-stage test.
40. All four elements are required in order for the exception to be engaged. The Commissioner has considered how each of the following conditions apply to the facts of this case:
 - The information is commercial or industrial in nature;
 - It is subject to confidentiality is provided by law;
 - The confidentiality is protecting a legitimate economic interest; and
 - The confidentiality would be adversely affected by disclosure.

Is the information commercial or industrial in nature?

41. The Commissioner has considered the withheld information, and notes that it comprises of costings for infrastructure including presentations and cost saving examples, correspondence between relevant parties, and benchmarking analysis.
42. The Commissioner is satisfied that the information is commercial in nature since it relates to the implementation of professional contracts.

Is the information subject to confidentiality provided by law?

43. The phrase “confidentiality provided by law” can apply to various circumstances. In this case, HS2 considers it has a legal duty, under the terms of the contracts it signs, to keep them confidential. It also considered that disclosure would breach the common law duty of confidentiality which it owes to all commercial partners in respect of his commercial interests.

² <https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e>

44. There is clearly an expectation of confidentiality on both sides, and the Commissioner has focused on the common law duty of confidentiality owed to all parties involved in the project.
45. For a common law duty of confidentiality to exist, it is required:
 - (a) that the information has the necessary quality of confidence, and
 - b) that it was imparted in circumstances which gave rise to an obligation of confidence.
46. Regarding (a), whether the information has the necessary quality of confidence, this requires that the information is not trivial, and has not otherwise been made public. The Commissioner notes that the withheld information relates to significant potential cost savings and benchmarking for the project and is, therefore, not trivial. HS2 has confirmed that information has not been made public. The Commissioner is satisfied that the information has the necessary quality of confidence.
47. Regarding (b), he has considered the "reasonable person test" established by Megarry J. in *Coco v AN Clark Engineers Ltd* [1968] FSR 415 and has concluded that, due to the nature of the contracts, a reasonable person would expect the terms of the contracts and related documentation to remain confidential.
48. Taking into account the nature of the information and the expectations around any agreed contracts and associated documents which are stated to be confidential, the Commissioner is satisfied that the circumstances gave rise to an obligation of confidence.
49. The Commissioner is therefore satisfied that the information is subject to the common law duty of confidentiality: that is, confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

50. As the Tribunal confirmed in the case of *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) ("Elmbridge"), to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person(s) the confidentiality is designed to protect.
51. This requires the consideration of two elements: whether a legitimate economic interest has been identified, and (because it needs to be

shown that the confidentiality is provided to protect this interest, as explained below) whether the interest would be harmed by disclosure.

52. In this case, the confidentiality was designed to protect the interests of the parties to the project. In this case the documentation and presentations form part of that project, the Commissioner is satisfied that the documents, presentations, and benchmarking relate to his legitimate economic interests.
53. The Commissioner is also satisfied that disclosure, at the time of the request, would cause harm to these interests.
54. He is therefore satisfied that HS2 correctly considered that the confidentiality was required to protect a legitimate economic interest.

Would the confidentiality be adversely affected by disclosure?

55. The final requirement for the exception to be engaged is for it to be shown that an adverse effect to the confidentiality, provided to protect the legitimate economic interest, would occur from the disclosure of the information.
56. Although this is a necessary element of the exception, the Commissioner's approach is that, once the first three elements are established, it is inevitable that this element will be satisfied. Disclosure of confidential information into the public domain would inevitably harm the confidential nature of that information and would also harm the legitimate economic interests that have been identified.
57. As explained in the Commissioner's guidance, referenced previously, this was confirmed in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010), in which the Tribunal stated that, given its findings that the information was subject to confidentiality provided by law and that the confidentiality was provided to protect a legitimate economic interest: "it must follow that disclosure... would adversely affect confidentiality provided by law to protect a legitimate economic interest" (para 14).
58. The Commissioner is satisfied that the exception is engaged.

Balance of the public interests: regulation 12(5)(e)

59. As previously stated, there are general interests in transparency when it comes to the financial affairs of HS2, and the Commissioner would refer to his comments at paragraphs 23-24 above.
60. In the case of the exception at regulation 12(5)(e), it is necessary for the Commissioner to consider whether the adverse effect on commercial

confidentiality which has been identified, is outweighed by the public interest in the disclosure of the information.

61. The Commissioner recognises the public interest in openness, transparency and accountability. He notes the scale of this project, the significant amount of public funds involved and the differing views amongst the public on its delivery and impact. The Commissioner accepts that there are weighty public interest arguments in favour of disclosure. Disclosure would enable the public to scrutinise HS2 cost calculations and understand more closely how it has been priced and judge for themselves whether value for money is to be achieved.
62. However, in this case, considering what technical and design information is already available and how this information and the withheld information could be used to work out the rates used, the Commissioner has decided that the public interest rests in maintaining the exception. The project is still in development and the procurement approach has not yet been proposed. He accepts that disclosure would harm HS2's ability to negotiate competitive rates and would adversely affect its ability to secure the best possible deal for the taxpayer. In order to obtain best value it is important that HS2 is able to negotiate with suppliers and contractors effectively. Disclosure of the withheld information, together with the information that is already in the public domain, would enable potential tenders to calculate the 'optimal costs' for aspects of the project. It would enable them to tailor their bid accordingly and hinder the prospect of them providing the most cost effective package for the taxpayer. This is not in the interests of the project, the public purse or the wider public.
63. The Commissioner is not aware of any concerns that HS2, aside from the issue of the withheld information, has failed to be transparent over its affairs in general. In his view, it would be concerning if withholding documentation meant that the public was less able to scrutinise HS2's position than before. He has therefore considered whether withholding the information has affected the public's ability to scrutinise the affairs of HS2.
64. He has ascertained that HS2 disclosed the documentation to the relevant parties, and that these have been subject to scrutiny in the normal way, in the same level of detail as is usual practice.
65. He also notes that estimates are for internal use and are not documents which are normally published. He notes that HS2 makes available relevant information to enable the public to gain an overall understanding of the project's position.

66. The Commissioner is satisfied that withholding the estimates and related documentation has not had a detrimental effect on HS2's usual level of transparency over its affairs, nor inhibited public scrutiny.
67. Whilst it is understandable that the local and wider communities are interested in the way taxpayer's money is spent on a large project like this, the Commissioner does not consider that the public interest in the withheld information itself is sufficient to outweigh the factors which favour the exception being maintained.
68. The Commissioner's decision is that the balance of the public interests in this case favours the exception at regulation 12(5)(e) being maintained, and that HS2 was therefore correct to withhold the information.
69. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated above at paragraph 22.
70. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced.
71. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.

Right of appeal

72. 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

73. 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.
74. 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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