

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

**Decision notice**

**Date:** 4 May 2018

**Public Authority:** HS2  
**Address:** 1 Canada Square  
London  
E14 5AB

**Decision (including any steps ordered)**

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1. The complainant has requested information about the HS2 project referring to a transcript of the House of Commons Public Accounts Committee hearing on HS2 held on 11 July 2017. HS2 refused to provide the requested information under section 36(2)(b)(i) and (ii), section 36(2)(c) and section 43(2) of the Freedom of Information Act (FOIA), and as far as the Commissioner considers the withheld information to be environmental, it argued regulation 12(4)(d) and 12(5)(e) of the Environmental Information Regulations 2004 (EIR) would apply.
2. The Commissioner's decision is that HS2 should have dealt with the request under EIR as the information requested is environmental under regulation 2(2) EIR. She considers that HS2 correctly applied regulation 12(4)(d) EIR to the withheld information.
3. The Commissioner requires no steps to be taken.

**Request and response**

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4. On 4 April 2017 the complainant requested information of the following description:

"I refer to the oral evidence session of the House of Commons Public Accounts Committee on Monday 11 Jul 2016 in which the witnesses were Philip Rutnam, Permanent Secretary, Department for Transport, David Prout, Director General, High Speed Rail Group, Department for

Transport, and Simon Kirby, Chief Executive, HS2 Ltd. The record of this session is at this link:

<http://data.parliament.uk/writtenevidenc...>

(<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-accountscommittee/high-speed-2/oral/35001.pdf>)

At question 55, in response to a follow up question from Sir Amyas Morse MP, Mr David Prout advises that an MPA report has assessed that one of the key risks "is whether or not we are trying to do it (the HS2 project) too fast." He continues "We have therefore invited the company to make proposals and to offer us advice on whether or not we should extend the programme by up to 12 months. We have not received that advice yet."

At question 58, Mr Simon Kirby confirms that to respond to the DfT request above, HS2 Ltd "will be producing a report in the Autumn.."

Under the provisions of the Environmental Information Regulations, I would be grateful if you would provide

1. The information contained in the request submitted to HS2 Ltd described by Mr Prout, along with any accompanying or referenced documentation provided to HS2 Ltd in relation to that request.
  2. The information contained in the report anticipated by Mr Kirby or any alternative equivalent response that was eventually provided.
  3. The information contained in any subsequent communications between HS2 Ltd and DfT that relates to the information contained in 2. above."
5. On 5 May 2017 HS2 responded. It refused to disclose the requested information under section 36(2)(b)(ii) and 36(2)(c) FOIA.
  6. The complainant requested an internal review on 7 May 2017 as he considered that the request should have been dealt with under EIR and because he was dissatisfied that the information was being withheld. HS2 sent the outcome of its internal review on 5 June 2017. It confirmed that it considers it processed the request under the correct legislation and upheld its original position. However it said that if it were to consider the request under EIR, regulation 12(4)(d) would be applicable.

## Scope of the case

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7. The complainant contacted the Commissioner on 25 August 2017 to make a complaint as he was dissatisfied with the application of the exemptions.
8. During the course of the Commissioner's investigation, HS2 additionally applied section 36(2)(b)(i) and 43(2) FOIA and regulation 12(5)(e) EIR to the withheld information.
9. The Commissioner has considered which legislation the request should have been dealt with under and whether HS2 was correct to rely on the exemptions/exceptions that have been applied to the withheld information.

## Reasons for decision

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10. Regulation 2(c) EIR defines environmental information as "measures...such as policies, legislation, plans, programmes...and activities affecting or likely to affect" the state of the elements of the environment.
11. HS2 has argued that the information requested relates to the establishment of policies and the review, consideration and monitoring of their implementation. Therefore it considers the information requested relates to the governance and planning of HS2. It considers it has no significant or meaningful bearing on any aspect of the state of the elements of the environment or the factors affecting it.
12. In *Crane v The Information Commissioner and The Department for Transport* EA/2016/0087 and EA/2016/0088<sup>1</sup>, the Tribunal recognised that, "We follow the Upper Tribunal's reasoning in *The Department for Energy and Climate Change v The Information Commissioner and H* [2015] UKUT 0671 (AAC) and take the view that there is sufficiently close connection between the withheld information and the overall HS2 project for us to look beyond the precise issue with which the disputed information is concerned and to have regard to the "bigger picture". We are satisfied that the HS2 project is a "measure" which affects or is

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1939/Dept%20for%20Transport%20EA-2016-0087%20\(16.01.17\).PDF](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1939/Dept%20for%20Transport%20EA-2016-0087%20(16.01.17).PDF)

likely to affect the elements and factors referred to in regulation 2(1) EIRs and that the documents breaking down the budget information into sub-categories is information on an integral, rather than an incidental aspect of that measure.”

13. The withheld information, Change Notices relating to Phase One and a review in response to a Change Notice, clearly relates to a measure (the HS2 project) which will or will be likely to affect the environment. The Commissioner does therefore consider that this information is environmental under regulation 2(c) EIR and this request should be considered under EIR.

### **Regulation 12(4)(d)**

14. Regulation 12(4) of the EIR states that for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that – (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data.
15. HS2 explained that this is material which is still in the course of wider completion in conjunction with formulating and developing government policy.
16. It explained that the report that Simon Kirby, HS2’s then Chief Executive Officer, referred to at the Public Accounts Committee hearing on 11 July 2016 was in response to a Change Notice (Change Notice 0013) that was issued by the Department for Transport (DfT) instructing HS2 to review options for delivery of Phase One of the project. It went on that HS2 formally responded to that request in a report (known internally as the “September Review”) which was submitted to the DfT in September 2016. Following HS2’s response, the DfT issued a further Change Notice (Change Notice 0014) instructing HS2 to develop an updated baseline incorporating many of the proposals from the September Review report and address the corporate implications of the proposals.
17. It said that the withheld documents include:
  - Change Notice 0013 issued to HS2 by the DfT.
  - HS2’s formal response to Charge Notice 0013.
  - Change Notice 0014 issued to HS2 by the DfT.
18. HS2 said that the withheld information relates to a report that was prepared as advise to the Secretary of State. The report sets out the options for Phase One delivery and advises on a strategy that could provide the improved schedule certainty sought in Change Notice 0013.

The report also addresses cost matters, including value engineering and value management proposals at a high level. Following the report the DfT issued Change Notice 0014 to prepare an updated Baseline incorporating many of the proposals.

19. HS2 said that the Main Works Civils Contracts (MWCCs) were awarded in July 2017 to progress with the construction of Phase One of HS2. MWCC Stage One period is focussed on design development and preparation for construction and will continue to the end of 2018. During this period HS2 is working with the MWCC contractors to look at opportunities to reduce time and costs. Subject to design review HS2 will then confirm the delivery stage (Stage Two) of the MWCCs. The detailed designs and strategy of Stage One delivery therefore remains open to consideration and change and will continue to be as the project progresses and develops, as would be expected through a functioning change control regime.
20. HS2 argued that ICO guidance makes it clear that whilst a particular document, may be finished, they may be part of material which is still in the course of completion. It said that the exception reflects an awareness that on some occasions public authorities require a 'safe space' in which to carry out its decision making.
21. The Commissioner confirms that she has issued guidance on this subject<sup>2</sup>. This states 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. 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."*
22. After viewing the withheld information and taking into account the HS2's submissions as set out above, the Commissioner considers that it is part of material which is still in the course of completion. The material relates to the formulation and development of the policy position of Stage One of Phase One of the HS2 project. In this case the request predated the awarding of the MWCCs in July 2017 and as part of the change control

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Environmental\\_info\\_reg/Detailed\\_specialist\\_guides/eir\\_material\\_in\\_the\\_course\\_of\\_completion.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.ashx)

regime the detailed designs and strategy of Stage One delivery continues to be open to consideration and review. The Commissioner therefore considers that regulation 12(4)(d) EIR was correctly engaged in this case.

23. As regulation 12(4)(d) EIR is subject to the public interest test, the Commissioner has gone on to consider the public interest factors in favour of disclosure and the public interest factors in favour of maintaining the exception.

### **Public interest arguments in favour of disclosing the requested information**

24. HS2 has explained that it believes the following public interest arguments favour disclosure:
- Compliance with HS2's legal obligations to be transparent in allowing access to environmental information.
  - Disclosure would contribute to the development of public debate and facilitate public understanding of an important public project and matters of public concern.
  - Disclosure would ensure HS2 remains accountable to the public in respect of its operations and decision making, especially where it involves the use of public funds.

### **Public interest arguments in favour of maintaining the exception**

25. HS2 has explained that it believes the following public interest arguments favour maintaining the exception:
- While the MWCC's were awarded in July 2017 to progress with the construction of Phase One of HS2 the detailed designs and strategy of Phase One delivery remains open to consideration. Whilst there is a public interest in knowing the decisions and actions taken by HS2 are meeting transparency and accountability principles, disclosure of all the advice being considered would inhibit the safe space to consider the information, deliberate on issues and reach decisions. Therefore there is a strong public interest in ensuring that public officials have a 'safe space' to work candidly and freely without being concerned that information could be released in a form where it is potentially misleading.
  - Releasing information where the policy is still under development runs the risk of misleading public debate. HS2 is a very high profile project which is subject to a high level of public and media scrutiny. Whilst HS2 is aware that it can contextualise information

that is currently under consideration, it is not confident that this will be sufficient to correct any misleading impressions or confusion that could be created if this information were released and used in the national debate surrounding HS2. Until the decision of the detailed designs and strategy of Phase One delivery is finalised and announced, releasing the information would mislead communities in to believing that how they will be affected by both the construction and running of HS2 has changed. It considers it is important for the public to know exactly what strategy and delivery options are being taken forward, rather than options or information which in the end may not be relevant.

- It is contrary to the public interest to disclose information reflecting possibilities considered before a decision has been made. Disclosure would mean HS2 would have to expend public resources on explaining and justifying information on possibilities before final decisions have even been taken. It is in the public interest that public officials are allowed a 'safe space' to appraise and assess all available options before making a public announcement. Once a decision is made HS2 will engage with local stakeholders and the local communities.

### **Balance of the public interest arguments**

26. The Commissioner gives weight to the general public interest in HS2 operating in an open and accountable manner. She considers that greater transparency leads to a better public understanding of particular issues and enables the public to assist in the decision making process where possible. The Commissioner also notes the significance and levels of public interest in any future decisions relating to HS2, including the overall environmental impact and cost to the public purse.
27. The Commissioner notes that policy decisions relating to specific aspects within the HS2 programme are yet to be taken, in particular in this case in relation to Phase One, Stage One. The Commissioner considers that effective policy making depends on good decision making which depends not only on sound evidence but candid communications that allow a full consideration of all the options without any concern over premature disclosure. Policy decisions, such as in relation to the HS2 project need to be thoroughly evaluated before it can be properly implemented and this can only happen when all parties have the confidence that there is no risk that those exchanges will be disclosed prematurely. The impact on these processes and weight to be given to these arguments must be determined on the circumstances of each case.
28. In this case the withheld information relates to policy decisions still under consideration relating to Phase One, Stage One of the HS2

project. It has confirmed that final policy decisions have not yet been taken in this area. Furthermore in this case the request was made prior to the awarding of the MWCC's for Stage One in July 2017. This policy area was still therefore live at the time of request. Therefore there is a strong public interest in maintaining the safe space for public officials to develop ideas, debate live issues and reach decisions away from external interference.

29. On balance the Commissioner considers that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception. Regulation 12(4)(d) EIR was therefore correctly applied in this case.
30. As regulation 12(4)(d) EIR was correctly applied to the withheld information in its entirety, the Commissioner has not gone on to consider the application of regulation 12(5)(e) EIR in this case.

## Right of appeal

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31. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

32. 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.
33. 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 .....**

**Gemma Garvey**  
**Senior Case Officer**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**