

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 2 November 2021

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

Decision (including any steps ordered)

1. The complainant has requested information from High Speed Two Ltd (HS2) about the number and location of saplings it intended to plant in the winter of 2020/21. HS2 responded by providing the numbers and location by county but refused to provide more specific sites. The information it did not provide was withheld under regulation 12(5)(a) – public safety. Later, HS2 also cited regulations 12(5)(b)(adversely affect the course of justice) and 12(5)(g) – (protection of the environment).
2. The Commissioner's decision is that none of the exceptions cited are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information that was withheld and was provided to the Commissioner under the heading 'Data'.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 8 January 2021 the complainant made the following request for information under the EIR –

'I believe from press reports that you are aiming to plant 300000 tree saplings this winter (2020/2021). Please could you tell me all the sites where you intend planting and how many saplings at each of the sites. Thank you.

In addition, I note with some alacrity that your introduction in the Whatdotheyknow website states "High Speed Two (HS2) Ltd is the company set up by the UK Government to consider the case for new high speed rail services between London and Scotland." Is it a bit late to "consider the case" given the destruction already wreaked"

6. HS2 responded on 5 February 2021 and provided the requested information by county. HS2 withheld the specific sites where saplings have been planted and where it planned to plant saplings in the future under regulation 12(5)(a) (public safety). HS2 also explained that the complainant would need to ask Whatdotheyknow questions about its website.
7. On 6 February 2021 the complainant asked for an internal review, questioning why he could not be provided with the withheld information.
8. HS2 provided an internal review on 25 February 2021 in which it maintained its original position but provided more detail about why this decision had been reached and also provided links to information already in the public domain. The internal review decided that the public interest in withholding the information outweighed the public interest in releasing it.

Scope of the case

9. The complainant contacted the Commissioner on 21 March 2021 to complain about the way his request for information had been handled.
10. HS2 added two further exceptions regarding the requested information when it responded to the Commissioner – regulation 12(5)(b) –

adversely affecting the course of justice and regulation 12(5)(g) – protection of the environment. HS2 also informed the complainant of the additional exceptions.

11. The Commissioner considers the scope of the case to be HS2's citing of regulations 12(5)(a), 12(5)(b) and 12(5)(g) and whether these exceptions have been correctly cited. If they have, she intends to look at whether it is in the public interest to release or withhold this information.

Reasons for decision

Is the information environmental information for the purposes of the EIR?

12. Regulation 2(1) of the EIR defines environmental information as any information in any material form 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) and (b) 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. The requested information relates to the planting of trees. This is clearly an environmental measure that will affect the elements of the environment referred to in (a) and (b) and therefore falls under regulation 2(1)(c) of the EIR.

Regulation 12(5)(a) – international relations, defence, national security or public safety

14. Regulation 12(5) states: 'For the purposes of paragraph (1)(a) a public authority may refuse to disclose information to the extent that its disclosure would adversely affect – (a) international relations, defence, national security or public safety'.
15. HS2 concluded that releasing the details concerning the location of the planting would adversely affect public safety. The Commissioner's guidance¹ on the EIR states:

"'Public safety' may be interpreted widely. The exception covers information that, if disclosed, would adversely affect the ability to protect the public, public buildings and industrial sites from accident or acts of sabotage; and where disclosing information would harm the public's health and safety."

16. To show that disclosing information would harm one of the interests in 12(5)(a) HS2 needs to:
- identify a negative consequence (adverse effect) of the disclosure that is significant (more than trivial) and is relevant to the exception claimed;
 - show a link between the disclosure and the negative consequence, explaining how one thing would cause the other;
 - show that the harm is more likely than not to happen.

¹ [Guide to the Environmental Information Regulations | ICO](#)

HS2's view

17. HS2 highlights the parallels between this regulation and section 38 FOIA where the Commissioner's guidance lists those involved in controversial work such as animal experimentation. HS2 suggests that there is a link between its application of this exception and controversial scientific research where disclosure could lead to sabotage and, consequently, risks to the physical safety of staff. It acknowledges, however, that HS2 staff are not involved in scientific research, though HS2 is a controversial project and has been the subject of what it describes as "*violent protestor activity*" that makes it "*analogous to controversial scientific research*". Revealing the locations of ongoing tree planting work may put those carrying out the work at risk.
18. Releasing the requested information would adversely affect public safety by revealing the location of current and upcoming tree planting activity, thereby increasing the likelihood of protests or intimidatory and violent behaviour towards the individuals carrying out the work.
19. HS2 then went on to provide further detail as to why disclosure would result in this adverse effect, following the bullet points set out in paragraph 16.
20. It argues that the information is the location of current and upcoming environmental activity relating to HS2. Releasing the information would lead to these sites becoming the target for protestor activity and any companies or individuals working there would be exposed to violent and intimidatory behaviour by those who are opposed to HS2 and who have already targeted individuals and endangered public safety. HS2 lists those opposed to the project as pressure groups, protestors who are politically motivated and individuals directly impacted by the railway and provided the Commissioner with a link to an article² to underpin its arguments. HS2 contends that organised groups have regularly attempted to disrupt its work on the railway at worksites and provided further links, only some of which can be provided in the links below³.

² [Treetop activists resist evictions as they fight to stop destructive HS2 \(socialistworker.co.uk\)](http://socialistworker.co.uk)

³ [Protesters move into woodland near Lichfield in a bid to stop trees being cut down to make way for HS2 - Lichfield Live](#) [Jones' Hill Woods HS2 protesters stand firm in treetop protests | Bucks Free Press](#) [Extinction Rebellion: Activists scale trees to stop HS2 cutting them down | The Independent](#) | [The Independent](#)

21. HS2's opinion is that, because of the nature of the sites referred to and the work being undertaken, there is potential for serious harm to either the protestors or members of the public. HS2 contends that the behaviour of, at least some of these individuals, is known to be violent.⁴ It provided the Commissioner with a statistic of five fatal injuries to members of the public in relation to construction in each of the last five years, according to the Health and Safety Executive (2019). The Commissioner understands that these are not statistics relating to HS2 but national figures.
22. HS2 then provided examples of violent and intimidatory behaviour being directed towards staff this year (2021). Two security officers and one police officer assaulted; a catapult used to launch a projectile at a security officer's vehicle; fluids were thrown over security officers; two security officers were bitten during a violent assault; a security officer sustained a permanent hearing related injury due to the use of a megaphone next to his ear; fuel and hydraulic lines on machinery cut, resulting in fuel leakage; a security officer kned in the groin by a protestor pretending to ask for directions; a group of 30 masked anti-HS2 activists attacked eight security officers punching and stamping on them in the dark, leaving eight people injured and one taken to hospital.
23. Companies associated with HS2 and not confined to sites where HS2 is undertaking works, have also been the subject of aggressive and intimidatory behaviour. This has taken the form of direct action onsite; over the internet; doxing – publishing data on the internet that identifies a business and people involved that allows others to identify them as individuals, plus other data that could be used to target individuals, such as phone numbers. HS2 went on to provide an example of direct action onsite where prominent anti-HS2 protestors visited a supplier in person. They posted on social media with the intention of persuading the director to cut ties with the project. The name of the company and its location was posted making it useful to others wishing to intimidate over email or by phone. Examples of direct action over the internet were provided such as the email address and phone number of the Health and Safety Executive were circulated on social media channels encouraging those opposed to make contact and complain that the eviction of protestors was not halted on health and safety grounds. People were asked to complain within a specified timeframe to maximise the pressure on the company and intimidate staff. The incident was reported

⁴ [HS2 protesters launch 'faeces and rockets' at evictors – official | Shropshire Star](#)

to the police. An example of doxing was provided where information from Companies House regarding the National Eviction Team was used to find the registered address of a Director which was then posted online using social media with the hope, HS2 says, of somebody local taking action against the individual.

24. The examples given, argues HS2, show the level of violent and intimidatory behaviour that has been directed at organisations associated with the HS2 project. Its view is that the release of the location of upcoming works would lead to those sites being the target of protest action and lead to the identification of individuals and organisations undertaking the work. This would increase the risk to organisations and staff working for them of being targeted by protestors. Its opinion is that, given the level of violent behaviour, the harm is therefore substantial. One protest group encourages its supporters to use 'Linkedin' to search for HS2 employees and "drop them a message". HS2 suggests that this is intimidation, though unstated.
25. HS2 then went on to point to previous decision notices where regulation 12(5)(a) had been cited correctly. [IC-40100-P6C4](#) was concerned with the release of addresses of properties owned by HS2 Ltd where the Commissioner was satisfied that the increased risk of harm from the release of the information would constitute an "adverse effect" and that there was a causal link between the two. The decision was upheld at Tribunal in [EA/2021/0098](#) where it noted that,

*"...there has been a large number of incidents which involve HS2 Ltd owned or managed property, and some of these appear to have involved intimidation and violent behaviour aimed at HS2 Ltd."*⁵

Disclosing a full list of such properties "would lead to more incidents at these properties whether involving basic criminal activity or HS2 Ltd related crime" (paragraph 29).

26. HS2 argues that there is a direct link between the information relating to the location of HS2 work and acts of intimidation and violence. HS2 considers that the release of this information increases the likelihood of some intimidatory behaviour or violent behaviour occurring with respect to more than one location and/or organisation. It suggests that increased protestor activity at these sites would adversely affect the

⁵ [Microsoft Word - 016 270921 Judge decision.docx \(tribunals.gov.uk\)](#), paragraph 28.

safety of any individuals working there. The release of the information would lead to harassment, or worse, either directly through protestor action or through the wider dissemination and encouragement of intimidatory behaviour towards those working there. Release would allow for the identification of the organisations undertaking this work. It suggests that these organisations are likely to be subcontractors, smaller in size, and likely to have less resources to use to protect themselves and their staff. HS2 adds that many such companies, fearing perceived violence, have removed information from their vehicles that identifies their organisation when working on the HS2 project.

27. HS2 concedes that it is not possible to be absolutely certain that release will lead to the adverse effect. However, it believes, that the incidents outlined in paragraphs 22 and 23 show that violence and intimidation have taken place at locations associated with HS2. HS2 provided instances of decision notices where the Commissioner has agreed that past behaviour is indicative of the likelihood that individuals would be singled out for harassment, intimidation and possible violence. It points to IC-40100-P6C4 (see paragraph 25) as the Commissioner accepting the likelihood of an increased risk of harm at HS2 properties if address information was to be released. EA/2021/0098 upheld this decision. HS2 believes that the release of the location of tree plantings would be highly likely to lead to more harassment, intimidation and violent behaviour.

The complainant's view

28. The complainant does not accept some of the allegations made by HS2 which he suggests are "*untrue and possibly libellous*". He challenges the "*allegations that faeces or urine have ever been thrown at HS2 staff or agents, or that staff have been assaulted*". He also challenges "*the claim that mitigation sites have been vandalised*" and that "*those who oppose the scheme are guilty of damaging woodlands, trees, woodland soils and hedges*".
29. His view is that those who oppose the scheme have "*borne witness to the dreadful paucity of care and quality of workmanship at those mitigation sites*" and that,

"much of the friction between those who oppose the scheme and HS2 has been created when HS2 Ltd and their staff have been acting or been prevented from acting criminally, and that this is a more likely reason for the information being withheld".

In his review request, the complainant listed examples where he argued that HS2's mitigation had been "*pretty woeful*" such as thousands of saplings planted too densely. He asked, if it is really so

dangerous to allow the public to see where the plantations are so that the work it is carrying out in the name of the public can be monitored.

The Commissioner's view

30. The Commissioner's guidance⁶ to this exception contains the following:

"The term public safety is not defined in the EIR. But in broad terms this limb of the exception will allow a public authority to withhold information when disclosure would result in hurt or injury to a member of the public. It can be used to protect the public as a whole, a specific group, or one individual who would be exposed to some danger as a result of the disclosure."

31. The EIR uses only the word "would" and not "would be likely" which means that the test for engaging the adverse effect exceptions are more stringent than for prejudice-based exemptions under the FOIA. Therefore a public authority cannot engage an exception if it cannot show that the adverse effect is more likely than not to happen. In practice this means a more than 50 per cent chance. It is not enough to say that an adverse effect could or might happen.
32. The Commissioner has previously recognised that HS2 and those who work for HS2, face the threat of violence. However, her previous decisions have focused on details relating to construction of the line itself and preparations for that construction. This request seeks information relating to mitigation measures which would (presumably) be less likely to attract violence from those who profess to care about the environment. HS2 has not demonstrated that it is more likely than not that sites of mitigation will attract the same behaviour and therefore it has not satisfied the high bar to engage this adverse effect exception. Therefore the exception is not engaged.
33. As the exception is not engaged, the Commissioner has not gone on to consider the public interest but will go on to consider whether the other exceptions cited by HS2 are engaged.

⁶ [International relations defence national security or public safety \(regulation 12\(5\)\(a\)\)-v1.1- EIR guidance - 20203112 \(ico.org.uk\)](#)

Regulation 12(5)(b) – adversely affect the course of justice

HS2's view

34. Regulation 12(5)(b) EIR states:

"12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature..."

35. HS2 refers to the Commissioner's guidance⁷ that states that the meaning of the course of justice is broad. It cites [EA/2008/0020](#) in which the Tribunal commented that 'the course of justice' is not referring to a specific course of action but is akin to the "*smooth running of the wheels of justice*". HS2 goes on to argue that the withheld information, would encourage or cause criminal activity or interfere with HS2's ability to counteract such activity and therefore adversely affect the course of justice. It highlights the guidance that suggests a link with section 31 FOIA which relates to law enforcement. This information, if released, would adversely affect the course of justice by facilitating offences and making it more difficult for HS2 to prevent crime.
36. HS2 again highlights a link between the prejudice test under the FOIA and the adverse effect test under the EIR. In line with the three point test outlined in paragraph 16, HS2 explains the consequences of release regarding locational information as targeting by protestors and states that violent and intimidatory behaviour is also criminal behaviour. HS2 contends that it follows that the link between disclosure and the adverse effect and the likelihood of the adverse effect occurring are the same as outlined in paragraph 26. In HS2's view the release of the location for upcoming work would therefore directly lead to criminal behaviour.

The Commissioner's view

37. Although this exception is broad, it is generally cited in the case of legal professional privilege, court records, the ability to receive a fair trial or information that would adversely affect law enforcement investigations

⁷ [Regulation 12\(5\)\(b\) – The course of justice and inquiries exception | ICO](#)

and proceedings. The Commissioner considers that the suggestion by HS2 that the release of this information would facilitate offences and make it more difficult to prevent crime is too broad.

38. Regardless of this, the bar has not been reached for an adverse effect as HS2 cannot evidence (for the same reasons as have been discussed above) that such an effect is more likely than not to occur.
39. As the Commissioner does not accept that the exception is engaged, she has not gone on to consider the public interest.

Regulation 12(5)(g) – protection of the environment

40. The legislation states the following –

“12.—(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect— (g) the protection of the environment to which the information relates.”

41. ‘The environment’ in this context has a wide meaning, as shown by the list of the elements of the environment referred to in regulation 2(1)(a).

42. The Commissioner’s guidance says that,

“The purpose of the exception is to allow a public authority to refuse to disclose environmental information if it would harm the protection of the environment to do so.”⁸

43. To refuse a request for environmental information under the exception in Regulation 12(5)(g), public authorities need to establish:

- that the information in question relates to the aspect of the environment that is being protected;
- how and to what extent the protection of the environment would be affected;
- and that the information is not on emissions.

HS2’s view

⁸ [Protection of the environment \(regulation 12\(5\)\(g\)\) \(ico.org.uk\)](https://ico.org.uk/our-work/investigations/hs2-2017-2018)

44. HS2 quotes the bullet points in the previous paragraph from the Commissioner's guidance. It highlights the fact that the exception is about biological diversity and its components, the protection of living organisms as part of their environment. The withheld data contains sensitive information allowing for the identification of the location of saplings being planted by HS2 in the then-current season. HS2 states that these saplings are part of its *"extensive programme of habitat creation and tree planting. The location of these sites therefore directly relates to the environment that is to be protected."*
45. HS2 argues that the environment is likely to be affected by releasing sensitive information relating to the location of the planting of the saplings. It suggests that revealing the sites would encourage protestors to trespass on private land, to damage or interfere with works that were authorised by the High Speed Rail (London-West Midlands) 2017 Act. Illegal protestor access and activity, HS2 claims, is highly likely to occur at these locations and that this would have an adverse effect on the environment.
46. HS2 contends that the saplings would be specifically targeted by some protestors. It cites the programme of works to undertake planned/licenced closures of badger setts within Warwickshire which, it says, led to regular targeted interference and tampering of mitigation works. This activity, HS2 states, is illegal and these occasions were reported to the police. This was part of a specific ecological programme which led to planned works being cancelled and delayed for several months. HS2's view is that this is detrimental to the welfare of the badger. It also cites the National Biodiversity Network guidance on sensitive environmental features on how to carefully consider how and to what extent disclosure would adversely affect the protection of the environment. HS2 quotes from this guidance that, *"a species is deemed sensitive if the release of information detailing its location could cause it to be damaged such as collection, hunting, destruction of habitat, or accidental damage through disturbance."* It lists the ten criteria which determine whether a species is sensitive that it argues apply in this context, such as precise location of sensitive sites, current or recent evidence of harmful activity and the ability of someone to use the information to carry out harmful activity. HS2's opinion is that newly colonised areas fits with one of the criterion as *"particularly vulnerable"*. However, HS2 acknowledges that it is not a conservation organisation but that tree planting allows it to create new woodlands, thereby protecting the environment. It adds that its planting works are undertaken by professionally competent contractors who are required to undertake work in accordance with industry best practice.

47. It is also highly likely, in HS2's opinion, that protestor activity would intentionally disrupt the works programme in an attempt to undermine its mitigation work, undertaken within that season. It points to the confidential information it provided to the Commissioner as an example. Finally, HS2 suggests that genuine curiosity would also encourage activity in the area and lead to the disturbance of the environment and the disruption of the planting activity.

The Commissioner's view

48. The Commissioner is unable to determine whether these proposed sites class as 'sensitive' in a biodiversity context. The examples that the Commissioner cites in her guidance are those that relate to the protection of a rare species of plant or an endangered bird. Clearly, when it comes to a rare or endangered plant or creature, disclosing the exact location could result in the stealing of or interference with a protected species. The Commissioner does not accept that the planting of thousands of saplings is a direct comparison or, more importantly, that any adverse effect would be more likely than not.
49. The Commissioner has not based her decision on the issues surrounding the HS2 project and mitigation to the environment, or whether the level of locational detail is necessary. She has based her decision on whether HS2 has provided enough relevant evidence regarding this particular information and the extent of the adverse effect that might ensue from its release. Though the potential exists for an adverse effect, HS2 has not satisfied her that it would be more likely than not with regard to the withheld information.
50. For this reason she has not gone on to consider the public interest.

Right of appeal

51. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. 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.
53. 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

Janine Gregory
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