

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

Decision notice

Date: 1 July 2020

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

Complainant: Dr James Conboy on behalf of the Chiltern
Society HS2 group
Address: hs2@jimconboy.com

Decision (including any steps ordered)

1. The complainant has requested information relating to a report on the safety case for the Chiltern Tunnel section of the High Speed 2 (HS2) railway. High Speed Two Limited (HS2 Ltd) has withheld the information under regulation 12(4)(d) (material still in the course of completion), regulation 12(5)(a) (public safety), and regulation 13(1) (personal data) of the EIR.
2. The Commissioner's decision is as follows:
 - HS2 Ltd correctly withheld the requested information under the exception at regulation 12(4)(d) and the public interest favoured maintaining this exception.
 - HS2 Ltd breached regulation 14(2) as it did not refuse the request within the required timescale.
 - HS2 Ltd breached regulation 11 as it did not carry out the internal review and notify the complainant of the outcome within the required timescale.
3. The Commissioner does not require HS2 Ltd to take any remedial steps.

Request and response

4. On 11 November 2018, the complainant wrote to HS2 Ltd and requested information in the following terms:

"We understand that you have commissioned a report on the safety case for the Chilterns Tunnel, a long standing concern of this society. We request a copy of the report, and any related correspondence between HS2 Ltd and its authors, under the Freedom of Information Act."
5. HS2 Ltd responded on 10 December 2018. It confirmed that it held the report and related correspondence. However, it withheld the information, citing the exceptions under regulation 12(5)(a) (public safety) and regulation 12(5)(e) (commercial information).
6. The complainant requested a review of HS2 Ltd's decision on 8 February 2019.
7. Following an internal review (see section below on "Scope of the case" for more detail), HS2 Ltd wrote to the complainant on 25 June 2019 confirming that it was still withholding the requested information, but revising its position with regards to the reasons for doing so. In its revised response, HS2 Ltd explained that it was now withholding the requested information under regulation 12(4)(d) (material in the course of completion, unfinished documents and incomplete data) and regulation 12(4)(e) (internal communications).

Scope of the case

8. On 7 May 2019, the complainant copied the Commissioner into correspondence sent to HS2 Ltd, complaining about the way his original request for information had been handled.
9. The Commissioner wrote to the complainant on 23 May 2019, asking him to clarify the purpose for copying the Commissioner into his correspondence.
10. The complainant responded to the Commissioner on 4 June 2019 and clarified that he had copied the Commissioner into his correspondence in the hope that it might have led to HS2 Ltd responding to his request. The complainant asked the Commissioner to investigate the time taken for HS2 Ltd to carry out the internal review that he had requested.
11. The Commissioner therefore wrote to HS2 Ltd on 11 June 2019 and requested that it issue an internal review decision as soon as was

practicable, and within 10 working days. As explained above, HS2 Ltd provided its internal review response to the complainant on 25 June 2019.

12. On 21 July 2019, the complainant wrote to the Commissioner to complain about the internal review response.
13. During the course of the Commissioner's investigation, HS2 Ltd further revised its position and added further grounds for its refusal to provide the requested information. It stated that it believed regulation 12(4)(d) applied to the requested documents in their entirety, and that regulations 12(5)(a) and 13 (personal data) applied to some parts of the documents. HS2 Ltd stated that it no longer wished to rely on regulation 12(4)(e).
14. In the first instance, the Commissioner's investigation has focussed on HS2 Ltd's reliance on regulation 12(4)(d) and will consider its reliance on regulations 12(5)(a) and 13 if necessary.

Reasons for decision

Regulation 12(4)(d)

15. Regulation 12(4)(d) of the EIR states that, for the purposes of paragraph (1)(a), 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.
16. 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."*
17. Regulation 12(4)(d) is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception. However, regulation 12(4)(d) is a qualified exception so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
18. The fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be

finished, it may be part of material which is still in the course of completion.

19. In its submission to the Commissioner, HS2 Ltd stated that the initial report was not commissioned by HS2 Ltd but by a contractor working for it. It stated that the report was not a review of the Chiltern Tunnel safety case. It explained that an employee at HS2 Ltd mistakenly referred to the report as a safety case commissioned by HS2 Ltd in a conversation with the complainant.
20. HS2 Ltd has stated that, in the interest of transparency, it had identified two reports as the most relevant information it held in respect of the request and considered their release.
21. HS2 Ltd's position is that, while the withheld information in this case is contained in documents which are finished, they can be categorised as material which is still in the course of completion. It explained that the design is not finalised and many of the decisions still need to be made before any of the issues deliberated in the documents will be concluded.
22. HS2 Ltd has described the reports as technical papers, concerned with discussing various aspects of design, analysing and alleviating risks, and providing accurate information through which policy can be formulated. As these works have not yet been started, HS2 Ltd has stated that the information forms part of wider considerations on the design of this tunnel. The information therefore directly relates to the continuing development of policy and the process of making decisions regarding works and mitigation measures in this area.
23. HS2 Ltd has referred the Commissioner to the decision for FER0848129, in which the Commissioner noted that while a particular document may itself be finished, it may be part of material which is still in the course of completion and therefore be captured by regulation 12(4)(d). The information requested in that case was several reports *"specifically prepared to outline the options for mitigating the effects of piling at the Colne Valley viaduct on Affinity Water abstractions."* The work referred to in those reports had not been started, and the information in the documents formed part of wider considerations on how to undertake the works.
24. HS2 Ltd considers that the information requested in this case is similar to the information requested in the decision for FER0848129, as it is considering options for works that have not yet started. HS2 Ltd has referred to paragraph 22 of the decision for FER0848129, in which the Commissioner noted that *"even if the requested information had been contained in finished documents at the time of the request, the documents are part of material that was still in the course of completion,*

namely final policies and approaches relating to particular ground investigations and associated works". HS2 Ltd has stated that this applies to the information requested in this case.

25. HS2 Ltd is of the view that the withheld information directly relates to the continuing development of policy and the process of making decisions regarding works and mitigation measures in this area and therefore regulation 12(4)(d) is engaged.
26. The Commissioner has noted her decisions in the following cases in which HS2 Ltd has previously relied on regulation 12(4)(d):
 - a. FER0668007 (July 2017), concerning information on the HS2 route at Meadowhall,
 - b. FS50698523 (May 2018), concerning information associated with a House of Commons Public Accounts Committee hearing, and
 - c. FER0848129 (January 2020), concerning risk assessments associated with a particular locality.

The Commissioner considers that the requested information in FER0668007 and FER0848129 is broadly similar to the requested information in this case, as it concerns HS2 Ltd projects in particular localities on the proposed HS2 high-speed rail route. The Commissioner found that regulation 12(4)(d) was engaged in all three cases.

27. As in those earlier cases, the Commissioner is satisfied that the information the complainant has requested in this case can be categorised as material still in the course of completion and that the exception at regulation 12(4)(d) is therefore engaged. In view of this, she has gone on to consider the public interest test.

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

Public interest in disclosing the information

28. The complainant is concerned that the train evacuation procedure proposed for the Chiltern Tunnel is unsafe and will result in restrictions being imposed on the service which can be provided. The complainant has explained that the safety issues - narrow evacuation ledges, lack of barriers between passengers and the tracks, absence of a (third) service tunnel – cannot be addressed once the contracts are awarded. The complainant is of the view that the reports would inform further discussion on this topic, and that these should be made public, as part of the current assessment of the HS2 project. The complainant is also of the view that should HS2 Ltd wish to confirm that the tunnel safety case

is incomplete at this late stage, then clearly this will be of some interest to the taxpayers who are funding the project.

29. In its submission to the Commissioner, HS2 Ltd has acknowledged that there are public interest arguments in favour of greater transparency and accountability around the progress of the HS2 programme.
30. HS2 Ltd has stated that disclosing the information would help to facilitate public understanding of the HS2 programme and increase understanding of the design options being considered for this area.
31. HS2 Ltd also stated that the disclosure of the information would help the public to understand the issues that are being considered in relation to the design of the tunnel.

Public interest in maintaining the exception

32. HS2 Ltd has stated that the information relates to policy development advice and proposals that are still in the course of completion. As such, the information will be subject to change as the assessment continues.
33. HS2 Ltd has argued that the Commissioner has acknowledged in a number of previous decisions, and specifically referred to paragraph 27 of the decision for FS50571592, that *"there is a strong likelihood that the integrity of and effectiveness of the decision-making process would be harmed by the disclosure of inchoate information"*.
34. HS2 Ltd has explained that a final decision on the measures for the Chiltern Tunnel has not been taken. It has confirmed that once a decision has been made the relevant information on the design will be made public. HS2 Ltd stated that this is not the same as the public being provided with unfinished information which is in the process of being developed, debated, and approved. HS2 Ltd has argued that releasing the documents at this time and in their present form would present an inchoate picture to the public which, in turn, would misinform and distract debate. Release would therefore create further confusion and would fuel controversy over an aspect of its planning policy that is already complex and controversial.
35. HS2 Ltd has also referred to paragraph 15 of the Commissioner's guidance on regulation 12(4)(d) which 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"

36. HS2 Ltd has also argued that it needs the opportunity to consider all available options, the "safe space". It explained that this "safe space" is required to operate candidly and freely when developing policy and planning the measures that may be undertaken in specific geographical areas. It argued that releasing information too early could discourage public officials from such a free and frank discussion of all available options and would therefore be detrimental to the decision-making process. It is in the public interest therefore that public officials are allowed a thinking space in which to appraise and assess all available options and considerations before a decision is made.
37. HS2 Ltd stated that it is important that it is provided the opportunity to engage with the relevant effected parties and convey this information to the appropriate people at the appropriate time and receive relevant feedback on the proposals. It considers that releasing the information at this time would undermine the engagement process and consequently diminish the decision-making process.
38. HS2 Ltd has stated that the withheld information is highly technical and is, essentially, concerned with analysing issues and alleviating risks and providing accurate information through which policy can be formulated. It argued 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. It stated that the Commissioner agreed with HS2 Ltd in paragraph 37 of the decision for FER0848129 that the information in that case *"is of a complex and technical nature which the majority of the general public is unlikely to fully understand"* ...and therefore... *"fielding any questions about the content of the information, and addressing any misconceptions or misunderstandings about it, would also be likely to interfere with the 'safe space' that HS2 needs to progress and finalise this particular piece of work"*.

Balance of the public interest

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

41. The Commissioner accepts that, at the time of the request, the works with which the withheld information is concerned were still under discussion and ways forward, including any associated risks and the mitigation of these risks, were being considered. The Commissioner acknowledges the complainant's safety concerns about the works, which are valid concerns with public interest. Furthermore, the particular works in this case are part of the wider transport project – the HS2 project – that has a great deal of wider public interest.
42. However, the Commissioner is satisfied that there is greater public interest in the ability of HS2 Ltd to be able to discuss, consider and plan the works in question without this process being frustrated through the release of the withheld information. At the time of the request the information was subject to change and is still considered 'live' at this point.
43. In addition, having reviewed the information being withheld, the Commissioner agrees with HS2 Ltd that it is of a complex and technical nature which the general public is unlikely to fully understand. Fielding any questions about the content of the information, and addressing any misconceptions or misunderstandings about it, would also be likely to interfere with the "safe space" that HS2 Ltd needs to progress and finalise this particular piece of work.
44. Finally, HS2 Ltd has stated that it intends to make public its final decisions on the measures for the area in question and that the public will be able to review and comment on the proposed measures at that point. In the Commissioner's view, this step will address the general public interest in these works and the complainant's concerns. The Commissioner is therefore satisfied that the public interest favours maintaining the exception under regulation 12(4)(d) on this occasion.
45. Because the Commissioner has found that the requested information engages the exception under regulation 12(4)(d) and that the public interest favours maintaining this exception, it has not been necessary for her to consider whether regulation 12(5)(a) or regulation 13 are also engaged.

Regulation 14 – refusal to disclose information

46. Under regulation 14(2) of the EIR, if a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal must be made as soon as possible and no later than 20 working days after the date of receipt of the request.

47. In this case, the complainant submitted his request on 11 November 2018 and HS2 Ltd did not refuse his request until 10 December 2018. HS2 Ltd therefore breached regulation 14(2) of the EIR.

Regulation 11 - Representations and reconsideration

48. The Commissioner notes that the complainant requested an internal review on 8 February 2019. However, HS2 Ltd failed to complete the process and notify the complainant of the outcome until 25 June 2019.
49. Regulation 11 of the EIR requires a public authority to carry out the internal review and notify the complainant of the outcome within 40 working days of receipt. As HS2 Ltd failed to do this on this occasion, the Commissioner has recorded a breach of regulation 11 of the EIR.

Right of appeal

50. 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

51. 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.
52. 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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