



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0220

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FER 0535668
Dated: 13 August 2014**

Appellant: MR JONATHAN LOESCHER

1st Respondent: INFORMATION COMMISSIONER

2nd Respondent: HIGH SPEED TWO (HS2) LIMITED

On the papers: FOX COURT AND FIELD HOUSE, LONDON.

**Dates: 9 FEBRUARY 2015 AND AFTER FURTHER
WRITTEN SUBMISSIONS, 16 MARCH 2015 AND
21 MAY 2015**

Date of decision: 2 APRIL 2015

Date of revised decision: 21 MAY 2015

Date of second revised decision 2 JUNE 2015

Before

ROBIN CALLENDER SMITH
Judge

and

ANNE CHAFER and ROSALIND TATAM
Tribunal Members

Written representations and submissions:

For the Appellant: Mr. Loescher himself
For the 1st Respondent: Ms Clare Nicholson, Solicitor for Information Commissioner
For the 2nd Respondent: Ms Karen MacKnight, Freedom of Information Manager
HS2 and – on revision – Timothy Pitt-Payne QC and Christopher Knight of Counsel.

GENERAL REGULATORY CHAMBER**INFORMATION RIGHTS****Subject matter: Environmental Information Regulations 2004**

Exceptions, Regs 12 (4) and (5)

- Legal professional privilege (5) (b)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice – for reasons set out in the Substituted Decision Notice - in place of the decision notice dated 13 August 2014.

SUBSTITUTED DECISION NOTICE

Dated	21 MAY 2015
Public authority:	HIGH SPEED TWO (HS2) LIMITED
Address of Public authority:	19TH FLOOR ONE CANADA SQUARE CANARY WHARF LONDON E14 5AB
Name of Complainant:	MR JONATHAN LOESCHER

The Substituted Decision

For the reasons set out in the Tribunal's determination the Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 13 August 2014.

Action Required

Within 35 days HS2 is to provide the Appellant with a full response to the request for: (a) "all internal notes and reports" dealing with the Flats Lane and Knox Grave Lane relocation proposals, and (b) copies of all minutes of meetings held within HS2 and the DfT to discuss the Flats Lane and Knox Grave Lane relocation proposals, in accordance with this judgment. For the avoidance of doubt this includes all information held in e-mail accounts in existence at the date of the request, 20 January 2014. Where information is held by HS2 and is not exempt under the EIR, that information is to be provided to the Appellant with the response. Where HS2

wishes to rely upon an exemption under the EIR to redact or withhold information, the basis for that redaction or withholding is to be explained to the Appellant in the response, who shall have the right to raise the response with the Information Commissioner.

R Callender Smith
Judge
21 May 2015

REASONS FOR DECISION

Introduction

1. Mr Jonathan Loescher (the Appellant) lives close to an area that may be affected by the construction of the high-speed rail link known as HS2.
2. He lives on Flats Lane, Weeford, Staffordshire. He belongs to a Residents' Group representing those who live in the Flats Lane and Knox Grave area.
3. This Residents' Group had made representations to HS2 about what it considered were unique features of its case which they wished to have taken into account when the DfT considered the issue of compensation and it has also submitted a "relocation proposal".
4. 20 January 2014 the Appellant wrote to HS2 with two requests.

As a resident of Flats Lane, Weeford, Staffordshire, I should be grateful if you could let me have the following information:-

- (1) Copies of all internal notes and reports dealing with the Flats Lane and Knox Grave Lane relocation proposals [**Request 1**]
- (2) Copies of all minutes of meetings held within HS2 and the DfT to discuss the Flats Lane and Knox Grave Lane relocation proposals [**Request 2**].

Please treat this as an enduring request and therefore please send me copies of not only past information but any further information as it occurs.

5. HS2 responded on 24 February 2014. In relation to **Request 1** it stated it was withholding the report it had on the relocation proposals on the basis of Regulation 12 (4) (d) EIR (material still in the course of completion). It

stated that it had considered the public interest test and found that the public interest in maintaining the exception outweighed the public interest in disclosing the information.

6. In relation to **Request 2** it explained did not hold any information falling within its scope.
7. HS2 then conducted an internal review at the request of the Appellant. The result of that internal review was that HS2 stated that, given the passage of time, the public interest test was now in favour of disclosure of much of the information within the report.
8. It however relied on Regulation 13 to withhold personal data. It maintained that the remaining redactions to the body of the report and its appendices 3 and 6 were legally privileged advice subject to Regulation 12 (5) (b) EIR (adverse effect to the course of justice) and that the public interest test favoured upholding the exception.

The complaint to the Information Commissioner

9. When the Information Commissioner considered the matter in his Decision Notice he stated:

[66]. HS2 has explained that any information it holds is held electronically. It explained that only a small number of staff were involved Flats Lane/Knox Grave Lane site. This is borne out to some extent by the number of officials listed in the report itself. Upon receipt of the request these officers were contacted and they were individually responsible for searching for any information falling within the scope of the request. HS2 is confident that these officials could be relied on to search for the information in all the relevant files relying on their knowledge of their own working practices. The only information returned through these searches was the one report that was subject to the first part of the complainant's request.

[67]. Importantly the officials involved in the Flats Lane/Knox Grave Lane issue have stated that no formal meetings were held apart from the meeting of the Commercial Committee for which the report was prepared. That meeting took place on 4 February 2014 which was after the request was made and therefore any minutes produced at that meeting are not captured by the request. Although, what HS2 describe as "informal meetings" between officials did take place, the officials have explained that it is not their working practice to take notes of such meetings. It has been explained to the Commissioner that these

informal meetings are used to obtain information from colleagues and discuss relevant matters. This appears to be a purely verbal process and officials have said that they do not consider that there is any business need to record these discussions or the decision-making process that occurs at these informal meetings.

10. The Commissioner upheld HS2's reliance on Regulation 12 (5) (b) on the basis that there would be a more than 50% chance of the course of justice being undermined if the legal advice was disclosed. He was also satisfied that its disclosure would place HS2 and the DfT at a disadvantage in any potential legal action that arose out of the case on the basis that there would be an adverse effect on the ability of the two public authorities to obtain a fair trial if it was released. He found that the public interest favoured maintaining the exception. He also explained that he was satisfied that, on the balance of probabilities, HS2 did not hold any minutes of the meetings described in the second part of the request.

The Notice of Appeal

11. The Appellant's main points were that HS2 assertions about the way meetings were recorded (reflected in the two extracts from the Decision Notice set out in full at Paragraph 9 above) were not credible.
12. In addition HS2 had led the Residents Group to believe that the relocation proposals would be dealt with by the Parliamentary Select Committee and "not a Judicial Proceeding and yet told ICO the opposite".

Written responses following the Notice of Appeal

13. HS2 submitted a 14-page written response from Ms Karen MacKnight, its Freedom of Information Manager, on 23 October 2014, together with a 4-page witness statement from Mr Steven Kidd, HS2's Senior Property Acquisitions Manager, of the same date. These documents are at pages 37 – 55 of the Open Bundle.
14. The Appellant provided a 5-page response to this material dated 5 November 2014 (pages 56 – 61 of the Open Bundle).

Closed material

15. The Tribunal was provided in advance of the hearing with an agreed bundle of material which included an unredacted version of all of the withheld information.
16. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.
17. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:
 - i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
 - ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
 - iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.
 - iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.
18. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:
 - i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.
 - ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.
 - iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

19. The closed bundle in this appeal contained the disputed information.

There was nothing additional in the closed bundle and it was necessary for the Tribunal to see the disputed information in order to reach its decision.

20. The Tribunal has considered carefully and rigorously the Appellant's and HS2's points and concerns already expressed in the notice of appeal and in other representations and submissions.

Further Directions and Responses

21. Following its first meeting to consider the matters on the papers the Tribunal issued Further Directions as follows:

The Tribunal wishes to receive a further written submission addressing how HS2 dealt with the scope of the original information request.

The Appellant's original request sought:

*"1. Copies of all internal notes and reports dealing with the Flats Lane and Knox Grave Lane relocation proposals.
2. Copies of all minutes of meetings held within HS2 Ltd and the DfT to discuss the Flats Lane and Knox Grave Lane relocation proposals."*

(1) It is clear from the Second Respondent's documentation in this paper appeal – notably but not exclusively in the witness statement of Stephen Kidd – that adjectival qualifiers like "lengthy" minutes of meetings and "formal" reporting (see Paragraphs 5,6 and 7) have been applied in a manner that seems to limit the generality of the original request. The Tribunal would like to understand why those qualifications and limitations were used and which specific key search terms were used.

(2) The Tribunal notes that the ICO in the Decision Notice [67] refers to "no formal meetings", not challenging this definition/terminology part of HS2's 'limited' searching for information, only concentrating on the date of this formal meeting and whether it was before or after the date of the request.

(3) Also, there appears to be a discrepancy in HS2's descriptions of their single e-system on page 45 para 4.7 which Steven Kidd expanded upon in his witness statement to explain that HS2 operate on a paperless basis where ever possible, filing relevant notes and details electronically (pg 53 para 5) as opposed to their response to Mr Loescher's FOI request dated 13 Nov 20 2014 page 205 which states 'We hold a large number of documents across a number of databases, folders and email accounts.'

22. HS2 responded on 24 February 2015. Because this material is not in the Open (or Closed) Bundles it is set out here for transparency.

23. In relation to (1) above it stated:

3.2.1 The Witness Statement of Steven Kidd dated 23 October 2014 (**the Statement**), at paragraph 5 states:

Though attendees may take handwritten notes for their own use after any such meeting (for example any actions they may have individually been assigned), formal minutes and notes are not routinely produced for these types of meetings. In a fast-moving, technologically-managed environment such as HS2 Ltd, it is my experience that communication tends to be either verbal or via internal email of key points, rather than lengthy minutes of meetings, other than where formal reporting for decision-making needs to be undertaken.

3.2.2 In that section "formal" is simply used to distinguish records created at or after each meeting (or other event which would be the subject of the document) and which were retained by HS2, compared to those incomplete, unstructured and "informal" handwritten notes which may have been taken at the time of each meeting for temporary, specific, individual use (but which were not retained and subsequently were therefore not held at the time of the Request).

3.2.3 The meetings held to discuss the relocation proposals referred to in the Minutes Request were considered part of the day to day way of working within HS2 and were not the type of meeting that would normally require a minute, note or report of the discussions to be taken, written up and retained (ie a "formal" record). The only meeting requiring a "formal" note to be created was the meeting of the Commercial Committee on 4 February 2014. This meeting took place after the date of the Request but was nevertheless, in line with HS2's overriding duty to advice and assist the Appellant, disclosed in part to the Appellant upon the conclusion of HS2's internal appeal, on 6 May 2014.

3.2.4 We consider it unlikely that any other "formal" notes, reports or minutes were ever created in respect of any other relevant meetings and we are certain that none existed at the time of the Request. It was not (and is not) standard practice (or necessary) within HS2 to create such documents. As set out in paragraph 6 of the Statement, HS2 also asked those individuals who were dealing with the relocation proposals and who would have been included in such meetings, whether any such "formal" records were held and it was confirmed, in each case, that no "formal" records were held by those individuals.

3.2.5 To the extent it was decided any “formal” note(s) had been needed they would have been input into the electronic system referred to below in paragraph 3.4.3 and become a “formal” document. To ensure no information had been missed, a search of that system by HS2 confirmed that, at the date of the Request, no such “formal” information within the scope of the Request was held.

3.2.6 Whilst it is also impossible to guarantee that no “informal”, handwritten, individual notes were ever created, this would also not have been standard practice. Nor would it have been necessary to retain such “informal” documents once any individual actions (for which those “informal” notes had been created) had been completed. As set out in paragraph 8 of the Statement, HS2 asked those individuals who were dealing with the relocation proposals whether any “informal” records were held and it was confirmed, in each case, that no “informal” records were held by those individuals.

24. In relation to (2) it stated:

3.3.1 In relation to the searches carried out by HS2 in relation to the Request, we strongly refute that they were in any way “limited”. We consider that the appropriate searches were carried out, in line with our legal obligations.

3.3.2 As stated in paragraph 4.7 in HS2’s Response to the Tribunal dated 23 October 2014, HS2 has a single electronic document system (set out in more detail in paragraphs 3.4.3 below). As stated in paragraphs 6 and 8 of the Statement (and as referred to in paragraphs 3.2.4 and 3.2.6 above), only a few members of HS2 staff were involved with the “relocation proposals” referred to in the Request by the Appellant would have been able to create records potentially within the scope of the Request.

3.3.3 “Informal” (paper) records may be held by individuals unless and until actions noted had been completed at which point there would be no need to retain details in writing electronically. HS2 checked with those relevant individuals involved in the relocation proposals whether any paper “informal” records were held, whether or not “lengthy”, within the scope of the Request and had confirmation that no such records were held, as set out in paragraph 8 of the Statement.

3.3.4 HS2 also asked each of those relevant staff members (who had a working understanding of the those relocation proposals and the manner in which documents were being created and retained in relation to those proposals) to confirm whether any “formal” information was held by them, whether “lengthy” or not, and they each confirmed that no such records were held.

3.3.5 Apart from the minutes of the Commercial Committee, it was possible that individuals involved with the relocation proposal within HS2 had input other relevant records into HS2’s eB system (as defined below in paragraph 3.4.3). This system was checked and no relevant records were created, other than the minutes of the Commercial Committee which were disclosed in part to the Appellant.

3.3.6 HS2 can therefore be certain that no “formal” records were created, other than the record disclosed in part. Again, for the avoidance of doubt, the searches were not “limited”, neither did they focus solely on either “formal” or “lengthy” notes, reports nor were they qualified in any other way. HS2 searched for all records within the requested information and the sole record that fell within the scope of the Request was redacted and disclosed to the Appellant.

25. In relation to (3) it stated:

3.4.1 Subsequent to the Request, on the 24 October 2014 the Appellant also made a further, related request for information under the EIR for the following information relating to the Flats Lane and Knox Grave Lane relocation proposals:

- Correspondence of any kind (external or internal);
- Emails of any kind (external or internal);
- Handwritten notes;
- Notes of any kind – whether written or electronic;
- Correspondence, emails or minutes of meeting held with the DfT or any other external body or person(s);
- Notes and minutes of meetings (external or internal);
- Emails correspondence or minutes of meeting relating to any complaints relating directly or indirectly to the Flats Lane Relocation Proposals; [and]
- Copies of any reports

together (the **Correspondence Request**).

3.4.2 HS2’s response to the Correspondence Request was dated 13 November 2014 (the **Correspondence Response**).

3.4.3 HS2 has a single electronic storage system called “enterprise Bridge” (eB) in which all documents HS2 produce are saved. This single system is for documents (ie all information which would have been caught by the Request). So the reference to a single database in that context is correct. Within this system HS2 stores documents in “folders”. For example, each individual request under the Freedom of Information Act 2000 or the EIR has its own folder in eB where all the documents relating to that request is saved. These are the “folders” referred to in the Correspondence Response. These folders were searched as part of HS2’s handling of the Request, as set out in paragraph 3.3.5 above.

3.4.4 The correspondence database referred to in the Correspondence Response, is a separate electronic system where HS2 saves all correspondence from and to stakeholders under their individual name. In this database, we have 450 records under the Appellant’s name. However, these records are all either:

3.4.4.1 documents which are neither “internal notes and reports dealing with the Flats Lane and Knox Grave Lane relocation

proposals” (as set out in the Notes and Reports Request) nor are they “minutes of meetings held within HS2 Ltd and the DfT to discuss the Flats Lane and Knox Grave Lane relocation proposals” (as set out in the Minutes Request); and/or

3.4.4.2 information that was created after the date of the Request.

3.4.5 The “e-mail accounts” referred to in the Correspondence Response are those accounts of HS2 staff which contain additional e-mail correspondence that are considered not to fall within the databases set out above, but which individual HS2 staff have entered into in respect of this matter and which are held within their respective Microsoft Outlook accounts. For the purposes of the Request, such e-mails in existence at the date of the Request were not considered to fall within the Notes and Reports Request or the Minutes Request. This is because they are neither “notes”, “reports” nor “minutes of meetings” and therefore fall within paragraph 3.4.4.1 above.

3.4.6 The e-mail accounts and correspondence database are outside the eB system. Therefore references to a number of databases, folders and e-mails in the Correspondence Response is not inconsistent with the handling of the Request. The Request solely covered information contained within the eB system, no records within either the Notes and Reports Request or the Minutes Request would be stored electronically elsewhere. However, HS2, still carried out searches of these other sources in relation to the Request, where it considered it was relevant and necessary to do so.

26. The Appellant’s comments on these responses were, in summary:

(1) Para 3.4.5 HS2 Ltd state “For the purposes of the Request, such e-mails in existence at the date of the Request were not considered to fall within the Notes and Reports Request or the Minutes Request. This is because they are neither “notes”, “reports” nor “minutes of meetings” and therefore fall within paragraph 3.4.4.1 above.” This raises the following concerns:-

a. We do not accept that the request for “notes” does not include emails. An email by definition is an electronic “note”. We simply cannot understand why emails have been considered not to fall within the request.

b. Even if it were considered that emails did not fall within the request (for the absence of doubt we do not accept this), the emails referred to in paragraph 3.4.5 may themselves have contained “notes”, “reports” nor “minutes of meetings”. If these emails were not searched how would HS2 Ltd have known that the emails did not themselves contain “notes”, “reports” nor “minutes of meetings”?

- (2) Para 3.2.1 The contention that email are a modern electronic form of “minute” or “notes” is supported by paragraph 5 of Steven Kidd’s witness statement which states *“In a fast-moving, technologically-managed environment such as HS2 Ltd, it is my experience that communication tends to be either verbal or via internal email of key points, rather than lengthy minutes of meetings, other than where formal reporting for decision-making needs to be undertaken”*. In fact the clear implication here is that emails serve as informal notes, reports and minutes. If emails are used as informal reports, minute or notes they should have been treated as being part of the request.
- (3) Para 3.4.4 Given that HS2 Ltd have arbitrarily decided that emails do not fall with the definition of “notes”, we wonder how many other of the 450 records under our name, HS2 Ltd have arbitrarily decided are “documents which are neither *“internal notes and reports dealing with the Flats Lane and Knox Grave Lane relocation proposals”* (as set out in the Notes and Reports Request) nor are they *“minutes of meetings held within HS2 Ltd and the DfT to discuss the Flats Lane and Knox Grave Lane relocation proposals”* (as set out in the Minutes Request);” What definitions have been used to exclude these 450 records?
- (4) Paras 3.4.4.1 and 3.4.4.2 We wonder how many of the 450 records referred to fell before the arbitrary date that HS2 wrongly limited the information request after (9 October 2013). HS2 Ltd treated the information request as having started from 9 October 2013. This is a completely unjustified limitation in the scope of our information request. Our relocation proposals were first put to HS2 Ltd on 9 May 2012. How many of the 450 records related to the period between 9 May 2012 and 9 October 2013?
- (5) We do not find it at all credible that HS2 Ltd simply has no “notes”, “reports” nor “minutes of meetings”, formal or informal, lengthy or short, electronic or paper, on the Flats Lane Relocation Proposals other than the minutes to the Commercial Committee on 4 February on 2014.

Conclusion and Remedy

27. There are a number of issues that can be dealt with shortly in this appeal before the consideration of what information held by HS2 should be revealed to the Appellant within the scope of his **Requests 1 and 2** of 20 January 2014 relating to copies of “all internal notes and reports” dealing with Flats Lane and Knox Grave Lane relocation proposals and copies of all minutes of meetings held within HS2 and the DfT to discuss the Flats Lane and Knox Grave Lane relocation proposals.

- (1) Appendix 2 of the Report: The names and/or identifying details of the owner/occupiers in this Appendix should remain redacted.

- (2) Appendix 3 of the Report: This relates to the compensation scheme when the land is compulsorily acquired and is an informative narrative which – in terms of commercial sensitivity – is unlikely to be information not already in the public domain. It is in the public interest, particularly to provide transparency, that it should be in the public domain and the material in it that has been redacted should be released.
- (3) Appendix 6 of the Report: This relates clearly and squarely to the legal advice given to HS2. The Tribunal agrees with both the Commissioner and HS2 that the information contained within it – having been considered in its totality by Tribunal as an un-redacted document – consists of legally privileged information protected from disclosure under Regulation 12 (5) (b) and the public interest in maintaining the exception outweighs the public interest in revealing that information.
- (4) “Enduring” information requests: such requests, placing on a public authority in the future the burden of providing information beyond information held at the time of the request, are not within FOIA and have no effect.

28. A more difficult area in this appeal is the tension between the restrictive nature applied by HS2 and the Commissioner to the scope of Requests 1 and 2 – what might be termed the “email” restriction - and a purposive interpretation of the Appellant’s request for copies of information from “all internal notes and reports”.

29. HS2 has sought to place a limitation on the practical interpretation of the Appellant’s request which the Commissioner did not challenge. In particular, in its further written response to the Tribunal, HS2 stated:

The “e-mail accounts” referred to in the Correspondence Response are those accounts of HS2 staff which contain additional email correspondence that it considered not to fall within the databases set out above, but which individual HS2 staff have entered into in respect of this matter and which are held within their respective Microsoft Outlook accounts. For the purposes of the Request, such emails in existence at the date of the Request were not considered to fall within the Notes and Reports Request or the Minutes Request. This is because they are neither “notes”, “reports” nor “minutes of meetings”....

30. The Tribunal does not accept that the limitation by HS2 is a valid or reasonable one.
31. In practical terms the Tribunal believes that e-mail accounts are likely to have contained information relevant to the Request. Emails are used by public authorities in situations where members of staff might previously have used face-to-face conversation to ask a query or share information as well as when typed or handwritten memos would have been used or when a telephone call might have taken place.
32. To take the commonplace example, when the Tribunal first considered this case on the papers it became apparent that there was need to issue further Directions to clarify the position of HS2. Those Directions were placed in an email that was sent to the Tribunal headquarters in Leicester for dissemination to the Parties in this appeal. The Tribunal considers these email Directions are clearly information in relation to notes relating to this appeal case.
33. Further, it is not unusual for meetings to take place where parties, even though no manuscript notes had been taken, use email exchanges to crystallise or clarify the information that may have been the subject of such meetings.
34. The Tribunal agrees with the Appellant that emails are capable, by definition, of being electronic “notes” and – as such – fall within the scope of his request. The *Oxford English Dictionary* defines “information” as

Facts provided or learned about something or someone.

35. Given that the Appellant’s request was for

.... the following *information*: (1) of *all* internal notes and reports
[emphasis added]....

the Tribunal cannot see why emails containing “information” in the sense of “facts provided or learned about something or someone” fall outside the scope of Requests 1 and 2.

36. The information held by HS2 as a public authority in emails of this nature is not of the same nature as information held in private email accounts of its employees.

37. As the Commissioner's Guidance of 15 December 2011 (v.1) emphasises, it is s.3 FOIA that sets out the two legal principles by which it is established whether information is held for the purposes of FOIA:

(2) For the purposes of this Act, information is held by a public authority if—

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.

Under section 3 (2) (a) information will be held by the public authority for the purposes of FOIA if it is held to any extent for its own purposes. Only if information is held solely on behalf of another person will the public authority not hold it for the purposes of FOIA.

Section 3(2)(b) provides that in circumstances where information is held by another person on behalf of the public authority, the information is considered to be held by the authority for the purposes of FOIA. It is this sub-section that is of relevance to information held in personal email accounts.

38. Within 35 days HS2 is to provide the Appellant with a full response to the request for: (a) "all internal notes and reports" dealing with the Flats Lane and Knox Grave Lane relocation proposals, and (b) copies of all minutes of meetings held within HS2 and the DfT to discuss the Flats Lane and Knox Grave Lane relocation proposals, in accordance with this judgment. For the avoidance of doubt this includes all information held in e-mail accounts in existence at the date of the request, 20 January 2014. Where information is held by HS2 and is not exempt under the EIR, that information is to be provided to the Appellant with the response. Where HS2 wishes to rely upon an exemption under the EIR to redact or withhold information, the basis for that redaction or withholding is to be explained to the Appellant in the response, who shall have the right to raise the response with the Information Commissioner.

39. For the avoidance of doubt, this means that HS2's correspondence system - and the relevant Microsoft email accounts - should be searched by key word

and not just whether the subject line states if the content is a note, report or minutes.

40. Our decision is unanimous.

41. There is no order as to costs.

Robin Callender Smith
Judge
21 May 2015