

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 05 September 2012

Public Authority: High Speed Two Limited ('HS2')

Address: 2nd Floor
Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant asked High Speed Two Ltd ('HS2') to disclose the distance farthest – from a property to the high speed rail line – which has been considered by the panel of the Exceptional Hardship Scheme ('EHS') and to have succeeded in attaining financial assistance.
2. HS2 refused to disclose the distance stating that to do so would prejudice the effective conduct of public affairs (section 36(2)(c)) and would cause prejudice to commercial interests (section 43(2)).
3. The Commissioner finds that HS2 correctly relied upon the exemption at section 36(2)(c).
4. The Commissioner requires no remedial steps to be taken in this case.

Request and response

5. On 20 January 2012 the complainant requested information from HS2 in the following terms:

"I have two questions, of which I formally request you answer in full under The Freedom of Information Act.

1) For you to supply me the full set of guidelines/ instructions/ assistance notes (or whatever title allocated to them) that the EHS [Exceptional Hardship Scheme] panel [the "panel"] have been supplied (verbally or written) to assist them in reaching their decisions on what

distance a property is required to be from HS2 line before it is deemed to be/or not be a candidate for EHS.

2) Kindly advise what the greatest distance is from the HS2 line that a property has met the EHS criteria and the owner's application progressed."

6. On 06 February 2012 HS2 responded to the complainant's request. The public authority released several documents provided to EHS panel members as part of their induction to the scheme.
7. HS2 confirmed that it held a map depicting properties under application for EHS assistance, including the complainant's own home, seen by the panel in their consideration of criterion two. It refused to release this information as disclosure would constitute "*a breach of those [other] property owners' privacy*" (section 40(2)).
8. HS2 went on to withhold information that would satisfy the complainant's request at item 2. HS2 stated that releasing the information would prejudice the effective conduct of public affairs (section 36) and would prejudice commercial interests (section 43).
9. HS2 confirmed that there was no set distance a property was required to be from the line for EHS assistance. HS2 went on to clarify that while distance is considered, it is one factor of many, namely, constituting the second criterion from five.
10. HS2 concluded that the public interest test was in favour of maintaining the exemptions as disclosure would:
 - " a) undermine the role of the EHS panel and Secretary of State, cause confusion to potential applicants to the scheme and, overall, undermine operation of the scheme, and;*
 - b) create unnecessary blight and adversely affect the property market."*
11. On 09 February 2012, the complainant informed HS2 that he was not satisfied with the response and requested an internal review.
12. On 10 February 2012, HS2 responded to the complainant after conducting an internal review. It upheld its initial refusal in full.

Scope of the case

13. The complainant contacted the Commissioner to complain about the way HS2 had responded to his request for information at item two:

"[...] what the greatest distance is from the HS2 line that a property has met the EHS criteria and the owner's application progressed."

14. Therefore, the focus of the Commissioner's investigation will be to determine whether HS2 correctly relied upon the exemptions at section 36 and 43 to withhold the distance farthest – from a property to the high speed rail line – which has been considered by the panel of the Exceptional Hardship Scheme and to have succeeded in attaining financial assistance.

Reasons for decision

Section 36

15. Section 36(2)(c) states that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

[...]

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

16. Section 36(2)(c) of the FOIA states that the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person for HS2 is the Chief Executive. HS2 Ltd provided the Commissioner with evidence to demonstrate that the opinion of the Chief Executive of HS2 was sought and provided. The Commissioner will go on to consider whether the opinion of the Chief Executive was a reasonable one.
17. If the opinion of the qualified person is in accordance with reason and not irrational or absurd then it is to be deemed 'reasonable'.¹
18. In order to determine whether section 36(2)(c) is engaged the Commissioner will consider:
 - whether the prejudice claimed relates to the specific subsection of section 36(2) that the authority is relying upon;

¹ Information Commissioner's section 36 FOIA guidance:
http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx at page 6.

- the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
19. The Commissioner recognises that the scheme has already made a number of payments to named individuals, that there are a number of claims in progress and that there will be further applications for assistance under the scheme in the future. The Commissioner therefore accepts that HS2 must effectively manage existing and future applications for assistance.
20. HS2 argued that the nature of the information and the timing of the request are such that the disclosure of the distance is likely to impact upon the ability to manage existing and future applications for assistance:
- "[The public] may be put off applying if their property was further than this distance. Conversely, members of the public would have reason to think that any distance within the figure requested would or should lead to an application to the EHS being accepted."*
21. HS2 argued that the EHS panel looks at each application on a case by case basis, makes a recommendation to the Secretary of State for Transport, who then, in turn, makes the decision to accept or refuse the application.
- "If the farthest distance was published this could undermine their roles and the public perception of their role."*
22. HS2 explained that there is no mechanism of appeal against decisions taken. However, unsuccessful applicants can re-apply to the scheme an unlimited number of times. Therefore, there is a possibility that HS2 could be inundated with applications from those applicants who live within the numerical distance disclosed who were originally refused on failure to meet criteria 2.
- "This would lead to both HS2 and DfT resources, people and money, being diverted from other work. It could also mean a delay in reaching a decision on first time applicants as there are only a limited number of panel members and a limited number of days per month they can sit."*
23. The Commissioner accepts that the nature of the information and the timing of the request are such that the disclosure of the information is likely to impact upon the authority's ability to manage existing and future applications for assistance. He considers that the effect of disclosing the information would be likely to increase the administrative

burden of handling claims at any given time and divert resources. This opinion is well within reason.

24. HS2 has provided evidence to illustrate that the Chief Executive has sufficient knowledge of the issues to which the information relates. The Commissioner is satisfied that the Chief Executive formed the opinion that the disclosure of the withheld information would be likely to prejudice the authority's ability to manage existing and future applications for assistance from the EHS.
25. For the reasons outlined above the Commissioner is satisfied that the opinion of the Chief Executive of HS2 is a reasonable one. Therefore, he considers that section 36(2)(c) of the FOIA is engaged.
26. The Commissioner will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
27. HS2 argued that the public interest factors in favour of disclosing the information are:
 - To further the statutory responsibility to release information in a timely manner as outlined in the authority's publication scheme
 - To promote accountability and transparency in Government decision making.
28. HS2 said that due to the potential negative effects, withholding the information requested outweighed the Government's own transparency policy. Therefore, it was considered that it was not in the public interest to release this information.
29. The complainant argued that the public interest favoured disclosure of the distance.
30. HS2 stressed that the scheme's guidance clearly states that there is no fixed distance to satisfy the second EHS criterion. And yet the complainant's own property distance 'failed' to satisfy the criterion because it was too great a distance from the rail line. The Commissioner notes the complainant's argument that the criterion appears to lack a barometer in which to measure, or compare, success.
31. The complainant argued that, to the contrary, disclosure of the information would provide "*much needed clarity*" for those applying to the EHS. After all, the distance farthest to have attained support, itself, would not establish the maximum distance in which the criterion would be satisfied even by the public authority's own reckoning.

32. The Commissioner recognises the much wider appreciation for openness and accountability needed and in this instance such arguments apply to the recommendations being made by the EHS by HS2 for the attention of the Secretary of State for Transport.
33. The Commissioner's application of the public interest test must consider the circumstances that existed when the information request was made.² The Commissioner notes that he should give due weight to the reasonable opinion of the qualified person when assessing the public interest, and should consider the severity, extent and frequency of prejudice to the effective conduct of public affairs. By accepting that a prejudice-based exemption is engaged it is also accepted, in the application of the public interest test, that the prejudice is not trivial or insignificant and that the prejudice, in this instance, would be likely to occur.
34. The Commissioner recognises that there is a degree of merit in HS2's public interest arguments for maintaining the exemption. However, such merit is significantly diminished by those factors in favour, in particular, the need to demonstrate that the scheme, and the second criterion, is one of integrity.
35. Having taken into account the public interest factors outlined above, the Commissioner considers that the balance of the public interest is very fine but ultimately falls on the side of HS2 and maintaining the exemption in light of the timing of the request and the potential resource strain disclosure would cause, especially at a time of increasing limitations on the public purse.
36. After considering all the circumstances in this case, the Commissioner finds that the disclosure of the withheld information would, in the reasonable opinion of a qualified person, likely prejudice the effective conduct of public affairs and that the public interest favours withholding of the requested information. HS2 is therefore not obliged to disclose the information having correctly relied upon the exemption at section 36(2)(c).
37. In light of the Commissioner's conclusion on the application of section 36(2)(c), it is not necessary to go on to consider the authority's application of section 43(2).

² DBERR v the Information Commissioner and the Friends of the Earth (EA/2007/0072)

Right of appeal

38. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

39. 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.
40. 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

Pamela Clements
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