

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

Decision notice

Date: 27 April 2015

Public Authority: High Speed Two Limited
Address: One Canada Square
London
E14 5AB

Decision (including any steps ordered)

1. The complainant has requested information about a compensation and relocation proposal related to a particular area affected by the proposed high speed rail link.
2. The Commissioner's decision is that High Speed Two has correctly applied section 12 of the FOIA (costs exceed the appropriate limit) to the request. He also finds it has met its additional obligations under the EIR and that the request is manifestly unreasonable under regulation 12(4)(b). He has decided that the public interest favours maintaining this exception.
3. Finally, the Commissioner finds that High Speed Two met its obligations to offer advice and assistance under section 16 and regulation 9.

The application of the FOIA and EIR to HS2

4. The FOIA and EIR only provide a right of access to information held by public authorities. The first thing to establish is whether HS2 is a public authority for the purpose of the FOIA and EIR.
5. Section 3(1) of the FOIA defines the term 'public authority' as including bodies that are publicly owned companies. The definition of a publicly owned company is then set out in section 6 of FOIA. This includes, at section 6(1), any company owned by the Crown, for example, those

owned by a government department. Regulation 2(2)(b) of EIR makes the same reference to section 3(1) of the FOIA.

6. High Speed Two is wholly owned by the Department for Transport. The Commissioner is therefore satisfied that HS2 is a public authority for the purposes of the FOIA and EIR.

Request and response

7. On 24 October 2014, the complainant wrote to High Speed Two (HS2) and requested information in the following terms:

"All the following information is requested in respect of the Flats Lane and Knox Grave Lane relocation proposals from 9 May 2012 (when members of the community met with HS2 Ltd and first put forward their relocation proposals) to the date of this email.

1. Correspondence of any kind (external or internal)
2. Emails of any kind (external or internal)
3. Handwritten notes
4. Notes of any kind – whether written or electronic
5. Correspondence, emails or minutes of meeting held with the DfT or any other external body or person(s).
6. Notes and minutes of meetings (external or internal)
7. Emails correspondence or minutes of meeting relating to any complaints relating directly or indirectly to the Flats Lane Relocation Proposals.
8. Copies of any reports.

For the absence of doubt:-

. The information requested above relates to information relating directly or indirectly to the Flats Lane and Knox Grave Lane relocation proposals.

. The Information requested above relates to both electronic or hard copy information.

. The information requested includes both internal and external communication

If the above information has already been supplied to us, or where we were party to the correspondence at the time, this information can be excluded from this request."

8. A decision notice in a separate but related case (FER0535668) provides some background to the circumstances of this particular case. The Flats Lane and Knox Grave Lane site is a small, mainly residential location which is potentially affected by the construction of the proposed new

high speed rail link from London to the northwest. There are a number of, what the residents affected believe to be, unique circumstances which they want taking into account when considering the compensation they are eligible for and how they can be helped to relocate.

9. The complainant appealed FER0535668 at the Information Tribunal (EA/2014/0220). He contended that the meeting 'notes' he requested in that case also covered emails, and the Tribunal upheld his appeal. While that appeal was ongoing the complainant submitted to HS2 the request that is the subject of this notice.
10. HS2 responded to this request on 13 November. It said that it is not obliged to comply with parts 1, 2, 4, 5, 6 and 7 of the request, citing section 12 of the FOIA (cost exceeds appropriate limit). HS2 said that it was also not obliged to comply with any of these parts that would fall under regulation 12(4)(b) of the Environmental Information Regulations (manifestly unreasonable request).
11. HS2 said that the EIR only applies to electronic information and therefore it had considered part 3 of the request under section 12 of the FOIA, and that section 12 applied to this.
12. It said that it had already provided the complainant with information regarding part 8 of the request following the earlier request, and it was therefore excluding it from its response.
13. HS2 also said that were it to identify any email or correspondence falling within the scope of the request, it would consider whether FOIA sections 36 (prejudice to effective conduct of public affairs), 40 (personal information) and 42 (legal professional privilege) and EIR 12(4)(d) (material in the course of completion) and (e) (internal communications), 12(5)(f) (interests of person who provided information) and 13 (personal data) apply.
14. HS2 told the complainant that it has provided him with a large amount of information over the preceding two years and that it did not hold any additional information related to his particular interest.
15. Following an internal review HS2 wrote to the complainant on 19 December. It maintained its original position.

Scope of the case

16. The complainant contacted the Commissioner on 22 December 2014 to complain about the way his request for information had been handled, specifically its application of section 12 of the FOIA and/or regulation

12(4)(b) of the EIR to parts 1, 2, 3, 4, 5, 6 and 7. The complainant has confirmed to the Commissioner that he is content with HS2's response to part 8 of his request, as this was dealt with under the appeal EA/2014/0220.

17. The complainant considers that HS2 has grossly exaggerated the time it will need to extract the relevant information. He also expressed dissatisfaction that HS2 had previously said in the course of FER0535668 that none of the requested information existed. The complainant considers there is a strong public interest in disclosing the information he has requested as the proposed railway involves the destruction of houses, businesses and jobs.
18. HS2 has explained to the Commissioner why it applied both information access regimes to parts 1, 2, 3, 4, 5, 6 and 7 of the request. It says it considered that some of the information might be administrative in nature and therefore may fall under the FOIA and not the EIR. To ascertain this, however, HS2 would need to examine every individual piece of information. Given the amount of information concerned, this would be prohibitive and is the reason HS2 applied both section 12 and regulation 12(4)(b) to the request.
19. The Commissioner has first considered HS2's consideration of the request under both access regimes. He has then investigated whether HS2 is obliged to comply with parts 1, 2, 3, 4, 5, 6 and 7 of the request under section 12 of the FOIA and regulation 12(4)(b) of the EIR.

Reasons for decision

Requests that span different access regimes

20. HS2 explained to the Commissioner the approach it had taken with regard to the information access regimes. It told him that it holds over 400 records of correspondence it has had with the complainant. These relate only to external correspondence with one individual concerning Flats Lane and Knox Grave Lane and does not take into account the additional internal emails about this topic. HS2 acknowledges that the complainant has not requested information contained in correspondence HS2 has had with him directly. It says, however, that most of the work on the complainant's case (regarding the compensation proposal) has arisen from his correspondence.
21. To identify which items concern the proposal in question, and when and who dealt with each item in order to identify and retrieve any other relevant information, HS2 says its FOI team would need to examine all the items. Without conducting such in depth analysis of what it

describes as a 'vast' amount of correspondence, it is not possible to ascertain whether information falls under FOIA or EIR. Consequently, it told the complainant that it was treating all the requested information under both FOIA and EIR.

22. The Commissioner acknowledges that HS2 has received a single, wide-ranging request for information; some of which it might have to consider disclosing under the FOIA, some of which it might have to consider disclosing under the EIR. The Commissioner has issued guidance on cases such as these¹. This guidance says that in order to calculate the costs involved in complying with a request, public authorities should take two steps.
23. First, it should consider the request under the FOIA. It should then consider any additional obligations under the EIR (and Data Protection Act [DPA], where necessary). This is not quite the approach HS2 has taken. It has however considered both the FOIA and EIR in its responses to the complainant and the Commissioner, and the Commissioner has taken this into account.

Step 1 – considering the request under the FOIA

24. In its responses to the complainant HS2 has said that, under section 12 of the FOIA, it is not obliged to comply with the request as the costs involved in doing so would exceed the appropriate limit.

Section 12 – cost exceeds the appropriate limit

25. Section 12 of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate limit to:
 - either comply with the request in its entirety, or
 - confirm or deny whether the requested information is held.
26. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request; 18 hours work in accordance with the appropriate limit of £450 set out above, which is the limit applicable to HS2. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:

¹ [Calculating costs where a request spans different access regimes](#)

- (a) determine whether it holds the information
 - (b) locate the information, or a document which may contain the information
 - (c) retrieve the information, or a document which may contain the information, and
 - (d) extract the information from a document containing it.
27. Where a public authority claims that section 12 of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit – in line with section 16.
28. To determine whether HS2 applied section 12 and section 16 of the FOIA correctly, the Commissioner has considered HS2's response to the complainant, and the submission it provided to him as part of his investigation.
29. HS2 told the complainant it estimated that it would take it at least five days – and exceed the £450 limit – to search for and identify all the relevant documents that might hold the information he has requested. It would then take additional time to extract that information.
30. HS2 told the Commissioner that it had based this estimation on its experience of fulfilling a similar request from the Parliamentary and Health Service Ombudsman (PHSO) a year earlier. This was in response to an ongoing complaint case that the complainant had submitted to the PHSO. That request had been for all the correspondence HS2 had had with the complainant. On that occasion, HS2 says it took between 15 and 20 working days to gather the information and provide it to the PHSO.
31. It said that the complainant's request differs from the PHSO's request in that it does not specify a time period, but simply asks for "*everything since...*" HS2 says it would therefore have to go back through years of records, correspondence and emails to locate relevant information. All documents relating to Flats Lane and Knox Grave Lane would have to be thoroughly examined to see if they fall within the scope of the request.
32. HS2 says that to identify and collate all the documents requested would involve a system wide search of all its databases, files and email accounts, and any personal notebooks of individual staff members, if they still exist. It says that some of the emails would be administrative in nature, eg arranging a meeting, and would not add to the complainant's understanding of the decision making process relating to their compensation proposal.

33. HS2 would have to identify all the relevant information and extract that which has already been disclosed to the complainant. In addition, HS2 would have to spend what it considers could be an unreasonable amount of further time redacting personal information from any identified documents. As noted at §17, correspondence with the complainant alone numbers over 400 items and HS2 says that analysing this by itself would be well in excess of the £450 limit.
34. First, the Commissioner notes that there *is* a time period specified in the request – the complainant has asked for information “... *from 9 May 2012... to the date of this email*” (24 October 2014). He has questioned HS2 about this and HS2 has confirmed that this timescale would not narrow down the scope of the request because activity and correspondence about the proposal in question did not begin until 2012.
35. The Commissioner also notes this aspect of the complainant’s request: “*If the above information has already been supplied to us, or where we were party to the correspondence at the time, this information can be excluded from this request.*” This seemed to the Commissioner to therefore exclude the 400+ items of correspondence with the complainant that HS2 says it holds.
36. Again, when questioned, HS2 told the Commissioner that the 400+ items can be broken down into 200+ items from the complainant and 200+ replies to the complainant. In addition, it will include internal correspondence and correspondence HS2 had with external agencies, about matters raised in the complainant’s emails. HS2 confirmed that it may (or may or not) also have received a small amount of other correspondence from individuals who are not part of the group directly affected by the Flats Lane and Knox Grave Lane relocation proposals.
37. The complainant has excluded correspondence directly with him from the request. However, to retrieve just the internal and external correspondence that followed from the complainant’s emails – which is included in the request – would exceed the appropriate limit. This is because HS2 would have to open all of the complainant’s emails, identify the matters concerned and approach the individuals and teams who may have dealt with the particular issues involved. These individuals would then have to search their own records and systems for information falling within the scope of the request.
38. The Commissioner has interrogated HS2’s submission and considered its arguments and all the circumstances of the case. He is persuaded that complying one element alone – email correspondence – would exceed the appropriate limit set out in section 12, taking account of the matters described above. The Commissioner is satisfied that, such is the wide ranging nature of the request, HS2 is correct not to comply with it in its

entirety on the basis of the provision provided under section 12 of the FOIA.

Section 16 – advice and assistance

39. Section 16 of the FOIA places a duty on a public authority to provide advice and assistance to someone making an information request. This includes helping an applicant refine a request so that it can be answered within the appropriate cost limit.
40. Referencing its obligation under section 16 of the FOIA, HS2 told the complainant that over the last two years it has provided him with a large amount of information about the compensation the government offers in relation to HS2, and how this fits with the particular compensation proposal the complainant has put forward. HS2 says that it has provided the complainant with all the information that it holds regarding how it considered this proposal. Consequently HS2 is unable to offer advice on how he could refine his request.
41. HS2 has told the Commissioner that it would normally provide guidance on how an applicant could refine their request. However, in this instance it considered that it could not provide any suggestions, and that any suggestions it did make would not satisfy the complainant.
42. HS2 appears to have been communicating with the complainant since May 2012 about the compensation proposal in question. During that time, HS2 has told the Commissioner it has endeavoured to provide the complainant with as much information as possible in response to their questions and information requests. In light of this, and HS2's comments above the Commissioner is of the view that, in the circumstances, HS2 has met its obligations under section 16.

Step 2 – considering any additional obligations under the EIR

43. As noted at §23, when a request appears to span different access regimes, it should first be considered under the FOIA, and then any additional obligations under the EIR (or DPA) should be considered.
44. HS2 has cited regulation 12(4)(b) of the EIR (manifestly unreasonable request) in its response to the complainant. Even though the request has been correctly refused under the FOIA, HS2 should still consider its obligations under the EIR because, under the Regulations, the complainant still has a separate right of access to any environmental information covered in the request. In this case therefore, the Commissioner has next gone on to consider any additional obligations HS2 may have under the EIR.

45. Under the EIR, it will only be permissible to take into account the costs related to providing environmental information as this is defined at regulation 2(1) of the EIR. However, the Commissioner's guidance says that public authorities can take into account the costs of collating all the information falling within the scope of a request as long as doing so is a necessary first step because they cannot otherwise isolate the environmental information.
46. HS2 acknowledges that, given its responsibilities, it is likely that some, but not all, of the relevant information held will be environmental information. As the request is wide ranging, it has refused the request under section 12 of the FOIA and 12(4)(b) of the EIR. In order to go on to consider its obligations under the EIR, HS2 would have to devise a search strategy in which it only searches for the environmental information.
47. The Commissioner considers that HS2 would be unable to devise such a strategy. This is because HS2 does not have any way of knowing in advance which correspondence or notes will contain environmental information and which won't. HS2 has consequently collated all the requested information before it can go on to isolate the environmental information. In this circumstance, the Commissioner accepts that collating all the requested information is a necessary first step because it cannot otherwise isolate the environmental information. He accepts that the costs of collating all the information can be taken into account when deciding if this request is manifestly unreasonable under regulation 12(4)(b).

Regulation 12(4)(b) – manifestly unreasonable request

48. HS2 has said it is not obliged to comply with the request under regulation 12(4)(b) of the EIR. This is because the cost and staff diversion involved in doing so make it 'manifestly unreasonable'.
49. Regulation 12(4)(b) says that a public authority may refuse to disclose environmental information if the request is 'manifestly unreasonable'. There is no definition of manifestly unreasonable under the EIR, but the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable.
50. The purpose of the exception is to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation, in handling information requests.
51. The exception can be used:
 - when the request is vexatious; or

- when the cost of compliance with the request is too great, as in this case.
52. Regulation 12(4)(b) is subject to a public interest test and regulation 12(2) says that a public authority should apply a presumption in favour of disclosing environmental information.
53. As explained elsewhere in this notice, section 12 of FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate limit to:
- either comply with the request in its entirety; or
 - confirm or deny whether the requested information is held.
54. The EIR do not have a provision where a request can be refused if the estimated cost of compliance would exceed a particular limit. However, the Commissioner considers that, under the EIR, if a public authority is able to demonstrate that the time and cost of complying with a request is obviously unreasonable, regulation 12(4)(b) will be engaged.
55. The Commissioner is mindful of the fact that environmental information has been deemed to warrant its own access regime and therefore the detailed provisions of the FOIA cannot be transposed into the EIR. Nevertheless, the Commissioner considers it reasonable that, where appropriate, the FOIA should inform his understanding of the EIR.
56. Whilst there is not a directly equivalent provision of section 12 in the EIR, regulation 12(4)(b) makes clear that the intention of the EIR is not to place an obligation on public authorities to respond to any information request regardless of the burden of processing that request. The Commissioner's view is that Parliament has given some indication, in section 12 of the FOIA, of what it would consider an acceptable burden for an information request to impose upon an authority. Section 12 of the FOIA provides that a public authority is not obliged to provide information where to do so would incur a cost to it of more than £450 or 18 hours work.
57. As detailed in §25 - §38, the Commissioner considers that HS2's explanation of the time necessary to comply with this request is credible and reasonable. He has decided that HS2 is entitled to refuse to comply with it under section 12 of the Act, because to do so would exceed the appropriate limit of £450.
58. Paragraph 56, concerning the use of section 12 of the FOIA to inform the understanding of regulation 12(4), have led the Commissioner to conclude that regulation 12(4)(b) is also engaged. The Commissioner has taken account of HS2's estimate of the time and cost necessary to

comply with the request, which is far in excess of the appropriate limit set out in the FOIA, and the particular circumstances of this case. This includes the cost of carrying out the necessary first step of collating all the information, as described at §47. The Commissioner has therefore concluded that the request in its entirety is also manifestly unreasonable within the meaning of regulation 12(4)(b), and HS2 is not obliged to comply with it.

59. The Commissioner considers that HS2 met its obligations under regulation 9 – to provide the complainant with advice and assistance – for the same reasons that he found it met its obligations under section 16 of the FOIA, detailed at §39 to §42.

Public interest test

60. Regulation 12(4)(b) is a qualified exemption which means it is subject to the public interest test at regulation 12(1)(b). This says that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the information

61. The complainant says that there is a strong public interest in disclosing the information he has requested as the proposed railway involves the destruction of houses, businesses and jobs.
62. HS2 accepts the public interest to public understanding and awareness of environmental matters derived from it being a transparent and accountable organisation. It acknowledges that any information not already released to the complainant may add to the complainant's understanding of decisions relating to the area in question.

Public interest arguments in favour of maintaining the exception

63. HS2 says that the amount of time it would need to spend complying with the request – detailed in §22 to §35 – would place an undue burden on it, diverting staff resources from providing its core functions and placing further costs on it. It says it has a duty to ensure it achieves value for money and diverting resources to complying with the request would not achieve this.
64. HS2 also says that it has provided extensive information to the complainant about his compensation proposal over the previous two years, through correspondence and meetings. It considers that the information covered in the request, including any handwritten notes taken for staff members' own use, would not add to the information the complainant has already received.

65. When HS2 applies an exemption or exception to requested information, HS2 says that it considers the wider public interest and not what the public might be interested in. In this case, HS2 considers that the information in question is not of benefit to the wider public as it relates to the personal circumstances of a particular individual.
66. Finally, HS2 has said that it has already disseminated a large amount of information to the wider public about how HS2 deals with property owners likely to be affected by the HS2 route, and what compensation is available.

Balance of the public interest

67. In balancing the public interest arguments for and against complying with the request, the Commissioner recognises the enormity of the impact that proposed demolition of residents' properties will have on them, and, in some cases, the impact on their livelihoods. He is of the view, however, that while this is of considerable interest to those directly affected, it is not of wider public interest. The Commissioner considers that HS2 satisfies the public interest in transparency about how HS2 is implementing the proposed new rail link by disseminating information through its publication scheme. It also corresponds and meets with those affected by the scheme when necessary, such as the complainant in this case. The Commissioner notes the large amount of information that HS2 has provided to the complainant over several years. He notes too, the length of time it would take HS2 to identify additional information within the scope of this request, based on its fulfilment of the similar request from PHSO. He finds that there is a significant public interest in allowing HS2 to focus its resources on carrying out its routine functions.
68. Having considered all the factors above, on balance the Commissioner finds that the public interest favours maintaining the exception.

Other matters

69. The Commissioner notes HS2's comment to the complainant at §12 with regard to part 3 of their request; that the Environmental Information Regulations applies only to electronic information. This is incorrect. While regulation 4(1)(a) encourages public authorities to make information available by electronic means, the Regulations apply to all environmental information that an authority holds: both electronic and non-electronic.

Right of appeal

70. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

71. 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.
72. 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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