

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

Decision notice

Date: 20 July 2018

Public Authority: High Speed Two Ltd (HS2)
Address: 1 Canada Square
London
E14 5AB

Decision (including any steps ordered)

1. The complainant has requested from HS2 a copy of the service agreement between it and a property management and estate service company. HS2 released relevant information it holds, withholding some under section 43(2) of the FOIA (commercial interests).
2. The Commissioner considers that HS2 should have dealt with the request under the EIR as the information requested is environmental information under regulation 2(1). She has decided however that the information HS2 has withheld engages regulation 12(5)(e) (commercial or industrial information) and that the public interest favours maintaining this exception.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 27 October 2017 the complainant wrote to HS2 and requested information in the following terms:

"Please provide an unredacted copy of the service agreement between High Speed Two (HS2) Ltd and Smith Lambert Hampton Ltd Property Management and Estate Services."

5. HS2 responded on 14 November 2017. HS2 released in its entirety some information from a Framework Agreement it holds, namely: the 'Framework Scope', Selection Procedure, Quotation Procedure and Package Order Conditions of Contract for Service documents. HS2 withheld other relevant information under section 43(2) of the FOIA. It said the public interest favoured maintaining this exemption.
6. HS2 provided a review on 5 December 2017 in which it maintained its original position.
7. As a result of the Commissioner's investigation HS2 reconsidered its response and, as a result, released further information. The information that has now been released and the information that is still in dispute is detailed below.

Scope of the case

8. The complainant contacted the Commissioner on 22 November 2017 to complain about the way his request for information had been handled.
9. There are two documents of interest in this case: a 'Framework Agreement' and a 'Land and Property Professional Services Framework Lot 3: 'Property Management Services' document.
10. The Framework Agreement comprises: Framework Agreement Recitals (Conditions of Contract and Contract Data) and seven Annexures: 1. Framework Information, 2. Framework Scope, 3. Selection Procedure, 4. Quotation Procedure and Appendix, 5. Commercial Schedule, 6. Forms of Novation and 7. Package Order Conditions of Contract. From the Framework Agreement, HS2 has now released the Agreement Recitals (the 'Framework Scope') and six of the seven Annexures. It has confirmed that it continues to withhold Annexure 5 - the 'Commercial Schedule'.
11. From the Land and Property Professional Services Framework Lot 3: 'Property Management Services' document, HSE has released Section 2 of the 'Package Order Special Conditions' element and three associated Appendices (A, B and C). HS2 originally confirmed that it continues to withhold all of Section 1 of the Package Order Special Conditions.
12. During the Commissioner's investigation, HS2 confirmed that subsection 1 of the above document; that is, the 'Employer's requirement'

over pages 1 – 5 of Section 1 of the Package Order Special Conditions, has already been released to the complainant as this information is included in the Framework Scope and Standard Conditions. The Commissioner has therefore removed this particular element from the scope of her investigation and focussed on sub-section 2 of Section 1 of the Package Order Special Conditions, which concerns the 'Consultant's proposal'.

13. The Commissioner's investigation has first considered whether HS2 should have handled the request under the EIR rather than the FOIA.
14. She has gone on to consider whether HS2 can rely on section 43(2) or its EIR equivalent to withhold the disputed information.

Reasons for decision

Is the request a request for environmental information?

15. Regulation 2(1)(c) of the EIR defines environmental information as "*measures...such as policies, legislation, plans, programmes...and activities affecting or likely to affect*" the state of the elements of the environment.
16. In *Crane v The Information Commissioner and The Department for Transport EA/2016/0087 and EA/2016/00881*, the Tribunal recognised that, "*We follow the Upper Tribunal's reasoning in The Department for Energy and Climate Change v The Information Commissioner and H [2015] UKUT 0671 (AAC) and take the view that there is sufficiently close connection between the withheld information and the overall HS2 project for us to look beyond the precise issue with which the disputed information is concerned and to have regard to the "bigger picture". We are satisfied that the HS2 project is a "measure" which affects or is likely to affect the elements and factors referred to in regulation 2(1) EIRs and that the documents breaking down the budget information into sub-categories is information on an integral, rather than an incidental aspect of that measure.*"
17. The Commissioner considers that the withheld information, which broadly relates to HS2's pricing and fees agreements with another party with regard to land and property, is integral to a measure (that is, the HS2 project) which will or will be likely to affect the environment. The Commissioner therefore considers that this information is environmental under regulation 2(1)(c) EIR and that this request should be considered under EIR. She has gone on to consider whether the withheld information engages the EIR equivalent of section 43(2); regulation 12(5)(e).

Regulation 12(5)(e) – commercial or industrial information

18. HS2 has provided the Commissioner with a background to the request and its response. It has explained that there is no single document that falls within the scope of the complainant's request for a 'service agreement'. Given its scale, HS2 requires a wide range of services relating to land and property.
19. As such, early in the programme an overarching 'Land and Property Professional Services Framework' was established. The Land and Property Professional Services Framework defines some of the conditions of contract a contractor has to work to, and allows HS2 to secure a range of services from a number of different contractors under a consistent set of terms and conditions. A contractor is appointed to undertake work in accordance with a defined Selection Procedure and a defined Quotation Procedure.
20. The 'Land and Property Professional Services Framework' comprises four 'Lots' which suppliers can be appointed to in respect of providing services. These Lots are: Lot 1 – Valuation Services; Lot 2 – Estates Services; Lot 3 – Property Management Services and Lot 4 – Urban Regeneration/Commercial Development Advice.
21. HS2 says the requested service agreement between it and Lambert Smith Hampton Property Management and Estate Services (LSH) falls within the scope of Lot 3 of the Land and Property Professional Services Framework, 'Property Management Services'.
22. Once the scope, pricing and supplier of the work required has been agreed through these procedures, a Package Order is then created which contains the detail of HS2's requirement and the conditions under which it is to be delivered. The 'Land and Property Professional Services Framework' defines some of the conditions to be adopted in each Package Order. Any further detailed conditions associated with the specific element of work the Package Order relates to are then incorporated into the associated individual Package Orders as 'Special Conditions'.
23. In respect of the Package Order raised with LSH for services associated with Property Management and Estates Services, there are three Appendices which define HS2's requirements in terms of:
 - Appendix A – Management Services
 - Appendix B – Residential properties and agricultural holdings
 - Appendix C – Commercial including office retail and industrial properties

24. Regulation 12(5)(e) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. Regulation 12(5)(e) is subject to the public interest test.
25. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

26. As above, HS2 has confirmed that it is continuing to withhold in full the 'Commercial Schedule' document and sub-section 2 of Section 1 of the 'Package Order Special Conditions' document. HS2 considers that this information relates to bespoke commercial pricing, financial management and contractor practices. It has provided this information to the Commissioner and she has reviewed it.
27. The 'Commercial Schedule' (Annexure 5 of the Framework Agreement) contains financial information in tables, on the staffing rates and charging structure associated with the four 'Lots' referred to above. However, it also appears to include a blank, template document relating to the quotation procedure, titled 'Land and Property Professional Services Framework - Lot 1 - Quotation Request and Form of Instruction'. HS2 has confirmed that regulation 12(5)(e) does not apply to this particular information and, although it is unlikely to be of interest, has indicated it is prepared to release this template document.
28. Sub-section 2 of the 'Package Order Special Conditions' (pages 6 – 8) comprises information on pricing. On page 9, both HS2 and LSH sign off Section 1. Again, HS2 has confirmed that regulation 12(5)(e) does not apply to the information in page 9 and that it is prepared to release it.
29. The Commissioner is satisfied that the information contained in the Commercial Schedule and pages 6 - 8 of the Package Order Special Conditions is commercial in nature and that the first criteria has been met.

Is the information subject to confidentiality provided by law?

30. In order to decide whether or not the information in this case has the necessary quality of confidence the Commissioner takes into account whether the information is more than trivial and whether it is already in the public domain.
31. The withheld information is taken from, or is associated with, the Framework Agreement HS2 has with LSH. The two pieces of information in scope detail staffing rates, charges and fees. As such, the Commissioner is satisfied that the information is more than trivial. She has noted that HS2 has told the Commissioner that LSH has specifically requested that this information is not made public. She is therefore satisfied that this information is therefore not already in the public domain and that the information is subject to an obligation of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

32. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106, 4 January 2011)* that, to satisfy this element of the exception, disclosing the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
33. In the Commissioner's view it is not enough that some harm *might* be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
34. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors"

35. In this case the HS2 has confirmed that confidentiality is designed to protect its own legitimate economic interests and those of LSH.
36. In its submission HS2 has told the Commissioner that it considered that disclosing the information *would be likely to* cause harm to, and impact upon, its own commercial position. Further into the submission,

however, HS2 has argued that disclosing the information *would* prejudice its bargaining position. As an example, HS2 says that if an organisation knows the agreed costing of an item or service then it can exploit this for profit or other gain. The nature of the HS2 project means that there will be similar procurements for a number of years. If this information were released it *would*, according to HS2, undermine its ability to negotiate competitive rates because potential suppliers *would* adjust their bids accordingly. Disclosing the information *would* therefore have an adverse impact on HS2's legitimate interests within the commercial market.

37. HS2 has told the Commissioner that LSH has indicated that releasing the information *would be likely to* prejudice its commercial interests but that release *would* give a competitor an unfair advantage on future tenders. The Commissioner understands from this that LSH is concerned that disclosing financial information associated with its agreement with HS2 would undermine its commercial operations by allowing its competitors an insight into its business model. Competitors would be able to interpret the information to inform potential future contract tender pricing and their own negotiations around costs and conditions for similar services.
38. Having considered the submission HS2 has provided and reviewed the withheld information the Commissioner is satisfied that disclosing the information would have the effects which are identified in the exception. Namely, disclosure would adversely affect the legitimate commercial interests of LSH and HS2.

Would the confidentiality be adversely affected by disclosure?

39. As the Commissioner has concluded that disclosure adversely affect LSH and HS2's legitimate economic interests, it follows that the confidentiality designed to protect such harm would be adversely affected by disclosure.
40. Since the necessary four criteria have been met the Commissioner has concluded that the information that HS2 continues to withhold engages the exception under 12(5)(e) and she has gone on to consider the public interest.

Public interest in disclosing the information

41. In its submission HS2 has referred to its legal obligations to be transparent and to help applicants with their requests for information.
42. HS2 has also noted the importance of demonstrating that it is using public money effectively and is getting value for money when purchasing goods and services.

43. In correspondence to the Commissioner, the complainant has stated his belief that the disputed information is of real interest to the public as it may be important for thousands of British homeowners affected by HS2. He has referred to the Commissioner's decision in FS50228493¹
44. FS50228493 from 2010 concerned a contract between the BBC and Capita. In that case the Commissioner found that section 43(2) was engaged but that the public interest favoured disclosing the information. The Commissioner notes that public interest arguments are considered on a case by case basis as they are usually unique to each particular set of circumstances.
45. However, the Commissioner did note that FS50228493 discusses a First Tier Tribunal (FTT) decision in which the FTT referred to 12 elements of a contract that the Office of Government Commerce guidance indicates should normally be disclosed by a public authority because it would further the public's understanding of how services bought with public funds would be delivered and how contracts should run. These were: Service level agreements; Product/service verification procedures; Performance measurement procedures; Contract performance information; Incentive mechanisms; Criteria for recovering sums; Pricing mechanisms and invoicing arrangements; Payment mechanisms; Dispute resolution procedures; Contract management arrangements; Project management information and Exit strategies and break options.
46. The Commissioner is satisfied that the withheld information in this case cannot be categorised as any of the above 12 areas (although information that has been released appears to fall under at least some of those areas).

Public interest in maintaining the exemption

47. HS2 considers that if the withheld information was to be released it would compromise its ability to conduct reasonable commercial negotiations in the future. It says it is also important that it protects the interests of the third party involved (LSH); it considers disclosure would have an adverse impact on the commercial competitiveness of that current contractor.
48. HS2 has argued that it has a duty to ensure the competitive position of companies in their particular market are not disadvantaged. Releasing

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2010/569506/fs_50228493.pdf

detailed information about HS2's operations would reveal information about the negotiating position. Suppliers could use this information when submitting bids during future procurements of a similar nature. This would hinder the ability of suppliers or bidders to act competitively within the market. Internal processes that allow such suppliers to create and maintain a competitive advantage would be lost as they became public knowledge, creating unfair and distorted competition in the market. HS2 says that it is important that the competitive position of companies in their particular market is not disadvantaged by doing business with HS2.

49. HS2 has gone on to argue that some of the withheld information has been provided to it on a commercially confidential basis. Companies provide HS2 with commercially sensitive information so that it is able to make robust decisions regarding its suppliers of goods and services. This ensures HS2 obtains the best value for money from each transaction. Disclosing the information would be likely to cause actual prejudice to the commercial interest of suppliers. Losing the trust of potential suppliers could damage HS2's reputation with suppliers within the infrastructure industry and therefore undermine its ability to procure specialised services. This would be to the detriment of the project and the public interest in seeking that HS2 is developed with the best advice and services, and at favourable rates.
50. Finally, as discussed earlier, HS2 says that the information in question relates to legitimate economic interests and that disclosing the information would prejudice HS2's bargaining position. For example, if an organisation knows the agreed costing of an item or service then it can exploit this for profit or other gain. The nature of the project means that there will be similar procurements for a number of years. If the information was released it would undermine HS2's ability to negotiate competitive rates because potential suppliers would adjust their bids accordingly. Therefore, disclosing the information would have an adverse impact on HS2's legitimate economic interests within the commercial market.

Balance of the public interest

51. The Commissioner appreciates that the HS2 project is controversial and one that many people are opposed to. It will have a significant impact on homeowners and on the villages, towns and countryside through which the train line will pass.
52. The complainant has said that the withheld information 'may' be important for affected homeowners, it may therefore be of interest to those individuals. Other than a concern about the HS2 project generally, the complainant has not provided the Commissioner with any

evidence of a specific concern about HS2's financial arrangements with LSH that would suggest that the disputed information has a wider public interest.

53. The Commissioner also notes that HS2 has released the majority of the Framework Agreement and the majority of the Package Order Special Conditions document. She considers that this is a satisfactory demonstration of transparency and goes a long way to meeting any wider public interest in the requested information.
54. In the absence of any specific concerns about HS2's relationship with LSH or costs associated with LSH's contribution to the delivery of HS2's strategic objectives, on this occasion the Commissioner finds that there is greater public interest in HS2 retaining its own competitive position. She has noted HS2's concern about the adverse impact on suppliers that it uses if the disputed information was released; that it would give a competitor an unfair advantage on future tenders. She considers this is valid but has focussed on the impact on HS2 if the information was released. The Commissioner considers that the public should have confidence that, during the course of this significant project, which British tax payers are funding, HS2 is able to compete fairly and competitively and to achieve value for money for the services it procures. This would be undermined if other companies had access to information on the charges and fees associated with HS2's agreement with LSH. The Commissioner is therefore satisfied that the public interest favours withholding the information HS2 has confirmed that it continues to withhold.

Right of appeal

55. 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

56. 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.
57. 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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