

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

Decision notice

Date: 3 December 2019

Public Authority: High Speed Two Limited (HS2)
Address: Two Snow Hill
Snow Hill Queensway
Birmingham
B4 6GA

Decision (including any steps ordered)

1. In two series of requests, the complainant – a firm of solicitors acting on behalf of a client - has requested information associated with the relocation of a Heathrow Express depot as part of the HS2 rail project. With regard to the first series of requests, HS2 released information relevant to some of the requests, withholding some under regulation 12(5)(e)(commercial confidentiality). HS2 said it did not hold other information. Finally, HS2 relied on the exception under regulation 12(4)(b) to refuse to comply with one request (manifestly unreasonable request). It voluntarily provided the complainant with a small amount of relevant information outside of the EIR.
2. With regard to two further requests, HS2 indicated it does not hold information falling within the scope of request 2.1 and has relied on regulation 12(4)(b) to refuse to comply with request 2.2.
3. The complainant considers: HS2 holds information relevant to five of the first series of requests; incorrectly relied on regulation 12(4)(b) with regard to request 1.4 and offered inadequate advice and assistance with regard to that request; and incorrectly relied on regulation 12(5)(e) with regard to request 1.9. They are also dissatisfied with the length of time it took HS2 to carry out an internal review of its response to these requests.

4. The complainant is dissatisfied with the length of time it took HS2 to provide a response to the second set of requests. They are also dissatisfied with its reliance on regulation 12(4)(b) with regard to request 2.2 and the advice and assistance it provided in relation to that request.
5. The Commissioner's decision is as follows:
 - HS2 can rely on regulation 12(4)(a) with regard to requests 1.5, 1.6, 1.7, 1.8 and 1.10 because, on the balance of probabilities, HS2 did not hold this information at the time the complainant submitted these requests.
 - HS2 can rely on regulation 12(4)(b) to refuse to comply with request 1.4 and request 2.2 by virtue of cost, and the public interest favours maintaining this exception.
 - HS2 provided adequate advice and assistance with regard to requests 1.4 and 2.2 and, as such, complied with regulation 9(1).
 - HS2 can rely on regulation 12(5)(e) to refuse to disclose information falling within the scope of request 1.9, and the public interest favours maintaining this exception.
 - HS2 breached regulation 11(4) as it did not provide an internal review of its response to the first series of requests within 40 working days of the request for one.
 - With regard to requests 1.5 – 1.8, 1.10, 2.1 and 2.2, HS2 breached regulation 14(1) as it did not provide an adequate refusal of these requests.
6. The Commissioner does not require HS2 to take any remedial steps.

Background

7. The Commissioner understands that land belonging to the complainant's client had been included within the High Speed Rail (London to West Midlands) Act through Additional Provision 2 (AP2) as a potential site for the relocation of the Heathrow Express depot. From the complainant's requests it appears that it was subsequently decided that the complainant's client's land was no longer required and that the compulsory acquisition of the land would not go ahead.

Request and response

8. On 11 October 2018 the complainant submitted the following request for information to HS2:

1.1) The date on which the DfT and/or HS2 took the decision to promote Additional Provision 2 (AP2) to the HS2 Bill;

1.2) The reasons for that decision;

1.3) The date on which the DfT and/or HS2 took the decision to include our clients' site in AP2;

1.4) Copies of all the correspondence between the DfT and/or HS2 and any other parties and documentation relating to the decision to include our clients' site in AP2; as well as all documentation in relation to the need for inclusion, the continuing need and lack of need for inclusion of the site for the HS2 project;

1.5) Confirmation of when the DfT entered into discussions and/or negotiations with Heathrow Airport Limited (HAL) and or Heathrow Express Operating Company Limited (Heathrow Express) in relation to the extension of the Heathrow Express franchisee to at least 2028 and copies of all documentation relating thereto;

1.6) Details of when the DfT and/or HS2 identified the alternative site in Reading for the relocation of the HEx depot;

1.7) The names of the DfT personnel involved in the discussions and/or negotiations with HAL and Heathrow Express;

1.8) Copies of all correspondence between the DfT and HAL and Heathrow Express and any other parties in relation to the extension of the Heathrow Express franchise;

1.9) A copy of the agreement between the DfT, HAL and Heathrow Express or any of these or related parties to extend the Heathrow Express franchise;

1.10) Confirmation of the date and provision of a copy of the transcript of the relevant HS2 Select Committee day(s) when the DfT and/or HS2 informed the HS2 Select Committee that the only suitable site for the relocation of the HEx depot was the site in Langley;

1.11) Confirmation of if, and if so the date and provision of a copy of the transcript of the relevant date, when the DfT and/or HS2 informed

the HS2 Select Committee that an alternative site for the relocation of the HEx depot had been identified in Reading."

9. HS2 responded on 7 November 2018 – its reference FOI18-2148. It provided information with regard to requests 1.3, and 1.11.
10. HS2 addressed request 1.2 outside of the EIR.
11. HS2 relied on regulation 12(4)(b) (by virtue of cost) to refuse to comply with request 1.4 and advised how the complainant might refine this request. HS2 provided its public interest arguments with regard to its reliance on this exception.
12. HS2 said that it did not hold information falling within the scope of requests 1.5, 1.6, 1.7, 1.8 and 1.9. With regard to requests 1.1 and 1.10, HS2 directed the complainant to where information it considered relevant is already published.
13. The complainant requested an internal review on 11 December 2018. With regard to request 1.1, the complainant considered that HS2's response evidenced when action was implemented and not when a decision was made, which is what they had asked for. The complainant asked HS2 to reconsider its responses to requests 1.2, 1.3 and 1.10.
14. With regard to request 1.4, the complainant considered they were not able to narrow the scope of this request but provided further information as to the information they are seeking. They also requested a copy of the advice HS2 had referred to in its response to request 1.4. This is technically a new request, which the Commissioner has categorised as request 2.1.
15. The complainant also asked HS2 to review its response to requests 1.5, 1.6, 1.7, 1.8 and 1.9.
16. With regard to HS2's response to request 1.11, the complainant requested further associated information as follows:

[2.2] *"Our client also requests the documents that record the decision (and the date of the decision) to advise our client, that their land was no longer to be required. We understand this will be included in the correspondence (including email correspondence) between the six senior civil servants mentioned in paragraph 7 of the HS2 EIR response, on this issue."*
17. HS2 provided an internal review on 18 February 2019 – its reference FOI18-2148R. HS2 provided further information relevant to requests 1.1 and 1.3. It maintained its position with regards to requests 1.2, 1.4, 1.10 and 1.11 and requests 1.5 – 1.8. Finally, HS2 released some

information it had identified that it holds that falls within the scope of request 1.9 – the requested Agreement - having redacted some of the information in it under regulation 12(5)(e)(commercial confidentiality) and providing public interest arguments for this information's non-disclosure.

18. HS2's review did not appear to address requests 2.1 and 2.2. In its submission to the Commissioner, and as a result of her investigation, HS2 confirmed that it had overlooked these two requests but had provided the complainant with a response to them on 11 October 2019.
19. In this response, HS2 confirmed it does not hold information within the scope of request 2.1 because the advice was given verbally, over the telephone. HS2 relied on regulation 12(4)(b) to refuse to comply with request 2.2, by virtue of cost. It suggested how the complainant might refine that request. HS2's response to these two requests has not been subject to an internal review although HS2 has reconsidered its response to the requests as a result of this investigation

Scope of the case

20. The complainant contacted the Commissioner on 18 April 2019 to complain about the way their requests for information had been handled.
21. In their initial correspondence to the Commissioner, the complainant outlined the scope of their original complaint, which it subsequently confirmed. Following HS2's response of 11 October 2019 to requests 2.1 and 2.2, the complainant also confirmed that they are dissatisfied with the length of time it took to provide a response to requests 2.1 and 2.2 and HS2's reliance on regulation 12(4)(b) with regard to 2.2.
22. Accordingly the Commissioner's investigation has focussed on the following, including the balance of the public interest where relevant:
23. Whether HS2:
 - holds information falling within the scope of requests 1.5 - 1.8 and request 1.10 or can rely on the exception under regulation 12(4)(a) with regard to these requests
 - can rely on regulation 12(4)(b) to refuse to comply with requests 1.4 and 2.2
 - complied with regulation 9(1) with regard to requests 1.4 and 2.2

- can rely on regulation 12(5)(e) to withhold information within the scope of request 1.9
- complied with regulation 11(4) with regard to the internal review it provided of its response to the first series of requests; and
- complied with regulation 14(1) with regard to its refusal of requests 1.5 – 1.8, 1.10, 2.1 and 2.2.

Reasons for decision

Regulation 12(4)(a) – information not held

24. Under regulation 12(4)(a) of the EIR a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
25. Turning first to requests 1.5, 1.6, 1.7 and 1.8 first, HS2 did not explicitly refer to regulation 12(4)(a) with regards to these requests - in its correspondence with the complainant or in its submission to the Commissioner - but its position is that it does not hold the information requested. For ease, these requests are as follows:
- 1.5) Confirmation of when the DfT entered into discussions and/or negotiations with Heathrow Airport Limited (HAL) and or Heathrow Express Operating Company Limited (Heathrow Express) in relation to the extension of the Heathrow Express franchisee to at least 2028 and copies of all documentation relating thereto;*
 - 1.6) Details of when the DfT and/or HS2 identified the alternative site in Reading for the relocation of the HEx depot;*
 - 1.7) The names of the DfT personnel involved in the discussions and/or negotiations with HAL and Heathrow Express;*
 - 1.8) Copies of all correspondence between the DfT and HAL and Heathrow Express and any other parties in relation to the extension of the Heathrow Express franchise;*
26. In its submission to the Commissioner HS2 confirmed that, in order to provide a response to the complainant to these requests, it had approached staff in both its Legal team and the relevant Track and Power team who had dealt with this issue. It also made contact with Department for Transport (DfT) as, in HS2's view, the above requests clearly directly related to discussions and correspondence regarding DfT, rather than HS2.

27. HS2 noted that only one of the requests refers to HS2 (request 1.6). HS2 confirmed that it did not identify any alternative site and, as it was not involved in the other discussions referenced (requests 1.5, 1.7 and 1.8), it considered it was not likely that it would hold any information relevant to those requests. HS2 has told the Commissioner that it had nonetheless approached the parts of the organisation involved in dealing with this area in order to ascertain whether it held any information within the scope of those requests.
28. In addition, and as a result of the Commissioner's investigation, HS2 says it undertook a keyword search for emails within the entire HS2 email system that contain *all* the phrases "AP2", "Heathrow", "Thorney Lane" and "Langley". HS2 confirmed that this search revealed that no such emails are contained on its system. HS2 provided the Commissioner with the results of the searches it undertook. HS2 noted that emails are retained on its email system for five years.
29. Having considered the wider circumstances as HS2 has explained them, and noted the discussions and searches HS2 has undertaken, the Commissioner is satisfied that, on the balance of probabilities, HS2 does not hold the information the complainant has requested in requests 1.5, 1.6, 1.7 and 1.8 and can rely on regulation 12(4)(a) in respect of these requests.
30. All EIR exceptions are subject to the public interest test, including regulation 12(4)(a). However, the Information Commissioner can see no practical value in applying the test where information is not held and she does not expect public authorities to do so. Therefore there is no public interest test to consider with regard to HS2's reliance on regulation 12(4)(a).
31. The complainant has also confirmed that they consider that HS2 holds information falling within the scope of request 1.10.
32. In their complaint to the Commissioner they say that it is their client's contention that the HS2 Select Committee would or should have been informed of the absolute need for their client's land from an earlier date than 21 January 2016. They consider that HS2 has *"failed to respond to the underlying request in relation to the information sought"*.
33. Request 1.10 is for:
 - 1.10) *Confirmation of the date and provision of a copy of the transcript of the relevant HS2 Select Committee day(s) when the DfT and/or HS2 informed the HS2 Select Committee that the only suitable site for the relocation of the HEx depot was the site in Langley;*

34. In its response HS2 had provided the complainant with a link to the transcript of a Commons High Speed Rail Committee on 21 January 2016 which was already in the public domain and which it considered to be relevant. HS2 upheld its handling of this request at internal review.
35. In its submission to the Commissioner HS2 has confirmed that, as it had stated in its original response to the request, Langley had been identified as the preferred option for the site of the relocated Heathrow Express Depot in the House of Commons High Speed Rail Committee on 21 January 2016. It says that notifying the Select Committee would have been undertaken by DfT, not HS2, and that it therefore holds no information regarding DfT informing the Select Committee before this date ie HS2 was relying on regulation 12(4)(a) with regard to request 1.10.
36. The request is for the date on which DfT and/or HS2 told the relevant HS2 Select Committee that the only suitable site for the relocated depot was the site in Langley, and a copy of the Committee transcript. HS2 had directed the complainant to information published by what it considers to be the relevant Committee (with the date). It has confirmed to the Commissioner that, if the Committee was notified about the suitability of the Langley site, it would have been DfT that would have notified the Committee, and not HS2.
37. The complainant may consider that the Select Committee would or should have been informed of the decision earlier than 21 January 2016. However, whenever the Committee was informed, the Commissioner accepts HS2's explanation that it would be DfT and not HS2 that would notify the Select Committee. As such, the Commissioner considers that in its response – ie its direction to where information of some relevance is already published – HS2 addressed request 1.10 as far as it was able. She has decided that, on the balance of probabilities, HS2 did not hold the specific information requested in request 1.10 at the time of the request. Although HS2 did not refer to the regulation 12(4)(a) exception with regard to request 1.10, the Commissioner considers that this exception was engaged with regard to that request. The position with regard the public interest test is as above.

Conclusion

38. The Commissioner has decided that, on the balance of probabilities, the information requested in requests 1.5 – 1.8, and request 1.10, is excepted from disclosure under regulation 12(4)(a) of the EIR as HS2 did not hold the specific information requested in these requests at the time they were submitted.

Regulation 12(4)(b) – manifestly unreasonable request, by virtue of cost

39. Regulation 12(4)(b) of the EIR says that an authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be categorised as manifestly unreasonable because it is a vexatious request or, as here, it can be categorised as manifestly unreasonable because of the cost associated with complying with it.
40. The EIR does not contain a limit at which the cost of complying with a request is considered to be too great. However, the Commissioner's guidance suggests that public authorities may use the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 as an indication of what Parliament considers to be a reasonable charge for staff time. It has been determined that £600 is the appropriate limit for public authorities that are central government departments, and that the cost of complying with a request should be calculated at £25 per hour; this applies a time limit of 24 hours.
41. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is then expected to consider the proportionality of the cost against the public value of the request before concluding whether the cost is excessive. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - determine whether it holds the information
 - locate the information, or a document which may contain the information
 - retrieve the information, or a document which may contain the information, and
 - extract the information from a document containing it.
42. Where a public authority claims that regulation 12(4)(b) 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 regulation 9(1) of the EIR.
43. HS2 is relying on regulation 12(4)(b) with regard to requests 1.4 and 2.2. These requests are as follows:

1.4) Copies of all the correspondence between the DfT and/or HS2 and any other parties and documentation relating to the decision to include our clients' site in AP2; as well as all documentation in relation to the

need for inclusion, the continuing need and lack of need for inclusion of the site for the HS2 project;

[2.2] "Our client also requests the documents that record the decision (and the date of the decision) to advise our client, that their land was no longer to be required. We understand this will be included in the correspondence (including email correspondence) between the six senior civil servants mentioned in paragraph 7 of the HS2 EIR response, on this issue."

44. In its submission HS2 has told the Commissioner that, although request 1.4 of the request may appear to be specific, the search required to uncover relevant information would be very wide in scope. Any discussions regarding the use of this land would not necessarily include a reference to the client (Thorney Lane) and therefore any relevant search would need to include a search for the area concerned ie "Langley". HS2 says its search for this term uncovered over two million emails. A revised keyword search for "Langley" and "AP2" [together] returned 3,822 results. HS2 provided the Commissioner with a record of these.
45. HS2 says that it would need to examine each of these emails in order to see whether they were captured by the request. They would then need to be further examined in order to determine whether any of the following exceptions (and potentially other exceptions) applied to any of the information: 12(4)(e) – internal communications; 12(5)(e) – commercial confidentiality; 13 (personal data).
46. To comply with request 1.4 would, HS2 says, therefore require at least a manual search of 3,822 emails. It has noted that in the First-tier Tribunal (Information Rights) appeal decision Salford vs ICO and TieKey Accounts Ltd (EA2012/0047) the Tribunal decided that, in that case, a reasonable estimate of time per page to examine was five minutes. In this case, as the information is contained within emails HS2 estimates that it would take two minutes 30 seconds to examine each email for relevance and for whether any exceptions applied.
47. Such an exercise would take just over 159 hours. HS2 says that in addition to this it would need to examine any relevant hard copy files stored on file along with any emails that had been stored 'off-line'. It says that, as it indicated in its internal review response, there were various areas of HS2 that may have relevant information and many of the members of staff who may have had relevant information will have moved on. HS2 notes that, therefore, even to identify where to search for any relevant 'off-line' communication would be a considerable endeavour in itself.

48. In its response to request 2.2 HS2 said that it could find no reference to the "six senior civil servants" the complainant had referred to, either in its response to the request, which the complainant had also referred to, or in the associated Annex. HS2 said it could therefore not easily identify any information that may be relevant to this request. It said that any search for email required to uncover relevant information would be very wide in scope. Discussion regarding the use of the land in question would not necessarily include a reference to the complainant's client and therefore any relevant search would need to include a search for the [geographic] area concerned.
49. As above, HS2 explained that a keyword search for "Langley" had uncovered over two million emails and that a keyword search for "Langley" and "AP2" returned 3,822 results. HS2 again said that each of these emails would need to be examined to determine whether they were relevant to the request. Each email would then need to be further examined to see whether any exception under the EIR is engaged. For this reason HS2 said that even a revised search would place a disproportionate burden on HS2 and that it therefore considered the request to be manifestly unreasonable, by virtue of cost.

Conclusion

50. With regard to request 1.4, the complainant had requested "correspondence" and "documents" relating to a decision to include their clients' site in AP2 and the need, or otherwise, to include the site in the HS2 project. Related to that request, in request 2.2 the complainant has requested "documents", and then gone on to say that they considered this material would be included in "correspondence", relating to a record of a decision to advise their client that their land was no longer required.
51. So request 1.4 concerns a decision not to use the complainant's client's land in the HS2 project and request 2.2 concerns a decision to advise the complainant's clients that their land was no longer needed.
52. The Commissioner went back to HS2. She asked it to consider whether it would be able to easily identify whether it holds information relevant to these two requests in any document – such as a specific meeting minute – rather than only in general email correspondence.
53. HS2 told the Commissioner that it had discussed the matter with the business area concerned and it believed it would not be possible to easily locate any relevant information. HS2 said it was aware that the complainant had submitted a similar series of requests to DfT and that DfT may more easily locate any relevant records of decisions.

54. However, as a result of the requests to DfT and associated complaint to the Commissioner, HS2 said it had had its attention drawn to a letter that DfT had sent to HS2's Corporate Sponsorship Director on 8 May 2018. DfT had considered that an extract from this letter was of some relevance to the above two requests and had provided the complainant with this extract. HS2 said also holds a copy of this letter and that it would provide the complainant with a copy of the extract voluntarily, outside of the EIR – whilst noting that the complainant already had a copy from DfT. HS2 confirmed that, because the letter from DfT had surfaced as a result of the associated complaint to the Commissioner, it had been able to identify and voluntarily release it. HS2 confirmed that it would not be able to locate easily any other information related to the two requests above.
55. The focus of the complainant's two requests is on decisions that may have been recorded in correspondence. In the circumstances, they have not been able to refine the request by, for example, identifying a specific timeframe, other than it would be in correspondence that predates the Select Committee of 21 January 2016. Nor is the complainant able to identify individuals who may have taken part in any such correspondence, or the likely job roles of individuals who may have made the decisions and been involved in any associated correspondence. As a result HS2 was not able to narrow down the scope of the request and has found that, if held, the requested information may be held amongst at least 4,000 emails and that it would take at least 160 hours to review each of these emails.
56. The Commissioner acknowledges that it will be frustrating for the complainant but she has decided that HS2 is correct to categorise the above two requests as manifestly unreasonable, by virtue of cost. Given the circumstances – the broad nature of the request and the volume of correspondence in which the requested information may be held (before even going on to consider whether it might be held in other 'documents') – the Commissioner finds that HS2 can rely on regulation 12(4)(b) to refuse to comply with requests 1.4 and 2.2.

Public interest test

Public interest in disclosing the information

57. HS2 has acknowledged that there is a public interest in openness, accountability and transparency. Disclosing the relevant correspondence and information behind a decision will enable the public to understand the decisions HS2 has made and the reasons for those decisions.

58. The Commissioner has reviewed the complainant's request for an internal review and their correspondence to her. She has not identified any arguments from the complainant as to why the public interest favours disclosing the information. The Commissioner has, however, noted the complainant's underlying concern; namely, that they believe that the High Speed Rail Select Committee would or should have been informed from an earlier date than that indicated by HS2 when it sent them the link to the transcript of the Select Committee of 21 January 2016.

Public interest in maintaining the exception

59. HS2 argues that as a publicly-funded organisation it is important that it exercises tight control of expenditure and resources. It is in the public interest that all HS2 funding is appropriately managed.
60. With regard to both requests, HS2 says that even just searching for relevant emails would require a significant amount of resources (at least 159 hours to just identify and prepare for release any relevant emails). The information cannot be easily identified and therefore any relevant search would be wide ranging and cover a significant number of documents. HS2 staff would have to be diverted from their core duties in order to devote time on searching, extracting and reviewing all of the information held in relation to the request. Furthermore the information would also need to be reviewed by the FOI unit to ensure that all exempt material was removed.
61. HS2 has noted the general public interest in openness but considers it is not clear what the wider public interest is in searching for this very specific information. On the other hand, to comply with the request would place a substantial burden on HS2. This diversion of resources is significant and disproportionate and would not be in the interests of the public.

Balance of the public interest

62. By HS2's estimation, which the Commissioner considers is reasonable and credible, it would take HS2 staff at least four working weeks to determine if it even holds the information that has been requested. Disclosing environmental information is the default position of the EIR and as such, public authorities may be required to accept a greater burden in providing environmental information than other information. In this case, however, the Commissioner is of the view that there is little wider value in the requested information being made available, if it is held. The public interest in HS2 being open and transparent has been met by HS2 addressing the majority of the complainant's wider series of requests. HS2 could have considered all or most of the

requests together before deciding if they were manifestly unreasonable by virtue of cost ie it could have refused to comply with most or any of them.

63. The underlying issue – the fact that the complainant’s clients incurred certain costs during the period when they understood that HS2 needed their land for the HS2 rail project – is clearly important to the complainant and their client – but is not, in the Commissioner’s view, of such wider importance that it justifies HS2 staff being diverted for at least four weeks. The Commissioner is satisfied that, in relation to requests 1.4 and 2.2, the public interest favours maintaining the exception under regulation 12(4)(b).

Regulation 9 – advice and assistance

64. Regulation 9(1) of the EIR place a duty on a public authority to offer an applicant advice and assistance so far as it would be reasonable to expect the authority to do so.
65. As referred to above, in cases where an authority is relying on regulation 12(4)(b), regulation 9 creates an obligation to provide advice and assistance on how the scope of the request could be refined or reduced to avoid exceeding the appropriate limit.
66. The Commissioner’s guidance states that where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy regulation 9 is:
- either indicate if it is not able to provide any information at all within the appropriate limit; or
 - provide an indication of what information could be provided within the appropriate limit; and
 - provide advice and assistance to enable the requestor to make a refined request.
67. As noted, in request 1.4 the complainant had requested “correspondence” and “documents”. In its response of 7 November 2018, HS2 advised that the complainant might refine this request by stipulating a timeframe for their request, and specifying categories of documents they are seeking, for example reports and signed letters, not emails.
68. It may have been the case that the complainant considers that they were unable to narrow that request in the way the HS2 suggested and considers that HS2 was being disingenuous. The Commissioner is also

aware that the complainant does not consider that the extract from the May 2018 letter from DfT addresses either request 1.4 or request 2.2. However, the fact is that HS2 suggested ways in which the request might be refined. It has also had further discussion with its relevant business area to see if it could easily locate information relevant to the request as it is phrased. Regulation 9(1) requires an authority to offer advice and assistance so far as it is reasonable to do so. It is not always possible for a request to be refined. Given the nature of request 1.4 and the potential volume of material captured, the Commissioner is satisfied that the advice and assistance HS2 offered was adequate and that it did not breach regulation 9(1) with regard to that request.

69. As noted, in request 2.2 the complainant had requested “documents” but then gone on to say that they considered this material would be included in “correspondence”. In its response to request 2.2, HS2 said it would like to explore with the complainant how it could best assist them to request relevant information that it holds, since a search of email correspondence had identified many thousands of results. HS2 encouraged the complainant to supply key words, date ranges or names that would enable it to conduct a search of its emails to identify any information relevant to this request, while not place a disproportionate burden on it. Again, the complainant considered that, because did not possess the information to enable such a refinement, they were not able to do this. For the reasons given with regard to request 1.4, however, the Commissioner is satisfied that the advice and assistance HS2 offered with regard to request 2.2 was adequate and that, again, it did not breach regulation 9(1).

Regulation 12(5)(e) – confidentiality of commercial information

70. 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 commercial interest. Regulation 12(5)(e) is subject to the public interest test.
71. 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?

72. The Commissioner's published guidance on section 12(5)(e) advises that for information to be commercial in nature, it will need to relate to a commercial activity; either of the public authority or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information.
73. The information being withheld under regulation 12(5)(e) in this case relates to request 1.9 and forms part of a 'Heathrow Express Overarching Agreement' document. This is an agreement between DfT, Heathrow Airport Limited and Heathrow Express Operating Company Limited (HEOC) to extend the Heathrow Express (HEX) rail service. HS2 says in its submission that the redacted information, which the Commissioner has reviewed, refers to obligations and restrictions on HEOC and First Great Western Limited (FGW) in terms of the commercial services they offer. In addition, some of the withheld information relates to the amount the Secretary of State has identified for investment in a particular scheme. The Commissioner is satisfied that this agreement is commercial in nature and it follows that information redacted from this agreement is commercial in nature.

Is the information subject to confidentiality provided by law?

74. In her published guidance on regulation 12(5)(e) the Commissioner advises that, in this context, this will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute.
75. In assessing whether the information has the necessary quality of confidence, the Commissioner has considered whether the information is more than trivial, whether or not it is in the public domain and whether it has been shared in circumstances creating an obligation of confidence. A useful test to consider with regard to the latter is to consider whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.
76. The Commissioner is satisfied that the disputed information is more than trivial, concerning as it does the extension of the Heathrow Express rail service and the running of that service.

77. In its submission to the Commissioner HS2 has said that in cases such as these, a private sector entity has an expectation of confidence, as a result of an explicit obligation on confidentiality being included in a commercial agreement between such an entity and the public sector. This indicates to the Commissioner that the withheld information has not been shared more widely than between those parties concerned. In addition, HS2 advised the complainant in its internal review decision that the information was not currently in the public domain. The Commission is therefore satisfied that at the time of the request, the information had not been shared more widely.

78. Because of the above factors the Commissioner considers that a reasonable person who was provided with the redacted information would consider that the information had been provided to him or her in confidence. She is therefore satisfied that the information in question is subject to confidentiality provided by law and that the second condition has been met.

Is the confidentiality provided to protect a legitimate economic interest?

79. HS2 has argued that the information is confidential because it could be used by competitors of HEOC and FGW to gain a commercial advantage by exploiting this information in current or future negotiations. If any future service were offered for tender, it would provide an unfair advantage to companies other than HEOC and FGW who could use the information to alter their tender.

80. With regard to the information relating to the amount the Secretary of State has identified for investment in a particular scheme, HS2 considers that any potential suppliers would be substantially advantaged, and the negotiations would thereby be undermined, should this figure be released into the public domain.

81. The Commissioner has considered HS2's position and she is satisfied the third condition has been met. She considers that disclosing the requested information would have the effect that is identified in the exception; namely, disclosure would adversely affect third parties' legitimate commercial interests ie those of HEOC and FGW – for the reasons given at paragraph 79.

82. HS2 has indicated that other organisations are currently in negotiations (with DfT) with regard to the HS2 project, by which the Commissioner understands that the organisations were also involved in negotiations at the time of the request. The HS2 rail project is an extremely high profile project and one that was 'live' at the time of the request and remains so at the date of this notice. As such, the Commissioner

considers it is very likely that other organisations would also be interested in tendering for associated services in the future. If information concerning the obligations and restrictions on HEOC and FGW in terms of the commercial services they offer was released, the Commissioner considers that other organisations would, as HS2 suggests, tailor their own tenders to make them more attractive. The information is being withheld to protect a commercial bargaining position in the context of existing or future negotiations. In the Commissioner's view it is more probable than not that disclosing the withheld information would therefore cause some harm to HEOC's and FGW's commercial interests in respect of those negotiations.

83. With regard to the remaining information being withheld, the Commissioner considers that it is more probably than not that the Secretary of State for Transport would not achieve the best value for money if the information associated with the amount of money he has identified for investment in a particular scheme was released. Some bidders would submit bids up to the value of the amount the Secretary of State has identified is available, rather than at the actual value at which they could deliver the scheme in question, which might be less than the amount available.

Would the confidentiality be adversely affected by disclosure?

84. HS2 says that disclosing the withheld information would adversely affect both competitiveness within a market and future negotiations with private sector organisations over the provision of services.
85. The Commissioner is satisfied that as disclosure would adversely affect HEOC, FGW's and DfT's commercial interests, it follows that the confidentiality designed to protect those interests would be adversely affected if the information was to be released.

Conclusion

86. Since the four necessary conditions have been met the Commissioner is satisfied that HS2 is entitled to rely on regulation 12(5)(e) to except from disclosure part of the information requested in request 1.9. She has gone on to consider the public interest arguments.

Public interest test

Public interest in disclosing the information

87. In its internal review response, HS2 acknowledged that there is a public interest in disclosing information to ensure public bodies are transparent and visible and so can be held to account regarding decisions they make and their use of public funds.

Public interest in maintaining the exception

88. In its internal review decision, HS2 advised that the information is contained within confidential contracts and regards ongoing commercial activities between DfT and third party partners. It said disclosing this information would adversely affect future negotiations should suppliers know details of their commercial interests could potentially be released. HS2 said it also found that ongoing commercial services would be disadvantaged if competitors knew the commercial interests and obligations of the service provider.
89. In its submission to the Commissioner HS2 confirmed that it is not in the public interest for a private sector organisation not to be able to rely on a public sector organisation's confidentiality obligation being met. This would potentially result in the private organisation withholding information that would result in a worse outcome for the taxpayer/public sector.
90. According to HS2 it is in the public interest that any negotiations regarding commercial contracts should be undertaken in an environment where no party has an unfair advantage over the other. It is also in the public interest to protect the ability of the Secretary of State to achieve the best value for money from any third party he negotiates with. At this time, for this specific information, HS2 therefore considers that the balance of the public interest lies with withholding the information.

Balance of the public interest

91. In the Commissioner's view, the wider public interest in HS2 being open and transparent has been met through HS2's disclosure of the majority of the agreement in question. As with her consideration of HS2's reliance on regulation 12(4)(b), the Commissioner appreciates that the specific information in the agreement that has been withheld may be of some interest to the complainant, although it would not appear to be relevant to the issue that is behind their requests to HS2. The Commissioner does not consider the information has sufficient wider public interest, however, to justify releasing it and thereby prejudicing the commercial interests of particular bodies. The Commissioner is satisfied that the public interest favours maintaining the regulation 12(5)(e) exception on this occasion.

Regulation 11 – representations and reconsideration

92. Under regulation 11(1) an applicant can request that the public authority reconsider its response to their request ie request an internal review.

93. Under regulation 11(4) the authority must provide the review decision as soon as possible and no later than 40 working days after the date of receipt of the request for a review.
94. In this case, the complainant requested a review of HS2's response to their first series of requests on 11 December 2018 but did not receive a review until 18 February 2019. HS2 therefore breached regulation 11(4) in terms of that review.

Regulation 14 – refusal to disclose information

95. Under regulation 14(1) of the EIR, if a request for information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the other provisions of this regulation.
96. A provision under regulation 14(2) is that if a request for environmental information is refused by a public authority, the refusal must be made as soon as possible and no later than 20 working days after the date of receipt of the request
97. A provision under regulation 14(3) is that the refusal must specify the reasons not to disclose the information including the exception relied on under regulations 12(4), 12(5) or 13.
98. The complainant submitted requests 1.5 – 1.8 and 1.10 on 11 October 2018 and requests 2.1 and 2.2 and 11 December 2018. On 7 November 2018 and 11 October 2019 respectively they received responses in which HS2 indicated that it does not hold information falling within the scope of requests 1.5 – 1.8, 1.10 and 2.1 (ie it was in effect relying on the exception under regulation 12(4)(a)) and it refused request 2.2 under regulation 12(4)(b).
99. The refusal of two of the requests was provided some 10 months after the requests were submitted and HS2 omitted to advise the exception it was relying on with regard to requests 1.5 – 1-8, 1.10 and 2.1. HS2's refusal of these requests, and request 2.2, therefore did not comply with the requirements of regulation 14(1).

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

101. 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.

102. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF