

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

Decision notice

Date: 13 December 2019

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
Westminster
London SW1P 4DR

Decision (including any steps ordered)

1. In three 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 High Speed 2 rail project.
2. With regard to the first series of requests, the Department for Transport (DfT) provided information relevant to some of the requests. It originally relied on the exception under regulation 12(4)(b) to refuse to comply with four requests (manifestly unreasonable request). However, it subsequently complied with one of these but confirmed to the Commissioner that it was relying on 12(4)(b) with regard to another of the requests. DfT withheld other information under regulation 12(5)(e) (commercial interests) and regulation 13 (personal data).
3. With regard to a second series of requests, DfT's position is that it did not hold information within the scope of one of the requests at the time it was submitted. DfT released information it considered falls within the scope of the second request, having redacted some of the information under regulation 12(5)(e).

4. With regard to the four parts of a third request, DfT released information relevant to two parts, and relied on regulation 12(5)(e) to withhold information relevant to the remaining two parts.
5. The complainant considers: DfT holds information in relation to one of the first series of requests; is incorrectly relying on regulation 12(4)(b) with regard to three of the requests and did not provide adequate advice and assistance with regard to those requests.
6. The complainant considers that DfT holds information within the scope of one of the second series of requests, and further information within the scope of the remaining request.
7. Finally, the complainant is dissatisfied with DfT's reliance on regulation 12(5)(e) to withhold information relating to request 3.
8. The Commissioner's decision is as follows:
 - On the balance of probabilities, DfT has complied with regulation 5(1) but breached regulation 5(2) with regard to request 2.2.
 - DfT can rely on regulation 12(4)(a) with regard to requests 1.10 and 2.1 because, on the balance of probabilities, it did not hold the specific information requested at the time the complainant submitted these requests.
 - DfT can rely on regulation 12(4)(b) to refuse to comply with requests 1.4, 1.5, 1.8 and 1.11 by virtue of cost, and the public interest favours maintaining this exception.
 - With regard to the 12(4)(b) exception, DfT offered the complainant adequate advice and assistance and complied with regulation 9(1).
 - DfT can rely on regulation 12(5)(e) to withhold the information requested in parts 3 and 4 of request 3 and the public interest favours maintaining this exception.
 - DfT complied with regulation 11(4) with regard to its internal review of the first series of requests.
 - With regards to requests 1.10, 1.11 and 2.1, DfT breached regulation 14(1) as it did not provide an adequate refusal of these requests.
9. The Commissioner does not require DfT to take any remedial steps.

Background

10. From DfT's submission the Commissioner understands that land belonging to the complainant's client was included within the High Speed Rail (London to West Midlands) Act through Additional Provision 2 (AP2). DfT says it is important to note that the decision underlying AP2 was made on the basis of the design development of the HS2 project that had identified a need to construct a new Heathrow Express depot facility at a particular site, which required the use of the land. The decision on what to include within AP2 was a result of developments to the route of the Project as a whole.
11. It appears that it was subsequently decided that the site for the relocated Heathrow Express depot – the complainant's client's land – was no longer required.

Request and response

12. Having not received a response or acknowledgement from DfT to requests they submitted on 11 October 2018, the complainants say that on 16 October 2018 they submitted duplicate requests to DfT, as follows:

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

2) The reasons for that decision;

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

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;

"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;

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

- 7) The names of the DfT personnel involved in the discussions and/or negotiations with HAL and Heathrow Express;*
- 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;*
- 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;*
- 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;*
- 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."*
13. DfT responded on 13 November 2018 – its reference E0016627. It provided information with regard to requests: 1.1; 1.3; 1.6; 1.7 (with some names withheld under regulation 13); 1.10 and 1.11.
14. DfT addressed request 1.2 outside of the EIR.
15. DfT relied on regulation 12(4)(b) (by virtue of cost) to refuse to comply with request 1.4. It advised that it had received advice regarding the potential volume of documents relevant to this part and suggested how the complainant might refine this part. DfT provided its public interest arguments with regard to its reliance on this exception.
16. With regard to requests 1.5, 1.8 and 1.9 DfT explained that Heathrow Express is not a franchise; it asked the complainant to clarify these requests.
17. The complainant requested an internal review on 11 December 2018. They clarified requests 1.5, 1.8 and 1.9. The complainant said they were dissatisfied with DfT's response to requests 1.1, 1.2, 1.3, 1.4, 1.6 and 1.10. They considered they were not able to narrow the scope of request 1.4 but provided further information as to the information they are seeking through this part. They also requested a copy of the advice DfT 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.
18. With regard to DfT'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 your response, on this issue."*

19. On 9 January 2019, DfT wrote to advise the complainant that it would take it longer than 20 working days to provide a review. It provided the review on 8 February 2019. The complainant had requested a review of DfT's handling of all of the requests, except request 1.7. DfT's first review of 8 February 2019 covered its response to requests 1.4, 1.7, 1.10 and 1.11.
20. DfT maintained its reliance on regulation 12(4)(b) with regard to request 1.4. With regard to the associated advice it had received (request 2.1), DfT detailed the information it had received from officials as to the process that would need to be undertaken to identify relevant information, and the approximate time this would take. DfT maintained its reliance on regulation 13 with regard to request 1.7 and upheld its handling of request 1.10.
21. With regard to request 1.11, DfT confirmed that the complainant had asked a further question in their request for a review (request 2.2) and that this question would be addressed in a separate letter being sent to them. With regard to its original response to request 1.11, DfT upheld its handling of this request ie that it had addressed this question and confirmed it did not hold any recorded information relevant to this request.
22. In a separate internal review response also dated 8 February 2019, DfT provided further information with regard to requests 1.1, 1.2, 1.3 and 1.6.
23. In this correspondence DfT again maintained its reliance on regulation 12(4)(b) with regard to request 1.4, and also applied this regulation to requests 1.5 and 1.8. With regard to request 1.5 DfT did, however, provide the complainant with the date on which it had entered into discussions with HAL over the Heathrow Express service.
24. DfT released some information relevant to request 1.9 – an agreement document – withholding some of the information under regulation 12(5)(e).
25. DfT upheld its handling of request 1.10. It categorised the further request associated with request 1.11 as part 12 (categorised as request

2.2 in this notice). It refused to comply with request 2.2 under regulation 12(4)(b).

26. During her investigation the Commissioner asked DfT to reconsider its response to request 2.2 (which DfT had categorised as request 12). DfT did so and identified that it was able to comply with this part. DfT withdrew its reliance on regulation 12(4)(b) and released information it considered relevant to request 2.2 to the complainant on 24 October 2019.
27. On 15 February 2019 the complainant had submitted the following request for information to DfT – request 3. It is associated with the redacted agreement document DfT had released in response to request 1.9:

"In relation to the HEx Overarching Agreement ("the Agreement") provided. Pursuant to the Environmental Information Regulations 2004 can you please provide the following:

1. *The date the Agreement was executed, the copy provided states it is the executed version but is not dated.*
 2. *The date of when the negotiations of this Agreement commenced.*
 3. *Provide a copy of the following unredacted:*
 - a. *Recital (I);*
 - b. *Paragraph (f) of the definition of "Franchise Conditions";*
and
 - c. *Schedule 3.*
 4. *Provide a copy of the Deed of Waiver and Amendment dated 21 December 207 [sic], referred to in the definition of "HS2 Deed of Waiver."*
28. DfT provided a response to this request on 15 March 2019 – its reference E0017127. DfT addressed parts 1 and 2 of the request. With regard to part 3, DfT referred the complainant back to its review response of 8 February 2019. It said its response to request 1.9 addressed part 3 of request 3, which the Commissioner understands to mean that DfT is relying on regulation 12(5)(e) with regard to part 3. DfT withheld the information requested in part 4 under regulation 12(5)(e).
 29. DfT advised the complainant to request an internal review if he was dissatisfied with its 15 March 2019 response but the complainant did not do this. However, DfT confirmed to the Commissioner that it has taken the opportunity to reconsider this request as a result of her investigation.

Scope of the case

30. The complainant contacted the Commissioner on 18 April 2019 to complain about the way their requests for information had been handled.
31. Having communicated with the complainant more than once during the course of the investigation about the scope of their complaint, the Commissioner's investigation has focussed on the following, including the balance of the public interest where relevant.
32. With regard to the first series of requests, whether DfT:
 - holds information falling within the scope request 1.10 or can rely on the exception under regulation 12(4)(a) with regard to this request
 - can rely on regulation 12(4)(b) to refuse to comply with requests 1.4, 1.5, 1.8 and 1.11 and the balance of the public interest; and
 - complied with regulation 9(1) with regard to the advice and assistance it offered to the complainant with regard to three of the above requests.
33. With regard to the second series of requests, whether DfT:
 - holds information within the scope of part 2.1 or can rely on the exception under regulation 12(4)(a)
 - has complied with regulation 5(1) with regard to request 2.2 or whether it holds further information within the scope of this request; and whether its response to part 2.2 complied with regulation 5(2).
34. With regard to the third request, whether DfT:
 - Can rely on the exception under regulation 12(5)(e) to withhold information falling within the scope of parts 3 and 4, and the balance of the public interest.
35. The Commissioner has also considered whether DfT 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 1.10, 1.11 and 2.1.

Reasons for decision

Regulation 5 - duty to make available environmental information on request

36. Under regulation 5(1) of the EIR a public authority that holds environmental information shall make it available on request, if it is not subject to an exception.
37. Under regulation 5(2) the information must be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
38. DfT had originally relied on regulation 12(4)(b) to refuse to comply with request 2.2, submitted on 11 December 2018, which is as follows:

"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 your response, on this issue."
39. The complainant disagreed with DfT that this request is manifestly unreasonable. They told the Commissioner that they would expect that DfT has a formal process to record such decisions, for example in a board paper or meeting minute. The complainant argued that this request is specific and that it should be straightforward for DfT to identify and provide the information. In addition they said that it was the DfT, not their clients, who made this decision and that they are therefore privy to the knowledge of when this decision was made. The complainant said it was disingenuous of DfT to suggest that their clients should specify the timeframe of when the DfT made its decision. They said this is particularly so in light of the fact that the DfT only provided the precise date of when the Overarching Agreement with Heathrow entities was concluded (27 April 2018) in its correspondence of 28 February 2019, despite the fact that they requested this information on 11 December 2018.
40. Having been advised by the Commissioner to reconsider this request, DfT withdrew its reliance on regulation 12(4)(b), identified relevant information it holds and released the information to the complainant on 24 October 2019. The information comprised a letter from DfT to HS2 Ltd dated 8 May 2018.
41. In subsequent correspondence the complainant told the Commissioner that they considered that the information DfT had released did not

address request 2.2. The complainant argued that the information DfT released concerns the decision to shut down the work stream for the construction of the Heathrow Express Depot at Langley; it is not a record of the decision (and the date of the decision) to advise the complainant's client that their land was no longer required, which is what was requested.

42. The Commissioner went back to DfT and asked it to confirm whether the above letter is all the information it holds that is relevant to request 2.2 and, if so, how it is able to confirm this.
43. In correspondence to the Commissioner of 27 November 2019, DfT confirmed that it does not hold the specific information requested in request 2.2. It explained that the responsibility to communicate to those concerned that their land was no longer required rested with HS2 Ltd which is a separate public authority under the FOIA. DfT noted that its letter to HS2 Ltd of 8 May 2018 instructed HS2 Ltd to close down the Langley workstream and to relay "the formal communication of this to all stakeholders". Although the landowners were not explicitly mentioned, DfT considers that they would quite clearly be a key stakeholder in this issue.
44. The Commissioner is aware that the complainant submitted a separate complaint to her concerning HS2 Ltd's response to similar series' of requests that they submitted to it. She has considered that complaint under reference FER0838245. HS2 Ltd relied on regulation 12(4)(b) with regard to request 2.2; that is it considered it could hold this information but the cost of complying with this request would exceed the cost limit.
45. In the circumstances, ie that HS2 Ltd was responsible for associated communications with stakeholders, the Commissioner accepts DfT's position that, if held, the information requested in request 2.2 would be held by HS2 Ltd and not DfT.
46. The Commissioner finds that DfT has released all the information it holds that is relevant to request 2.2, namely the letter of 8 May 2018, and, on the balance of probabilities, holds no further information. DfT has therefore complied with regulation 5(1) but breached regulation 5(2) as it did not make the 8 May 2018 letter available until approximately 10 months after the request was submitted.

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

47. 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.
48. Request 1.10 is for:
 - 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;*
49. In its response DfT 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. DfT upheld its handling of this request at internal review.
50. The complainant does not consider this published information addresses the request but that DfT holds information falling within its scope. In their complaint to the Commissioner they say that it is their client's contention that the HS2 Committee would or should have been informed of the absolute need for their clients land from an earlier date than 21 January 2016. They consider that DfT has "*failed to respond to the underlying request in relation to the information sought*".
51. In its submission to the Commissioner, DfT maintains that the role of the Select Committee on the High Speed Rail (London – West Midlands) Bill was to provide parties affected by the Bill with the opportunity to object to specific provisions and to seek its amendment. DfT says that, as such, officials would not provide evidence to the Select Committee other than in response to petitions that it was hearing. The Select Committee heard evidence on the issue that is the focus of this part of the request on the date DfT says it had provided in its response of 13 November 2018 (ie 21 January 2016) and DfT says this was when evidence was submitted. It says that discussion between officials and the Select Committee would not take place outside of this process.
52. Request 1.10 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. DfT had directed the complainant to what it considers to be the relevant Committee (with the date) and has confirmed that officials and the Committee would not discuss this matter outside of the Committee process.
53. It seems to the Commissioner that DfT has provided a response to the request as it has been phrased. The complainant may consider that the

Select Committee would or should have been informed of the decision earlier than 21 January 2016 – and that DfT should hold the specific information requested. However, the Commissioner has been presented with no reason to doubt that in its response – ie its direction to where information of some relevance is already published – DfT addressed request 1.10 as far as it was able.

54. She has decided that, on the balance of probabilities, DfT did not hold the specific information requested in request 1.10 at the time of the request. Although DfT 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.
55. All EIR exceptions are subject to the public interest test, including regulation 12(4)(a). However, the 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. There is no public interest test to consider with regard to DfT's reliance on regulation 12(4)(a) therefore.
56. Request 2.1, submitted on 11 December 2018, is for the guidance DfT was given which resulted in it determining that it would exceed the cost limit to comply with request 1.4. The request was as follows:

"We request a copy of the advice which is referred to in the DfT EIR response".
57. As a result of the Commissioner's investigation, DfT provided the complainant with a response to this request on 27 November 2019 – it had not done so previously. It advised that when it had received the complainant's request, the staff member dealing with it had received verbal advice from a team member that the request should be deemed manifestly unreasonable on the grounds of time and resource. DfT confirmed that it does not hold the specific information being sought.
58. The Commissioner sees no reason to doubt this is the case. It is entirely credible that the advice was given verbally and so, at the time of the request on 11 December 2018, DfT would not hold in recorded form the advice that the complainant requested. Although it has not referred to regulation 12(4)(a), the Commissioner finds that DfT can rely on regulation 12(4)(a) with regard to request 2.1. The position regarding the public interest test is as above.
59. In its 27 November 2019 response, DfT released to the complainant an extract from an email of 3 January 2019 which details the advice in question. However, the Commission must consider the situation as it was at the time of the request and she is satisfied that the information recorded in the above email was not held at 11 December 2018.

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

60. 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.
61. 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.
62. 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.
63. 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.
64. DfT is relying on regulation 12(4)(b) to refuse to comply with requests 1.4, 1.5, 1.8 and 1.11. These requests are as follows:

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;

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;

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;

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.

65. In its communications with the complainant DfT had indicated that it does not hold information within the scope of request 1.11.
66. However, DfT has confirmed in its submission to the Commissioner that it considers these requests, including request 1.11, to be manifestly unreasonable on the basis of the breadth of the requests and the amount of time it would take to determine, locate, retrieve and extract the documents that would fall within them.
67. DfT had addressed one part of request 1.5 but refused the second part, for documents, under regulation 12(4)(b). Discussing that element of request 1.5 and request 1.8 first, DfT has noted that these requests essentially cover the same area; requesting respectively documentation and correspondence relating to discussions between DfT, HAL and Heathrow Express. It says these discussions took place over a period of 19 months between September 2016 and April 2018.
68. DfT says that an initial assessment revealed approximately 1,000 emails relating to these discussions within the inbox of a single member of staff. Many of these emails also had attachments which would also need to be checked. These discussions were undertaken by a team drawn from multiple divisions within the department, including legal, project and commercial teams. Whilst many of the same emails and documents would be duplicated in team members' inboxes, DfT says there will be some documents that would not be duplicated.
69. This would mean that all emails and documents of each team member would need to be checked. The team would include the six senior civil servants identified and at least three others whose names were not

released due to the junior nature of their positions but who nevertheless were involved throughout this process.

70. DfT argues that even the most conservative estimate of the total number of documents and emails would far exceed the guidelines for the amount of time that could reasonably be expected to be incurred in complying with this request.
71. It says there are several locations within its filing systems where such documents could be stored but the broad nature of the request for all documentation and correspondence would mean that the documents within these locations would not comprehensively meet this definition of what has been requested, and that it would still need to examine inboxes.
72. DfT has explained that, similarly, requests 1.4 and 1.11 relate to documents and correspondence pertaining to the requirement for Thorney Lane's land to be included in the HS2 project, and the decision to ultimately remove that requirement.
73. It says that a search of the filing system for the project revealed:
 - 150 documents directly relating to Thorney Lane
 - 2,000 documents relating to Langley
 - 12,000 documents relating to AP2
74. These documents were those filed within DfT's information management system but did not include anything that might be stored in email inboxes but which had not yet been filed.
75. In addition to the 150 documents directly referencing Thorney Lane, another 14,000 documents relating to the Langley depot and the decision to include the Thorney Lane land within AP2 would need to be checked. Despite not referencing Thorney Lane, all of these documents would potentially be within scope of the requests.
76. DfT says that when it assessed the time required to do this for request 1.4, it used an assumption of five pages per document, which it believed represented a reasonable average between the mix of submissions (typically 5-15 pages), reports (anything from 10 to 100 pages) and emails (typically one or two pages).
77. DfT says it then checked a sample of four documents. These four documents comprised 22 pages which took 25 minutes. This included checking to see if they were relevant to the request, whether any information would need redacting and documenting these findings.

78. Applying this rate of work to only the 2,150 documents which mention Langley and Thorney Lane (an assumption of around 10,000 pages) produces a resource requirement of around 160 hours. DfT judged this to be an underestimation of the total resources required as once inboxes were checked this would far exceed 2,150 documents and it could not rely on the 12,000 documents relating to AP2 which do not mention Langley or Thorney Lane not being relevant.
79. In their request for a review, the complainant disagreed that request 1.4 of the request is manifestly unreasonable for the reasons DfT had given in its response; namely that the request had not stipulated a time frame, covered a broad remit and relates to a subject on which a lot of work was done. They argued that the request explicitly states that the request relates to the decision not to include its client's site in the AP2; that this is, in fact, very specific and should be easy to identify.

Conclusion

80. Through the four requests the complainant has requested "correspondence" and "documents" relating to a decision to include their clients' site in AP2, decisions concerning the Heathrow Express franchise and advice that may have been given to the HS2 Select Committee.
81. In the circumstances, the complainant has not been able to refine the requests 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 decisions, or the likely job roles of individuals who may have made the decisions and been involved in any associated correspondence. As a result DfT was not able to narrow down the scope of the requests and has found that, if held, the requested information may be held amongst literally thousands of documents and emails, which would take 160 hours to review, at least.
82. The Commissioner acknowledges that it will be frustrating for the complainant but she has decided that DfT is correct to categorise the above four requests as manifestly unreasonable, by virtue of cost. Given the circumstances – the broad nature of the requests and the volume of material in which the requested information may be held – the Commissioner finds that DfT can rely on regulation 12(4)(b) to refuse to comply with requests 1.4, 1.5, 1.8 and 1.11.

Public interest in disclosing the information

83. The complainant disputes DfT's assertion in its internal review response that their clients' requests for information are '*essentially a matter of private interest rather than the information having any significant public*

value'. They say that although their clients are private businesses, this does not automatically mean that the information requested does not have significant public value. They argue that, on the contrary, the requested information relates to DfT's assessment and decision-making in relation to a major infrastructure project. It also relates to DfT's duty to ensure that Parliament, through the HS2 Committees, was provided with accurate and up-to-date information during the hybrid bill process, including when significant changes occurred or were envisaged.

84. DfT has acknowledged that there is a wider public interest in the HS2 as a whole and that disclosure would demonstrate the efficient use of public money in delivering HS2. In addition, DfT indicates that disclosure would hold Government to account over how it treats those people and businesses impacted by compulsory purchase for such projects deemed to be in the public interest such as, but not limited to, HS2. Finally, disclosing the information would demonstrate a wider Government commitment to transparency.

Public interest in maintaining the exception

85. In its response and review response DfT argued that the requested information is wide ranging and covers a significant number of documents. It said that staff would be diverted from their core duties to devote time to searching, extracting and reviewing all of the information in relation to the request.
86. DfT considered that to comply with the requests would place a substantial and disproportionate burden on DfT and would result in an unreasonable diversion of public resources. It said that there is a public interest in favour of ensuring that a public authority does not have to divert significant public resources. DfT concluded by noting that in her published guidance the Commissioner advises that a public authority must consider whether it is reasonable in all the circumstances to withhold the information requested in these requests. It confirmed that as the requests cover a wide range of documents, over a wide timeframe, and cover a broad remit, from a variety of sources, it considered it was likely that it would take over 50 hours of one person's time to identify, locate and extract the information requested. This would, according to DfT, place a substantial and disproportionate burden on its resources.

Balance of the public interest

87. The Commissioner takes account of the fact that regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure.

88. By DfT's estimation, which the Commissioner considers is reasonable and credible, it would take DfT 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 DfT being open and transparent has been met by DfT addressing the majority of the complainant's wider series of requests. DfT 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.
89. The underlying issue – the fact that the complainant's clients incurred certain costs during the period when they understood that their land was needed 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 DfT staff being diverted for at least four weeks. The Commissioner is satisfied that, in relation to requests 1.4, 1.5, 1.8 and 1.11 the public interest favours maintaining the exception under regulation 12(4)(b).

Regulation 9 – advice and assistance

90. 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.
91. 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.
92. 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.

93. With regard to its reliance on regulation 12(4)(b), in its response to the complainant of 13 November 2018, DfT explained that the request as framed caught a high volume of documents including a significant amount of email correspondence. It gave examples of the ways in which the complainant "*might consider*" narrowing the terms of the requests. These were by stipulating a short and narrowed timeframe or specifying categories of documents being sought, such as reports and signed letters, not emails.
94. The complainant considers that DfT was prescriptive in its suggestions as to how they might narrow their request, because it suggested that emails 'should' be excluded from the request. With regard to request 1.4, the complainant confirmed that they considered they were unable to narrow that request in the way the DfT suggested as their clients do not possess the information to enable such refinement.
95. The Commissioner has reviewed DfT's correspondence. She disagrees that DfT was prescriptive. She considers that the suggestions that DfT gave to the complainant were reasonable in the circumstances and notes that it advised the complainant that it might consider following either of the suggestions given, and did not suggest they should or must follow either suggestion. The Commissioner has decided that DfT did not breach regulation 9(1) in this case.

Regulation 12(5)(e) – commercial interests

96. 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.
97. DfT is relying on regulation 12(5)(e) to withhold information falling within the scope of parts 3 and 4 of request 3. Part 3 concerns information that DfT redacted from the overarching agreement it released in response to part 9 of request 1. Part 4 is for a technical agreement regarding the existing agreements that Heathrow Express possesses to access track and platforms in order to run the service. For ease, these two parts are as follows:
3. *Provide a copy of the following unredacted:*
- a. *Recital (I);*
 - b. *Paragraph (f) of the definition of "Franchise Conditions"; and*
 - c. *Schedule 3.*

4. *Provide a copy of the Deed of Waiver and Amendment dated 21 December 2007 [sic], referred to in the definition of "HS2 Deed of Waiver."*

98. 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?

99. 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.

100. DfT has provided the Commissioner with an unredacted version of the information question. With regard to part 3, it has explained what each of the elements it redacted under regulation 12(5)(e) is, and why it redacted those elements. It has done the same for the information requested in part 4. The Commissioner is satisfied that the overarching agreement between DfT, HAL and Heathrow Express to extend the Heathrow Express rail service – a redacted version of which it released to the complainant – is commercial in nature. It follows that the information redacted from this agreement is commercial in nature. The Commissioner is satisfied that the technical agreement requested in part 4 is also commercial in nature.

Is the information subject to confidentiality provided by law?

101. 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.

102. 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.

103. 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.
104. With regard to whether the information has been shared, in its submission to the Commissioner DfT says that the overarching agreement information is protected by the common law duty of confidence between the parties of agreement; indicating it has not been shared more widely than between those parties. In view of its position with regard to the commercial sensitivity of the technical agreement (discussed below), the Commissioner is satisfied that this agreement will not have been shared more widely.
105. Because of the above factors the Commissioner considers that a reasonable person who was provided with both parts of the requested 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?

106. In her related published guidance, the Commissioner advises that a commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent.
107. DfT has explained that Heathrow Express operates as an Open Access Operator of a service between Paddington station and Heathrow Airport. This means that it does not operate a franchised service on behalf of DfT but operates under authority granted to it by the Office of Rail and Road. Consequently, Heathrow Express is exposed to competition from other commercial bodies that a franchise operator might not be; not being eligible for any kind of revenue protection or having a DfT obligation to step in to operate the service.
108. In the case of Heathrow Express, this competition includes London Underground services, Transport for London Elizabeth Line services, bus services, private hire providers such as Uber and other private transport options. Heathrow Express also competes with transport providers

going to other airports as passengers will take account of the journey to the airport when deciding where to fly from. DfT says this is an unusual set of commercial pressures and makes for a competitive environment in which to operate. Finally, it has told the Commissioner that HAL is also owned by a publicly traded ownership group and any information that could negatively affect its ability to operate its own rail service could adversely impact its share price.

109. DfT has noted that it has released a redacted version of the Overarching Agreement between HAL, Heathrow Express and the Secretary of State for Transport. In its submission, DfT has explained its reasoning behind the redactions including those that are the subject of part 3 of the complainant's request. It says that releasing the 'Recitation 1' and 'Schedule 3' information would put into the public domain information associated with a particular obligation on Heathrow Express. It has explained why releasing this information would prejudice Heathrow Express's commercial interests but the Commissioner does not intend to reproduce this in this notice.

110. Similarly with 'Clause 1.1, definition of Franchise Conditions, sub clause (f)'. DfT has explained that this sub clause describes a particular restriction on Heathrow Express and has explained why releasing this information would prejudice Heathrow Expresses commercial interests.

111. With regard to the information requested in part 4 of the request, as above DfT has explained that this technical agreement concerns the existing agreements that Heathrow Express possesses to access track and platforms required to run the service. It says this access comes with certain industry standard rights and obligations. In this agreement, Heathrow Express waives certain of those rights as part of a wider set of agreements with HS2 Ltd over the interfaces between the HS2 project and the Heathrow Express service.

112. These access rights are, DfT says, an asset for Heathrow Express as they enable it to operate the service from which revenue is generated. Any reduction in the value of these access rights through, for example, waiving rights to seek compensation or object to disruptive works, reduces the value of the Heathrow Express service. DfT has explained to the Commissioner the nature of the waiver covered by this particular agreement.

113. DfT argues that disclosing this information to competitors would give them an opportunity to gain a commercial advantage during this period. It has explained why this would be the case but the Commissioner does not intend to detail this in this notice.

114. The Commissioner has considered DfT'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 Heathrow Express and HAL. This is because details about a particular obligation, restriction and waiver that Heathrow Express is subject to would become available to potential competitors.

Would the confidentiality be adversely affected by disclosure?

115. As the Commissioner has concluded that disclosure would adversely affect Heathrow Express'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

116. Since the four necessary conditions have been met the Commissioner is satisfied that DfT is entitled to rely on regulation 12(5)(e) to exempt the information requested in parts 3 and 4 from disclosure. She has gone on to consider the public interest arguments.

Public interest in releasing the information

117. The complainant's public interest argument is as above; namely that the request relates to DfT's assessment and decision-making in relation to a major infrastructure project. It also relates to DfT's duty to ensure that Parliament, through the HS2 Committees, was provided with accurate and up-to-date information during the hybrid bill process, including when significant changes occurred or were envisaged. As such there is a wider public interest in disclosing the requested information.

118. DfT again acknowledged that there is a wider public interest in the HS2 as a whole and that disclosure would demonstrate the efficient use of public money in delivering HS2. In addition, DfT indicates that disclosure would hold Government to account over how it treats those people and businesses impacted by compulsory purchase for such projects deemed to be in the public interest such as, but not limited to, HS2. Finally, disclosing the information would demonstrate a wider Government commitment to transparency.

Public interest in maintaining the exception

119. In its submission DfT has indicated that, for the reasons it has given as to why it is relying on regulation 12(5)(e), the balance of the public interest favours maintaining this exception.

Balance of the public interest

120. The Commissioner recognises the scale of the HS2 project and the public interest in it generally. As has been referred to with regard to the regulation 12(4)(b) exception, the Commissioner recognises too that the underlying issue – the fact that the complainant’s clients incurred certain costs during the period when they understood that their land was needed for the HS2 rail project – is clearly important to the complainant and their client. But again, in the Commissioner’s view, it is not of such wider importance that it justifies adversely affecting the commercial interests of third parties associated with the HS2 project. In addition, the complainant has indicated that the focus of their concern is the fact that their clients incurred certain costs during the period when they understood that their land was needed for the HS2 rail project. In the Commissioner’s view the information being withheld under regulation 12(5)(e) is not likely to shed any light on that particular matter.
121. The Commissioner considers that the wider public interest that exists in DfT being open and transparent about the HS2 project has been met through the information it has released in response to the requests in this case. With regard to the arguments that the complainant has presented, the Commissioner considers that there are processes in place – such as the HS2 Select Committee - that will review and monitor the project, including aspects such as decision-making, information-sharing and how the project manages those bodies affected by the project.
122. The Commissioner is satisfied on this occasion that there is a stronger public interest in DfT withholding the requested information. This is to enable the HS2 project to be delivered as effectively and efficiently as possible by having strong and productive relationships with those with whom DfT and HS2 Ltd are working.
123. To summarise, the Commissioner has decided that DfT can rely on regulation 12(5)(e) to withhold the information requested in parts 3 and 4 of request 3 as disclosure would adversely affect the commercial interests of third parties. She finds that the balance of the public interest favours maintaining this exception.

Regulation 11 – representations and reconsideration

124. Under regulation 11(1) an applicant can request that the public authority reconsider its response to their request ie request an internal review.
125. 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.

126. In this case, the complainant requested a review of DfT's response to their first series of requests on 11 December 2018 and received two review decisions on 8 February 2019. Taking account of the Bank Holidays over the Christmas period, DfT provided a review within 40 working days and therefore did not breach regulation 11(4) in terms of that review.

Regulation 14 – refusal to disclose information

127. 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.

128. 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

129. 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.

130. The complainant submitted requests 1.10 and 1.11 on 16 October 2018 and request 2.1 on 11 December 2018. With regard to requests 1.10 and 1.11, in its response of 13 November and internal review of 8 February 2019, DfT indicated that it does not hold information relevant to these parts but did not refer to the regulation 12(4)(a) exception. It has subsequently relied on regulation 12(4)(b) with regard to request 1.11. With regard to request 2.1, DfT did not provide the complainant with a refusal of this request.

131. The Commissioner finds that DfT did not refer to regulation 12(4)(a) with regard to request 1.10 and has not communicated to the complainant its reliance on regulation 12(4)(b) with regard to request 1.11 or its reliance on regulation 12(4)(a) with regard to request 2.1.

132. DfT's refusal of these requests therefore did not comply with the requirements of regulation 14(1).

Right of appeal

133. 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

134. 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.

135. 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