

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

Decision notice

Date: 21 November 2019

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

Decision (including any steps ordered)

1. The complainant has requested information showing that HS2 Limited (HS2) is aware of the reduction in forecast of GDP and has made this known to the Department for Transport (DfT) and what updates it has made as a result of this. HS2 identified a report intended to advise the DfT of this and withheld the information under section 36 of the FOIA.
2. The Commissioner considers the information should have been considered under the EIR as it is environmental information and as such HS2 applied the regulation 12(4)(d) and 12(4)(e) exceptions to withhold the report.
3. The Commissioner's decision is that HS2 has incorrectly engaged regulation 12(4)(e) but has correctly engaged regulation 12(4)(d) but that the public interest favours disclosing the information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 18 January 2019 the complainant made a request to HS2 in the following terms:

"If in the next few years productivity continues at recent levels and the OBR decide to reduce their long term growth forecast to a more prudent and defensible 1% per year (about 5 times higher than the average productivity growth since 2007) then the benefits of HS2 reduce to about £50bn resulting in the project giving a loss to the nation of about £32bn.

Given this, but acknowledging that my analysis maybe incorrect, please will you provide recent information that shows that HS2 Ltd are aware of this risk and their quantification of the level of benefit reduction that results from the changes in GDP and productivity forecasts since July 2017.

Please provide information that shows that HS2 Ltd has brought the issue to the attention of the DfT, the Treasury and the Cabinet Office. Please also provide information that shows what steps HS2 Ltd have taken in response to the OBR's warning about the uncertainty of their productivity forecast and what level of further downside risk HS2 Ltd are taking into account in their analysis?"

7. HS2 responded on 15 February 2019 providing links to several documents. The complainant requested an internal review of this decision on 16 February 2019. He stated HS2 had not answered his request and asked HS2 to confirm if it had carried out an assessment of the changes since July 2017 and briefed Ministers.
8. An internal review was conducted and a response sent to the complainant on 7 April 2019. HS2 considered it had already stated that it had informally liaised with the Department for Transport (DfT) to provide economic case advice but acknowledged it did not address the request to be provided with the analyses. HS2 confirmed these were held but considered this information exempt from disclosure on the basis of section 36 of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner following the internal review on 11 May 2019 to complain about the way his request for information had been handled.

10. The complainant raised concerns, not only with the decision to refuse to disclose the information but also as to whether the request had been considered under the correct legislation or should have been considered under the EIR.
11. During the course of the Commissioner's investigation, HS2 stated if the request were to be considered under the EIR it would apply regulation 12(4)(d) and regulation 12(4)(e).
12. The Commissioner considers the scope of her investigation to be to determine if HS2 should have considered the request under the FOIA or the EIR and whether HS2 was correct to rely on the exemptions/exceptions that have been applied to the withheld information.

Reasons for decision

Is the information environmental?

13. Regulation 2(c) of the EIR defines environmental information as "measures ... such as policies, legislation, plans, programmes ... and activities affecting or likely to affect" the state of the elements of the environment.
14. The information in this case is a Step-Through Report. This Report evidences the provision and updating of economic advice by HS2 to the DfT based on the latest available data at the time.
15. HS2 has argued that the information is too far removed from any effect on the environment.
16. In *Crane v The Information Commissioner and The Department for Transport* EA/2016/0087 and EA/2016/0088¹, the Tribunal recognised that, "We follow the Upper Tribunal's reasoning in *The Department for Energy and Climate Change v The Information Commissioner and H* [2015] UKUT 0671 (AAC) and take the view that there is sufficiently close connection between the withheld information and the overall HS2 project for us to look beyond the precise issue with which the disputed information is concerned and to have regard to the "bigger picture". We

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1939/Dept%20for%20Transport%20EA-2016-0087%20\(16.01.17\).PDF](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1939/Dept%20for%20Transport%20EA-2016-0087%20(16.01.17).PDF)

are satisfied that the HS2 project is a “measure” which affects or is likely to affect the elements and factors referred to in regulation 2(1) EIRs and that the documents breaking down the budget information into sub-categories is information on an integral, rather than an incidental aspect of that measure.”

17. The withheld information is made up of economic case advice to the DfT based on a range of demand forecast, including high and low GDP growth scenarios. This information clearly relates to a measure (the HS2 project) which will or will be likely to affect the environment.
18. The Commissioner does therefore consider that this information is environmental under regulation 2(c) of the EIR and this request should be considered under the EIR.

Regulation 12(4)(d)

19. Regulation 12(4)(d) of the EIR states that for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that – (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
20. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception. However, Regulation 12(4)(d) is a qualified exception so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
21. The fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion.
22. The requested information relates to the HS2 project. At the time of the request, the last set out of HS2 economics that had been published was in 2017. Decisions on whether Phase 1 should go ahead and whether Phase 2b should go before Parliament had not been made.

23. The explanatory memorandum to the EIR (COM/2000/0402)² states that “the Commissioner places great importance on public authorities being afforded safe space (thinking space) and drafting space when considering whether, and on what terms, a venture should be entered into.”
24. The Commissioner has issued guidance on this subject³. This states that:
- “The fact that the exception refers to both **material** in the course of completion and unfinished **documents** implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy.”*
25. The Commissioner does not accept that reports such as the one in this case can be said to be material in the course of completion as to accept this would be to accept that as long as the HS2 project is ongoing related information must be material in the course of completion. The Commissioner does accept that the exception can apply to information which is part of the policy making process. However, HS2 Ltd must be able to point to specific policies which are still being formulated and developed and demonstrate how the actual information relates to that policy. It is not enough to say that just because HS2 is an ongoing project with certain issues still to be resolved, the exception is engaged. In this case, the report does not appear to be part of the policy making process but is more concerned with the continuing implementation of existing policy.
26. However, whilst the information may not be material in the course of completion by virtue of it being part of an ongoing policy process, having viewed the withheld information the Commissioner notes the report is marked as being a draft and was sent to the DfT as an update with no intention of this being published until the final version was completed. In the Upper Tribunal case of *Highways England Company*

² <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52000PC0402&from=EN>

³

http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.ashx

*Ltd v Information Commissioner & Manisty [GIA/1589/2018]*⁴, Judge Jacobs found that:

"Similarly, the mere status of something as a draft alone does not automatically bring it under the exception. The words 'in the course of completion' suggest that the term refers to individual documents that are actively being worked on by the public authority. Once these documents are no longer in the 'course of completion' they may be released, even if they are still unfinished and even if the decision to which they pertain has not been resolved. 'In the course of completion' suggests that the document will have more work done on it within some reasonable time frame."

27. The Commissioner accepts the report is material still in the course of completion as it is clear the information is still an unfinished document. Whilst a draft can be a finished document, in this case it seems this was a working draft sent to the DfT as an update with no intention of this being published until the final version was completed. The document shows the revision history and demonstrates that the document has continued to be worked on during its lifecycle and that a final revision would be made for publication. The Commissioner is satisfied that the document was intended as a foundation for further discussion and the version of the report being considered here was material in the course of completion.
28. The Commissioner therefore considers that regulation 12(4)(d) of the EIR was correctly engaged.
29. As regulation 12(4)(d) EIR is subject to the public interest test, the Commissioner has gone on to consider the public interest factors in favour of disclosure and the public interest factors in favour of maintaining the exception.

Public interest arguments in favour of disclosure

30. HS2 has acknowledged that disclosing the information would facilitate a greater public understanding of the detailed economic analysis underlying the benefits and costs of a publicly funded project. Disclosure would therefore promote greater transparency and accountability and increase trust in HS2 Ltd.

⁴ <https://www.gov.uk/administrative-appeals-tribunal-decisions/highways-england-company-ltd-v-information-commissioner-and-henry-manisty-2018-ukut-423-aac>

31. The complainant argues that disclosure would enable public participation and scrutiny in decisions. The Office for Budget Responsibility (OBR) had provided economic forecasts in March 2017 and at the time of the request the most recent published set of HS2 economics had been published in July 2017 based on the OBR forecasts. The economics sensitivities indicated the sensitivity to reduced GDP growth assumptions might result in Phase 1 and all subsequent phases of HS2 becoming uneconomic. It was also in the public domain that the costs for the project were increasing significantly.
32. At the time of the request the OBR had revised their March 2017 forecasts downwards and the complainant considered the economic forecast would be reduced further as since 2009 the OBR had made corrections every year as actual growth continued to be below their predictions.
33. The complainant made his request in January 2019 following his analysis of the economic forecasts and concerns that the HS2 project may not proceed due to its economic viability. He argues that due to the continuing expenditure, disruption and environmental damage caused by the preliminary works and the lack of any updated published HS2 economics since July 2017 there was a need to see information on the impact of changes to the OBR forecasts to allow for effective public debates on the future plans for HS2.

Public interest arguments in favour of maintaining the exception

34. HS2 argues there is a strong public interest in ensuring that public officials have a safe space to work candidly and freely without being concerned that information could be released in a form where it is potentially misleading.
35. HS2 considers releasing information regarding economic analysis that is still under consideration would be likely to lead to confusion and ill-informed debate, misleading the public regarding the progress of the HS2 programme. HS2 notes that the information in question is speculative and would add little to public debate while disclosure into the public domain would misinform the public debate. There is strong public interest in ensuring that public authorities are given space to develop policies and make informed decisions, without concern that the public debate could be skewed by the early release of unfinished analyses.
36. It is also argued that disclosing information that is still under consideration would lead to the diversion of resources to explain issues and engage in public debate regarding matters that had not yet been decided.

Balance of the public interest arguments

37. The Commissioner gives weight to the general public interest in HS2 operating in an open and accountable manner. She considers that greater transparency leads to a better public understanding of particular issues and enables the public to assist in the decision making process where possible. The Commissioner also notes the significance and levels of public interest in any future decisions relating to HS2, including the overall environmental impact and cost to the public purse.
38. The Commissioner also recognises that HS2 does require a degree of safe space in which to engage with other parties, in this case the DfT, to analyse various scenarios. This type of exchange and advice-gathering does carry some need to be without undue scrutiny to preserve the quality of the advice and views being offered.
39. That being said, HS2 has placed the greatest emphasis on the argument that disclosing this information would be misleading and divert resources from its core functions to deal with attention the disclosure might generate. This is not an argument the Commissioner apportions more than a slight weight to – if the information would be misleading then the public authority can provide explanatory text to support the information and ensure it is clear but it is not for the Commissioner to be concerned with the accuracy or clarity of the information that is being considered for disclosure.
40. HS2 has not expanded further on the safe space arguments so it is not clear to the Commissioner how likely or extensive the impact of disclosing the report would be on the future free and frank advice that the DfT would provide to HS2 would be. Whilst the Commissioner can acknowledge there is some weight to be given to the general argument that a safe space is required without specific detail she also has to weight this against the fact that given the high profile, high budget nature of the HS2 project, advice on the economic impact of HS2 Phase 1 would continue to be asked for and provided regardless of disclosure. If this advice became more guarded or lessened in quality as a result of disclosure and prejudiced the project in any way this would of course not be in the public interest; however the Commissioner considers the likelihood of this to be low as the large scale nature of this project and the funding required is significant enough that those engaged in it would be unlikely to put this in jeopardy by providing lesser quality advice for fear of public scrutiny.
41. The Commissioner recognises there is a significant public interest in the HS2 project in general and more specifically in the budget and finances of the project. This is due to the publicly-funded nature of it and the media reports and speculation about the project going over budget. At

the time of the request it had been reported that HS2 was allegedly over-budget and its Chairman had resigned⁵. As pointed out by the complainant the last published set of HS2 economics was in July 2017 and there is therefore a strong argument for the disclosure of the report which shows that HS2 Ltd was seeking advice and updating its economic models as a result of the OBR's updated economic forecasts. This would provide the public with assurances that HS2 was considering the economic impact of Phase 1 following the OBR's revisions and was being fiscally responsible with a large-scale publicly funded project. This is a particularly strong argument given the lack of published economic information since July 2017 and the increased speculation at the time of the request about the over-spending on the HS2 project.

42. Taking all of this into account, and considering the presumption in favour of disclosure inherent when considering environmental information, the Commissioner finds on balance that the public interest arguments in favour of disclosure outweigh the public interest arguments in favour of maintaining the exception. Regulation 12(4)(d) EIR was therefore incorrectly applied in this case.
43. As regulation 12(4)(d) EIR was incorrectly applied to the withheld information in its entirety, the Commissioner has gone on to consider the application of regulation 12(4)(e) EIR in this case.

Regulation 12(4)(e) – internal communications

44. As the Commissioner has decided that the public interest lies in the disclosure of the information which is subject to regulation 12(4)(d) she has gone on to consider HS2's application of regulation 12(4)(e) to withhold the information.
45. Regulation 12(4)(e) of the EIR says that an authority may refuse to disclose information to the extent that the request involves disclosure of internal communications.
46. As the Commissioner notes in her published guidance on the application of regulation 12(4)(e), the term 'internal communications' is not defined in the EIR and is normally interpreted in a broad sense.

⁵ <https://www.theguardian.com/business/2018/dec/05/sir-terry-morgan-resigns-as-chairman-of-crossrail-and-hs2>

<https://www.theguardian.com/uk-news/2019/jan/13/hs2-may-run-fewer-slower-trains-to-stay-on-budget-and-schedule>

47. With regard to the term 'internal', the Commissioner notes in her guidance that "*..an 'internal' communication is a communication within one public authority.*".
48. With regard to 'communications', the guidance notes that "*the concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file...It will therefore include not only letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others.*"
49. The Commissioner is satisfied that as the report is produced by HS2 as an economic analysis it is a communication. However, the information was intended to be communicated outside of HS2 to the DfT. Whether it had been at the time of the request is not the issue, the information was intended to be communicated outside HS2 and therefore it cannot be said to be an 'internal' communication and as such the exception cannot be engaged.
50. The Commissioner therefore finds that HS2 has incorrectly applied the regulation 12(4)(e) exception to withhold the information.

Right of appeal

51. 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

52. 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.
53. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF