

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 June 2020

Public Authority: High Speed 2 ("HS2") Limited
Address: Two Snow Hill
Snow Hill Queensway
Birmingham
B4 6GA

Decision (including any steps ordered)

1. The complainant has requested the names of the parties that had entered into non-disclosure agreements ("NDAs") with HS2. HS2 refused to disclose the information citing section 36 (opinion of the qualified person), section 41 (confidential information) and section 40(2) personal information.
2. The Commissioner's decision is that section 41 is not engaged. Although the exemption at section 36 is engaged, the public interest favours disclosure of the requested information. The Commissioner has also found that personal information has been correctly withheld under section 40(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the names of the parties that signed NDAs, apart from the names of individuals that signed them in their personal capacity. Where an individual has signed on behalf of an organisation their name should be redacted, leaving only the organisation's name.

4. 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

5. On 21 May 2019 the complainant made his initial request for information under the FOIA as follows:

"Details of the 280 Non Disclosure Agreements signed by HS2 and are on its confidentiality register (as of date of the request)

May I request:

1: A breakdown of when the NDA's were signed, by year or preferably by month.

2: Details of how many NDA's were signed by third (i.e. external) parties and how many were signed by internal parties, (i.e. employees).

3: If internal, which departments have asked staff to sign NDA agreements

4: If external, what industry / sector does the external party predominantly work in."

6. HS2 responded late on 25 June 2019 and provided information relating to points one and two of the request. Point three was not applicable because it was stated that no NDAs had been signed by internal parties. It was also explained that HS2 did not hold the sectors that the external parties worked in but did hold the names of the parties.

7. On 25 June 2019 the complainant then requested the names of the parties:

"May I note that HS2 did not contact me with a query regarding part 4 of the request. If the sectors that the firms work in is not known, may I ask for this FOI to include the parties names in this [r]esponse as the alternative."

8. HS2 responded on 22 August 2019 (having written to the complainant on 23 July 2019 to extend the response timeframe in order to consider the public interest) and refused to provide most of the requested

information, citing section 36(2)(b)(ii) and 36(2)(c)(prejudice to the effective conduct of public affairs). However, the qualified person's opinion only cited section 36(2)(c). It did, however, provide a link to a response to a parliamentary question which contained the names of 31 local authorities that had been erroneously released in response to a previous freedom of information request.

9. The complainant requested an internal review on the same day.
10. HS2 provided an internal review on 13 October 2019 in which it maintained its original position regarding section 36 and also cited section 41 (information provided in confidence).
11. After the Commissioner wrote to HS2, it issued a revised response to the complainant, having discovered that there were some errors in the information it had previously provided. At the same time HS2 cited the exemption at section 40(2) because some of the information was third party personal information, the names of individuals.

Scope of the case

12. The complainant contacted the Commissioner on 14 October 2019 to complain about the way his request for information had been handled.
13. The Commissioner considers the scope of the case to be HS2's citing of section 36, section 41 and section 40(2) as a basis for not disclosing the withheld information.

Reasons for decision

Section 41 – information provided in confidence

14. Section 41(1) of FOIA provides that –

*"(a) Information is exempt information if it was obtained by the public authority from any other person (including another public authority); and,
(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person".*

15. The Commissioner's advice on section 41 states that *"information will be covered by Section 41 if -*

- *it was obtained by the authority from any other person,*
- *its disclosure would constitute a breach of confidence.*
- *a legal person could bring a court action for that breach of confidence, and*
- *that court action would be likely to succeed.”¹*

Was the information obtained from any other person?

16. Section 41(1)(a) states that the information must have been obtained from “*any other person*”.
17. The public authority quoted the Commissioner’s advice on section 41 as follows:

“...the exemption won’t cover information the authority has generated itself, although it may cover documents (or parts of documents) generated by the public authority if these record information provided in confidence by another person, for example:

- A transcript of the verbal testimony given by an employee at an internal disciplinary hearing.” (paragraph 13)
18. The Commissioner has considered whether the names of the external party signatories to an NDA “generated” by HS2 is confidential information. These are mutual confidential agreements (HS2 has provided the template document to the Commissioner) designed to provide confidentiality regarding whatever data is exchanged between HS2 and the third parties concerned. The Commissioner’s guidance describes a mutual contract as terms that are mutually agreed by the respective parties and not provided by one party to another. In the case of the mutual confidential agreement it is HS2 who is providing the terms of the agreement that is then signed by the third party concerned who appear to have equal responsibility to maintain that confidentiality. It is certainly not information provided by “*another person*” to HS2 although its purpose is to make any ensuing exchange of data confidential.

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

19. However, the request is solely for the names of the parties, not for the contents of the NDAs or the exchange of data following such an agreement. It is clear that the agreement has been drawn up by HS2 and the presence of a party name on the document does not mean that it has been provided by "another person" within the terms of the exemption. Consequently the Commissioner does not accept that the exemption is engaged. She has therefore not gone on consider the other factors that the guidance sets out in order to engage this exemption or considered whether there would be a public interest defence if the information was to be disclosed.

Section 36 – prejudice to the effective conduct of public affairs

20. Section 36 FOIA provides that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(b) would, or would be likely to, inhibit-

i. the free and frank provision of advice, or

ii. the free and frank exchange of views for the purposes of deliberation,

or (2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

21. HS2 in its response to the complainant applied sections 36(2)(b)(ii) and 36(2)(c) to the requested information. The internal review did not specify the limbs of section 36 it was relying on. Although the qualified person's opinion highlighted section 36(2)(c) alone, the Commissioner has accepted that she will include consideration of section 36(2)(b)(ii) in this decision notice because HS2's response to the Commissioner specified it and the public authority argued that the qualified person had inferred it in the contents of his opinion. Therefore the Commissioner accepts that these two limbs of section 36 were considered by the qualified person.

Section 36(2)(b)(ii) - inhibition to the free and frank exchange of views

22. Firstly, the Commissioner has looked at the application of section 36(2)(b)(ii).
23. The Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed that opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
24. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person in respect of HS2 is Mark Thurston who is Chief Executive. The Commissioner is satisfied that the Chief Executive who gave his opinion was the appropriate qualified person. The opinion of the qualified person was provided on 22 July 2019 in direct response to this request.
25. Although HS2 had stated that the prejudice would occur in its initial response to the complainant, the internal review and its response to the Commissioner, the qualified person was less categorical in his argument and did not specify whether the prejudice to the effective conduct of public affairs “would” or “would be likely” to occur if the requested information was disclosed. For that reason the Commissioner has taken the lower threshold – “would be likely” rather than the stronger evidential burden needed for “would”.
26. The Commissioner next needs to establish whether his opinion was reasonable.

Is the qualified person’s opinion reasonable?

27. The qualified person in relation to the exemption at section 36(2)(c) must give an opinion that the release of the requested information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
28. The Commissioner’s guidance² regarding the definition of “reasonable” is as follows:

“In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law...The most relevant definition of ‘reasonable’ in the Shorter Oxford English Dictionary is: “in accordance with reason; not

² <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."

29. In order to determine whether section 36(2)(b)(ii) is engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered the following factors -
 - Whether the prejudice relates to the specific subsection that has been cited, in this case 36(2)(b)(ii). If the prejudice or inhibition is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request.
 - The qualified person's knowledge of, or involvement in, the issue.
30. HS2 has set out in the response to the Commissioner its arguments as submitted to the qualified person. Firstly, it explained that confidentiality agreements preserve confidentiality when two or more parties exchange sensitive information. These agreements offer protection when parties want to share confidential or commercially sensitive information with each other but need to make sure it is not shared more widely.
31. The agreements are like a contract and are entered into by mutual consent that protect both parties to the agreement. HS2 regularly engages with organisations or individuals as the project develops. There is a need to share, for example, detailed design work at an early stage and third parties may share information with HS2 that they do not wish to be disclosed more widely. It is vital that the appropriate parties are consulted and have a chance to provide feedback so that the designs and eventual service are optimised within statutory and planning consents.
32. The qualified person gave the opinion that the agreement, though drafted together by the parties (rather than from one party to the disclosing party), is clearly afforded a level of confidentiality by both parties when they enter into it.
33. The qualified person's view is that it is vital that HS2 is able to exchange information with local authorities and other third parties in a full and frank manner.
34. The arguments put forward by HS2 and shown to the qualified person rely on free and frank views being exchanged in confidence which clearly relates to section 36(2)(b)(ii) and the overall arguments are largely focused on the NDAs and any information exchanged, rather than the information that was actually requested. However, the Commissioner's

guidance makes it clear that it is the processes that may be inhibited rather than what is contained in the information.

35. Therefore, despite the limited argument surrounding what had actually been requested in relation to how it would inhibit the "*free and frank exchange of views for the purposes of deliberation*", the Commissioner accepts that the qualified person's opinion is one a reasonable person could hold because releasing the names could be inhibiting, solely by disclosing that such agreements are in place. Consequently the exemption is engaged.

Public interest arguments

Public interest arguments in favour of maintaining the exemption

36. HS2 argues that releasing these details undermines the engagement process. The parties involved need to maintain trust and confidence in each other and in the process by which the information is shared so as to ensure a full and frank exchange of views in order to inform the detailed design of the HS2 project.
37. HS2's view is that its staff need a "safe space" to undertake development work and consult on that work with the relevant parties. They must be able to exchange information free from concern about inappropriate release. Release of the identity of the NDA names could undermine the confidence in the process by which HS2 engages with third parties and hamper the ability to appropriately exchange information, negatively impacting on the design process.
38. Such agreements during the planning phase are necessary to avoid placing homes and businesses in unnecessary blight, protect commercially sensitive information and protect the personal information of those potentially affected by any proposed changes. HS2 concluded that it would therefore be inappropriate to release the fact that any such agreements are in place.

Public interest arguments in favour of disclosure

39. HS2 has cited the general public interest in favour of greater transparency, visibility and accountability with regard to the progress of the HS2 programme. The public authority also recognises that transparency means that public bodies can be held to account for their decisions and use of funds.
40. Disclosure of this particular information would show which organisations HS2 had exchanged sensitive information with.

Balance of the public interest

41. The Commissioner's view is that it is reasonable to assume that many parties, such as local authorities that are accountable to the public, will have been consulted. The general public is both likely to assume that this is the case and expect that they will be able to have this confirmed. Parties not directly accountable for the use of public money are engaging with a public authority that is. Currently, even if they wish to do so, parties are unable to confirm that they have signed an NDA with HS2. In such an important matter as the building of a monumental infrastructure project affecting many members of the public, either directly or indirectly and using a very significant amount of public money, the public interest lies in knowing what parties have signed these NDAs. The Commissioner's opinion is nonetheless confined to the request for party names, excluding personal information.

Section 36(2)(c) – prejudice to the conduct of public affairs

42. Section 36(2)(c) contains the phrase "otherwise prejudice". In effect this means that it cannot be applied to a prejudice that would be covered by another exemption. In *McIntyre v Information Commissioner and the Ministry of Defence (EA/2007/0068, 4 February 2008)*, the Information Tribunal said at paragraph 25:

"We take a similar view to the Commissioner that this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure".³

43. It is the Commissioner's opinion that the arguments put forward by HS2 regarding section 36(2)(c) are not materially different from those put forward regarding section 36(2)(b)(ii). The Commissioner's view is that section 36(2)(b)(ii) is applicable to the withheld information and, as both limbs cannot apply at once if the prejudice is the same, section 36(2)(c) has not been considered.

³ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf> - paragraph 55

Section 40(2) – personal information

44. HS2 has withheld some of the requested information under section 40(2) because it considers it to be the personal data of third parties.
45. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
46. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
47. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
48. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

49. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

50. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
51. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

52. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
53. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information withheld is the names of individuals. This information identifies the individuals concerned, some of whom are private individuals acting in their own right and some as representatives of organisations. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
54. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
55. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

56. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

57. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
58. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

59. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
60. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such

interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”⁵.

61. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

62. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

63. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the

⁵ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

64. The complainant was not made aware by HS2 that there was any personal information contained in this information until a recent amended response where it was explained that there had been some errors in the figures previously provided and that the information also contained personal information. The complainant has told the Commissioner that his view is that this personal information should be released in line with the public interest in the release of all the parties who have signed NDAs with HS2.

Is disclosure necessary?

65. 'Necessary' means more than desirable but less than indispensable or of absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
66. HS2 acknowledges that there is a general legitimate public interest in openness and transparency regarding the names of the individuals and organisations that HS2 Ltd has interacted with. The public authority accepts that disclosure would increase public understanding of the work that it does and, more generally, the development of HS2.
67. However, HS2 does not consider it necessary in any of these cases to disclose the name of the individual concerned to gain an understanding of how HS2 interacts with people regarding the line of route, or to ensure that they are dealt with appropriately. The public authority explains that the independent HS2 Construction Commissioner mediates in unresolved disputes between the project and individuals or bodies. The Construction Commissioner reports on his activities and these reports are available online.⁶
68. The Commissioner's view regarding the disclosure of names can depend on seniority. It is reasonable to assume that individuals signing on behalf of an organisation are likely to be in a senior position and might

⁶ <https://www.gov.uk/government/collections/hs2-independent-construction-commissioner#construction-commissioner-reports>

reasonably anticipate the potential disclosure of their name in response to an information request. However, the Commissioner has concluded that the disclosure of the names of the representatives/those acting on behalf of organisations is not necessary to meet the legitimate interest in disclosure because that interest can be met by the disclosure of the names of the organisations themselves.

69. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure regarding those individuals signing on behalf of an organisation, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
70. However, she has gone on to consider the balancing test in relation to the names of private individuals that have been withheld. Whilst there is a more compelling reason not to disclose these names, it is not possible to make the same argument because there is no other way to meet the legitimate interest of the complainant.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

71. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
72. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
73. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

74. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
75. Although the Commissioner accepted earlier in this decision notice that the names of parties that are not personal data should be disclosed, she does not accept that ordinary individuals would have any expectation that their names would be released, given the confidentiality implied by the NDAs they signed. Despite the fact that the NDAs mention the possibility of an information request being made and that HS2 has obligations under the legislation, it is likely that an individual might envisage the contents of the the NDAs potentially being disclosed but not their names.
76. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
77. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
78. The Commissioner has therefore decided that HS2 was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

79. 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

80. 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.

81. 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
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