

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 09 March 2020

Public Authority: High Speed Two Limited

Address: Two Snowhill
Snow Hill Queensway
Birmingham
B4 6GA

Decision (including any steps ordered)

1. The complainant has requested information, plans and reports relating to the approach and throat section to the North-West of Euston Station. High Speed Two Limited (HS2) initially responded that there was no information for some parts of the request and applied Regulation 12(5)(d), material which is still in the course of completion, to the remaining parts of the request. During the course of the investigation, it applied Regulation 12(4)(b) (manifestly unreasonable) to the remaining parts of the request.
2. The Commissioner's decision is that Regulation 12(4)(b) (manifestly unreasonable) does apply to the information and the public interest favoured maintaining this exception. The Commissioner also found a breach of regulation 14(2). The Commissioner does not require HS2 to take any steps.

Request and response

3. On 7 December 2018 the complainant requested the following information:
 - 1. The date by which the finalised plans for the approach and throat section to the North-West of Euston Station will be published.*
 - 2. Any documentation or reports that progressively review the emerging design against the environmental statement to ascertain whether any new significant adverse effects arise from the new plan.*
 - 3. Documentation or reports assessing the risk of the current designs and proposing measures to mitigate those risks.*

4. Documentation or reports documenting proportionality assessments undertaken with regards to the potential infringements of Art 8 and Art1P1 caused by a collapse in the tunnels or retaining wall by Park Village East.

5. The independent reports referred to by Rob Carr at the ECRG in May 2018 that analyse the viability of the latest plans.

6. A copy of the assessment report regarding the ground settlement effects on [address redacted] as a result of the latest plans, requested in line with paragraph 4.18 of the HS2 Information Paper on Ground Settlement.'

4. On 9 January 2019 HS2 stated that it would need more time to consider the balance of the public interest with respect to regulation 12(4)(d) (Material in the course of completion, unfinished documents and incomplete data) for Q2, Q3 and Q5. It provided the following responses to Q1, Q4 and Q6.

- For Q1 it stated *'HS2 Ltd does not hold information on a specific date by which the finalised plans for the approach and throat section to the North-West of Euston Station will be published. However it is currently anticipated the submission of the plans for planning approval under Schedule 17 HS2 Act will take place before the end of 2019. Detail Design is anticipated to develop (depending on consent schedule and construction schedule) through until late 2020.'*
- For Q4 it stated *'there are no documents specifically addressing the implications for Article 8 and Article 1P1 (of the European Convention on Human Rights) of a collapse in the tunnels or retaining wall. However, DfT and HS2 Ltd remain committed to honouring all lawful obligations, including those under the Convention.'*
- For Q6 it stated *'no data are held. There is no assessment report for [redacted address].'*

5. On 13 February 2019 HS2 confirmed that no information was held for Q1, Q4 and Q6. It provided links to publicly available information for Q2 and stated *'any other information is part of an ongoing decision making and design process and is likely to be subject to change as the scheme develops'* and cited Regulation 12(4)(d).

6. For Q3, it stated *'this information is part of an ongoing decision making and design process'* and cited Regulation 12(4)(d).

7. For Q5 it stated *'the document referred to was an independent opinion on geotechnical aspects of the plans'* and cited Regulation 12(4)(d) as this document is part of an ongoing decision making and design process.

8. The complainant requested an internal review on 3 April 2019. She argued:
 -the only information you give which relates directly to HS2 as it is due to be built here is in your answer to question 1....
 -it does not describe in any way the environmental impacts the current 'March 2017' Euston Approaches design will have on me....
 - HS2 Ltd cannot suppose that I am not extremely anxious about the effects of the March 2017 design on me, my family and my home.
9. HS2 sent the outcome of its internal review on 17 June 2019. It stated '*I appreciate that you, as are others in the immediate vicinity, are anxious about the impact this aspect of HS2 may have on where you live. However, I have reviewed the decision to withhold the information under Regulation 12(4)(d) EIR – materials in the course of completion, unfinished documents and incomplete data...and uphold the decision provided in the original response.*'
10. On 8 July 2019 the complainant wrote to the Commissioner.

Scope of the case

11. The complainant contacted the Commissioner on 8 July 2019 to complain about the way her request for information had been handled.
12. The Commissioner considered the scope of the case to be whether HS2 handled the request in accordance with the EIR. Specifically, whether HS2 was entitled to rely on the exception under Regulation 12(5)(d) material in the course of completion as a basis for refusing to provide the withheld information at Q2, Q3 and Q5.
13. However, during the course of the Commissioner's investigation HS2 reconsidered its position and informed the complainant that it had now applied Regulation 12(4)(b) (manifestly unreasonable) to the remaining 3 parts of the request. It explained that searches for Q2 and Q3 alone of the request returned 500 documents, about 20,000 pages of information.
14. In response to the Commissioner's letter the complainant confirmed that she wished to continue with the complaint and would not, at this time, submit a refined FOIA request.
15. The Commissioner has considered whether HS2 has correctly applied Regulation 12(4)(b) to refuse to provide the withheld information at Q2, Q3 and Q5.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

16. Regulation 12(4)(b) of EIR states that:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(b)the request for information is manifestly unreasonable;”

17. HS2’s position is that the request is manifestly unreasonable on the grounds that to comply with it would impose a significant burden on HS2’s resources, in terms of time and cost. To be clear, HS2 has not stated that the complainant is herself manifestly unreasonable: *‘it is the burden of processing the FOIA request that is manifestly unreasonable, because of the sheer scale of the task, not [redacted name] herself’*.

18. The EIR differ from the Freedom of Information Act 2000 (FOIA) in that there is no specific cost limit set for the amount of work required by an authority to respond to a request, as that provided by section 12 of the FOIA.

19. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) which apply in relation to section 12 of the FOIA are not directly relevant to the EIR. However, the Commissioner accepts that the Fees Regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request, but they are not a determining factor in assessing whether the exception applies.

20. Another clear difference is that under the EIR a public authority can take into account the time and cost involved in redacting exempt information. Whereas under FOIA this is not a permissible task when considering section 12 and the Fees Regulations.

21. Regulation 12(4)(b) sets a robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is “manifestly” unreasonable, rather than simply being “unreasonable”. The Commissioner considers that the term “manifestly” means that there must be an obvious or clear quality to the identified unreasonableness.

22. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information. This was confirmed by the First-tier Tribunal in the hearing of the Department of Business Enterprise and Regulatory Reform v The Information Commissioner and Platform (EA/2008/0097). The tribunal

considered the relevance of regulation 7(1) and commented as follows (paragraph 39):

"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be 'to the widest extent possible'. Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."

23. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:
- Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services.
 - The nature of the request and any wider value in the requested information being made publicly available.
 - The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
 - The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
 - The presumption in favour of disclosure under Regulation 12(2).
24. HS2 explained that the original search for information was deficient, as the information held by contractors on behalf of HS2 was not considered:
- 'this was an oversight and we apologise. When the request was considered afresh in January 2020 it became clear that there was a large amount of information held on our behalf that was relevant to this request. We therefore applied Regulation 12(4)(b) of the Environmental Information Regulations.'*
25. HS2 argued that the scope for activities that may be considered under regulation 12(4)(b) is broader than those set out in the Fees

Regulations; a fact supported by the Commissioner's guidance on regulation 12(4)(b)¹. HS2 therefore argued that it was appropriate to include the additional activities of reviewing the located information to determine if it may be disclosed or if exceptions apply could be factored in when considering the burden to HS2 in complying.

26. HS2 considered the requests Q2 and Q3 to be broad in nature (any documentation or reports *'that progressively review the emerging design'* and any documentation or reports *'assessing the risk of the current designs'*) and the search for documents uncovered 497 documents (18080 pages). *'An attempt was made to focus the request on only the key documents relevant to the request. Even this narrowed search uncovered 71 documents (2796 pages)'*
27. HS2 stated that each document would need to be manually examined in order to determine whether any of the following Regulations were applicable to any of the information in each document:
 - Regulation 12(4)(d): Materials in the course of completion, unfinished documents and incomplete data
 - Regulation 12(5)(a): International relations, defence, national security or public safety
 - Regulation 13: Personal information
28. HS2 added that *'other exemptions may apply to this information but without an examination of each document it is not possible to say. It is worth noting that, due to nature of the documents, any material that would need to be withheld cannot be easily distinguished from material that could be released (with respect to 12(4)(d) and 12(5)(a)).'*
29. HS2 calculated that at 5 minutes per page, a manual examination of the 497 documents with 18080 pages would take 1,506 hours. (Or 233 hours to examine the focused search of 71 documents with 2796 pages.)
30. HS2 provided the Commissioner with detailed submissions in regard to the detrimental impact complying with the request would have. It focused on the diversion of resources from normal business activities that would occur and the impact this would have on contractors and HS2 staff:

¹ <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

'Once the contractors and HS2 Ltd staff had prepared for release, the information would need to be reviewed by the FOI unit to ensure that all exempt material was removed. Given the highly technical nature of the information it is certain that the FOI unit would need to liaise with the business area and contractor to ensure that the information was properly understood and that the Regulations had been applied appropriately.'

31. The Commissioner has been provided with a small sample of 113 pages from the withheld information. The 2 documents contain detailed information on possible designs and mitigation measures for the relevant areas. She accepts that the sample contains technical information for which the HS2 FOI unit would need to liaise with the business areas to apply the Regulations.
32. HS2 explained that *'there is no 'final' design at this time and the designs are developed on an ongoing basis and will continue to be developed until the detail design is complete for all the assets. The information, therefore, relates to policy development advice and proposals that are still in the course of completion and as such the information will be subject to change as the development of the design continues.'*
33. The Commissioner has previously accepted that documents that appear to be complete in themselves can be part of material which is still in the course of completion (see FER0848129 and our guidance https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf). The Commissioner notes that the provided samples have had 2 and 3 revisions in 2018.
34. HS2 stated that *'releasing the documents at this time and in their present form would present an inchoate picture to the public which, in turn, would misinform and distract debate...HS2 need the opportunity to consider all available options (the "safe space")...Releasing information too early could discourage public officials from such a free and frank discussion of all available options and would therefore be detrimental to the decision-making process.'*
35. HS2 also provided the Commissioner with arguments to support the likelihood of the need to consider the Regulations 12(5)(a) and 13 when reviewing the requested documents for disclosure. Therefore it was clear to HS2 that collating and reviewing the information for all the information requested would take HS2 staff and their contractors away from their work.
36. The Commissioner acknowledges that HS2 has provided thorough and detailed explanations regarding the potential burden to HS2 and their contractors would be put under if they complied with the request.

Certainly, there are strong arguments for the amount of time it would take HS2 staff and contractors to review the documents.

37. Similarly, there is a clear burden on the Freedom of Information team. That being said, the FOI team at HS2 would not be diverted from their day to day activities as this is expected of them but there is a case for saying they would be under extra pressure and this may divert them from dealing with other requests within the statutory timeframes.
38. HS2 has demonstrated that compliance would take over 1500 or 233 hours. The Commissioner considers this is sufficient to demonstrate that complying with the complainant's request is manifestly unreasonable and that regulation 12(4)(b) of the EIR applies. The Commissioner wishes to make the point that even if the estimate is excessive and the estimated average time per page is reduced from 5 minutes to one minute (300 hours or 46 hours) there would still be a significant burden and diversion of resources which would still be considered manifestly unreasonable.
39. Therefore the Commissioner accepts there is a burden that will occur if the request is complied with.

The public interest test

40. Regulation 12(4)(b) is a qualified exception and is therefore subject to the public interest test at regulation 12(1)(b) which states that information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

41. The complainant lives alongside the proposed railway line and so the requested information is directly relevant to her as she argues that *'their construction design...shows every sign of causing serious damage to my house.'*
42. HS2 acknowledges that there is a public interest in openness and transparency. Disclosing the relevant correspondence and information behind a decision will enable the public to understand the decisions made and the reasons for those decisions.

Public interest in maintaining the exception

43. Regulation 12(4)(b) applies to the request and not the requestor. HS2 recognised that the complainant is directly affected by the work in this area: *'however, requests are considered 'applicant blind' and a release of information through the Regulations is considered a release to the*

world... and therefore it is the general public interest which has been considered in this instance.'

44. HS2 stated that *'while there is always a public interest in releasing information that is in the best interests of society, it is not clear what the wider public interest is for searching for this very specific information. Information on design is shared at public engagement events generally, and where relevant, appropriate information will need to be shared with the planning authority to obtain Schedule 17 consents. These processes satisfy the public interest in ensuring that information is shared with affected parties and that the project is undertaken appropriately.'*
45. HS2 argued that as a publicly-funded organisation it is important it exercises tight control of expenditure and resources: *'it is in the public interest that all HS2 Ltd funding is appropriately managed. Identifying all documents that are relevant to this request has already taken a significant amount of time and effort. To prepare for release HS2 Ltd staff would have to be diverted from their core duties in order to devote time on searching, extracting and reviewing all of the information held in relation to the request.'*
46. HS2 also argued that it is in the public interest that public officials are allowed a thinking space in which to appraise and assess all available options and considerations before a decision is made: *'release of the information at this time would undermine the engagement process and consequently diminish the decision-making process.'*

Balance of the public interest arguments

47. With regard to the public interest in disclosure the Commissioner has taken into account the general public interest in transparency and accountability. She recognises the complainant's reasons for making the request as being legitimate and is mindful of the presumption in favour of disclosure.
48. However, balanced against this is the burden that would be imposed on HS2. The fact a request relates to a subject matter that is likely to have significant environmental implications is not reason in and of itself to put public authorities to a large effort in compliance where to do so would require significant public resources to be applied in order to fully comply with the request.
49. In this case the Commissioner agrees with HS2 that the public interest favours the maintenance of the exception. She considers the overwhelming and unreasonable burden compliance would cause HS2 outweighs any public interest factors in favour of disclosure. Disclosure would place a significant burden on HS2 and divert it away from its other functions and this is not in the wider interests of the public.

50. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

51. As covered above, in this case the Commissioner’s view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner’s decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Regulation 9 – advice and assistance

52. The application of regulation 12(4)(b) of the EIR triggers the duty to provide advice and assistance in accordance with regulation 9. This means that a public authority should assist the applicant in making a fresh, refined request which could be considered without being a burden in terms of cost so far as it is reasonable to do so. For example, a public authority could suggest narrowing the scope of the request to a particular topic or by timeframe. In some cases it will not be possible for a public authority to provide any advice and assistance of this nature. In these cases public authorities are still expected to inform the applicant of this and why.
53. The Commissioner acknowledges that, at a late stage, HS2 attempted to narrow the number of documents captured by the request by trying to identify only those documents which were most relevant, but this still identified many documents which would prove too burdensome to supply. In its correspondence to the complainant, HS2 was unable to suggest any practical way to narrow the request but was willing to explore ways with the complainant and to consider any refined request for specific aspects that were of interest to her.
54. The Commissioner noted that Q5 referred to a single document and the complainant argued that HS2 had not sent any of the requested documents. HS2 referred to the Commissioner’s guidance for section 12 of the FOIA, which is useful in this case (see paragraph 32 <https://ico.org.uk/media/for->

[organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf](#)):

'As a matter of good practice, public authorities should avoid providing the information found as a result of its searching and claiming section 12 for the remainder of the information. It is accepted that this is often done with the intention of being helpful but it ultimately denies the requestor the right to express a preference as to which part or parts of the request they may wish to receive which can be provided under the appropriate limit.'

55. The Commissioner does accept that, in some circumstances, it will not be possible to provide advice on what information could be provided within the cost limit. In addition, she accepts that HS2 did not disclose one particular document as the complainant has the right to state her preferences in a refined request. Therefore, the Commissioner considers that HS2 has complied with regulation 9 and provided appropriate advice and assistance to assist the complainant.

Regulation 14(2) – Refusal to disclose information

56. Regulation 14(2) specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.
57. In the circumstances of this case HS2 only applied the exception provided by regulation 12(4)(b) during the Commissioner's investigation. The Commissioner must therefore find a breach of regulation 14(2).

Other Matters

58. The Commissioner notes that HS2 accepts that the original search for information was deficient, as the information held by contractors on behalf of HS2 was not considered. The Commissioner is disappointed that HS2 failed to respond to this FOIA request as fully as possible as soon as possible.
59. Therefore, the Commissioner reminds HS2 that adequate searches must be made at every stage of the FOIA process. Given the explicit phrasing of the request, HS2 should have consulted its contractors at an earlier stage.
60. In the future, the Commissioner would remind HS2 to consider each FOIA request very carefully so that all possible information that is potentially within the scope of the request is identified and considered at the time of the first response to the complainant.

Right of appeal

61. 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

62. 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.
63. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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