

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

Date: 16 September 2021

Public Authority: High Speed Two Limited
Address: Two, Snowhill
Snow Hill
Queensway
Birmingham
B4 6GA

Decision (including any steps ordered)

1. The complainant requested details of a contractor's request to carry out soil translocation works. At various points, High Speed Two Limited ("HS2 Ltd") relied on Regulations 12(4)(a) (information not held), 12(4)(d) (material in the course of completion), 12(4)(e) (internal communications), 13 (third party personal data), 12(5)(a) (public safety) and 12(5)(e) (commercial interests) of the EIR. By the completion of the investigation it had withdrawn its reliance on the latter two exceptions.
2. The Commissioner's decision is that only some of the withheld information engages Regulation 12(4)(e), although where it does, the public interest favours disclosure. She finds that Regulation 12(4)(d) is only engaged in relation to some of the requested information and, where it is, the public interest favours maintaining the exception. Finally, the Commissioner considers that Regulation 13 has been incorrectly applied in a single instance. As HS2 Ltd failed to complete its internal review (reconsideration) within 40 working days it breached Regulation 11 of the EIR. Finally, HS2 Ltd also breached Regulation 14 of the EIR.
3. The Commissioner requires HS2 Ltd to take the following steps to ensure compliance with the legislation.

- Disclose, to the complainant, the information identified in the Confidential Annex to this notice.
4. HS2 Ltd 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 6 May 2020, the complainant wrote to HS2 Ltd to share broader concerns about its approach to ancient woodlands. As part of that correspondence, the complainant also requested information in the following terms:

"[1] please would you confirm, as is implied in your letter, that HS2 Limited has indeed agreed a "departure" from the Ecology Technical Standard in relation to the ancient woodland translocation works with the works contractor?"

"[2] Please would you also supply [the complainant] with copies of any correspondence and notes of any discussions between HS2 Limited and the works contractor regarding any such departure application, including HS2's assessment of why a departure was justified in the particular circumstances."

6. HS2 Ltd responded on 5 June 2020. It stated that it needed to extend the deadline for compliance by a further 20 working days, due to the volume and complexity of the requested information.
7. A substantive response was provided on 30 June 2020. HS2 Ltd stated that no departure had been agreed and therefore relied on Regulation 12(4)(a) to refuse element [1] of the request, because it held no relevant information. In respect of element [2], it relied on Regulations 12(4)(d), 12(4)(e), 12(5)(e) and 13 of the EIR respectively to withhold the requested information.
8. Following an internal review, HS2 Ltd wrote to the complainant on 16 October 2021. It maintained that it had been correct to rely on all the stated exceptions, but now considered that it was also entitled to rely on Regulation 12(5)(a) of the EIR to withhold the names of its contractors.

Scope of the case

9. The complainant contacted the Commissioner on 14 December 2020 to complain about the way the request for information had been handled.
10. During the course of the Commissioner's investigation, HS2 Ltd withdrew its reliance on Regulations 12(5)(e) and 12(5)(a), but it maintained that the remaining exceptions were engaged.
11. The Commissioner notes that the complainant has not raised an issue with HS2 Ltd's reliance on Regulation 13 and therefore she did not seek specific submissions on the matter. The Commissioner is broadly content with HS2 Ltd's use of the exception – except for one specific matter which is discussed below. The complainant has also not disputed that HS2 Ltd holds no information within the scope of element [1] of the request.
12. The Commissioner considers that the scope of her investigation is to determine the extent to which Regulations 12(4)(d) and 12(4)(e) of the EIR are engaged and, where they are engaged, where the balance of the public interest lies.

Reasons for decision

Is the requested information environmental?

13. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*

- (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
14. As it is information relating to the translocation of soil and the microorganisms contained within, the Commissioner believes that the requested information is information on a measure (translocation) affecting the elements of the environment (namely soil, landscape and biological diversity). For procedural reasons, she has therefore assessed this case under the EIR.

Regulation 12(4)(e) – internal communications

15. Regulation 12(4)(e) states:

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

(e) the request involves the disclosure of internal communications."

16. The Commissioner's public guidance on this exception¹ defines a communication as encompassing any information which someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
17. The EIR does not provide a definition of what is meant by 'internal'. However, the Commissioner's guidance provides clarification on the scenarios where communications can be defined as such. Such a scenario is where the communications have taken place solely within a public authority.

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

18. Regulation 12(4)(e) is a class based exception. This means that there is no requirement to consider the sensitivity of the information in order to engage the exception. However, the exception is subject to a public interest test under regulation 12(1)(b) of the EIR.
19. The withheld information can be separated into a number of distinct elements. Firstly, there is a chain of emails circulated between HS2 Ltd employees concerning a potential application from a contractor ("Chain A"). Next there is a chain, originating with a contractor, discussing drafting changes to the proposed application ("Chain B"). There is a draft memo setting out the terms of the application ("the Draft"), an email summarising the key points of a phone call ("Chain C") and a further memo providing advice to the contractor on its application ("the Advice"). The Advice appears to be an updated version of the Draft. Finally there is what appears to be a printout from an online form in which the contractor's application is formally recorded alongside the views from HS2 Ltd ("the Application").
20. HS2 Ltd argued that all of the withheld information represented internal communications – despite the fact that some of the information had been shared with (or originated from) its contractors.
21. In explaining why it had reached this view, HS2 Ltd relied on the judgement in *Thornton v Information Commissioner & HS2 Ltd* (EA/2018/0111), in which the Tribunal ruled that the relationship between the Department for Transport and HS2 Ltd was sufficiently close as to render correspondence passing between the two "internal communications" for the purpose of the EIR.
22. HS2 Ltd argued that the relationship it had with its contractors was analogous to its relationship with the DfT as set out in *Thornton*:

"Similarly, in terms of the work being carried out for the construction of the railway, there is a very close relationship between the HS2 works contractors and HS2 Ltd. HS2 Ltd exerts a great deal of control over the decision making in terms of how environmental protection, such as soil translocation, is carried out. By and large, HS2 Ltd dictates the terms under which this type of work is carried out, and indeed, whether such work is undertaken at all.

"Within this framework the HS2 works contractors cannot be considered an external contractor. It is important to note in this context that the HS2 works contractors are typically "joint ventures" of a number of suppliers that have been formed only for the purposes of supporting HS2 Ltd in building the railway.

"It is clear therefore that the HS2 works contractors are far from independent from HS2 Ltd and that the framework of decision-making means that information shared between them should be seen as not between a public authority and a third party but as internal communications. The Directive was not intended to create a false segregation between different structures of government."

The Commissioner's view

23. The Commissioner has previously set out in her decision notices why, despite the judgement in *Thornton*, she does not consider that the correspondence between HS2 Ltd and the DfT constitutes "internal communications"² and notes that, as a matter of law, *Thornton* does not constitute a binding precedent. However, the Commissioner considers that *Thornton* is, in any case, irrelevant to this request – as no correspondence with the DfT falls within the scope of the request. The focus here is on HS2 Ltd's relationship with its contractors.
24. HS2 Ltd is a company, created by the Government, to act as a vehicle for developing the HS2 project – a vast infrastructure project which will take years to come to fruition. When HS2 Ltd engages contractors it is asking the contractor to carry out a specific task (or set of tasks) over a specific time period, for a specific price and these terms are agreed, between the parties, in a contract.
25. The contractors whom HS2 Ltd chooses to engage are not owned by HS2 Ltd (or, at least, HS2 Ltd has not attempted to argue that they are), they are privately-owned companies with their own shareholders – to whom they are accountable.
26. The fact that some of the contractors may have set up special joint ventures for the purpose of seeking contracts with HS2 Ltd does not alter that position. Such joint ventures may be necessary to allow two separate companies to work together and share ideas, staff or materials – or to limit the liability of the contractors. HS2 Ltd does not own these joint ventures nor can it require companies to enter into them.
27. Therefore HS2 Ltd only exerts any control over its contractors through the terms and conditions of the contracts it enters into – and to which the contractors agree. If HS2 Ltd has entered into a contract with a particular company to build a bridge, but that contract does not specify

² See, for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617873/fs50854372.pdf>

or restrict the materials which must (or must not) be used, HS2 Ltd does not have the power to direct that company to use particular materials. HS2 Ltd may have the power to direct when and where soil translocation is carried out – but that power derives either from statute or from the contract that both parties agreed to be bound by, not because the contractor is obliged to follow each and every instruction they receive from HS2 Ltd.

28. The Commissioner is therefore satisfied that, whilst the relationship between HS2 Ltd and its contractors may be close, there is nothing to suggest that HS2 Ltd has merged or exerts sufficient day-to-day control over those contractors to the extent that its communications with them could reasonably be described as “internal.”
29. The logical extension of HS2 Ltd’s argument is that, if any of its contractors communicated directly with any government department, on any matter, that communication would be one which is “internal” – because the contractors are integrated with HS2 Ltd, which is itself integrated with the DfT and correspondence between government departments is specifically brought within the scope of the exception by Regulation 12(8). Such an interpretation does not fit with Recital 16 of the EU Directive, from which the EIR derive, which states that:

*“The right to information means that the disclosure of information should be the general rule and that public authorities should only be permitted to refuse a request for environmental information in specific and clearly defined cases. **Grounds for refusal should be interpreted in a restrictive way**, whereby the public interest served by disclosure should be weighed against the interest served by the refusal.”* [emphasis added]

30. The Commissioner therefore considers that once HS2 Ltd has shared information with its contractors, that information ceases to be an internal communication. With the exception of Chain A, she notes that all of the withheld information has been shared outside of HS2 Ltd and thus does not constitute internal communications.
31. It follows that Regulation 12(4)(e) of the EIR is only engaged in relation to Chain A.

Public interest test

32. Information that comprises an internal communication must still be disclosed under the EIR – unless the balance of the public interest favours withholding that information.

33. In explaining why the public interest should favour maintaining the exception, HS2 Ltd focused particular attention on the protection of the "private thinking space" that the exception is designed to protect:

"The release of internal deliberations would contribute to poorer and less auditable decision-making. HS2 Ltd and the Joint Ventures need the opportunity to consider all available options (the "safe space") when considering ecological works. This "safe space" is required to operate candidly and freely when developing policy and planning the measures that will affect the ecological work that HS2 Ltd undertakes.

"In order to ensure accurate and full analysis is undertaken, it is vital that analysts within HS2 Ltd have a safe space in which to develop ideas and experiment with scenarios. Release of internal deliberations at this time would restrict the future quality of advice by interfering with the process, ultimately undermining the quality of the analysis.

"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. It is in the public interest therefore that public officials are allowed a thinking space in which to appraise and assess all available options and considerations before a decision is made."

34. Reflecting on the importance of the work, HS2 Ltd also noted that:

"It is important that HS2 Ltd staff and the HS2 supply chain feel free to exchange information and debate scenarios in order to inform decisions which contribute to the ecological protection work surrounding the development of the railway. The Translocation of soil is an important aspect of this work and it is important that HS2 has the "safe space" to conduct ongoing ecological work free from concern about the need to justify and explain their work before it is entirely complete, and free from concern that their work might be undermined or distracted by debating evolving these elements in the public domain. Any restraint on the contemplation of scenarios would ultimately be to the detriment of the project.

"Soil translocation will be undertaken in a number of areas during the development the railway. The issue is therefore very much 'live'. The protection of ancient woodlands is a key aspect of the ecological work that HS2 Ltd is undertaking and is therefore highly sensitive. Release of this information would have a chilling effect on the free and frank exchange of views as the project develops."

35. The complainant did not provide the Commissioner with any public interest arguments when the complaint was submitted. However, the Commissioner notes that, when seeking an internal review, the complainant pointed to the lack of need for a "safe space" once a decision had been taken and the lack of weight usually given to "chilling effect" arguments.

The Commissioner's view

36. In the Commissioner's view, the balance of the public interest in this instance favours disclosure of this particular information.
37. As the complainant has pointed out, arguments about the need for a "safe space" in which to deliberate will only generally be relevant when the public authority is in the process of arriving at its decision. In some circumstances, the Commissioner accepts that the safe space may need to extend for a short time beyond the announcement of a decision, as the public authority decides how to communicate and explain that decision – but HS2 Ltd has not sought to argue that this is the case.
38. The withheld information (as a whole) makes clear that a decision had already been made at the point the request was responded to and therefore the Commissioner considers there was no longer a need to maintain a safe space.
39. Equally, the Commissioner can only afford limited weight to any "chilling effect" arguments. Public officials should be well aware that their correspondence is potentially vulnerable to an information request – particularly where the information involves decision-making in the environmental sphere. She nevertheless expects those officials to be candid and forthright in providing advice. They should not easily be deterred from expressing robust views.
40. HS2 is the largest infrastructure project undertaken by the UK government in a generation. There are competing views over the necessity of the project, but what is beyond question is that construction will have a considerable environmental impact along the line of route.
41. The current line of route would see the track cut through several sections of ancient woodland. HS2 Ltd has explained that:

"As part of an overall package of measures put forward to compensate for the loss of ancient woodland, HS2 Ltd offered to undertake ancient woodland Soil Translocation and to use these soils to support the creation of new habitats at suitable locations. HS2 Ltd's own specification (Ecology Technical Standard) describes the requirement for undertaking Soil Translocation, which includes a seasonal window for such works to be undertaken and completed."

42. HS2 Ltd went on to explain that:

"In a circumstance where an HS2 contractor wishes HS2 Ltd to consider the feasibility of undertaking works or processes that do not meet HS2 Ltd's requirement, an application is made by the contractor for a departure. HS2 Ltd considers such proposals and either authorises all or part of a departure or refuses the request."

43. The Commissioner considers that the process of translocation is one that appears considerable and which suggests that the unmitigated consequences of construction will also be considerable. The fact that exacting standards (ETS) have also been put in place to manage the process suggests that the consequences of not following those standards would, again, be considerable.
44. Taking that into consideration, the Commissioner therefore concludes that the decision as to whether or not to allow a contractor to depart from ETS when undertaking translocating activities is one with considerable consequences for the environment. It follows that there is a strong public interest in understanding the decision-making process that was followed – even if (as in this case) the decision was to refuse permission.
45. The Aarhus Convention (from which the EIR derive) sought to increase the public's access to environmental information so as to improve the ability of ordinary members of the public to participate in and challenge the process by which decisions with consequences for the environment are made. The information which HS2 Ltd is relying on Regulation 12(4)(e) to withhold reveals details of the process which the organisation followed and the factors it considered when arriving at its decision.
46. Furthermore, it appears to the Commissioner that this may have been the first occasion on which such a decision was made. Nothing in HS2 Ltd's submission or the withheld information references any earlier decision – so it appears that this decision may have formed a template or set a precedent against which future applications will be judged. If that is the case, that will further increase the public interest in understanding the process behind this particular decision. Even if it is not the case, the public interest in disclosure remains strong.
47. Whilst the Commissioner accepts HS2 Ltd's argument that there is an ongoing discussion about optimal methods for mitigating the effects of construction on ancient woodlands, she does not consider the fact that HS2 Ltd's approach may be revised in future to carry particular weight. It is possible that, when presented with a different set of facts, or in light of new legislation, research results, policy guidance or court

judgements, HS2 Ltd may decide that it needs to take a different approach from that which it took here. But that does not alter the fact that HS2 Ltd clearly felt sufficiently confident in its approach at the time to take the decision that it did. HS2 Ltd has not convinced the Commissioner that the prospect, at this stage, of it making a fundamental shift in its approach to soil translocation is anything more than speculative.

48. Finally, the Commissioner notes that the EIR contains a presumption in favour of disclosure. However, in this particular case, she considers that the public interest in disclosure already outweighs that in maintaining the exception.
49. The Commissioner therefore considers that, whilst Regulation 12(4)(e) is engaged in relation to Chain A, the balance of the public interest falls in favour of disclosure and therefore HS2 Ltd must disclose it, subject to redactions of personal data as described in the Confidential Annex.

Regulation 12(4)(d) – material in the course of completion

50. Regulation 12(4)(d) of the EIR states that 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

51. In its submission to the Commissioner, HS2 Ltd, argued that all the information was “material in the course of completion” because it:

“directly relates to the continuing development of policy and the process of making decisions regarding works and mitigation measures across the whole HS2 programme. ICO Guidance on Regulation 12(4)(d) states “If the process of formulating policy on the particular issue is still going on when the request is received, it may be that disclosure of drafts and unfinished documents at that stage would make it difficult to bring the process to a proper conclusion” (paragraph 15)

52. The EIR do not define what “material in the course of completion” actually is, but in *Highways England Ltd v Information Commissioner & Manisty* [2018] UKUT 423 (AAC), the Upper Tribunal laid down the following guidelines:

“The exception must, nevertheless, be applied restrictively. It must not be engaged so widely as to be incompatible with the restrictive approach required by EU law. But it must not be engaged so narrowly that it defeats its purpose of allowing public authorities to think in private.

"It is not engaged when a piece of work may fairly be said to be complete in itself. 'Piece of work' is a deliberately vague expression that can accommodate the various circumstances in which the exception has to be considered...The piece of work may form part of further work that is still in the course of preparation, but it does not itself require further development. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of a project to another? Another factor may be whether the authority is ready to go public about progress so far. The fact that the project, exercise or process is continuing may also be relevant, although this is probably always going to be a feature when a public authority is relying on this exception..."

"...The way that the public authority has treated the material is relevant but not decisive. A public authority cannot label its way out of its duty to disclose. A label like draft or preliminary thoughts may, or may not, reflect the reality. The scope of the exception depends on the substance, not the form in which the material is stored or presented."

53. With the exception of the Draft and Chain B – which will be discussed in more detail below – the Commissioner does not consider that the withheld information comprises material in the course of completion. To describe it as such requires going beyond the restrictive way in which the exception must be applied.
54. The Commissioner has already recognised that there is an ongoing conversation about the optimal method for mitigating damage to ancient woodlands and their soils. However, the information being withheld is focused on the decision to approve (or, as it turned out, not approve) the particular application for a soil translocation that would not be carried out according to ETS. That was a discrete decision and the preparatory work to inform that decision had been completed (and the decision made) at the point at which HS2 Ltd responded to the request. HS2 Ltd was not considering options for a decision it might take at some point in the future.
55. The withheld information does contain suggestions for possible future research, but it does not suggest that the decision that was taken requires any further supporting work or that there is a seamless link between one decision and the next.
56. It is to be expected that, as work progresses along the full extent of the line of route, HS2 Ltd will be faced with more decisions about soil translocation. It is equally to be expected that later decisions will feed

off the experience of earlier decisions and that HS2 Ltd will adapt its approach as more data become available. However, each decision will involve consideration of the particular facts that prevail at each site. Therefore it is not correct to describe the soil translocation question as one long drawn out process, but as a series of discrete decisions which will both evolve with the lessons learned from earlier decisions, but will also flex to fit individual circumstances. The withheld information relates to one such decision – not multiple.

57. The Commissioner therefore considers that all of the withheld information forms part of a particular piece of work which cannot reasonably be described as incomplete. She is therefore satisfied that, with the exception of the Draft and Chain B, none of this information engages Regulation 12(4)(d) of the EIR.
58. Whilst the Commissioner does not consider the Draft to be material in the course of completion, she does consider that it is an unfinished document.
59. The document in question is watermarked with the word "draft." Whilst, as the *Manisty* decision makes clear, such designations are not, in themselves, determinative, both the contents of the information itself and the contents of Chain B indicate that this was an early version of the Advice. Therefore the Advice is the "complete" version of this document.
60. The Commissioner is therefore prepared to accept that the Draft is an unfinished document and thus engages Regulation 12(4)(d) of the EIR.
61. Chain B also engages the exception, because it directly refers to the contents of the Draft and makes suggestions for revisions. It therefore "relates to" an unfinished document and thus also engages the exception.

Public interest test

62. Unfinished documents must still be disclosed under the EIR unless the balance of the public interest favours maintaining the exception.
63. Once again, HS2 Ltd drew the Commissioner's attention to the need to protect its own "internal thinking space." It also added that:

"In this case, the mitigation measures are still ongoing across the route. HS2 Ltd has been sharing information with the community when it is sufficiently progressed and finalised and will continue to do so. This is not the same as the general public being provided with internal discussions where policy and processes are in the process of being developed, debated and approved. Releasing the documents at this time and in their present form would present an

incomplete picture to the public which, in turn, would misinform and distract debate.

"The withheld information is technical and is, essentially, concerned with discussing options and policy. It is important that HS2 Ltd staff and the HS2 supply chain have the "safe space" to conduct ongoing development work free from concern about the need to justify and explain their work before it is complete and free from concern that their work might be undermined or distracted by debating evolving methodologies and data in public."

64. HS2 Ltd referred to the need to protect "inchoate" information from entering into the public domain and causing confusion. It argued that:

"In this instance while the process is ongoing and decision-making process in other locations is still incomplete it would be difficult to place the withheld information in full context or counteract any resulting confusion...In decision Notice FER0848129 the commissioner noted that, in terms of works on HS2 in a specific area, those specific works "are part of the wider transport project – the HS2 project – that has a great deal of wider public interest". However, the commissioner went on to state that, in that instance, "there is greater public interest in the ability of HS2 to be able to discuss, consider and plan the works in question without this process being frustrated through the release of the withheld information" (paragraph 37). In this case soil translocation will be undertaken in the future at various locations and it is 9 important that HS2 Ltd and its contractors can consider options without fear that early release will interfere with this process.

65. When taken as a whole, the Commissioner does not consider that the withheld information is "inchoate" or misleading. However, as she has found that the exception is not engaged in relation to most of the withheld information, she must confine her analysis to the particular information that engages the exception.
66. Given that she is ordering disclosure of Advice and the remainder of the withheld information, the Commissioner must consider whether disclosing an earlier version of that document may cause confusion. On balance, she considers that it would.
67. Having competing versions of a document in the public domain prevents a public authority from articulating a consistent message and diverts time and resources towards managing a PR issue. A public authority does also need to be afforded some protection for its internal thinking space.

68. The Commissioner has already set out her view of the balance of the public interest in respect of Chain A. Whilst those factors are also present in respect of Chain B and in respect of the Draft, they carry significantly less weight here. This is because the public interest lies in disclosure of the Advice, the Application, Chain A and Chain C. Once those documents have been placed into the public domain, the residual public interest in also having access to Chain B and the Draft falls considerably as they add very little to the understanding of the process by which HS2 Ltd arrived at its decision.
69. Therefore on the one hand, the public interest in favour of disclosure has been considerably weakened by disclosure of the other information, whilst, on the other hand, the public interest in favour of maintaining the exception is, in this case, stronger.
70. The Commissioner has considered the EIR's presumption in favour of disclosure, but this does not alter her view that the public interest in favour of maintaining this exception outweighs the public interest in disclosure.

Regulation 13 – personal data

71. In general, the Commissioner was content with HS2 Ltd's redactions of personal data – with one exception.
72. One of the emails in Chain A names a particular well-known celebrity "the Celebrity" and speculates about a particular course of action that that individual may take once the decision was announced – although it is not clear from the context how likely the author considered this action to be. HS2 Ltd has indicated to the Commissioner that it wishes to redact the name of the Celebrity.
73. The Commissioner did not seek submissions on this point as she was not aware of this issue until having been provided with the withheld information. Given the delays in processing this case, she considered that seeking further submissions would be disproportionate as she has sufficient expertise (as the regulator of data protection legislation) to reach a decision on her own.
74. By naming the Celebrity and offering an opinion about the action they might take, HS2 Ltd has created personal data relating to that individual.
75. The Commissioner considers that there is a legitimate interest in the public knowing the identity of the Celebrity as the particular email, whilst still coherent, makes less sense with this redaction. She also considers that the email implies that the Celebrity's potential actions played a (albeit small) part in HS2 Ltd's thinking on this matter.

Disclosure of the name is necessary to achieve this legitimate interest as there is no less intrusive means of meeting the interest.

76. Although the Commissioner recognises that the Celebrity is likely to be unaware that they have been referred to in such correspondence, she is not convinced that disclosure of their name is likely to cause them unwarranted damage or distress.
77. The Celebrity in question is a well-known figure with a well-documented interest in the matters being discussed in the withheld information. The Commissioner is also satisfied that there was a reasonable chance that the Celebrity would take the course of action envisaged and had previously done so publicly.
78. As the opinion does not appear to be based on any confidential information that the Celebrity had provided, the Commissioner is satisfied that they are unlikely to suffer reputational damage. Whilst disclosure may generate some press enquiries, she considers that the Celebrity is unlikely to be distressed by such enquiries given their public profile.
79. The Commissioner therefore requires HS2 Ltd to ensure that the Celebrity's name is included in Chain A, when it is disclosed.

Procedural Matters

Reconsideration (internal review)

80. Regulation 11 of the EIR states that:

- (1) *Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.*
- (2) *Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.*
- (3) *The public authority shall on receipt of the representations and free of charge—*
 - (a) *consider them and any supporting evidence produced by the applicant; and*
 - (b) *decide if it has complied with the requirement.*

- (4) *A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.*
- (5) *Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—*
- (a) the failure to comply;*
 - (b) the action the authority has decided to take to comply with the requirement; and*
 - (c) the period within which that action is to be taken.*
81. HS2 Ltd admitted to the Commissioner in its submission that, on this occasion, it had not communicated, to the complainant, the findings of its internal review until the 41st working day after the review had been requested. The Commissioner therefore records a breach of Regulation 11 of the EIR.

Refusal Notice

82. Regulation 14 of the EIR states that:

- (1) If a request for environmental 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 following provisions of this regulation.*
- (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.*
- (3) The refusal shall specify the reasons not to disclose the information requested, including—*
 - (a) any exception relied on under regulations 12(4), 12(5) or 13; and*
 - (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).*
- (4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.*
- (5) The refusal shall inform the applicant—*

- (a) that he may make representations to the public authority under regulation 11; and*
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.*

83. The Commissioner notes that HS2 Ltd cited different exceptions at various points during the lifecycle of the request – although she notes that the exceptions on which it eventually relied were cited in the original refusal notice.
84. However, the complainant also drew the Commissioner's attention to the requirements of Regulation 14(4) of the EIR and noted that HS2 Ltd had not set out when it expected the incomplete material to be completed.
85. The Commissioner is therefore obliged to record a breach of Regulation 14 in respect of this request. However, given her findings above, she does not consider it proportionate to order remedial steps.

Other matters

86. In a recent decision, the Upper Tribunal recognised the legitimacy of confidential annexes to decision notices but stressed the importance of minimising the amount of information annexes contain and, wherever possible, summarising their contents.
87. The Commissioner is issuing a confidential annex because, of necessity, identifying the relevant information within the bundle of withheld documents involves some references to material that has been withheld. In order to preserve a meaningful right of appeal for HS2 Ltd, those references must remain withheld. However, in the interests of openness, the Commissioner wishes to record that she is taking the following approach to the redaction of personal data.
88. HS2 Ltd may redact the names of all the officers and contractors.
89. HS2 Ltd may redact all specific contact information (eg. private lines, mobile or extension numbers) but not generic or corporate contact details. HS2 Ltd may redact the first half of email addresses (ie. the part that contains a name), but must leave the second part visible (ie. showing the organisation the individual works for).
90. HS2 Ltd may redact professional qualifications and job titles if it considers that such information could be used to identify the sender of an email.

Right of appeal

91. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

92. 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.
93. 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

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