

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

Decision notice

Date: 26 October 2022

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 from High Speed Two Ltd (HS2) to identify by address and postcode properties HS2 had acquired and subsequently resold, the dates of purchase, resale, whether any improvements had been carried out and their cost. HS2 asked for clarification and subsequently provided some information. It withheld some of the requested information under regulations 12(5)(a), 12(5)(b) and 13 of the EIR.
2. The Commissioner's decision is that HS2 has correctly cited regulation 13 of the EIR to withhold the requested information.
3. The Commissioner does not require any steps.

Request and response

4. On 13 September 2021, the complainant wrote to HS2 and requested information in the following terms:

"Further to [reference redacted] response, please would you:

1. Identify by address and/or postcode each of the 2 properties disclosed
2. Identify the date of purchase by HS2/DfT and the date of resale
3. Whether any improvements funded by HS2 were made to either property, and if so the amount."

5. This request had led from an earlier request on 21 July 2021:

"Please disclose if any properties acquired by HS2 have been resold, and if so the original acquisition price paid and the subsequent resale price for each and any property" (21 July 2021).

6. On 13 September 2021 HS2 asked for clarification as to what the complainant meant by "improvements" in question three.

7. On the same day the complainant responded as follows:

"Any financial payments made in respect of either property in Q1 and Q2 to repair or improve the fabric or structure of the building post acquisition by HS2. This does not include any security costs paid by HS2."

8. The response from HS2 was provided on 11 October 2021. Information relevant to part one was withheld under regulations 12(5)(a) (public safety), 12(5)(b)(the course of justice) and regulation 13 (third party personal data). HS2 provided information relating to part two (that the properties were purchased and resold between 2014 and 2020) but withheld the specific dates of purchase and resale under the same exceptions it had used for part one. Information relating to part three was provided.

9. The complainant requested an internal review on 12 October 2021.

10. On 9 November 2021 HS2 wrote to the complainant stating that it needed to extend the time it required for an internal review.

11. HS2 provided an internal review on 3 December 2022 that maintained its position with regard to parts one and two of the request. However, HS2 amended its response to part three, explaining that the figure

provided was inaccurate because it had included security costs. Alternative figures were provided to the complainant.

Scope of the case

12. The complainant contacted the Commissioner on 3 December 2021 to complain about the way their request for information had been handled. They stated that HS2 had used public risk as a cover to conceal the requested information relating to the sale of two properties originally purchased under a compulsory purchase order/need to sell.
13. The Commissioner considers the scope of this case to be HS2's citing of regulations 12(5)(a)(public safety), 12(5)(b)(the course of justice) and regulation 13 of the EIR.

Reasons for decision

Is the information environmental information for the purposes of the EIR?

14. 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);

(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);

15. The requested information relates to the HS2 project and the compulsory purchase of housing and any alterations made to those properties as a result. This is clearly part of a plan or programme affecting or likely to affect the state of the elements of the environment referred to in (a) and therefore falls under regulation 2(1)(c) of the EIR.

Regulation 13 personal data

16. Regulation 13(1) of the EIR 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 regulation 13(2A), 13(2B) or 13(3A) is satisfied.
17. In this case the relevant condition is contained in regulation 13(2A)(a)¹. 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 UK General Data Protection Regulation ('UK GDPR').
18. 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 regulation 13 of the EIR cannot apply.
19. 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?

20. Section 3(2) of the DPA defines personal data as:
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¹ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

“any information relating to an identified or identifiable living individual”.

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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 more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
23. 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.
24. HS2's view is that the requested information is the personal data of the individuals whose properties have been acquired by HS2 and then resold. Presumably, this includes the individuals buying the resold properties.
25. HS2 refers to the GDPR and the definition of personal data, as quoted in paragraphs 20-23 of this decision notice. It references the Commissioner's guidance, specifically [IC-120487-J6M5](#) and repeats this definition, arguing that the withheld information relates to the persons concerned and has these individuals as its main focus. It underpins its view by making reference to an earlier decision notice that followed the Tribunal's decision in the case of *England & L B of Bexley v Information Commissioner* (EA/2006/0060 & 0066):

“the Commissioner's established approach is that the addresses of private properties will constitute personal data, even without the corresponding disclosure of the names of their occupiers.”

26. HS2 notes that, although this refers to private properties it clearly references occupiers, and is therefore applicable in this circumstance. Regardless, it contends that the address where someone resides, or the fact that they owned and decided to sell a particular property is information that concerns them. It is location data and essentially where the data subjects have lived. It also says that the information relates to these individuals' decisions to sell their property to or purchase a property from HS2.
27. The information requested in part one of the request is personal data as it could lead to the identification of third-party individuals. The information requested in part two of the request would not be personal

data if it solely related to HS2 but the same dates relate to the selling or purchase of properties by third party individuals. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information also relates to third party individuals. He is satisfied that this information both relates to and could lead to the identification of the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

28. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
29. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

30. 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".

31. In the case of an EIR 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.
32. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

33. Article 6(1) of the UK 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.
34. 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"².

35. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, 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.
36. 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

37. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
38. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and
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² 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, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) 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".

commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

39. HS2 acknowledges that, "The public has a legitimate interest in knowing that public money has been spent appropriately."

Is disclosure necessary?

40. 'Necessary' means more than desirable but less than indispensable or 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 EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
41. HS2 contends that, "In this instance, there is no pressing social need which would necessitate release of the withheld information." It acknowledges the legitimate interest in transparency and stresses that the majority of the requested information has been provided to the requester. HS2 points out that it has disclosed the fact that two properties have been acquired by them, along with the original price paid on acquisition and the resale price. "Information about the amount spent on repairs or improvements to the fabric or structure of the buildings has also been provided." HS2 has only withheld the exact addresses, the dates of acquisition, and the date of resale for each property.
42. HS2 argued that there is already independent oversight of the process by which it acquires properties. HS2 reports to the Department for Transport regarding property acquisition and it is "monitored by the Residents Commissioner who oversees and monitors HS2 Ltd's commitments to residents and produces a periodic report³". HS2 is audited internally and externally by the National Audit Office⁴. It considers that these mechanisms serve the legitimate interests of the public and the principles of transparency and accountability without interfering with the rights of the third-party individuals.

³<https://www.gov.uk/government/collections/hs2-ltd-residentscommissioner>

⁴ <https://www.nao.org.uk/report/high-speed-two-a-progress-update>

43. The complainant explained to the Commissioner that the matter was serious to those who had had their properties compulsorily purchased and that this was the only way those people could obtain direct evidence to support their serious concerns. Their view is that not providing the addresses and/or postcodes obstructs the calculation of injurious affection⁵ caused by HS2. The complainant argues that the information would be publicly available from the Land Registry if the addresses were released and that the release of the information would pose no risk to the new owners of the two properties concerned.
44. The Commissioner considers that, from the point of view of the complainant, disclosure is necessary to meet their legitimate interests.

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

45. 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 EIR 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.
46. 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.
47. 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.

⁵ "Injurious affection" means that land and property is adversely affected by statutory schemes, causing a decrease in their market value.

48. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
49. HS2 argues that the information relates to the home and family life of those who sold their properties to HS2 and therefore relates to the individuals' private life. Its view is that it is reasonable for the public to expect their personal information to be treated appropriately and only processed in line with best practice, ICO guidance, and the relevant legislation. HS2 contends that it takes its responsibility to handle personal information appropriately and its duty to protect individual privacy rights. HS2 explains that it wants the public to have trust and confidence in HS2 that it will "only use personal information where appropriate and necessary".
50. HS2 contends that members of the public would not expect their identity released to the world at large when it could "invite the risk of harassment, verbal or physical abuse". The third-party individuals have also not been consulted. HS2 makes reference to the arguments it provided under regulations 12(5)(a) and 12(5)(b) and the confidential information it provided to support that view which it believes "would lead to these addresses or individuals concerned becoming the target of abusive and intimidatory behaviour by those opposed to the HS2 project". HS2's view is that if this behaviour were to ensue, it would cause unjustified distress to the individuals concerned.
51. The consequences of disclosure (verbal, physical abuse and harassment) HS2 argues are unnecessary and unjustified. There is no assumption of disclosure in the legitimate interests test and, whilst there is a clear public interest in public funds being spent appropriately, the release of the requested information is not necessary to satisfy this interest. The amount spent has been released and all that has been withheld is the address of the property and the dates of the transactions. The process has been subject to independent oversight. It is HS2's opinion that, "Disclosure would therefore have an excessive and disproportionate adverse effect on the legitimate interests of the individuals concerned" and that "the legitimate interest does not outweigh the interests and rights of the individual and there is no lawful basis for processing".
52. The Commissioner understands the complainant's desire to see the withheld information because they believe it will help the cause of those who have had their properties compulsorily purchased/purchased under the 'need to sell' scheme to make a calculation. He also acknowledges the complainant's view that the disclosure is unlikely to pose a risk to the individuals concerned.

53. However, the consequences of disclosure are an unknown factor, even if the Commissioner is not persuaded by HS2's views about the level of harm that might ensue. He accepts that the data subjects concerned would not anticipate or expect that their personal data connected with the sale and purchase of property to/from HS2 would mean that their address/postcode would be disclosed. From the postcode, it would be relatively easy to lead to the individuals' names, though the Commissioner recognises that this is not the objective of the complainant. He also recognises that the names of those who purchase houses and the price they pay is publicly available from the Land Registry but an address and postcode is required first. To provide the address and/or postcode, and dates of purchase and resale could then lead to the identification of the individuals concerned and their dealings with HS2. This could cause damage and distress to the individuals concerned who might reasonably not expect their decisions to sell or purchase in these specific circumstances to be identified in this way. The balance between their rights and freedoms and the legitimate interests of the complainant are not easy to determine. However, whilst accepting the complainant's view that it would aid them to make an important calculation and one that might well be of value to other affected individuals, he has had to take account of HS2's argument that the process is subject to independent oversight.
54. 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.
55. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

56. The Commissioner has therefore decided that HS2 was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).
57. As the Commissioner has decided that HS2 has correctly cited regulation 13(1) of the EIR, he has not gone on to consider regulations 12(5)(a) and 12(5)(b) of the EIR.

Right of appeal

58. 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

59. 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.
60. 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

Janine Gregory
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