

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

Date: 24 November 2022

Public Authority: High Speed Two Ltd
Address: Snow Hill
Queensway
Birmingham
B4 6GA

Decision (including any steps ordered)

1. The complainant has requested estimated completion dates for specific projects. The above public authority ("the public authority") disclosed some information and relied on regulation 12(4)(d) of the EIR (material in the course of completion) to withhold the remainder.
2. The Commissioner's decision is that regulation 12(4)(d) of the EIR is engaged but the balance of the public interest favours disclosure. The public authority breached regulation 5(2) as it disclosed information outside of the 20 working day timeframe.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 16 May 2022, the complainant wrote to the public authority and requested information in the following terms:

"I would be grateful if you could provide me with up to date progress information held by HS2 Ltd or its contractors on your civil engineering works and construction compound utilisation between the Burton Green tunnel and the River Blythe Bypass culvert.

"Specifically, please can you provide the actual or currently estimated start and finish dates for the key elements, including, but not limited to, the following items which have been identified in your earlier reports:

- Burton Green auto-transformer station base slab
- Burton Green auto-transformer station equipment
- Burton Green retaining structure and cutting
- Kenilworth Greenway realignment Burton Green to Waste Lane
- M186 accommodation overbridge
- B4101 Waste Lane overbridge
- Beechwood utility diversions
- Beechwood culvert
- Beechwood Farm accommodation underpass
- Beechwood embankment
- Truggist Hill Farm building demolition
- Carol Green utility diversions
- Lanscombe culvert
- Truggist Hill culvert
- Carol Green rail underbridge
- Footpath M191 accommodation underpass
- Kenilworth Greenway extension to Station Road
- Balsall Common viaduct
- Truggist Lane utility diversions
- Lavender Hall embankment
- Lavender Hall Lane overbridge
- Lavender Hall Lane realignment
- Park Lane realignment
- Park Lane Cutting
- A452-Park Lane roundabout
- Park Lane flood alleviation culverts
- Park Lane utility diversions
- Park Lane cutting
- Footpath M214 overbridge
- Footpath M215 accommodation green overbridge
- Bradnock auto-transformer station base slab

- Bradnock auto-transformer station equipment
- Sixteen Acre Wood utility diversions
- Bradnock auto-transformer station access road
- Sixteen Acre Wood embankment
- Marsh Farm viaduct
- Marsh Farm flood alleviation ponds
- Mercote Mill embankment
- Mercote Hall Lane (Bridleway M218) accommodation overbridge
- A452 utility diversions
- A452 Kenilworth Road realignment
- A452-Marsh Lane roundabout
- A452 Kenilworth Road overbridge
- Horn Brook cutting
- Blythe Bypass embankment
- River Blythe Bypass culvert
- Rail infrastructure and systems works in the subject area
- Rail systems installation in the subject area
- Commissioning
- B4101 Waste Lane overbridge satellite compound
- Beechwood Farm accommodation underpass satellite compound
- Carol Green Rail underbridge (south) satellite compound
- Carol Green Rail underbridge (north) satellite compound
- Balsall Common viaduct satellite compound
- Park Lane Cutting main compound
- Footpath M214 overbridge satellite compound
- Bradnock auto-transformer station satellite compound
- A452 Kenilworth Road overbridge satellite compound
- River Blythe Bypass culvert satellite compound

“Please indicate if an element is no longer required or has been renamed. Dates expressed as month/year are adequate.”

6. The public authority responded on 15 June 2022. It relied upon regulation 12(4)(d) of the EIR to withhold the information – a position it upheld at internal review.
7. During the course of the Commissioner’s investigation, the public authority reviewed its position. It accepted that some of the information (relating to projects completed) should have been disclosed at the time of the request. It now disclosed this information to the complainant.

Reasons for decision

8. In line with previous similar decisions, the Commissioner agrees that the information in question is information on a measure affecting the elements of the environment and so the request falls under the EIR.
9. The Commissioner accepts HS2's argument that the information in question (ie. the estimated start and finish dates) is information that relates to material in the course of completion.
10. The dates on which a particular project will start and on which it will finish are determined by progress on and the complexity of, the project itself. The Commissioner accepts that these individual projects (which together make up this overall section of track) will be at varying stages of progress. As each project progresses from concept, through planning and implementation to completion, it may hit snags which cause certain aspects to be re-thought or re-designed – all of which will cause either the start time, the completion time, or both, to alter from previous estimates. Therefore until each individual project is completed it remains "in the course of completion" and so the estimated start and finish dates (which derive from the progress made towards completion) are information which relates to material (ie. the project) in the course of completion.
11. The Commissioner is therefore satisfied that the exception is engaged.
12. The public authority's arguments for maintaining the exception largely revolved around a central assumption that the public at large would be incapable of understanding that estimated dates were estimates, which, it argued, would:

"distract public debate and rather than focusing on the relevant issues in hand debate will focus on secondary issues. In this case release of the preliminary dates would give those dates a validity and certainty that is not warranted. ICO Guidance on Section 38 lists one of the reasons to withhold information as 'speculative or incomplete information that could mislead the general public and cause them to fail to act or act against their own interests.'

"Release of this information would lead individuals, businesses and others affected by the works in the local area, to presume that the dates had more validity than is in reality the case. This would lead them to make arrangements (i.e., business planning decisions) based on this information. Such decisions could prove costly to them as the schedule changes."

13. As a general rule the Commissioner is rarely impressed by arguments that rest on an assumed inability of the general public to understand either the content of information held by a public authority or the context in which it was created. The information in this case is straightforward and there is nothing to prevent the public authority from disclosing the information with the caveat that it is subject to change – possibly significant change – and should not be taken as definitive. The Commissioner is extremely sceptical that explaining that estimates are only estimates is a task that would necessitate anything more than the most minimal diversion of resources – and the public authority has put forward no evidence to demonstrate that any diversion would be either significant or even required.
14. Far from misleading public debate, the Commissioner considers that releasing the estimates is likely to lead to a better-informed public debate. If no information is published, that debate will still go on, but is likely to be based on rumour and speculation – rather than official information. Individuals and businesses will already be making decisions based on their perception of what the withheld information is – if they consider it necessary to do so. Providing the withheld information will allow them to make better decisions than they are currently able to do.
15. The Commissioner recognises that the works required to build HS2 will cause considerable disruption whilst they are ongoing. Whilst the disruption caused by each project is only likely to affect a small area, the effect within that area will be significant and the cumulative effect of each project is likely to be substantial. He is therefore satisfied that there is a public interest in disclosure of information that would better-inform debate. He is also satisfied that the arguments in favour of maintaining the exception are weak.
16. The Commissioner therefore considers that the balance of the public interest favours disclosing the information.

Procedural matters

17. The public authority disclosed some of the information it held outside of the 20 working day timeframe for responding to requests submitted under EIR. Whilst the Commissioner does encourage public authorities to revisit their original positions and disclose information where possible, he is still obliged to record a breach of regulation 5(2) of the EIR.

Right of appeal

18. 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

19. 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.
20. 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
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Wilmslow
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