

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 November 2022

Public Authority: High Speed Two(HS2) Limited
Address: Two Snowhill,
Snowhill Queensway
Birmingham
B4 6GA

Decision (including any steps ordered)

1. The complainant has requested information relating to High Speed Two Limited's ("HS2") Phase One project. HS2 refused to provide the information and relied on regulation 12(4)(b) (manifestly unreasonable) of EIR as its basis for doing so.
2. The Commissioner's decision is that HS2 have failed to demonstrate that regulation 12 (4)(b) of EIR is engaged. He requires HS2 to take the following steps to ensure compliance with the legislation.
 - Disclose the information or issue a fresh response that does not rely on section 12(4)(b) of EIR.
3. 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 FOIA and may be dealt with as a contempt of court.

Request and response

4. The complainant wrote to HS2 and requested information in the following terms:

"NB This is new request & does not reference any previous FOI. I would like to monitor HS2 property spend and as such I will making the request below on a monthly basis.

Please can you give me an updated figures & the date collated:

- 1) How much has been spent to date on property?
 - 2) What are the committed property liabilities to date?
 - 3) What are the estimated further property costs?
 - 4) How many parcels of land (not including subsoil in tunnelling locations) required for the construction of phase one where purchase has been completed?
 - 5) How many parcels of land (not including subsoil in tunnelling locations) on the route of phase one which HS2 Ltd has taken temporary possession of?"
5. HS2 responded and refused to provide the information citing regulation 12(4)(b) of EIR as its basis for doing so.

Reasons for decision

6. The Commissioner agrees that the requested information is environmental information and therefore, HS2 was right to handle the request under EIR. This reasoning covers why the Commissioner considers that regulation 12(4)(b) of EIR is not engaged.
7. The Commissioner's guidance¹ states that public authorities should use the guidance under section 14(1) of FOIA² when considering whether a request for environmental information is manifestly unreasonable on the grounds that it is vexatious. Although there are some differences between the structure of the relevant provisions in FOIA and the EIR, these should make no difference in practice.
8. Regulation 12(4)(b) does not oblige a public authority to comply with a request if it is vexatious. Public authorities may refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation, or distress.

Complainant's position

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

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/what-does-vexatious-mean/>

9. In their complaint to the Commissioner, the complainant disagreed with HS2's reliance on regulation 12(4)(b) because it had responded to the same questions in an earlier request for information reference FOI-21-4244 in June 2021. In the complainant's view, HS2 had engaged in "thousands" of compulsory purchase orders in the past year and their request was for an update on the original request. The complainant has also explained in their internal review request that although their requests are identical, they seek updated information of what they consider to be "month on month, massively changing information."

HS2's position

10. In its submissions to the Commissioner, HS2 provided a timeline of interactions with the complainant. It explained that the complainant's request was part of a series of requests on the same subject matter. These requests were treated as combined request and refused on the basis that to comply with it would be burdensome. Those earlier responses explained what could be supplied without imposing an inappropriate burden on HS2 and offered majority of the information to the complainant. Whilst the complainant initially accepted this offer, they also requested for a review of HS2's decision not to comply. It states that the complainant has ignored this and continued to make additional requests for information one of which has generated this complaint to the Commissioner. Therefore, the current request has been refused as manifestly unreasonable under regulation 12(4)(b) of EIR because HS2 consider that it amounts to a manifestly unjustified, inappropriate or improper use of a formal procedure.
11. In determining whether this request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress, HS2 has explained that the request is one of a series of 14 requests for information and requests for review. HS2 says it has responded to all the requests appropriately and in most cases all the information was provided. Where the request was refused as manifestly unreasonable due to burden, the refusal was fully explained, and advice and assistance provided on how the request could be narrowed to enable HS2 to respond. While it acknowledges that some of the requests were not responded to in a timely manner due to complexity or data captured, HS2 says it has always provided the information where an exception or exemption does not apply.
12. HS2 has submitted that many of the request within this series of requests overlap and are received in quick succession. This provides insufficient time to respond before another request or review is received. It noted that the same request was received every month between April to June 2022. It maintains that in this case, it is the series of requests

that has become manifestly unreasonable attracting HS2's reliance on regulation 12(4)(b) of EIR.

13. HS2 argues that, since January 2019 it has received 65 information requests and 12 requests for review from the complainant. HS2 says this suggests that the complainant will continue to make requests in the future. It accepts that there is a genuine interest in the HS2 project and most of the complainant's requests appear to be genuine attempt to obtain information. However, it believes the complainant's intent to have shifted, in that, the complainant appears to focus on how their request has been dealt with. HS2 has taken this view because of the complainant's request to treat this specific request separate from previous EIR requests.
14. HS2 contend that previous responses have fully explained the reasons for combining requests and also provided clear explanation of what is needed to enable HS2 to deal with each request and provide the information. In addition, the fact that the complainant both accepted the offer and challenged the earlier refusal meant that HS2 could not supply the information it had offered to provide, and the complainant has not expressed a clear preference. HS2 says it was due to the complainant's reluctance to engage that it considered the current request to be manifestly unreasonable.
15. In this case, HS2 argues that the complainant has improperly used the EIR procedure by failing to engage despite the advice and assistance provided on previous similar requests. It considers that the matter which should be before the Commissioner is the disagreement with the original decision. Instead, the complainant has made repeated identical requests and appears to be asking HS2 to decouple requests by ignoring the advice and persistently making the same request.
16. HS2 argues that the request has no value or serious purpose within itself because the complainant has repeatedly requested the information on many occasions and ignored any advice or assistance provided. HS2 says that, this indicates that their intention is no longer to obtain the information and has drifted away from the original purpose. They argue that the complainant has made comments on What Do They Know website ("WDTK") that imply that their purpose is to challenge earlier decisions to combine requests. It states that their reluctance to appeal the earlier decision to the Commissioner indicates a refusal to refer the matter of combining the request for independent investigation.
17. Whilst HS2 admit that the complainant has not exhibited behaviour at a level to be considered vexatious, it contends that as they have repeatedly made the same request and ignored advice and assistance provided by HS2 and also failed to engage in dialogue regarding their

requirements, the complainant has demonstrated a behaviour likely to have the effect of harassment.

18. Based on their submissions, HS2 consider there is a detrimental impact of complying with this request due to the complainant's intransigent stance of repeated requests, ignoring advice and assistance and failing to engage with HS2. It has stated that dealing with the complainant's requests has diverted resources and increased the burden of dealing with other, genuine requests for information. These requests and the surrounding emails, the complexity of the timeline and amount of correspondence, required a large number of resources within the FOI team in order to respond correctly.
19. In considering whether the value and purpose of the request justifies the impact on the public authority, HS2 argues that:

"...there is little value to the public in HS2 dealing with this request. The only response possible, unless HS2 is to vary from ICO best practice, is to issue a refusal notice citing the burdensome limb of 12(4)(b). Such a notice is of little value to the requester or the public and does not enhance the transparency and accountability of HS2.

"As HS2 Ltd is a publicly funded organisation, the key question is whether a reasonable person would believe that this expenditure of public money is justifiable, given that the only response could be the issuing of a refusal notice that has already been issued three times before...any response to the request has little inherent value to the public, and consequently it is unjustifiable in terms of the impact on public resources and the negative effect on the legislation itself...compliance would lead to other, burdensome, and vexatious requests being made by this requester and possibly by other requesters. This would undermine the process and be detrimental to the reputation of the legislation."

The Commissioner's view

20. The Commissioner has considered the previous requests made by the complainant in reaching his decision that regulation 12(4)(b) is not engaged.
21. In his view the request that was submitted by the complainant and combined contained one request of three parts and another request of five parts. HS2 provided advice and assistance to the complainant explaining that it could respond to part one and three of the

complainant's request of three parts and all five parts of the complainant's request of five parts.

22. Consequently, after challenging the combined request (in the form of an internal review request) and accepting HS2's offer, subsequent requests submitted by the complainant mirrored their request of five parts. The Commissioner notes that HS2 has confirmed that they can respond to the complainant's request of five parts and had previously responded to identical requests.
23. HS2 are refusing to comply with the complainant's subsequent request on the basis that it requires them to provide an unequivocal confirmation that they would be satisfied with future responses. The Commissioner does not consider this to be a reasonable approach. There is no obligation on the complainant to confirm in advance what information would or would not satisfy their request, unless HS2 required clarity of the scope of the information requested. However, this is not the case here as HS2 have been able to answer identical requests without difficulty. Therefore, HS2 should have responded to the subsequent request that was submitted by the complainant.
24. HS2 required the complainant to refine their request and explained what a reasonable refinement would be. However, the complainant appears to have gone beyond that, but HS2 are refusing to comply. The Commissioner does not consider that HS2 has handled the complainant's request in accordance with the EIR. This is because it has failed to take into account the fact that the complainant has specifically refined their request based on the advice and assistance it provided.
25. On the basis of the evidence before the Commissioner, it is his view that HS2 have failed to demonstrate that regulation 12(4)(b) of EIR is engaged and therefore does not consider the request to be vexatious.
26. As the Commissioner's decision is that regulation 12(4)(b) is not engaged, it has not been necessary to consider the public interest in this case.

Other matters

27. Regulation 4 of EIR require authorities to proactively make environmental information that they hold available to the public by electronic means. In order to make information available to the public in a systematic way, authorities must organise their records and routinely publish them. This is separate from the duty to make information available in response to individual requests. Although the EIR (unlike

FOIA) do not require authorities to operate a publication scheme, we recommend that they do so as a matter of good practice.

Right of appeal

28. 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

29. 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.
30. 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

Esi Mensah
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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