

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

Date: 7 February 2022

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

Decision (including any steps ordered)

1. In a four part request, the complainant has requested information about wildlife surveys. High Speed Two Limited (HS2 Ltd) advised it does not hold information within scope of parts 1 and 3 of the request and relied on regulation 12(4)(b) of the EIR (manifestly unreasonable request) to refuse to disclose the information requested in parts 2 and 4. HS2 Ltd subsequently advised the Commissioner that, on reconsideration, its position is that parts 1 and 3 of the request also engage regulation 12(4)(b).
2. The Commissioner's decision is as follows:
 - The complainant's entire request can be categorised as manifestly unreasonable under regulation 12(4)(b) of the EIR, by virtue of cost, and the public interest favours maintaining this exception. No breach of regulation 9(1) occurred (advice and assistance).
3. The Commissioner does not require HS2 Ltd to take any remedial steps.

Background

4. HS2 Ltd has provided the following background. Its proposals and works require that ecological surveys are undertaken in order to understand likely impacts and to meet relevant regulations. Ecological surveys are undertaken to identify protected or notable species and habitats that are present, or potentially present, within a site or the surrounding area. Information collected from ecological surveys can inform ecological assessments of a site and help identify requirements for mitigation design and to assist in designing appropriate site management practices. Depending on the type of survey undertaken, surveys to assess protected species will often need to be undertaken by qualified specialists licenced by Natural England.

Request and response

5. On 8 December 2020 the complainant wrote to HS2 Ltd and requested information in the following terms:

“In each of the last two financial years (i) 2018-19 and (ii) 2019-20 please answer the following questions:

 - 1) How many wildlife surveys have you commissioned?
 - 2) What has the total cost been to HS2 of these wildlife surveys?
 - 3) What was the cost of the most expensive single wildlife survey?
 - 4) Please list all the species that were recorded that may result in HS2 having to taking specific action to protect that species?”
6. On 2 January 2021 HS2 Ltd advised the complainant that, due to the complex and voluminous nature of the information requested, it would need to extend the timescale for the response to 40 working days rather than 20 working days [a provision under regulation 7(1) of the EIR].
7. HS2 Ltd responded to the request on 2 February 2021. It advised that it does not hold the information requested in part 1 and part 3 of the request because its contracts cover large geographical areas and encompass multiple surveys. HS2 Ltd said that it does not commission individual surveys and therefore does not hold this information
8. HS2 Ltd withheld the information requested in part 2 under regulation 12(5)(e) (confidentiality of commercial information) and provided information it considered was of some relevance to part 4.

9. The complainant requested an internal review on 23 February 2021 with regard to HS2 Ltd's response to part 2 of the request. He also asked HS2 Ltd to clarify its response to part 4.
10. HS2 Ltd provided an internal review on 16 April 2021, withdrawing its reliance on regulation 12(5)(e). HS2 Ltd explained that its data is not held centrally or organised in such a way to enable it to provide the requested information easily. HS2 Ltd provided more detail about how surveys are commissioned and paid for and advised that, as such, regulation 12(4)(b) was engaged. HS2 Ltd said that, given the breadth of material covered by the request, it was not able to suggest any practical way in which the request could be narrowed.
11. HS2 Ltd has told the Commissioner through its submission to him that, reviewing the request again as a result of the complaint, it had identified that there is information online that has some relevance to the request and which the complainant might find helpful. HS2 Ltd wrote to the complainant on 25 January 2022 to provide links to this published information.

Scope of the case

12. The complainant contacted the Commissioner on 13 June 2021 to complain about the way his request for information had been handled.
13. The Commissioner clarified with HS2 Ltd its response to parts 1 and 3 of the request. It appeared to the Commissioner that HS2 Ltd *could* hold information within scope of parts 1 and 3 of the request, or the 'building blocks' to derive that information. Regarding part 1, for example, HS2 Ltd could theoretically add up all the surveys it had commissioned and come up with the total number.
14. HS2 Ltd agreed that, on reflection, it could hold the information requested in part 1 but would need to examine all work packages to determine how many surveys were involved. HS2 Ltd said that it was less likely to be able to identify the most expensive survey requested in part 3. This is because more than one survey may be included in an invoice/purchase order, and the total cost may include more than one survey (ie the cost of each survey would not be separately recorded). HS2 Ltd confirmed that the work it would need to identify if it held information within scope of either of these two parts, and/or to locate, retrieve and extract the information would represent an unreasonable burden.

15. The Commissioner's investigation has therefore focussed on whether HS2 Ltd is entitled to rely on regulation 12(4)(b) of the EIR to refuse to disclose information within scope of all four parts of the request, and the balance of the public interest. He has also considered whether there was any breach of regulation 9(1).

Reasons for decision

16. Regulation 12(4)(b) of the EIR says that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be categorised as manifestly unreasonable on the grounds that it is vexatious or, as in this case, a request can be categorised as manifestly unreasonable because of the cost associated with complying with it. Regulation 12(4)(b) is subject to the public interest test under regulation 12(1)(b).
17. The EIR does not contain a limit at which the cost of complying with a request is considered to be too great. However, the Commissioner's guidance suggests that public authorities may use the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 as an indication of what Parliament considers to be a reasonable charge for staff time. It has been determined that £600 is the appropriate limit for public authorities that are central government departments, and that the cost of complying with a request should be calculated at £25 per hour; this applies a time limit of 24 hours.
18. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is then expected to consider the proportionality of the cost against the public value of the request before concluding whether the cost is excessive. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - determine whether it holds the information
 - locate the information, or a document which may contain the information
 - retrieve the information, or a document which may contain the information, and
 - extract the information from a document containing it.
19. Multiple requests within a single item of correspondence, as in this case, are separate requests for the purpose of regulation 12(4)(b).
20. The Commissioner's position is that there may be occasions where it is permissible to consider a number of EIR requests together when

deciding if they are manifestly unreasonable on the grounds of cost. This is in line with the approach to requests considered manifestly unreasonable on the grounds that they are vexatious, where the context in which they are made can be taken into account.

21. Where a public authority claims that regulation 12(4)(b) is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit. This is in line with the duty under regulation 9(1) of the EIR.
22. HS2 Ltd's submission to the Commissioner has first discussed part 2 of the request – what the total cost of wildlife surveys has been to HS2 Ltd across two particular years.
23. HS2 Ltd says that, in context, it interpreted this question as the total cost of all wildlife surveys commissioned by, or on behalf of HS2 Ltd, since 1 April 2018 for all Phases of HS2 and up until 31 March 2020.
24. The cost of wildlife surveys is not explicitly split out in HS2 Ltd's accounts ie there is no General Ledger Code or Product Category Code that specifically identifies 'Wildlife Surveys'. Therefore, HS2 Ltd says, it is not possible to simply run a report within the finance system to identify the cost of wildlife surveys.
25. HS2 Ltd controls expenditure through Purchase Orders which are set up for business approved work and are underpinned by agreed contracts. To ensure that each contract is managed appropriately, each one is allocated to a contract manager who is located in the relevant business area. The contract manager administers the performance of the supplier through, for example, regular reporting and formal supplier reviews. This ensures that the contracts are managed efficiently and that all obligations are met.
26. As a consequence of this system, not all of the information is stored in one central location and HS2 Ltd says it would therefore not be easy to locate and extract the information for each survey. In order to collate the information to provide a total for all expenditure on wildlife surveys, it would be necessary to identify each contract and purchase order that was raised to cover the cost of wildlife surveys.
27. This would entail examining a number of contracts, each with multiple sub-contracts. Multiple work packages would need to be examined to identify relevant invoices. Each of these would potentially need to be examined to separate out wildlife surveys from other work carried out by the same suppliers (ie non-'wildlife survey' work).

28. In order to gauge the extent of the work required, HS2 Ltd collected a rough estimate of the number of surveys for one part of the HS2 route. For the Western leg of Phase 2b (Crewe to Manchester) approximately 38,164 ecological surveys were undertaken. While this does not directly equate to the number of contracts, invoices or Purchase Orders that would need to be assessed, even if each relevant invoice/Purchase Order contained ten surveys, HS2 Ltd says it would need to reconcile the 38,164 ecological surveys back to the corresponding invoice, purchase order and contract to determine the cost for each one and then bring this information together into a new report. There are in excess of 150 invoices and each invoice would need to be analysed with the business teams to determine exactly which part of the costs relate specifically to ecological surveys.
29. To determine the cost of the surveys HS2 Ltd would need to review each of the 38,164 ecological surveys and reconcile these back to the contract, associated purchase order, and invoices. Assuming that each invoice would take one hour to analyse (specifically filtering out non-survey work) with a secondary exercise to reconcile back to the total number of surveys completed, HS2 Ltd has estimated that this would take approximately 300 hours to collate this information for one small part of the HS2 route.
30. Collating this information for just one small part of the route would therefore cost £7,500 (300hrs x 25/hr) which HS2 Ltd considers would impose an unreasonable financial burden on it.
31. Whist noting his point at paragraphs 18 - 19, the Commissioner has nonetheless gone on to consider HS2 Ltd's explanation about part 4 of the request, which is for a list of all species that were recorded that may result in HS2 Ltd having to take specific action to protect that species.
32. HS2 Ltd has noted that the question is asking for **all species**, the identification of which could have resulted in HS2 Ltd or contractors instituting remedial measures or a change in planned activities.
33. Therefore whether a species was captured by the request would not only depend on what the species was, but also where it was, what the impacts of HS2 activity in the area was and the timing of those works. Among the specific actions that may be undertaken are avoiding specific areas (e.g. cordoning of a tree where a nesting bird was identified); gating entrances to badger setts; constructing newt ponds; or changes to the design of the railway to avoid any impacts in the first place. The approach is constantly being refined to take account of the presence of species and this is why, HS2 Ltd says, it employs experienced contractors who bring in ecological specialists.

34. While in some circumstances it is easy to identify that specific species have warranted specific measures (eg, gating badger setts), to determine all detected species that have led to specific actions would require an examination of each instance where the species had been detected. HS2 Ltd has acknowledged that its original response erroneously assumed that the request was for those species that were afforded legal protection. HS2 Ltd says that clearly this is not the case, as it would always endeavour to minimise the environmental impact of construction, whether there was legal obligation to protect a species or its associated habitat or not.
35. Consequently species that have been detected would need to be identified and then each instance examined to understand whether the detection of this species led to any specific action to protect it, in all circumstances where it had been recorded.
36. HS2 Ltd says that it undertook a search of ecology proformas which identified a possible 1,105 species. This is not a full search, as there are also landscape, tree and woodland proformas.
37. For each species listed, HS2 Ltd says it would need to undertake a search to find 'confirmed' results, that is to eliminate instances where none had been detected (eg where there is a yes/no option, to eliminate those that stated 'no'). Each instance where there was a positive identification would then need to be examined to categorise whether this identification had led to specific measures being instituted as a result on a case-by-case basis.
38. Without undertaking such an exercise, it is difficult to be certain regarding the actual time required, but even a conservative estimate of one hour for each listed species would require 1,105 hours to identify all such species that led to specific remedial actions being undertaken to protect such a species. Collating this information would incur a cost of £25,375. HS2 Ltd considers that would be far in excess of what can be deemed reasonable.
39. Finally, HS2 Ltd has also noted that the list of 1,105 species is not definitive. Some proformas such as wintering birds, don't have a specific list of species and are left open to record anything during the surveys. Other species recorded as incidental observations may be recorded in free text comment fields and can be difficult to extract.
40. The Commissioner considers that HS2 Ltd has given sufficient thought to the work that it would need to do to provide the information requested in parts 2 and 4 of the request. He accepts its account of how its contracts are managed and how, as a result, the complexity around how recorded information associated with wildlife on the route of the HS2 rail

line is held. In the case of part 2, the Commissioner considers HS2 Ltd's estimate of two hours per invoice is reasonable. But even if it only took half an hour to review each invoice, this would still incur a cost of £1,875 and that would be just for one part of the HS2 rail route. The request appears to concern the entire HS2 route.

41. The Commissioner accepts that there is value to the requested information. For the complainant, as expressed in his request for an internal review, the underlying issue to which the request related was how public funding was being used. That is, his focus does not appear to have been the results of any wildlife survey and actions taken to protect surveyed species. The complainant's interest is nonetheless an important issue, as is the effect of the HS2 route on the natural environment that lies in its path. However, for the reasons HS2 Ltd has given, the cost of identifying and disclosing the requested information would run into many, many thousands of pounds and would be, in the Commissioner's view, a disproportionate financial burden to HS2 Ltd.
42. The Commissioner's decision is therefore that HS2 Ltd is entitled to rely on regulation 12(4)(b) of the EIR in respect of part 2 of the request alone. Considering this part together with the remaining parts of the request he finds that disclosure of the information requested in all the four parts of the request can be excepted under regulation 12(4)(b). The Commissioner has gone on to consider the public interest test, which will include discussion on the proportionality or otherwise of the cost of complying with the request.

Regulation 12(1)(b) - public interest test

Public interest in disclosing the information

43. In his request for an internal review, the complainant noted that the EIR specifically states [under regulation 12(2)] that a public authority shall apply a presumption in favour of disclosure. The complainant did not believe that in all the circumstances the balance of public interest would fall in favour of withholding the information he had requested. He argued that HS2 is a major and costly undertaking and that there is a genuine public interest in seeing that the allocated funding is being used in an open and transparent way.
44. In addition to the general public interest in transparency and accountability around the progress of the HS2 programme, HS2 Ltd acknowledges that in this case, disclosure would help the general public to understand the cost of wildlife surveys and the steps HS2 Ltd is taking to mitigate the effects on wildlife along the route.

Public interest in maintaining the exception

45. In its submission to the Commissioner, HS2 Ltd has noted that complying with this request would entail a significant amount of time and effort to find the information and then prepare it 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 relevant information held.
46. In addition, and as discussed above it would cost a substantial amount to comply with the request; HS2 Ltd considers it would cost more than £33,000. It argues that there is a strong public interest in ensuring that public funds are spent proportionally.
47. HS2 Ltd already proactively publishes a substantial amount of information on what it spends on environmental surveys. Publishing this information ensures that HS2 Ltd is open and transparent about its expenditure and the environmental work it is undertaking. Consequently, in this case, at this time, HS2 Ltd considers that the interests of the public are not best served by undertaking the resource-intensive search required to obtain the information requested.

Balance of the public interest

48. HS2 Ltd says that as a publicly funded organisation it is important that it exercises tight control of expenditure and resources. It is in the public interest that all HS2 Ltd funding is appropriately managed.
49. Given the scale and profile of the HS2 there is, of course, a great deal of public interest in the cost of the project and in the work HS2 Ltd is doing to mitigate any effects on wildlife.
50. However, to comply with this request would entail a significant amount of time and effort. To gather the requested information HS2 Ltd staff would have to be diverted from their core duties in order to devote time on locating, extracting and collating all of the information held.
51. Of the time identified above to comply with part 2, only the resource required to locate and extract the cost information for the western leg of Phase 2b has been calculated. This exercise would take more than 318 hours which is equivalent to £7,951. To gather the data for part 4 (excluding the wintering birds proformas and any data in the surveys recorded as free text) would take an estimated 1,105 hours. HS2 Ltd has calculated that this is equivalent to a cost of £25,375. The Commissioner finds the figure would in fact be £27,625.
52. Consequently, taking account of the whole HS2 route, it would cost substantially more than £33,326 (in fact, more than £35,000) to

disclose information in response to this request and would therefore cost far more than could be considered a reasonable amount, in terms of both cost and time.

53. HS2 Ltd considers that while there is always a public interest in releasing information, this interest needs to be weighed against the cost of providing it and consideration should also be given to the information that is already in the public domain. HS2 Ltd notes that it publishes details of all contractual payments over £25,000 and all corporate card transactions over £500. Other information on HS2 Ltd expenditure (including its annual report and accounts) is published on the relevant pages of its publication scheme.
54. Furthermore, HS2 Ltd proactively publishes [wildlife] survey data that it collects (except that which may cause harm to protected species) and will continue to do so on a regular basis. Proactively publishing this data has led to praise from those who use it and has greatly increased transparency in this area. Disclosing the requested information on particular species would not significantly add to public understanding or ensure appropriate oversight. It would, however, impose a disproportionate burden, at the taxpayer's expense.
55. The Commissioner agrees with HS2 Ltd in this case; that the public interest favours maintaining the regulation 12(4)(b) exception. The financial and time burden that disclosing the requested information would cause to HS2 Ltd is very substantial indeed. That burden would be disproportionate and not in the public interest, in the Commissioner's view. That is because HS2 Ltd already proactively publishes adequate financial information (which appears to be the complainant's focus) and wildlife survey data.

Regulation 9 – advice and assistance

56. Regulation 9(1) of the EIR says that a public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
57. HS2 Ltd has told the Commissioner that, given the nature of the request it is difficult to offer any further information (in addition to the information it has already provided to the complainant), that would not impose a disproportionate burden on HS2 Ltd.
58. HS2 Ltd notes that it has provided a list of animal species that had been recorded on the Ecology Forms where legislation compels protection (and therefore, presumably, protective measures). It has also provided links to data on HS2 Ltd spending over £25,000 and Ecological Survey Data for Phase One. While this information is not what has been

requested, HS2 Ltd considered it may be of assistance to the complainant.

59. Because of the way HS2 Ltd commissions and pays for wildlife surveys, the way associated information is held, and because of the scale of the HS2 project, the Commissioner considers that there was no advice that HS2 Ltd could have reasonably given the complainant, to help him narrow down his request so that the burden of complying with it could be reduced. As such, he finds there was no breach of regulation 9(1).

Right of appeal

60. 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

61. 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.
62. 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

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