

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

Date: 22 June 2023

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information relating to HS2. The Cabinet Office withheld it under regulation 12(4)(e) (internal communications.)
2. The Commissioner's decision is that the exception is engaged and the public interest lies in maintaining the exception.
3. The Commissioner does not require further steps.

Request and response

4. On 12 June 2021, the complainant wrote to the Cabinet Office and requested:

"A copy of all information presented to the Prime Minister in January 2020 relating to HS2."

5. The Cabinet Office responded on 9 July. It explained that section 35 (formulation of government policy) and the Environmental Information Regulations applied. Even though it didn't cite section 10(3), it explained it needed more time to consider where the balance of the public interest lies.
6. On 1 September 2021, the Cabinet Office confirmed that the requested information was exempt under section 35. The complainant requested an internal review on the same day.
7. Following an internal review Cabinet Office wrote to the complainant on 19 January 2022. It upheld its previous position and also applied regulation 12(4)(e) (internal communications).

Background information

8. High Speed Rail 2 (HS2) is a high-speed railway network currently under construction between London, Birmingham, Manchester and the East Midlands.¹
9. On 23 January 2020, the Prime Minister's Private Secretary provided information to the (then) Prime Minister, Boris Johnson, which showed what the article refers to as 'exponential increase in HS2 demand.'
10. On 11 February 2020, the Prime Minister announced to the House of Commons that HS2 would go ahead in full.

Scope of the case

11. The scope of the Commissioner's investigation is to firstly consider which access regime the Cabinet Office should have handled the request under and secondly, whether it was correct to withhold the information requested.
12. The Commissioner has recently dealt with a similar case, IC-151483-R8T9², where the request asked for a copy of all evidence about passenger growth that was presented to the Prime Minister.

¹ [What is HS2 - HS2](#)

² [ic-151483-r8t9.pdf \(ico.org.uk\)](#)

13. There are five pieces of information being withheld in this case:
- 1) Annexes B and C contained within a HS2 trilateral note
 - 2) A HS2 PowerPoint
 - 3) A note from Cabinet Secretary Mark Sedwill to the Prime Minister
 - 4) A document that refers to the Oakervee Review³
 - 5) A note from a Private Secretary to the Prime Minister to which all of the requested information and the agenda was attached.

Scope of the case

Is the requested information environmental?

14. The Cabinet Office's submission to the Commissioner focusses on both section 35(1)(a) and regulation 12(4)(e).
15. 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;

³ [Oakervee Review \(publishing.service.gov.uk\)](http://publishing.service.gov.uk)

- (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);
16. In the Cabinet Office's submission it acknowledges that 'We consider that the construction of a railway network is a 'policy... plan and activity' (requiring legislation) which affects the elements referred to in regulation 2(1)(a) of the EIR as it (at the very least) has an impact on 'soil, land, landscape and natural sites'. The impact of Phase 1 of HS2 on the environment has been extensively chronicled by the Government in its environmental statements.⁴
17. The Commissioner has seen the requested information and agrees with the Cabinet Office that it falls within the definitions of either 2(1)(c) or 2(1)(e). For procedural reasons, he has therefore assessed this case under the EIR and not FOIA.

Regulation 6(1)(b) - form and format

18. The Cabinet Office has applied regulation 6(1)(b) to the information at 4) which refers to the Oakervee Review.
19. Paragraphs 22-27 of IC-151483-R8T9⁵ discusses why regulation 6(1)(b) doesn't apply to the information at 4) and the Commissioner doesn't intend to replicate that analysis here.
20. He'll now consider whether all of the withheld information, including 4), can be withheld under regulation 12(4)(e).

Regulation 12(4)(e) - internal communications

21. Regulation 12(4)(e) states that information is exempt from disclosure if it involves 'the disclosure of internal communications'. It's a class-based exception, meaning there is no need to consider the sensitivity of the

⁴ [HS2 Phase One environmental statement: documents - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444444/HS2_Phase_One_environmental_statement_documents_-_GOV.UK_(www.gov.uk))

⁵ IC-151483-R8T9

information to engage the exception. If information represents an internal communication, the exception will apply.

22. In their internal review request the complainant explained "if some of this material came from external bodies (eg HS2 Ltd) then it would not be "internal communications." The Commissioner has seen the withheld information; whilst some of the calculations might have originally come from outside sources, the actual withheld information originated from within the Cabinet Office.
23. The Cabinet Office has explained:

"The requested information was provided to the Prime Minister, which is therefore self-evidently a communication. It was done so by officials in the Prime Minister's private office and is therefore internal in character."
24. The wording of the request itself demonstrates that the withheld information is an internal communication – it was all presented to the Prime Minister to present the potential next steps for HS2 and it was presented internally.
25. As in IC-151483-R8T9, the Commissioner is satisfied that regulation 12(4)(e) is engaged and he will go onto consider the balance of the public interest.

Public interest test

Public interest arguments in favour of maintaining the exception

26. The Cabinet Office is concerned that the withheld information is likely to be used in ongoing policy development, for instance decisions on the later phases of HS2.
27. There is a public interest in protecting the safe space that government needs to formulate policy, debate issues and make decisions. HS2, though controversial, is very much a live issue and remained so at the time that the request was made. The Cabinet Office is concerned that disclosure would undermine the 'ability of officials to express themselves openly on policy and for Ministers to make properly informed decisions.'
28. The Cabinet Office is also concerned that disclosure would inhibit free and frank discussions around HS2, and that this loss of frankness and candour would damage the quality of advice, leading to poorer decision-making.

Public interest arguments in favour of disclosure

29. There is a presumption in favour of disclosure under the EIR. It supports an individual's right to be informed on environmental matters.
30. There is also a legitimate public interest in HS2. It's a controversial project; many individuals oppose the project based on the impact it will have on wildlife, the countryside and homes. It has been made more controversial by delays and increasing budgets, which were behind the decision to commission the Oakervee Review. Disclosure would allow the public to scrutinise the evidence that was presented to Boris Johnson so they could better understand the Prime Minister's decision to proceed with the project. Ultimately, HS2 has and will continue to involve a significant amount of taxpayer money; it will also affect a significant amount of people. With this comes the need for transparency and accountability.

The balance of the public interest test

31. The Commissioner has decided that the balance of the public interest lies in maintaining the exemption.
32. The Commissioner recently considered a similar case, IC-131125-S9C8, which dealt with a request for a copy of the Heywood Review⁶. The Oakervee Review⁷ is a study on whether the HS2 project is still viable, whereas the Heywood Review (which is not in the public domain) is an in-depth study which explores all the potential possibilities of the project. It touches upon matters which are still subject to ongoing policy discussions, such as the construction of stations and rolling stock (trains under construction for HS2).
33. The Cabinet Office has explained:

"We contend that if the Commissioner is satisfied that the information contained in Sir Jeremy's reports continue to relate to the development of policy on HS2 and that the public interest does not favour its disclosure, it should follow that the same logic should apply to the requested information."
34. The Cabinet Office must be careful not to assume that because previous information about HS2 has been withheld, it can blanketly withhold all information about HS2. Each request must be considered on a case-by-

⁶ [Top UK civil servant reviews HS2 project | HS2 | The Guardian](#)

⁷ [Oakervee Review \(publishing.service.gov.uk\)](#)

case basis. The Heywood Review is not the requested information in this case; the Cabinet Office must consider the effects of disclosing the passenger growth evidence in all circumstances of the case.

35. The Cabinet Office has also stated:

“We consider that if such detailed matters considered by Sir Jeremy still, in the view of the Commissioner, relate to policy development then the broader and more substantial considerations about whether to proceed with the project at all must also, in our view, still relate to the development of current policy on HS2.”

36. Civil servants and other public officials are expected to be impartial and robust in meeting their responsibilities, and not easily deterred from expressing their views by the possibility of future disclosure. However, chilling effect and safe space arguments are likely to be at their strongest when closely related to live government policy.
37. Whilst the Commissioner acknowledges that policy development can't go on indefinitely, he agrees with the Cabinet Office. The decision to proceed with HS2 might be the result of the internal communications but the actual evidence itself relates to, and will directly inform, current and future policy discussions on HS2.
38. The annexes and the power point cover alternate proposals, forecasts, costs and BCR (benefit costs ratios) in relation to HS2. Because this information all relates to ongoing, live policy, the Commissioner has decided the public interest lies in maintaining the exception and allowing HS2 to progress as robustly as possible.
39. The analysis of the Oakervee Review is just that, it analyses the review's findings and recommendations. Since the findings and recommendations of the review are already in the public domain, and the analysis doesn't add anything of substance, the Commissioner doesn't believe that disclosure is warranted in this instance.
40. Finally, there is the note from Mark Sedwill to Boris Johnson and also the note from a Private Secretary to Boris Johnson. The information contained within the first note is accurately represented in the Oakervee Review to the point where disclosure is again not warranted. The second note is purely administrative and will not meaningfully add to any debate on HS2 and again disclosure isn't warranted.
41. Ultimately, the Commissioner considers that both the Oakervee Review and the Prime Minister had to determine the same thing – whether it was viable to proceed with HS2. The recommendation of the review was that the project should continue and the Prime Minister followed this

recommendation and used the same information, though in a different level of detail, to make this decision.

Procedural matters

42. Since the Cabinet Office provided its refusal under FOIA and not the EIR, it has breached section 14(2) of the EIR which states any refusal under the EIR needs to be provided within twenty working days of receipt of the request.
43. Furthermore, the Cabinet Office has breached regulation 11 of the EIR which states that any internal review under the EIR must be carried out within 40 working days.

Right of appeal

44. 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

45. 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.
46. 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

Alice Gradwell
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