

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

Date: 16 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 14 June 2021 the complainant wrote to the Cabinet Office and requested:

"Can I have a copy of the evidence on HS2 passenger growth, presented to Boris Johnson in January 2020, as described in Dom Cummings Substack article.¹"

5. The Cabinet Office responded on 1 September 2021, refusing the request under section 35(1)(a) (government policy) of FOIA.
6. The complainant requested an internal review on the same day.
7. The Cabinet Office provided the outcome to its internal review on 15 February 2022. It upheld its previous position.

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.²
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 Commissioner is also dealing with a similar case, IC-151363-G1Z1, where the request asked for a copy of all evidence presented to the Prime Minister, rather just focusing on passenger growth.
12. During the Cabinet Office's handling of this other request, it cited regulation 12(4)(e) (internal communications) of the EIR.
13. Since the two requests are so similar, it follows that regulation 12(4)(e) may also apply to the request that's the subject of this notice.
14. The scope of the Commissioner's investigation therefore is to firstly consider which access regime the Cabinet Office should have handled

¹ [Systems politics, systems management \(substack.com\)](https://www.substack.com/p/systems-politics-systems-management)

² [What is HS2 - HS2](https://www.substack.com/p/what-is-hs2-hs2)

the request under and secondly, whether it was correct to withhold the information requested.

15. The Commissioner notes that there are four pieces of evidence that relate to passenger growth, and were presented to the Prime Minister, which fall within the scope of the request:
 - 1) Annexes B and C contained within a HS2 trilateral note
 - 2) A single slide from a larger HS2 PowerPoint
 - 3) A single paragraph in a note from Cabinet Secretary Mark Sedwill to the Prime Minister
 - 4) Three paragraphs that refer to the Oakervee Review³.
16. During this investigation, the Cabinet Office confirmed that 2) is a duplicate of information contained within 1) so the Commissioner doesn't need to consider this information separately. It also confirmed that 4) was exempt under section 21 (information reasonably accessible via other means) (or regulation 6(1)(b) of the EIR).

Reasons for decision

Is the requested information environmental?

17. The Cabinet Office's submission to the Commissioner focusses on both section 35(1)(a) and regulation 12(4)(e).
18. 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);

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

- (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); 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);
19. 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
20. 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.
21. He will first consider the information at 4) that the Cabinet Office is withholding under regulation 6(1)(b).

Regulation 6(1)(b) – form and format of the regulation

22. Regulation 6 discusses in what form and format a public authority should disclose information in response to a request made under the EIR. If the information is exempt under an exception in regulation 12, regulation 6 will not apply.
23. Regulation 6 allows individuals to receive environmental information in their preferred form or format, subject to certain conditions. A public

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.pdf)

authority may only refuse to comply with the requestor's wishes if: firstly, if it's reasonable for the public authority to provide the information in a different form or format and secondly, if the information is already publicly available and accessible to the requester in another form or format.

24. For the purposes of regulation 6(1)(b), form refers to the physical form of information (for example hard copy or electronic) and format refers to how the information is configured or arranged within that form (for example, electronic information could come in several different file types pdf, Microsoft Excel or CSV).
25. The Cabinet Office has applied regulation 6(1)(b) to three paragraphs that were presented to Boris Johnson on 23 January 2020; these paragraphs discuss the findings and conclusions of the publicly available Oakervee Review.
26. The two pieces of information are not the same; the Oakervee Review is a publicly available document that provides HS2 recommendations to the government and the withheld information is a cross government analysis of the Oakervee Review and its recommendations.
27. It doesn't appear that Boris Johnson was presented with a copy of the Oakervee Review itself but a separate analysis of the review. Ultimately, the information that is being requested here is not the same as what is in the public domain; it was produced for and represents a different purpose, subtle though it is. Therefore, the withheld information cannot be withheld under regulation 6(1)(b).
28. The Commissioner will now go onto consider whether the information at 4), as well as 1) and 3), can be withheld under regulation 12(4)(e).

Regulation 12(4)(e) – internal communications

29. 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 information to engage the exception. If information represents an internal communication, the exception will apply.
30. 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.”
31. 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. 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

32. The Cabinet Office explained to the complainant that 'the evidence on HS2 passenger growth that you requested is likely to be used in ongoing policy development, for instance decisions on the later phase of HS2.'
33. 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.'
34. 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

35. There is a presumption in favour of disclosure under the EIR. It supports an individual's right to be informed on environmental matters.
36. 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

37. The Commissioner has decided that the balance of the public interest lies in maintaining the exemption.

38. The Commissioner recently considered a similar case, IC-131125-S9C8, which dealt with a request for a copy of the Heywood Review⁵. The Oakervee Review 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).

39. 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.”

40. 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-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.

41. 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.”

42. 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.

43. 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 on passenger growth but the actual evidence itself relates to, and will directly inform, current and future policy discussions on HS2. He must

⁵ [Top UK civil servant reviews HS2 project | HS2 | The Guardian](#)

consider the effects of disclosing each piece of withheld information separately.

44. Annexes B and C outline passenger growth forecasts but are inextricably linked to ongoing policy matters, alternative proposals, forecasts, costs and BCR (benefit costs ratios). 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.
45. The three paragraphs that discuss the Oakervee Review do just that, they analyse the review's findings and recommendations. Since the findings and recommendations of the review are already in the public domain, the Commissioner doesn't believe that disclosure is warranted in this instance.
46. Finally, there is the paragraph from Mark Sedwill to Boris Johnson. Again, the Commissioner considers this information is accurately represented in the Oakervee report to the point where disclosure is again not warranted.
47. 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, that the review discusses to make this decision.

Procedural matters

48. 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.

Right of appeal

49. 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

50. 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.
51. 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

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