

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 14 February 2024

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information on ground investigations undertaken as part of the HS2 project in two areas of Staffordshire. High Speed Two Limited (HS2) refused the request as manifestly unreasonable under regulation 12(4)(b) of EIR.
2. The Commissioner's decision is that HS2 has correctly refused the request under regulation 12(4)(b) of EIR and has complied with regulation 9 in providing appropriate advice and assistance.

#### **Request and response**

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3. On 24 July 2023, the complainant wrote to HS2 and requested information in the following terms:

"I understand from the HS2 Select Committee the following applies : The Select Committee has also called for HS2 Ltd to commit to publishing a report, by the end of the year, with more detail on the ground investigations that have been undertaken. It would also like to see annual or biennial updates on further results of technical ground investigations. It also recommends that HS2 Ltd should "willingly, and

in a timely manner” provide further information relating to the investigations when requested from stakeholders.

You are formally being asked to publish what you have for the area of Madeley and Whitmore Staffordshire.”

4. HS2 responded on 18 August 2023. It stated that the request was being considered under EIR and it was under no obligation to publish the data for Madeley or Whitmore as these are on Phase 2a of the route and the Select Committee Report related to Phase 2b of the HS2 route. HS2 considered it could not comply with the request under EIR as it would be manifestly unreasonable to do so (regulation 12(4)(b)) due to the time it would take to locate and collate the requested information.
5. Following an internal review, HS2 wrote to the complainant on 18 September 2023. It stated that it upheld its position that it would be manifestly unreasonable to respond to the request.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 5 October 2023 to complain about the way their request for information had been handled.
7. The Commissioner considers that the scope of his investigation is to determine if HS2 has correctly refused to provide the requested information under the exception at regulation 12(4)(b) EIR.

### **Reasons for decision**

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#### **Regulation 12(4)(b) – manifestly unreasonable**

8. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
9. The Commissioner considers that a request can be manifestly unreasonable either if the request is vexatious, or where compliance with the request would incur a manifestly unreasonable burden on the public authority both in terms of costs and the diversion of resources.
10. In its submissions to the Commissioner, HS2 has relied upon the latter interpretation of regulation 12(4)(b), that it considers the amount of work required to comply with this request in full would bring about a manifestly unreasonable burden.

11. Under FOIA, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') specify an upper limit for the amount of work required beyond which a public authority is not obliged to comply with a request. This is set at £450 for HS2.
12. The Fees Regulations state that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
  - determining whether the information is held;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.
13. The EIR differ from FOIA in that under the EIR there is no upper cost limit set for the amount of work required by a public authority to respond to a request.
14. While the Fees Regulations relate specifically to FOIA, the Commissioner considers that they provide a useful point of reference where the reason for citing regulation 12(4)(b) of the EIR is the time and costs that compliance with a request would expend. However, the Fees Regulations are not the determining factor in assessing whether the exception applies.
15. Regulation 12(4)(b) sets a robust test for a public authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is "manifestly unreasonable", rather than simply being "unreasonable". The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness.
16. Given the high burden referred to, the Commissioner expects a public authority to provide both a detailed explanation and quantifiable evidence to justify why complying with a request would impose such an unreasonable burden on it, and therefore why regulation 12(4)(b) is engaged. The Commissioner therefore asked HS2 to provide more detail to explain its position.
17. HS2 explained that it had considered an earlier request that asked for a subset of this data (Madeley area only) and had refused this as manifestly unreasonable when information relevant to the request spanned over 130 documents. Given the large volume of information involved, the information relevant to this request is the same information captured in the earlier request and more.

18. HS2 has provided examples of a sampling exercise it carried out on one document on Phase 2a ground investigations in Contract Area 3. This document is 5,773 pages. HS2 has pointed to a decision of the First-Tier Tribunal (EA/2012/0047) in which the Tribunal found that a reasonable estimate of time per page to examine was five minutes. As such, HS2 argues that looking at this one document would require over 481 hours. Even if this was reduced to two minutes per page the amount of time would exceed 192 hours.
19. The Commissioner had asked HS2 to explain why it considered there was likely to be exempt information within this document as this was the main crux of HS2's arguments ie that it would be burdensome to review the information and consider if any exceptions applied and, if so, to make appropriate redactions.
20. HS2 told the Commissioner it considered there would be information in the document that may engage three exceptions under EIR:
  - Regulation 13 – personal data
  - Regulation 12(5)(a) – public safety
  - Regulation 12(5)(e) - commercial or industrial information
21. In terms of personal data HS2 has provided clear examples of personal data in the document in the form of names and photographs.
22. With regard to public safety HS2 has pointed to names of small companies as one example of information that may need to be redacted, using examples of the Commissioner's previous decisions such as in decision notice IC-122093-M2Z1 where he found that disclosing the names of small organisations could lead to the disclosure of locational information that could be used by protestors to target sites. HS2 has stated that locational information is present throughout the document and consideration would have to be given to regulation 12(5)(a) in each case.
23. In terms of commercial information, HS2 states the documents are focused on examining the ground conditions in various parts of Staffordshire and this type of information is of a clear commercial nature, gathered in circumstances providing a duty of confidence. The information has clear financial implications for the owners or uses of the land.
24. HS2 did not locate specific information in its sampling exercise that engaged regulation 12(4)(d) (material in the course of completion), but given the nature of the document it considered it was likely there would be information in the documents that may engage this exception. At the

time of the request the exploratory works in the area were ongoing so it is argued there is likely to be some 'draft' information in the documents.

25. The Commissioner also asked HS2 to explain if exempt information would be in all relevant documents ie whether these documents would be withheld in their entirety as this would likely make the process of considering if redactions should be made significantly quicker. HS2 did acknowledge that this kind of information will be in a large proportion of the documents and there will be some sections that contain only raw data so will be withheld in their entirety under regulation 12(5)(a) or 12(5)(e) but the nature of the requested information and the size of the documents means there will be information that does not engage exceptions and the documents will still need to be viewed page by page.
26. The Commissioner notes the request essentially asks HS2 to disclose all information it has on ground investigations in Madeley and Whitmore. The request is not limited by time or any specific departments, members of staff or other limiting factors. It is understandable therefore that the request will incorporate a significant amount of recorded information (130 documents for just the Madeley area). The Commissioner accepts, based on the ongoing nature of the works and the explanations given by HS2, that some of the information held in the documents will be exempt from disclosure (or will at least need to be considered for exemption).
27. HS2 has already identified over 130 documents for one of the two areas, with pages numbering in the thousands. Even at just one minute per page, significantly less than the five minutes originally suggested, the time needed for HS2 to comply with the request will exceed 80 hours.
28. HS2 has demonstrated that compliance would place a significant burden upon it in terms of time and resources and in the Commissioner's view a 'manifestly unreasonable' level of burden given the size of it as a public authority and the resources it has. For these reasons, the Commissioner is satisfied that regulation 12(4)(b) of the EIR applies.

### **The public interest test**

29. HS2 recognises there is a general public interest in disclosure of information which contributes to the development of public debate and facilitates public understanding of an important public project and matters of concern. Where public funds are being spent, there is a public interest in accountability, and transparency. There is a legitimate public interest in knowing that HS2's resources are used appropriately and effectively.
30. The complainant considers there is a strong public interest in the information as it has caused significant stress for local people who have been affected by HS2's plans.

31. Balanced against this, HS2 considers it important it maintains tight control of expenditure and resources. It is in the public interest that all HS2 funding is appropriately managed. Identifying documents relevant to this request has already taken a significant amount of time and effort and to prepare for release HS2 staff would have to be diverted from their core duties in order to devote time on searching, extracting and reviewing all of the information held in relation to the request.
32. Of the time identified, only the resource required to read each page and identify any exempt material of one document has been calculated. Just this exercise would take a significant number of hours and would therefore, in HS2's view, be far more than could be considered a reasonable amount of time to comply with respect to this request. It argues that while there is always a public interest in releasing information that is in the best interests of society, it is not clear what the wider public interest is for searching for this very specific information.
33. General Information on works in the area is shared at public engagement events, and where relevant, HS2 advises appropriate information will be shared with landowners and those affected or with responsibilities for the management of the land. These processes satisfy the public interest in ensuring that information is shared with affected parties and that the project is undertaken appropriately.
34. The Commissioner considers this is a balancing exercise – weighing up the impact compliance would have on the public authority's time and resources and the identified public interest arguments in favour of disclosure. There are clear public interest arguments in relation to information that would improve public understanding and scrutiny of the HS2 project. That being said, this information is at a more granular level and the public interest in it is more likely to be limited to local people. However, the Commissioner recognises there is still public interest in HS2 complying with this request and disclosing what information it is able to.
35. There still remains weighty public interest arguments in favour of protecting the resources and time of a public authority where a request would be so burdensome, costly and time consuming to process. It is not in the public interest to divert resources away from the public authority's other functions and services when compliance would take such a significant amount of time.
36. In this case, it has been shown that at a rate of one minute per document (which is very low) would take HS2 over 80 hours to collate and review the recorded information it has identified so far and this is not all the recorded information HS2 potentially holds. This is significant and only goes to highlight just how much recorded information

potentially falls within the broad nature of this request and what compliance would involve. Despite the public interest in the information, this would place an overwhelming burden upon HS2 in terms of time and expense that cannot be justified. It would have to disproportionately divert a huge amount of time and resources away from other functions in order to comply and on this scale, the Commissioner is satisfied that this is not in the wider interests of the public.

37. For the above reasons, the Commissioner has decided that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.
38. He would, however, like to point out that, considering the public interest in disclosure because of the nature of the requested information in this case, he would expect HS2 to accept some additional burden in terms of compliance if a fresh request for information were to be made and this was much more focussed and refined. This is with the necessary caveat that even if a new request can be processed under the EIR it is likely that some of the requested information may still engage exceptions under the EIR.

### **Regulation 9**

39. There is a duty on a public authority to provide an applicant with appropriate advice and assistance when applying regulation 12(4)(b) of the EIR so far as it is reasonably practicable. This is to assist the applicant in framing a new request which could be potentially considered without hitting any threshold of cost and time.
40. The Commissioner notes that the complainant framed this request broadly and asked for everything HS2 held on the subject of ground investigations in the specified areas. HS2 stated in its response to the complainant that it would be difficult to suggest any practical way to refine the request but made clear it would consider any revised request that might narrow the scope. It suggested focusing on specific aspects that might be of interest to the requester.
41. The Commissioner considers that appropriate advice and assistance was provided. HS2 suggested a focus on more specific areas and it is not clear what other advice could have been provided. For these reasons, the Commissioner is satisfied that HS2 has complied with regulation 9 of the EIR



## Right of appeal

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42. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

43. 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.
44. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**Water Lane**  
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