

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 November 2021

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

Decision (including any steps ordered)

1. The complainant has requested information about noise modelling in the Radstone area. High Speed Two Limited ('HS2 Ltd') released some information and withheld the remainder under regulation 12(4)(d) of the EIR (material in the course of completion). HS2 Ltd subsequently advised that it considers some of the withheld information also engages regulation 12(5)(e) (confidentiality of commercial or industrial information) and regulation 13 (personal data).
2. The Commissioner's decision is as follows:
 - The information being withheld under only regulation 12(4)(d) of the EIR engages that exception but the public interest favours disclosure.
3. The Commissioner requires HS2 Ltd to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld information having first redacted from it the information categorised as commercially sensitive information under regulation 12(5)(e), and personal data as appropriate.
4. HS2 Ltd 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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 11 March 2021 the complainant wrote to HS2 Ltd and requested information in the following terms:

“At the HS2 Liaison group meeting of 26th February 2021, a representative from EKFB indicated that the latest proposed solution for Radstone (to minimise the noise of HS2 trains) would generate no more noise than the previous solution which had been agreed by way of Additional Provision 4 and an Assurance. To make such a claim, appropriate noise modelling must have been carried out.

I am therefore making a request under both the Freedom of Information Act and the Environmental Information Regulations to receive the following information (separately) for each of the above scenarios:

Inputs

Train speed

Height of line in relation to that shown in the Environmental Statement

Height and length of noise barrier used

Height and length of bund

Acoustic impedance of bund

Noise modelling outputs

Noise contour maps

Frequency range of noise level assessment”

6. HS2 Ltd responded on 12 April 2021. It released the majority of the requested information but withheld one draft report - the “current draft designs” - under regulation 12(4)(d) of the EIR. HS2 Ltd confirmed that it considered the public interest favoured maintaining this exception.
7. Following an internal review HS2 Ltd wrote to the complainant on 15 June 2021. It upheld its position and at that point also noted that the “full design information” would be provided as part of the Schedule 17¹

¹ <https://www.gov.uk/government/publications/high-speed-rail-london-to-west-midlands-act-2017-schedule-17-statutory-guidance/high-speed-rail-london-west-midlands-act-2017-schedule-17-statutory-guidance>

application for the related work, and that this would be available via the local Council's planning portal.

Scope of the case

8. The complainant contacted the Commissioner on 20 June 2021 to complain about the way his request for information had been handled.
9. In its submission to the Commissioner, HS2 Ltd advised that, having reconsidered the withheld information, it considers that some of the information – the projected estimated costs of different design options – also engages the exception under regulation 12(5)(e) and that the names of less senior members of staff contained in the report engage the exception under regulation 13.
10. The complainant has confirmed that his focus is on what the design proposals are, and not on how much they might cost. The information also being withheld under regulation 12(5)(e) is therefore out of scope of this case. In addition, the complainant has expressed no interest in the withheld personal data.
11. The Commissioner's investigation has therefore focussed on whether HS2 Ltd is entitled to withhold some of the requested information under regulation 12(4)(d) of the EIR, and the balance of the public interest.

Reasons for decision

Regulation 12(4)(d) – material in the course of completion

12. Regulation 12(4)(d) of the EIR says that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
13. The explanatory memorandum to the EIR (COM/2000/0402) states that
“...the Commissioner places great importance on public authorities being afforded safe space (thinking space) and drafting space when considering whether, and on what terms, a venture should be entered into.”
14. Regulation 12(4)(d) is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse

effect in order to engage the exception. However, regulation 12(4)(d) is a qualified exception so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

15. The fact that the exception refers both to material in the course of completion and to unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion.
16. In his complaint to the Commissioner the complainant has raised the following points. He has explained that Radstone is a small hamlet in Northamptonshire not far from the town of Brackley. Soon after the plans for the High Speed 2 (HS2) rail line were first published in 2010, the alignment of this line was moved approximately 600 metres closer to Radstone. In the complainant's view, this hamlet was "sacrificed" for the greater good, and to the benefit of other villages and future housing developments in South Northamptonshire.
17. The complainant notes that trains travelling in the region of 200 mph make a very considerable noise, and that noise will occur at approximately two minute intervals according to the planned frequency of operation. Consequently a group of Radstone residents petitioned the HS2 Select Committee at Westminster in 2015-16 to request that noise mitigation measures be put in place in the vicinity of this hamlet. This petition resulted in changes being included in Additional Provisions 4 (which is an addition to the HS2 Environmental Statement) and the list of Assurances which would require the building of a noise barrier five metres high and 800 metres long, as well as a lowering of the HS2 line by as much as 1.5 metres.
18. EKFB (a joint venture of four civil engineering and construction companies) was appointed the joint contractors for the central region (C3), which includes Radstone, in 2017. On 8 February 2021, a representative of EKFB advised the Radstone residents that changes were being made to the design of the HS2 line in the vicinity of their hamlet. The noise barrier would no longer be installed, and an earth bund (mound) would be raised instead. Furthermore the line would no longer be lowered as much as previously implied. In other words, the complainant says, HS2's contractors were no longer going to respect the changes which had been legally set out in Additional Provisions 4 (AP4) and the list of Assurances. EKFB assured the residents that the latest design would create no more noise than that of the previous design although, the complainant says, EKFB provided no meaningful evidence to support that claim.

19. The complainant therefore submitted his FOI request to HS2 Ltd to obtain the inputs and outputs of the noise modelling work which had been performed whereby EKFB claimed that their new solution created no more noise than the previous design.
20. The complainant argues that EKFB has had almost four years to prepare its detailed designs for this section of the HS2 line. Therefore HS2 Ltd's claim that this is "effectively a preliminary design" is not credible in his view. The complainant considers that the start of actual construction is now probably only months away. While there may have been several design iterations to reach this point, he questions whether there will be any more iterations before construction starts on this section.
21. The complainant acknowledges that there could be further iterations of the HS2 design in the vicinity of Radstone, but he considers that to be unlikely at this stage. The complainant argues that the design presented to Radstone residents in February 2021 and at a meeting in May 2021 (after the FOI request) is likely to be the final one or close to the final design, otherwise contractors EKFB would not have shared that information with Radstone's residents.
22. For its part, in its submission to the Commissioner HS2 Ltd has first explained that in order to help develop a noise mitigation design that complies with commitments, a number of design scenarios are investigated before proposing the optimum solution. The design options include different earthworks designs (heights and lengths of bunds) and different noise barrier designs (heights and lengths of barriers). These designs in combination with the other parameters requested in the request for information in this case (trains, train speed, alignment etc) define the overall noise performance of the railway. A report into options was prepared by HS2 Ltd's contractors which HS2 Ltd rejected. That report contains information relating to the height and lengths of bunds and barriers captured by the request. HS2 Ltd provided the Commissioner with a copy of the report which, as noted, is the information it is withholding.
23. HS2 Ltd's submission goes on to advise that the withheld information is contained within a document which is, in itself, completed but is part of material which is still in the course of completion. The report was prepared by HS2 Ltd contractors to assess options for the design of the high speed track through the Radstone area.
24. HS2 Ltd has described the document as a technical paper, specifically prepared to assess different options for this part of the high speed track. It says that as these works have not yet been started, the information forms part of wider considerations on how to undertake these works. The assessment examines an alignment opportunity that has not been

subject to any level of design other than a high-level assessment of feasibility.

25. HS2 Ltd rejected the assessment. It has explained that its rejection note advises that design certificates must set out how comments will be addressed, and designs updated in time for the optimal and compliant designs to be presented at Schedule 17. HS2 Ltd has told the Commissioner that neither the paper nor the design have been revised and submitted to HS2 Ltd by the relevant contractor at this point.
26. HS2 Ltd argues that that the information therefore directly relates to the continuing development of policy and the process of making decisions regarding works and mitigation measures in this area (relating to noise reduction). It has noted that the Commissioners' published guidance on regulation 12(4)(d) states "If the process of formulating policy on the particular issue is still going on when the request is received, it may be that disclosure of drafts and unfinished documents at that stage would make it difficult to bring the process to a proper conclusion" (paragraph 15).

The Commissioner's conclusion

27. The Commissioner is satisfied that the withheld information can be categorised as material in the course of completion. She accepts that the draft report in question forms part of the process of assessing options for designing the high speed rail track through Radstone. That process is not yet settled and no final decision on the track's design has been made. As such, the Commissioner has decided HS2 Ltd was entitled to apply regulation 12(4)(d) of the EIR to the information it is withholding. She has gone on to consider the associated public interest test.

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

Public interest in maintaining the exception

28. HS2 Ltd has first re-stated that the withheld information relates to the vertical alignment of the track in the location of Radstone, being a matter which remains under consideration/in development. The requested information forms part of a set of wider materials about this part of the line - such materials are still in the course of completion and as such the information will be subject to change as the assessment continues.
29. In a number of previous decisions, HS2 Ltd goes on to say, the Commissioner has acknowledged that "there is a strong likelihood that the integrity of and effectiveness of the decision-making process would be harmed by the disclosure of inchoate information". In this case, the

design process is still ongoing. HS2 Ltd says it has been sharing information with the community when it is sufficiently progressed and finalised and will continue to do so. This is not the same as the general public being provided with unfinished information, which is in the process of being developed, debated and approved. Releasing the documents at this time and in their present form would, in HS2 Ltd's view, present an inchoate picture to the public which, in turn, would misinform and distract debate.

30. In EA/2011/0269 & 0285 (Uttlesford District Council vs the Information Commissioner), the First-tier Tribunal (Information Rights) ('the FTT') referred back to the recitals to the Directive 2003/4/EC, which underpin the EIR. The FTT noted that release of the incomplete information in that case, "would have defeated the intent behind recital 20 in that the information disclosed would not have been accurate" (paragraph 50).
31. In this case, HS2 Ltd says, the withheld information is highly technical and, essentially, is concerned with analysing the effects of design proposals and providing information through which policy can be formulated. It is important that HS2 Ltd staff have the "safe space" to conduct this ongoing development work free from concern about the need to justify and explain their work before it is complete, and free from concern that their work might be undermined or distracted by debating evolving methodologies and data in public.
32. HS2 Ltd argues that it needs this "safe space" to operate candidly and freely when developing policy and planning the measures that may be undertaken in specific geographical areas. Releasing information too early could discourage public officials from such a free and frank discussion of all available options and would therefore be detrimental to the decision-making process. In HS2 Ltd's view it is therefore in the public interest that public officials are allowed a thinking space in which to appraise and assess all available options and considerations before a decision is made.
33. Furthermore, it is important, HS2 Ltd says, that it is provided with the opportunity to engage with the relevant affected parties and convey this information to the appropriate people at the appropriate time and receive relevant feedback on the proposals. Releasing the incomplete information into the public domain "at this time would" interfere with this engagement process.

Public interest in disclosing the information

34. The complainant notes that HS2 Ltd had advised him that placing the information into the public domain at the point of his request would interfere with the engagement process and cause unwarranted concern

and unnecessary confusion. The complainant argues that, in fact, unnecessary concern is being caused by the non-disclosure of information.

35. HS2 Ltd had advised the complainant that the final plans will be published when the Schedule 17 Application is made. But the complainant considers that, by then, it is likely to be too late for local residents to have any influence on the specification of the HS2 line in the vicinity of Radstone, particularly regarding the height of the line.
36. With regard to HS2 Ltd's argument that there is a strong public interest in ensuring that public officials have a safe space to work, the complainant has drawn the Commissioner's attention to the FTT decision in EA/2020/0088V², which also concerned HS2 Ltd. The FTT stated in that case that "It is clear ... that the purpose of making environmental information public is not only to give the public greater awareness and reassurance but also so that they can take part in decision-making about environmental matters". The complainant argues that that cannot happen if requested information is withheld.
37. The complainant considers it is relevant to point out that Parliament is currently conducting a consultation to review the procedures and practices of hybrid bills³. He notes that Question 9 asks: "Where promoters make undertakings to a hybrid bill select committee, or give assurances, how can Parliament most effectively ensure that they fulfil those obligations?" The complainant says that that is the very issue that is being addressed here. In his view the contractors EKFB are unwilling to fully respect the Additional Provisions 4 and Assurances given at the time of petitioning the HS2 hybrid bill by Radstone residents. The complainant considers that Parliament is clearly aware and is concerned that agreements made by the HS2 Hybrid Bill Select Committee are not being implemented in full.
38. The complainant argues that by refusing to release the requested noise modelling information, HS2 Ltd is preventing any form of meaningful review of these design changes in the vicinity of Radstone. That is despite HS2 Ltd and its contractor EKFB having, he says, chosen to

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2821/Green,%20S%20-%20EA2020-0088V%20%20Judges%20Final%20DECISION%20\(19.04.21\)%20.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2821/Green,%20S%20-%20EA2020-0088V%20%20Judges%20Final%20DECISION%20(19.04.21)%20.pdf)

³ 1. <https://www.parliament.uk/business/news/2021/april/consultation-launched-on-hybrid-bill-procedure-and-practice/>

deviate from the legally agreed modifications detailed in Additional Provisions 4 and the list of Assurances. The complainant considers that what HS2 Ltd builds will have a permanent adverse effect on the residents of Radstone. It is essential in his view, to ensure that the adverse noise effects are mitigated in a satisfactory way before construction of the line commences near the hamlet.

39. HS2 Ltd has acknowledged that there are general public interest arguments in favour of greater transparency and accountability around the progress of the HS2 programme. In this case, HS2 Ltd says, disclosing the information would help to facilitate general public understanding of the HS2 programme and increase understanding of the alternatives being considered in this area. Release would also help the public to understand the design options and the mitigation measures which are being considered in relation to any impacts.

Balance of the public interest

40. HS2 Ltd has noted that the argument that releasing information in the course of completion has the potential to misinform is not one that, in previous decisions, the Commissioner has apportioned great weight to. This is because a public authority can provide explanatory text to support the information being disclosed, to ensure that it is clear. However, the Commissioner has also acknowledged that this is not always appropriate since an authority will not always hold, final completed versions of documents which allow for discrepancies to be resolved.
41. HS2 Ltd says that in this instance, assessments are ongoing and are part of an iterative design process. Therefore, while the decision-making process is still incomplete it would be difficult to place the withheld information in context or counteract any resulting confusion.
42. In this case, once the analyses are complete HS2 Ltd says that it will share the majority of the information with the affected parties and release it into the public domain during the Section 17 approval process. However, it considers that early release of the detailed analysis could restrict the deliberations or the scenarios that are analysed.
43. Furthermore, in HS2 Ltd's opinion, releasing this information may lead to a reluctance to fully share opinions and analyses. It says that such restrictions on the exchange of information or analysis being undertaken would reduce the quality of the internal deliberations and ultimately impair the decision-making process. HS2 Ltd goes on to discuss in more detail the "safe space" argument and the possible chilling effect disclosure would have on officials' discussions.

44. HS2 Ltd has also noted in its submission that in July 2021 its Community Engagement team gave a presentation to those people directly affected by the proposals.
45. Finally, HS2 Ltd has noted the Commissioner's decision in FS50887455⁴. In that case, which is somewhat similar to the current one, the Commissioner found there was greater public interest in HS2 Ltd being able to consider particular proposals away from the probable distraction of fielding questions from the public about those proposals that may, in any case, have been changed or refined.
46. The Commissioner had also noted that, as in the current case, HS2 Ltd had given a presentation directly to those affected by the design proposals and that those discussions were part of an iterative design and community engagement process. The Commissioner notes, however, that the presentation HS2 Ltd gave in the current case was in July 2021 ie it post-dated the request and the period up to HS2 Ltd's internal review response.

The Commissioner's conclusion

47. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure.
48. The Commissioner has reviewed the FTT's decision in EA/2020/0088V. That case concerned an HS2 infrastructure project that carried risks of contamination to the drinking water supplied to 3.2 million people. The request was for associated reports which HS2 Ltd had withheld under regulation 12(4)(d). The FTT found that regulation 12(4)(d) was engaged but that the public interest favoured disclosure.
49. In its original submission to the Commissioner and its response to the FTT in that appeal, HS2 Ltd had relied on public interest arguments that are substantially similar to its arguments in this case; the need for a 'safe space' in which to undertake further discussion and that disclosing 'inchoate' information would mislead the public and cause HS2 Ltd to have to spend time (and public money) correcting false impressions.
50. With regard to its 'safe space' argument, in the absence of any compelling evidence from HS2 Ltd that disclosure would cause a 'chilling effect', the FTT in the earlier case did not accept that public officials

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617817/fs50887455.pdf>

would be discouraged or undermined if the information was disclosed. Similarly, the Commissioner does not consider that HS2 Ltd has presented compelling evidence in this case to suggest that its officials would feel unable to have full and frank discussions, internally or with its contractors, if the requested information was to be disclosed.

51. With regard to HS2 Ltd's argument that disclosing the information would cause confusion or interfere with its engagement process, on the evidence presented to her in this case, the Commissioner is not persuaded. It appears that HS2 Ltd has a dedicated 'Community Engagement' team whose role is likely to involve discussing, clarifying and explaining HS2 works and design proposals to the public. The Commissioner considers that that team, and other relevant parts of HS2 Ltd, would be able to place the disclosed information in context and deal with queries that emerge.
52. The Commissioner has noted her decision in FS50887455. However, she considers each complaint submitted to her on a case by case basis – it is extremely rare for the circumstances of each complaint to be identical. As the FTT and the complainant have noted, the purpose of making environmental information public is to give the public greater awareness and reassurance and to enable them to take part in decision-making about environmental matters.
53. The Commissioner does not consider the arguments that HS2 Ltd has put forward for withholding the information in this case are sufficiently compelling so as to outweigh the EIR's presumption in favour of disclosure. The route of the HS2 line in the vicinity of Radstone may not directly affect millions of people, as in EA/2020/0088V, but it will nevertheless have a major and lasting impact on people living and working in that area. Those people are entitled to take part in the associated decision-making and to be as fully informed as possible before any final planning decisions are made.

Right of appeal

54. 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

55. 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.
56. 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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