

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

Date: 10 January 2022

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

Decision (including any steps ordered)

1. Across two pieces of correspondence, the complainant requested ecological and protected species survey reports for a specific location. High Speed Two Limited (HS2 Ltd) released the majority of the relevant information it holds and withheld some under regulation 12(5)(g) of the EIR (the protection of the environment to which the information relates) and regulation 13 (personal data).
2. The Commissioner's decision is as follows:
 - HS2 Ltd is entitled to apply regulation 12(5)(g) of the EIR to some of the requested information and the public interest favours maintaining this exception.
 - It was reasonable for HS2 Ltd to categorise the complainant's second piece of correspondence as a separate request and to aggregate it with the first request. HS2 applied regulation 7(1) correctly but did not disclose all the relevant information or issue a refusal in respect of some of the information within 40 working days of receipt of the second request. HS2 Ltd's response therefore breached regulation 5(2) and regulation 14(2) of the EIR.

- HS2 Ltd did, however, advise the complainant within the required timescale that it needed a further 20 working days to respond to the requests and therefore complied with regulation 7(3).
3. The Commissioner does not require HS2 Ltd to take any remedial steps.

Background

4. In its submission to the Commissioner, HS2 Ltd has provided the following context. It says that HS2 Ltd's 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 7 October 2020 the complainant wrote to HS2 Ltd and requested information in the following terms:

"I am requesting all ecological and protected species survey reports for the area within the 2km radius of SP 88725 04426

Please ensure that the protected species information is not redacted from these reports under Regulation 12 (5)g as I am already aware of the presence of protected species in the requested data area. Moreover with the occasional exception of badger data) such reports are always made fully public and unredacted in relation to planning applications. Given there are thousands of such examples, any suggestion that effectively identical reports produced for HS2 Ltd may be subject to Regulation 12 (5)g is clearly not valid and obstructive."

6. At this time, the complainant was in correspondence with other HS2 Ltd staff. In the course of that correspondence, on 26 October 2020 the complainant asked for the following information:

"Before I provide the requested information, could I ask that you send me the following details in order to ensure that a) I do not duplicate

any information you already hold and b) so that I can judge if your own surveys were undertaken with the due diligence you are requesting of ours.

- A map showing the location of all surveys carried out since 2014 within 2km of Jones' Hill Wood
 - Details of each survey carried out such as dates and weather conditions;
 - Results of any acoustic surveys, including any sound recording files;
 - Results of the potential roost assessment of trees, with grid references and photos"
7. This correspondence was passed to HS2 Ltd's FOI team. On 23 November 2020 HS2 Ltd wrote to the complainant to advise him that it was extending the time for its response to his "request for information ... received on 26 October 2020" from 20 working days to 40 working days.
 8. On 21 December 2020 HS2 Ltd provided the complainant with a response. It first advised that it had combined the above two 'requests'. HS2 Ltd released the majority of the information in the relevant survey reports that it holds and withheld some under regulation 12(5)(g) of the EIR. HS2 Ltd also withheld the personal data of surveyors under regulation 13.
 9. The complainant requested an internal review on 23 December 2020. He was dissatisfied that HS2 Ltd had categorised both items of his correspondence as separate requests and had aggregated them; the resulting length of time it had taken HS2 Ltd to respond; and its reliance on regulation 12(5)(g) to withhold some of the requested information.
 10. Following an internal review HS2 Ltd wrote to the complainant on 29 January 2021. It confirmed that it considered it was entitled to combine the complainant's two pieces of correspondence, whilst noting that "in many senses" the complainant's correspondence of 26 October 2020 "had added to and built on" his request of 7 October 2020. HS2 Ltd then advised that the EIR entitled it to extend the period for a response by a further 20 working days and that, following his correspondence of 26 October 2020, it had sent the complainant a letter advising that an extension was necessary and that it expected to provide a response to the 'request(s)' on or before 21 December 2020. Finally, HS2 Ltd confirmed that it considered the public interest favoured maintaining the regulation 12(5)(g) exception.

11. In the course of the Commissioner's investigation, HS2 Ltd told the Commissioner that in the course of preparing its submission for him, it noticed that some information in the material it had originally disclosed to the complainant had not been redacted appropriately and other information had been redacted erroneously. HS2 Ltd advised that it has sent the complainant a revised response on 28 October 2021, correcting those issues. However, HS2 Ltd confirmed that it continued to rely on regulation 12(5)(g) to withhold some information within scope of the request.
12. Subsequently, HS2 Ltd then identified further information within scope of the requests that it held at the point the complainant had submitted them: a report (not commissioned or undertaken by HS2 Ltd) and data in 'ZCA' files and Excel spreadsheets. On 22 December 2021, HS2 Ltd released the majority of this information to the complainant but again withheld some under regulation 12(5)(g) of the EIR (and regulation 13).

Scope of the case

13. The complainant contacted the Commissioner on 2 February 2021 to complain about the way his request for information had been handled; specifically HS2 Ltd's reliance on regulation 12(5)(g) and procedural aspects of its handling of his request.
14. The Commissioner's investigation has focussed on whether HS2 Ltd is entitled to withhold some of the requested information under regulation 12(5)(g) of the EIR, and the balance of the public interest.
15. He has also considered whether HS2's handling of procedural aspects of the requests complied with regulation 5, regulation 7 and regulation 14 of the EIR.

Reasons for decision

Regulation 12(5)(g) – protection of the environment to which the information relates

16. Under regulation 12(5)(g) of the EIR a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the protection of the environment to which the information relates.
17. In general terms, making environmental information available to the public ultimately contributes to a better environment, by increasing

people's awareness and understanding of environmental issues. This principle is recognised in EU Directive 2003/4/EC on Protection of the environment (regulation 12(5)(g)) – EIR guidance 20120516 Version: 1.1 4 public access to environmental information, which the EIR implement.

18. However, there may be situations when disclosing the information would actually have an adverse effect on the environment. The Directive says that a request may be refused if disclosure would adversely affect "the protection of the environment to which such information relates, such as the location of rare species" (Article 4(2)(h)). So if, for example, a public authority holds information about the breeding site of a rare bird species and disclosing the location of the site would expose the site to interference or damage, then the exception may be relevant because disclosure could adversely affect the protection of the environment.
19. The information that HS2 Ltd is withholding under regulation 12(5)(g) is the geographic co-ordinates and other information associated with the possible location of certain species.
20. To refuse a request for environmental information under the exception in regulation 12(5)(g), public authorities will need to establish:
 - that the information in question relates to the aspect of the environment that is being protected
 - how and to what extent the protection of the environment would be affected; and
 - that the information is not on emissions.
21. In its submission to the Commissioner, HS2 Ltd has discussed the above criteria. With regards to the first, it has noted that regulation 2(1)(a) to (f) of the EIR lists the elements that describe what constitutes the environment in the Regulations. This list does not refer to animals, plants or other living organisms but rather "biological diversity and its components". The Commissioner's guidance on 12(5)(g) notes that this exception is about the protection of biodiversity, "that is, living organisms as part of the environment and their interrelation with the other elements of the environment". The guidance further clarifies that this "would include the protection of a badger sett or the location of a rare plant, in so far as they are part of the natural environment of a particular area".
22. Without going into detail as to what aspects of the environment the withheld information in question relates to in this case, the Commissioner is satisfied, from HS2 Ltd's explanation, that the

information relates to possible protected species in the location referred to in the request and that the first criterion is met.

23. HS2 Ltd's submission has next discussed the second criterion. It considers that illegal activity could occur if the withheld information was to be released. HS2 Ltd's submission discusses this matter in more detail, but the Commissioner does not intend to reproduce that detail in this notice.
24. Finally, HS2 Ltd has confirmed that the withheld information does not concern emissions.
25. The Commissioner is aware that in his correspondence with HS2 Ltd the complainant advised HS2 Ltd that he was already aware of the presence of certain protected species in the requested data area. He also said that reports such as those he had requested are always made fully public and unredacted in relation to planning applications. The complainant argued that, given there are thousands of such examples, HS2 Ltd could not rely on regulation 12(5)(g) to withhold the information. Finally, he said that Natural England and organisations like the Woodland Trust and the RSPB publish protected species data.
26. The Commissioner notes the complainant's point that other bodies may disclose protected species data. However, it is entirely up to those bodies whether or not they publish that information, and it does not follow that HS2 Ltd should also therefore put similar information into the public domain. Disclosure under the EIR is disclosure to the world at large, not just to the applicant. The Commission has considered HS2 Ltd's submission and the withheld information and he is satisfied that HS2 Ltd is entitled to withhold the disputed information under regulation 12(5)(g) of the EIR. He has gone on to consider the public interest test.

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

Public interest in disclosing the information

27. 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.
28. In this case, HS2 Ltd says, disclosing the information would help to facilitate general public understanding of the steps HS2 Ltd is undertaking to understand, and therefore mitigate the effects on, animal life in the Jones' Hill Wood area.

Public interest in withholding the information

29. Without repeating the detail of its argument HS2 Ltd argues that it is possible that disclosing the information – which would indicate whether or not certain species had been identified in the location – could encourage people to try to deliberately (or unintentionally) interfere with or harm any such species. This includes disrupting any of HS2 Ltd's mitigation works, in an attempt to frustrate HS2 Ltd's works on the High Speed 2 rail line, for example by anti-High Speed 2 protestors.
30. In its submission HS2 Ltd has stated that it is not in the public interest to disclose information that would lead to any protected species being harmed.

Balance of the public interest

31. HS2 Ltd has noted that it has released to the complainant the majority of the information he requested. In addition it proactively publishes survey data which it collects (except that which may cause harm to a protected species). HS2 Ltd says that proactively publishing this data has led to praise from those who use it and has greatly increased transparency in this area. In addition HS2 Ltd has advised that its work with the natural environment and protected species is undertaken by professionally qualified experts under licence from National England. There is therefore independent oversight of the process of protecting particular species.
32. The Commissioner appreciates that the complainant may have a personal interest in the withheld information. However, he has not made a case that this specific information has any wider public interest. The public interest in HS2 Ltd being transparent in how it identifies, manages and mitigates risks to protected species and the natural environment generally is met, in the Commissioner's view, by the measures it has taken, and which are noted above. It cannot be in the public interest for any protected species, if present, to be at greater harm of disturbance or harm as a result of the information requested in this case being published. It is also not in the public interest for work on the high speed rail line to be disrupted, potentially. As such, the Commissioner finds that the balance of the public interest favours maintaining the exception in this case.

PROCEDURAL MATTERS

Regulation 5 – duty to make environmental information available on request / Regulation 7 – extension of time / Regulation 14 – refusal to disclose information

33. Under regulation 5(2) of the EIR a public authority that holds environmental information shall make it available on request as soon as possible and within 20 working days after the date of receipt of the request.
34. Under regulation 14(2) of the EIR, a public authority must make a refusal to disclose environmental information as soon as possible and no later than 20 working days after the date of receipt of the request.
35. However, under regulation 7(1) of the EIR, where a request is made under regulation 5, the public authority may extend the period of 20 working days for a response and/or refusal provided by regulation 5(2) and regulation 14(2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.
36. Under regulation 7(3) the public authority must notify the applicant accordingly as soon as possible and no later than 20 working days after the date of receipt of the request.
37. The complainant is dissatisfied that HS2 Ltd aggregated his request of 7 October 2020 and correspondence of 26 October 2020 and did not provide a response to his requests until 21 December 2020.
38. With regard to aggregating requests, the FOIA fees regulations do not apply under the EIR, there is no specific provision for the aggregation of substantially similar requests for environmental information. The Commissioner's position, however, is that there may be occasions where it 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
39. In its submission HS2 Ltd has noted the Commissioner's published guidance on regulation 12(4)(b) of the EIR (manifestly unreasonable request) in relation to the cost of complying with a request exceeding the appropriate limit. The guidance advises that a public authority, when estimating the proportionality of the burden or cost of dealing with a request, should consider all circumstances of the case, including, amongst other things "the context in which the request is made which

may include the burden of responding to other requests on the same subject from the same requester”.

40. In this case HS2 Ltd has noted that the second 'request' was prompted by communication to the complainant from HS2 Ltd Ecologists, who had asked for the results of surveys he had allegedly undertaken. HS2 Ltd says it treated the second 'request' as an elaboration and clarification of the initial request and the 'requests' were therefore combined in order to ensure that, taken in the round, 'the request(s)' were not manifestly unreasonable.
41. Following further questioning by the Commissioner, HS2 Ltd confirmed on 7 January 2022 that the request of 26 October 2020 contained a request for new information; information that the complainant would not have received (where regulation 14(2) was not engaged) if he had submitted only the request of 7 October 2020. The additional information that he received as a consequence of the 26 October 2020 request was photographs, audio files and maps. HS2 Ltd did not consider that information to be covered by the first request for "survey reports".
42. Having considered the matter, the Commissioner is satisfied that HS2 Ltd was entitled to categorise the correspondence of 26 October 2020 as a new request, and it was reasonable for HS2 Ltd to aggregate it with the first request.
43. The complainant notes that HS2 Ltd had advised him that it was extending the period for a response by a further 20 working days as it had deemed his request(s) to be "complex and voluminous". In his view the actual information provided was neither complex or voluminous and he considers that HS2 Ltd categorised it as such in order deliberately to delay providing a response.
44. The Commissioner reviewed the material disclosed to the complainant and initially agreed that, while it is somewhat complex, it did not appear to be especially voluminous. The Commissioner understood that the information in scope, which had been disclosed originally, comprises two spreadsheets and a notated image/map of the location in question. His view was that the information in the spreadsheets would be straightforward to manipulate and redact and, in addition, considered that the public interest considerations would have been relatively straightforward in this case.
45. However, in further correspondence to the Commissioner on 15 November 2021, HS2 Ltd confirmed that it considered it had not been practicable to respond to the requests within 20 working days.

46. HS2 Ltd says the spreadsheet[s] did not already exist in “that format”, (by which the Commissioner understands HS2 Ltd to mean in the format in which they were disclosed) and the precise data requested had to be extracted from a large database. The person who carried out the data extraction advised:
- “Currently the “all ecological and protected species survey reports” data is held across two different systems in two separate schema versions. EDP for Phase 1 have been consolidating all legacy data into the current single GIS version of the data holding. This is still in development.
 - We don't yet have a tool in place to extract data from the current single GIS version of this data for a dedicated Area of Interest (in this case the coordinates requested). The data is structured as a one-to-many relational database, i.e. many tabular results relating to a single spatial feature. This makes it difficult to extract tabular data for a specific location without a tool – this is in development.
 - Any exports going outside of HS2 will need to undergo data cleansing to remove any GDPR data – nothing is ‘fixed’ on this for the current single GIS version of the data holding.
 - Due to the one-to-many relational database structure it may not be immediately easy to use by less technical data users and guidance may need to be produced, or pre-export data manipulation required to minimise the need to ‘join the related tables together’ user-side.”
47. HS2 Ltd advises that in the last bullet point the individual is referring to the published data, as referred to in its original submission to the Commissioner. At the time of the request HS2 Ltd was not regularly proactively publishing these data.
48. HS2 Ltd also notes that the above refers to GDPR but, as well as personal data, HS2 Ltd had to consider whether any other exemptions were relevant.
49. Considering everything that was involved, HS2 Ltd says, preparing the information for release was not a straightforward or simple task. Locating and extracting the information was a complex task. In addition, correctly identifying any exempt information and then determining where the balance of the public interest lies was also complicated and needed careful consideration.
50. Primarily due to the work needed to extract data and create new spreadsheets for disclosure, but also taking account of HS2 Ltd's need to consider whether any information was exempt information and to

consider the associated public interest test, the Commissioner considers it was reasonable for HS2 Ltd to believe it needed a further 20 working days to comply with the requests and therefore to rely on the provision under regulation 7(1) of the EIR.

51. The complainant submitted his requests on 7 October 2020 and 26 October 2020. HS2 Ltd made available the majority of the relevant information it holds within the 40 working days provided by regulation 7(1). However, as noted, during the course of the Commissioner's investigation HS2 Ltd identified further relevant information that it holds, which it disclosed to the complainant on 28 October 2021 and 22 December 2021. HS2 Ltd's response therefore did not fully comply with regulation 5(2) of the EIR.
52. And as has been noted, HS2 Ltd subsequently advised the complainant on 28 October 2021 and 22 December 2021 that it was refusing to disclose some of the further relevant information it had identified. HS2 Ltd's response therefore breached section 14(2) of the EIR.
53. However, HS2 Ltd advised the complainant on 23 November 2020 that it needed to extend the time for a response by 20 working days. This was within the 20 working day requirement (of the 26 October 2020 request) and, as such, HS2 Ltd did not breach regulation 7(3).

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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