



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2021/0098P

Before
Judge Stephen Cragg Q.C.

Tribunal Members

Kate Grimley Evans
Emma Yates

**Determined, by consent, on written evidence and submissions
Considered on the papers on 23 September 2021.**

Between

David Miles

Appellant

-and-

The Information Commissioner

HS2 Ltd

Respondents

DECISION AND REASONS

DECISION

1. The appeal is refused.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 354.

BACKGROUND

4. On 21 January 2020 the Appellant wrote to High Speed Two Ltd ("HS2 Ltd") and made the following request for information under the FOIA:-

Under the Freedom of Information Act I am requesting a full list with dates, addresses, post codes and amounts of all properties purchased via HS2 since inception to 31/12/2019.

I need this data listed in excel format as has been supplied by you on three previous annual occasions.

5. HS2 responded on 17 February 2020. It provided a list of property prices, in ascending order, and a separate list of partial postcodes of purchased properties. However, it refused to provide the information in full. After intervention by the Commissioner, HS2 Ltd agreed that, due to the framing and context of the request, and the reason why HS2 Ltd held the information, the requested information was very likely to be "environmental" within the definition at regulation 2(1)(c) Environmental Information Regulations (EIR) being information "on" measures and activities likely to affect the elements and factors of the environment.
6. On 17 November 2020, HS2 Ltd explained that it withheld the information under exceptions of the EIR: (a) regulation 12(5)(a) (public safety); regulation 12(5)(b) (course of justice); and (c) regulation 13 (personal data). This position was maintained following an internal review.

LEGAL FRAMEWORK

7. In the context of this case it will become clear that the focus is on the exemption in reg 12(5)(a) EIR.
8. A public authority holding environmental information is required to make it available on request (reg. 5(1) EIR).
9. However a public authority ‘may refuse to disclose information to the extent that its disclosure would adversely affect...international relations, defence, national security or public safety:’ reg. 12(5)(a) EIR. It has to be more probable than not that the alleged harm would occur if the information were released.
10. Further in the context of this case, it is the public safety limit limb of the reg 12(5)(a) EIR which is said to be relevant. The Commissioner has issued guidance which relates to this exemption:-¹

The term ‘public safety’ is not defined in the EIR. But in broad terms this limb of the exception will allow a public authority to withhold information when disclosure would result in hurt or injury to a member of the public. It can be used to protect the public as a whole, a specific group, or one individual who would be exposed to some danger as a result of the disclosure.

11. The Commissioner’s guidance refers to the first-tier tribunal (FTT) case of *OFCOM v Information Commissioner and T-Mobile (UK) Limited* (EA/2006/0078) where the Tribunal held that disclosure of information about the location of mobile phone base stations would adversely affect public safety on the basis that it would encourage the theft of cable from those base stations rendering them dangerous.
12. Even if the exception is found to apply, a public authority can only refuse to disclose the requested environmental information if ‘in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information’: Regulation 12(1)(b) EIR.

DECISION NOTICE

¹ <https://ico.org.uk/media/for-organisations/documents/2021/2619006/12-5-a-international-relations-20203112-11.pdf>

13. The Commissioner issued a decision notice on 6 April 2020. HS2 Ltd provided the Commissioner with details of why it considered there would be an adverse effect on public safety resulting from the disclosure of the information. HS2 Ltd explained to the Commissioner that it considers that there is an increased risk of harm to the individuals residing at the properties acquired by HS2 Ltd. It also considers there is an increased risk of harm to those individuals who maintain, improve or manage the properties. The Commissioner records that:-

19. HS2 has provided examples, in confidence to the Commissioner, of incidents when tenants and other individuals at its properties have been targeted by anti-HS2 protestors, and experienced suspicious and intimidating behaviour. HS2 has also provided examples to the Commissioner of damage to some properties (both occupied and vacant) and trespass. These were also provided in confidence.

20. As well as providing evidence to the Commissioner, HS2 wrote to the complainant outlining the damage that it envisaged, including the targeting of properties for various criminal activities.

21. In its view, the evidence provided to the Commissioner shows “a direct link between the addresses being known as associated with HS2 and acts of intimidation and violence”.

22. HS2 has also drawn the Commissioner’s attention to websites on which anti-HS2 protestors encourage the public to make direct contact with persons connected with HS2; in HS2’s view, it considers the behaviour being encouraged would amount to intimidation, and could be extended to individuals at its properties.

14. HS2 Ltd said that although some information is already in the public domain, publishing a list that places each property’s address alongside its purchase price and the date of purchase would make it easier for individuals, and properties, to be targeted. It therefore considers that the risk would be increased by the disclosure of the information. The Commissioner was of the view that:-

30...having considered her guidance on regulation 12(5)(a), the Commissioner considers that the likelihood of damage to property in ways such as trespass, potential theft and damage to windows, etc, falls within ‘public safety’ and can therefore be considered in the context of regulation 12(5)(a). The guidance makes clear that the exception can be used to protect the public as a whole, and can relate to potentially targeted sites, as well as to individuals.

32. The Commissioner is satisfied that an increased risk of harm to individuals and properties, as is envisaged, would constitute an 'adverse effect'. She is also satisfied that there is a causal link between the disclosure of the requested information and this adverse effect. That is, in her view, it is the disclosure of the requested information that would increase the risk.

34. The Commissioner is satisfied that the evidence provided by HS2 shows that incidents of harm at its properties were increasing during the period leading up to the request for information. She considers it to be a reasonable conclusion that there would be an increased risk of such incidents occurring if the property details were published in the requested manner.

36. She is satisfied that HS2 has demonstrated that disclosure of the requested information 'would' have an adverse effect, and is satisfied that the exception is engaged.

15. In relation to the public interest test the Commissioner noted that regulation 12(2) EIR specifically states that a public authority shall apply a presumption in favour of disclosure, and therefore that she had 'included this in her deliberations'.

16. The Commissioner concluded on this issue that:-

56...the Commissioner has been persuaded that disclosing the information at the date of the request, in the requested manner and with the requested level of detail, would increase the risk of harm to the public. She considers this to be a real and significant risk.

57. In favour of disclosure, she is aware that the HS2 railway is a high profile, high impact project which continues to attract widespread attention. It has proved to be a very expensive project and has many critics, not least for the impact it has had on the British countryside. She is aware that there is a high level of interest in HS2's activities.

58. The Commissioner considers that, in the face of so much attention and criticism, some of which comes from MPs, and in light of the very high cost of the project, there is a need for HS2 to seek to be as transparent and accountable as possible.

59. However, in this case, she considers that the two lists provided to the complainant do go some way towards HS2 meeting these obligations. It is possible from the lists to learn exactly what has been spent, as well as (separately) the number of properties acquired and in which wider postcode area.

60. The Commissioner acknowledges that there is some interest in being able to extract more information than it is possible to do from the lists. She notes that it is not possible, from the lists, to link the price of each property with

any geographical area, nor with any particular year. The complainant has explained that the data, in the form it has been presented, cannot be manipulated in order to extract details of activities at local level.

61. The Commissioner has also been presented with arguments that some information about the properties is already publicly available, and that, therefore, it is unnecessary to withhold the requested information.

62. She has weighed the public interest in being able to easily access the information about the acquired properties all together on one spreadsheet, and in being able to carry out more detailed analysis, against the adverse effect on public safety in this case.

17. The Commissioner decided that in the circumstances of the case and taking all relevant factors into account, having viewed the withheld information, that the adverse effect on public safety outweighs the public interest in disclosure. She did not find that there is a sufficiently compelling interest in the disclosure of the information, to overturn the exception. On that basis it was not necessary for her to consider the exceptions under regulation 12(5)(b) EIR and regulation 13 EIR.

THE APPEAL AND RESPONSE

18. The Appellant filed an appeal dated 12 April 2021. His grounds of appeal stated:-

Item 19 of the decision [see above] states that information has been provided in confidence to the ICO. It does not state as to whether the ICO has tested the accuracy, truth and voracity of this in confidence information.

I must be given the opportunity to test the voracity of these claims in order to counter them appropriately if necessary.

If these claims are true then they must be placed into the public domain or does HS2's failure to disclose this in confidence evidence to me require me to start a new Information Request process (this would be madness). It seems that the whole IOC decision is heavily influenced by information I am not privy to. I am quite prepared to sign a confidentiality agreement in order to view this information.

The decision also states that the information required can be gleaned from commercial website like Rightmove but this is incorrect. HS2 and the Dept of Transport refuse to put the property acquisition data on the Land Registry site so that the public can review it.

I still maintain that the information requested is in the public interest and that HS2's refusal to provide it as requested is further evidence of their anti-social and secretive behaviour.

19. The Commissioner responded by saying that the Appellant would be provided with an open bundle containing as much evidence as possible for the appeal, and that she stood by her decision that the public interest in protecting public safety far outweighed the limited public interest in disclosure.

20. HS2 Ltd has also made a response to the appeal in which it says:-

11. There are a number of organisations who are openly opposed to HS2, a minority of which advocate violent and intimidatory action against anyone connected to HS2 Ltd. Information regarding these groups and the violent behaviour of some individuals is outlined in HS2 Ltd's submission to the ICO. The frequency and severity of this violent behaviour has continued to increase since this submission.

12. For example, in Wendover on 26th March 2021 a gang of 30 masked anti-HS2 activists attacked eight security officers, punching and stamping on them in the dark in the middle of the A413, leaving eight people injured and one being taken to hospital.

...

13. This violent behaviour has been directed towards properties managed by HS2 Ltd and the people living in those properties, as detailed in HS2 Ltd's submission to the Information Commissioner. These incidents are described in more detail in the Confidential Annex.

14. It is therefore likely that the release of addresses for properties owned by HS2 Ltd into the public domain would facilitate violent and intimidatory behaviour towards those renting these properties from HS2 Ltd. It would increase the probability of attacks against those who maintain, repair or manage these properties on behalf of HS2 Ltd.

21. HS2 Ltd also explained the process by which property was acquired by HS2 Ltd using the terms of a 'Compensation Code.'

22. On 4 August 2021, the Appellant commented again about withholding of HS2 Ltd's evidence when he said:-

Throughout this appeal process I have been treated as if I am an untrustworthy person who is liable to give information to assist terrorists and other violent groups. I seriously resent the implications of this slur which is made with no evidence.

I am a member of a highly regarded professional organisation as well as being covered by the official secrets act. I do not have a criminal record. If HS2 can provide evidence from within their organisation why am I not to be treated the same as their staff handling this in the disclosure that I am seeking.

HS2 and the ICO must present to me their reasons for disregarding my person integrity so that I can refute it.

...

HS2 must present to me and the hearing any link that data previously supplied to me has directly led to any violent incidents against residents.

Attacks by violent groups on workers has absolutely no bearing on my FOI, unless HS2 can prove this to the hearing and my satisfaction.

DISCUSSION

23. We should deal first with the Appellant's complaint that there is no reason why the information sought cannot be provided to him as he is a trustworthy person who will not give information others with less integrity.

24. The FOIA does not operate by considering the trustworthiness or otherwise of the requester. We note that within FOIA, itself, there are no provisions which allow a public authority to place any conditions as to whom a requester might further disseminate information once it has been disclosed under FOIA. The same is true of the Commissioner's powers: the Commissioner cannot direct that further disclosure is limited in any way. When a case comes to the Tribunal, the Tribunal's functions are restricted to those set out in s58 FOIA. If the Tribunal does not dismiss the appeal, it can otherwise only 'allow the appeal or substitute such other notice as could have been served by the Commissioner'. Thus, if the Commissioner cannot limit to whom disclosure is made once a requester has established an entitlement to disclosure, then neither can the Tribunal. There is nothing in FOIA or the Tribunal Rules which would allow the Tribunal, for example, to direct that information should be disclosed to the requester only if the requester undertakes not to disclose the

information to anyone or else, or to withhold it from a particular description of person.

25. In terms of case law on this issue we would note *Office of Government Commerce v Information Commissioner* [2010] QB 98 (*OGC*) (a case which explored the relationship between parliamentary privilege and the Commissioner's powers) where Stanley Burton J said at paragraph 72 that:-

72 Disclosure under FOIA is always to the person making the request under section 1 . However, once such a request has been complied with by disclosure to the applicant, the information is in the public domain. It ceases to be protected by any confidentiality it had prior to disclosure. This underlines the need for exemptions from disclosure.

26. In relation to HS2 Ltd's evidence and in particular the detailed list of incidents described in Annex A we agree with the Registrar's decision of 2 August 2021 that 'it is inappropriate, in these proceedings, to disclose in a more public manner incidents which have been reported. [The Appellant] has an overview of the concern that High Speed Two Limited has about the consequences of the information being placed in the public domain which is, in my view, sufficient to enable him to participate in these proceedings?.

27. The submissions made by HS2 Ltd in its email of 8 January 2021 have been redacted to exclude some of the figures, but the Appellant knows much of the detail, for example that:-

Since 2017 there have been 287 incidents to HS2-owned/managed properties. Of these, 91 were recorded as a security concern.

...

There have been a number of instances of intimidation and violent behaviour.

These include a number of incidents of arson, aggressive and physical abuse of security guards, trespassers.

28. Having seen some more of the detail, as has the Commissioner, it is clear to the Tribunal that not all the incidents referred to by HS2 Ltd are the result of those

hostile to the project taking action, and it seems obvious that some of the incidents will relate to opportunistic (or more carefully planned) criminal activity such as theft. However, what is also clear is that there has been a large number of incidents which involve HS2 Ltd owned or managed property, and some of these appear to have involved intimidation and violent behaviour aimed at HS2 Ltd.

29. Having reached this conclusion, it seems obvious to the Tribunal that a disclosure of a list of full addresses of HS2 Ltd properties, if it became generally available, would lead to more incidents at these properties whether involving basic criminality or HS2 Ltd related crime. This is the case even if disclosures have been made in the past of similar information, as the withheld material is an updated list which will contain new properties about which details were not previously available.
30. For those reasons we support the Commissioner's reasons for finding that the exemption in reg 12(5)(a) EIR applies in this case. It seems to us very likely that disclosure (to the world at large, as we must consider it) will lead to an increase of the kind of incidents reported by HS2 Ltd and that public safety, when considered generally, will inevitably be adversely affected.
31. In relation to the public interest test we take into account the amount of information in the public domain already and the lists which have been made available by HS2 Ltd. We wholeheartedly endorse the Commissioner's comments about the HS2 railway as a high profile, high impact project which continues to attract widespread attention, and that it has proved to be a very expensive project with many critics, not least for the impact it has had on the British countryside. All that means that there is a need for HS2 Ltd to seek to be as transparent and accountable as possible.
32. However, we also accept the Commissioner's reasoning that the need to protect public safety outweighs, in this case, the limited additional public interest gained by the disclosure of the requested information, in the light of the information already disclosed. Finally, we have considered the presumption in favour of disclosure in the EIR but, applying this presumption, it does not tip the balance of the public interest in favour of disclosure, given the important public safety issues involved.

33. The case of *Information Commissioner v (1) E Malnick and (2) ACOBA* [2018] UKUT 72 (AAC) sets out that if the Tribunal has agreed with the Commissioner as to the application of the exception to the EIR considered by the Commissioner, then the Tribunal need not consider any other exception. We do so agree and therefore have not gone on to consider either regulation 12(5)(b) or regulation 13 EIR.

34. For those reasons this appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 27 September 2021.

Promulgation Date: 28 September 2021.