

## Environmental Information Regulations 2004 (EIR)

### Decision notice

**Date:** 2 February 2012

**Public Authority:** High Speed Two Limited

**Address:** 2nd Floor  
Eland House  
Bressenden Place  
London  
SW1E 5DU

### Decision (including any steps ordered)

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1. The complainant requested the disclosure of evidence held by High Speed Two Limited ("HS2 Ltd") – a company set up by the Department for Transport – that demonstrates the technical feasibility of the proposed high speed rail link from London to Birmingham.
2. During the course of the investigation the Commissioner advised HS2 Ltd that it had not interpreted the complainant's request correctly. HS2 Ltd, as a result, conducted a fresh search and furnished the complainant with information that fell within the scope of his information request. The complainant argued that HS2 Ltd held more information.
3. The Commissioner finds that HS2 Ltd holds no further relevant information other than that now disclosed to the complainant.
4. The Commissioner requires no steps to be taken.

### Request and response

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5. On 23 April 2011, the complainant wrote to HS2 Ltd and requested information in the following terms:

*"Please could you provide me with the evidence that HS2 Ltd has that it will be practicable to run 18 train per hour (each way) on the London to West Midlands section of HS2?"*

6. HS2 Ltd responded on 03 June 2011. It stated that information was held but that it was already accessible in the public domain. It directed the complainant to a statement published online regarding technical assumptions concerning the capacity of high speed rail.
7. On the same day the complainant informed HS2 Ltd that he was not satisfied with the response and requested an internal review.
8. Following an internal review HS2 Ltd wrote to the complainant on 01 July 2011. It upheld its initial decision, namely, that the information was already publicly available.
9. Following the initial refusal, communications continued between the complainant and HS2 Ltd. On 29 June 2011, before sending the results of the internal review, an HS2 Ltd employee explained that the 18 train per hour service pattern was specified on the basis of expected developments in existing technology, which are anticipated to be in service within the next few years:

*"It does not rely on new or unproven technologies. Therefore, we do not accept that there is any need for additional clarification."*

It also enclosed a statement from the Department for Transport detailing points concerning capacity and demand of the proposed high speed rail.

10. On 05 October 2011 the complainant wrote to HS2 Ltd and stated that he had evidence to show that information that fell within the scope of his request might, to the contrary, be held by HS2 Ltd given its mention and reference within internal company documents. He submitted a fresh information request as a means to clarify the meaning of his original request. This request is not considered specifically by the Commissioner other than where it helps to clarify the meaning of the request dated 23 April 2011.
11. In the request dated 05 October 2011, the complainant stated that he had not been provided with any documentation from HS2 Ltd supporting the *"reasoning, authority or analysis"* of the line's capacity. He argued that he had only been provided confirmation of the assumption. The complainant pointed HS2 Ltd to correspondence that made reference to feasibility meetings. He contested that opinions spoke of in such meetings were unlikely to be unsupported by analysis or documented review. The complainant went on to quote an HS2 Ltd employee who confirmed the existence of peer reviews within an internal email.
12. HS2 Ltd responded on 11 November 2011 and released the following information:

- Notes from visits and meetings held with train manufactures and high speed rail operators.
  - Analysis work undertaken by HS2 Ltd's chief engineer presented to the Technical Challenge Panel meeting on 23 June 2009 and 14 September 2009.
  - Copies of the remits given to organisations asked to consider or review the stem capacity of the Y network.
  - The technical notes of third parties and peer reviews.
  - Email chains concerning technical feasibility.
13. The retrieval of information by HS2 Ltd to be considered for disclosure, ultimately disclosed on 11 November 2011, ran parallel to enquiries made by the Commissioner.

### Scope of the case

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14. The complainant contacted the Commissioner on 04 July 2011 to complain about the way his request for information had been handled. He has argued that there are reasons to think that the government's plans for high speed rail will be technically unacheivable and that HS2 Ltd must hold this information.
15. The complainant's request was interpreted by HS2 Ltd as seeking the disclosure of "*formal reports*" which would support the claim that the high speed rail would be able to run 18 trains per hour. HS2 Ltd argued that this was a reasonable assumption to make given "*the general nature of the request*" and the request for "*evidence*". It has explained that given this interpretation, it did not undertake an extensive search as it was aware of relevant published information.
16. Where a complainant has been in discussions or correspondence with the public authority about a particular matter then the Commissioner would expect the public authority to take into account the contemporaneous dealings with the applicant to clarify the information that was being requested.<sup>1</sup> In this case the complainant drew the attention of HS2 Ltd to contemporaneous dealings in his information request, namely to an oral statement presented at a recent transport summit. Bearing this in mind, he stated his request should be considered in the following context:

*"That it is possible to run 18 train per hour (each way) on the London to West Midlands section of HS2 was challenged at the 'High speed rail*

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<sup>1</sup> *Boddy v North Norfolk District Council* [EA/2007/0074], para 25.

*summit' (reported in 'Modern Railways' April 2011, page 56) by Jacques Robouel of Systra. He suggested that current signalling allowed 12 trains per hour at speeds of 250/300km/hr, perhaps rising by 20% with new signalling systems. Given that capacity in terms of train per hour declines with speed, 18 trains per hour at 360km/hr does not look achievable."*

17. By way of background, the contested HS2 Ltd claim that an 18 train per hour service was feasible was an assumption first published in a report to Government in March 2010:

*"[...] if more cities were to be served by dedicated new lines and a high degree of segregation from the classic rail network was achieved, then the capacity of the line could be increased to 18 trains per hour. This would also depend upon improvements in rolling stock and signalling technology."<sup>2</sup>*

18. The complainant also acted on behalf of an action group opposed to high speed rail and had several lines of correspondence with HS2 Ltd. The Commissioner considers that this rendered the request unclear as to what information (or "evidence") he sought. Therefore the Commissioner considers that HS2 Ltd should have provided advice and assistance (FOIA section 16) to clarify what information the complainant sought.
19. The complainant has argued that his request was interpreted too narrowly. He has argued that "evidence" is not restricted to information that constitutes "formal reports" but should include any information that might demonstrate the capacity of high speed rail in appreciation of the complainant's outlined contentions regarding technical feasibility. After taking these arguments into account the Commissioner finds the complainant's reading to be the objective reading of the request.
20. The Commissioner considers that in the initial response, while HS2 Ltd maintained they held information and this was available by other means, it was implicit in stating that, otherwise, no information was held.
21. During the course of the investigation HS2 Ltd, prompted by the Commissioner, conducted another search for information in appreciation of the reading of the complainant's request as set out in paragraph 19 above.

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<sup>2</sup> High Speed Rail London to the West Midlands and Beyond – A report to Government (March 2010). Chapter 2, page 40, section 2.311. Available at: <http://webarchive.nationalarchives.gov.uk/20110131042819/http://www.dft.gov.uk/pgr/rail/pi/highspeedrail/hs2ltd/hs2report/pdf/chapter2.pdf>

22. Following this, further relevant information was identified by HS2 Ltd. This was disclosed to the complainant.
23. Despite this, the complainant maintained that HS2 Ltd held more relevant information and asked the Commissioner to continue his investigation.
24. Therefore the scope of the case will be to consider HS2 Ltd's handling of the request, and specifically whether it holds any further relevant information.

### Reasons for decision

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25. When initially responding to the complainant's request, HS2 Ltd stated that the information held was already accessible in the public domain. Subsequently (as noted above) it did locate more information, and provided this to the complainant. However, other than this information now provided to the complainant, its position is that no further relevant information was held at the time of the complainant's request. Therefore the Commissioner has gone on to consider whether any further relevant information – other than that now disclosed to the complainant – was held by HS2 Ltd at the time of the request.
26. Regulation 12(4)(a) of EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when a request is received.
27. In cases such as this where there is some dispute as to whether a public authority holds information falling within the scope of the request the Commissioner has been guided in his approach by a number of Tribunal decisions which have used the civil standard of the balance of probabilities, i.e. whether on the balance of probabilities the Commissioner is satisfied that no further information is held.<sup>3</sup> In deciding where this balance lies the Commissioner will take into account the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
28. Therefore, the Commissioner will consider both:
  - the scope, quality, thoroughness and results of the searches and

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<sup>3</sup> See *Bromley v Information Commissioner* [EA/2006/0072].

- other explanations offered as to why the information is not held.

### **The search**

29. The complainant argued the searches were poorly and incompetently conducted and that further relevant documents were in existence but had not been discovered.
30. During the investigation HS2 Ltd provided a substantive response to the Commissioner detailing how it came to find the additional relevant information (now disclosed).
31. HS2 Ltd maintains all records electronically, and in this case all of the information was retrievable by such means. The complainant's request was sent to members of the HS2 Ltd engineering team who were known to be working on the subject of rail capacity at the time. Information was then relayed back to the information governance team to be considered for disclosure.
32. A member of staff who should have been included in assisting with the search for the information was missed. While this alerted the Commissioner to the likelihood that searches had been inadequate, he was satisfied that the mistake had been resolved by HS2 Ltd on its own accord and could be put down to simple human error.
33. During the investigation of the case HS2 Ltd released a considerable amount of information to the complainant in response to his request. The Commissioner considers that such a release itself demonstrates that staff responded to the information governance team's request for a search to be undertaken.
34. During the investigation HS2 Ltd accepted that it should consider the objective reading of the complainant's request, and subsequently carried out additional searches based on this reading. Bearing this in mind, the Commissioner is satisfied that the correct information was – eventually – considered for release.
35. The Commissioner is aware that HS2 Ltd has a framework and publications policy. Both are in line with the wider government policy which supports the transparency agenda.
36. HS2 Ltd is currently considering the development of a formal records management system but at present the Commissioner notes that it appears to lack one. HS2 Ltd did, however, argue that its information governance team are constantly developing in-house best practice to meet the demands of its growing work load.

37. HS2 Ltd stated that it had a training programme in place and that all staff are aware of their responsibilities under the EIR and the FOIA.
38. The Commissioner is concerned that HS2 Ltd's original search for recorded information failed to identify all relevant staff first time round. However, he considers that the subsequent contact made with all engineering staff at HS2 Ltd – who were engaged with work concerning route line capacity – would have identified all recorded information held. While the Commissioner has some concerns about the quality of the searches carried out by HS2 Ltd, taking into account the above points, and in the absence of any evidence to the contrary, he is satisfied that it would have identified all relevant information that was held.

### **Other explanations as to why the information is not held**

39. The complainant argued that HS2 Ltd might be intentionally withholding information that would demonstrate that the technical feasibility of high speed rail had been exaggerated.
40. HS2 Ltd explained to the Commissioner that it did not consider it necessary to do feasibility work on capacity specification as it was confident that its assumption that the running of 18 trains per hour was technically achievable. HS2 Ltd identified a senior engineer, and stated that on the basis of his *"professional and considered opinion"* it was confident enough to make robust claims that the running of 18 trains per hour was indeed feasible. Therefore HS2 Ltd has confirmed that it relied upon the *"professional assumptions"* of its staff – information which is not recorded.
41. Whilst the Commissioner acknowledges the complainant's concerns, taking into account HS2 Ltd's arguments, and in the absence of any evidence that further information is held, he is not persuaded, on the balance of probabilities, that HS2 Ltd holds further information that might fall within the scope of the complainant's request. Therefore, after considering all the information before him, the Commissioner concludes that on the balance of probabilities no other relevant information is held.
42. Regulation 12(1)(b) of the EIR requires that all exceptions, including regulation 12(4)(a), are subjected to a public interest test. However, it is not possible for the Commissioner to do this given his finding that HS2 Ltd does not hold the information to which the public interest could apply.

## Other matters

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43. The Commissioner appreciates that there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records.<sup>4</sup> This is particularly the case with HS2 Ltd where a large cross-sector and multi-faceted team exist whose records are inevitably spread across a number of departments. During the investigation of this case HS2 Ltd properly conceded that it was difficult at times, due to the technical nature of this particular information request, to determine relevant staff that might hold information within the scope of the request.
44. The Commissioner accepts that mistakes that occurred within HS2 Ltd whilst handling the request did not help in convincing the complainant that the various searches were conducted with appropriate competence or indeed whether they were even sincere. The Commissioner would ask HS2 Ltd to be mindful of the need to read requests objectively and to conduct their searches with appropriate rigour.

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<sup>4</sup> *Bromley v the Environment Agency* [EA/2006/0072], para 13.



## Right of appeal

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45. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

46. 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.
47. 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 .....**

**Gerrard Tracey  
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