

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 March 2015

Public Authority: High Speed Two (HS2) Limited
Address: 2nd Floor Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant made a freedom of information request to HS2 Ltd for copies of reports prepared by the Major Projects Authority on its assessment of the HS2 rail project ("HS2"). HS2 Ltd dealt with the request under the Freedom of Information Act and refused the request under the section 35(1)(a) exemption although during the course of the Commissioner's investigation it changed its reliance to the section 36(2)(b) and (c) exemptions.
2. The Commissioner's decision is that the request is for environmental information and ought to have been considered under the Environmental Information Regulations (EIR). The Commissioner considered whether the regulation 12(4)(e) exception (internal communications) would apply but found that it was not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - HS2 Ltd shall disclose to the complainant copies of the MPA reports from November 2011 and June 2012.
4. The public authority 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The complaint in this case concerns a request for copies of assessment reports prepared by the Major Projects Authority. The Commissioner has already considered disclosure of one of the withheld reports in a previous case which involved a request made to the Cabinet Office. In that case (referred to in this notice as "the Cabinet Office case") the Commissioner issued a Decision Notice in June 2013 in which he found that a report produced by the MPA in November 2011 was environmental and ordered that it be disclosed.¹
6. The Secretary of State for Transport subsequently issued a veto of the Commissioner's decision pursuant to section 53 of the Freedom of Information Act 2000 (FOIA) and regulation 18(6) of the EIR. The Secretary of State's veto is currently the subject of judicial review proceedings.

Request and response

7. On 12 July 2013 the complainant made a freedom of information request to HS2 Ltd for information regarding assessment reports prepared by the Major Projects Authority (MPA) concerning the deliverability of HS2. The request referred to an earlier request which had been made to HS2 Ltd and which was dealt with under the reference FOI2-414. That request asked for, amongst other things, the MPA's assessment of HS2. The complainant's new request read as follows:
 - i. *all the information that was requested in that earlier request, as documented in the response, and which was acknowledged to be held by HS2 Ltd.*
 - ii. *In addition, please confirm the date that MPA assessment, that is acknowledged to be held by HS2 Ltd, was provided to HS2 Ltd. Please provide copies of any accompanying correspondence received.*

¹ FER0467548

http://ico.org.uk/~media/documents/decisionnotices/2013/fer_0467548.ashx

tabulated summary of some MPA information”, not the actual report.

- The HS2 holds copies of the Autumn 2011 report and the Summer 2012 report. These would fall within the scope of his request but were not provided and no reason was given as to why they were withheld.
 - Even if FOIA rather than EIR applied to the information, section 35(1)(a) could not be applied because the HS2 Ltd is a non-departmental public body (“NDPB”) not a government department.
11. HS2 Ltd presented the findings of its internal review on 1 November 2013. First of all, HS2 Ltd maintained that FOIA, rather than the EIR, was the correct regime to apply to the request. It also upheld its position that FOIA provided access to information rather than documents which was used as grounds for refusing that part of the complainant’s request which asked for communications with third parties that relate to the consideration of the HS2 project by the MPA. HS2 Ltd also said that its original response to the request was correct as it had understood that the complainant was asking for a copy of the MPA assessment rather than the MPA report. It said that it would consider disclosure of the MPA report as a new request. It subsequently explained that this was being refused by relying on the section 35(1)(a) exemption.
12. The complainant contacted HS2 Ltd on 3 November 2013 to ask again that it reconsider its response to his request. He again questioned the decision to deal with the request under FOIA rather than the EIR. He also argued that even if FOIA were to apply, the section 35(1)(a) exemption could not be relied on by HS2 Ltd as this exemption can only be used by government departments. He also asked HS2 Ltd to reconsider its response that it does not have to comply with part of the request because FOIA only provides for a right of access to information not documents.

Scope of the case

13. On 27 March 2014 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
14. The Commissioner subsequently agreed with the complainant that the scope of his investigation would be to consider whether or not the requested information was environmental and therefore what access regime the request should have been considered under. The

Commissioner would then go on to consider whether HS2 Ltd holds a copy of the MPA assessment reports and if so, whether they ought to have been disclosed.

15. During the course of the Commissioner's investigation HS2 Ltd withdrew its reliance on section 35(1)(a) (formulation and development of government policy) and instead substituted this with the exemptions in section 36(2)(b) and (c) (prejudice to effective conduct of public affairs). It maintained that the information should be considered under FOIA but argued that were the Commissioner to decide that the EIR should be applied it would seek to rely on regulation 12(4)(e) which provides an exception for internal communications.

Reasons for decision

Environmental information

16. The Commissioner's first task is to consider whether the requested information is environmental. Environmental information is defined in regulation 2(1) of the EIR:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

17. As the Commissioner found in the Cabinet Office case, HS2 is a measure or programme which is likely to affect many of the elements and factors referred to in regulations 2(1)(a) and (b). As noted in that case, its construction is likely to affect land and landscape, and its construction and operation will be likely to have a significant impact on environmental factors such as energy and noise.
18. For its part, HS2 Ltd said that it did not dispute that HS2, during construction and operation, will have an effect on the state of elements of the environment and factors such as noise, the requested information relates not to the assessment of the HS2 project itself but the management of the HS2 programme by the Department for Transport (DfT). Therefore, it argued that the MPA reports are too far removed from the HS2 project to fall within regulation 2(1).
19. The Commissioner's view is that the information is clearly 'on' HS2 which is a measure likely to affect the elements and factors in regulation 2(1)(a). Therefore, the information is clearly environmental information by virtue of regulation 2(1)(c).
20. Having satisfied himself that the EIR is the correct regime to apply, the Commissioner has gone on to consider the regulation 12(4)(e) exception rather than the exemptions cited under FOIA.

Regulation 12(4)(e)

21. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that it involves the disclosure of internal communications. Regulation 12(8) of the EIR specifies that for these purposes internal communications includes communications between government departments. In this case the requested information consists of two reports prepared by the Major Projects Authority and subsequently passed to the DfT and HS2 Ltd. The first report was produced in November 2011 and a second subsequent report produced in June 2012. The first report was considered in the Cabinet Office case referred to above.
22. The Major Projects Authority is a partnership between the Cabinet Office and HM Treasury and its "fundamental aim" is described as "significantly improving the delivery success rate of major projects across central

government".² HS2 Ltd is not a government department but is instead a (NDPB) and a company limited by guarantee, its sole member being the Secretary of State for Transport.

23. HS2 offered the following arguments as to why it believed that the information can be classed as an internal communication:

- i. HS2 Ltd was formed by the DfT;*
- ii. It is wholly-owned and funded solely by the DfT;*
- iii. It has staff seconded from the DfT who are remunerated on a basis determined by the DfT;*
- iv. It has a Chairman and Board appointed by the Secretary of State for Transport;*
- v. It has aims, roles and responsibilities which are set by the DfT, and set only by the DfT; and is in all respects created in order to do the bidding of the DfT and the Secretary of State;*
- vi. The matters from time to time entrusted to HS2 Ltd are matters which would (if not carried out by a separate legal entity) inevitably fall to be performed by the DfT itself. Those matters include policy formulation and development: in other words, core 'governmental' functions;*
- vii. Moreover the MPA report in this case concerned the joint responsibilities of the DfT and HS2 Ltd in relation to the HS2 project. So both the relationship between the DfT and HS2 Ltd and the nature of the report, indicate that the report was in this case an 'internal communication'.*

24. HS2 Ltd argued for a "proper and purposive interpretation" of regulation 12(4)(e) and Article 4(1) of the Directive which implements it. It referred to the European Commission's proposal (COM (2000) 402) upon which the Directive was based for support:-.

"It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion or internal communications. In each such case, the public interest served by disclosure of such information should be taken into account." (page 12 of the proposal – emphasis is HS2 Ltd's)

25. It said that the term "internal" should not be interpreted too restrictively by focusing on whether a public authority has passed a communication to a separate legal entity. This would, it suggested, run contrary to the

² <https://www.gov.uk/government/groups/major-projects-authority>

general preference for autonomous and uniform definitions within EU instruments and would result in the nature of government structure in a member state governing whether or not the exception could be engaged. Instead, it said that the question of whether or not a communication was internal should focus upon whether or not the communication took place within the public authority's "private space" for deliberation.

26. Essentially, an internal communication is a communication that stays within one public authority. Once a communication has been sent to someone outside the authority, it will generally no longer be internal. One exception is communications between government departments as this is specifically provided for in regulation 12(8) of the EIR. However the Commissioner's long established view is that communications between a government department and a NDPB or a wholly owned company are not internal communications. This is because these organisations are separate legal entities. They are set up precisely to act independently from government and at arms' length from Ministers.
27. The Commissioner accepts to an extent the point made by HS2 Ltd that Member states with complex government structures should not be disadvantaged by being unable to rely on the exception for communications between departments. For this reason the Commissioner accepts that 12(4)(e) can for instance be applied to communications between a government department and an Executive Agency. However, the Commissioner does not accept that this principle can be applied to communications with an organisation which has been specifically placed outside of government by virtue of its designation as an NDPB.
28. The Commissioner also finds support for this view in the findings of the First-tier Tribunal (Information Rights) in *Defra v Information Commissioner and Portmann (EA/2012/0105)*. In that case the Tribunal found that communications between the Department for Environment, Food and Rural Affairs (Defra) and the Marine Management Organisation, a NDPB sponsored by Defra, could not be classed as internal communications:

"We agree with the Commissioner that these considerations do not suffice to render the communications 'internal', particularly given the need to interpret the exceptions under the EIR restrictively...the MMO was deliberately established as a non-departmental public body rather than as a departmental one, or a government agency. We disagree with Defra's submission that it would be a strange outcome if the result of a change in the machinery of Government were to have the effect of rendering formerly 'internal' communications 'external' when in

*substance the nature of the dialogue between the parties was materially unaltered. The 'change in machinery' was far wider than simply renaming the MFA the MMO. The MMO has separate accountability and can be called before a select committee for example. If Parliament had intended a non-departmental public body in general, or the MMO specifically, to be included within the definition in regulation 12(8) EIR as to the extent of 'internal' in the governmental context it would have done so in the framing of the regulations or by amending them at a later date. This is entirely consistent with the sea change brought about by the introduction of the Freedom of Information Act 2000 and the EIR."*³

29. For these reasons the Commissioner finds that in the circumstances of this case regulation 12(4)(e) is not engaged.

³ Defra v Information Commissioner (EA/2012/0105), para. 26.

Right of appeal

30. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. 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

Graham Smith
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