

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 6 September 2022

**Public Authority:** High Speed Two Limited  
**Address:** 2 Snow Hill  
Queensway  
Birmingham  
B4 6GA

#### **Decision (including any steps ordered)**

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1. The complainant requested the amount paid in out-of-court settlements broken down by year. High Speed Two Ltd ("HS2 Ltd") refused to provide the requested information and relied on section 43 (commercial interests) and 40(2) of FOIA (third party personal data) in order to do so.
2. The Commissioner's decision is that HS2 Ltd has not demonstrated why section 43 of FOIA applies and consequently is not entitled to rely on this exemption. Section 40(2) is engaged, but only for some of the data. Finally, HS2 Ltd breached section 10 and section 17 of FOIA in respect of this request.
3. The Commissioner requires HS2 Ltd to take the following steps to ensure compliance with the legislation.
  - Disclose, to the complainant, the data for the years specified in the confidential annex to this Notice.
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**

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5. On 13 May 2021 the complainant requested information of the following description:

“I wish to know the total amount HS2 limited has paid in out of court settlements from 2009 through to 2021. Broken down by year.”
6. On 18 June 2021, HS2 Ltd responded. It relied on section 12 to refuse the request, but advised that, if the complainant was prepared to restrict his request to just settlements agreed since March 2016, it would be able to identify the relevant information without exceeding the cost limit.
7. On 20 June 2021 the complainant agreed to refine his request in this manner.
8. On 13 September 2021, HS2 Ltd responded to the refined request. It confirmed that it held some information but wished to withhold it. It relied sections 40(2) and 43 of FOIA in order to do so.
9. The complainant requested an internal review on 14 September 2021. HS2 Ltd sent the outcome of its internal review on 12 October 2021. It upheld its original position.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 15 October 2021 to complain about the way his request for information had been handled.
11. The Commissioner originally wrote to HS2 Ltd on 23 June 2022 in order to set out the scope of the investigation. In line with his usual practice, he asked HS2 Ltd to provide its substantive response within 20 working days. HS2 Ltd responded the following day to ask the Commissioner to extend that deadline until Friday 2 September 2022.
12. The Commissioner agreed to extend the deadline to the date requested by HS2 Ltd, but on the proviso that he would consider HS2 Ltd's response to be the full and final response on which he would base his decision – with no further opportunity for HS2 Ltd to amend or clarify its position.
13. HS2 Ltd provided its submission on Wednesday 31 August 2022 and the Commissioner has treated that submission as HS2 Ltd's full and final response.

14. The Commissioner considers that the scope of his investigation is to determine whether HS2 Ltd is entitled to rely on either section 40(2) or section 43 to withhold the information in question.

## **Reasons for decision**

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### **Section 40 - personal information**

15. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
16. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
18. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

19. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".
20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
22. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

23. HS2 Ltd explained to the Commissioner that the most common types of claim likely to fall within the scope of the request would be employment tribunals and commercial disputes (such as over procurement processes). Disputes relating to land and property would be brought against the Secretary of State for Transport and, as such, would be paid by the DfT, rather than HS2 Ltd.
24. HS2 Ltd pointed out that information about employment tribunals is in the public domain – including where the case is withdrawn (usually because the parties have agreed a settlement) before a tribunal decision is promulgated. The information in the public domain includes the name of the individual bringing the case. This would allow a motivated intruder to compare the withheld information (ie. the total value of claims in each year) against the tribunal cases withdrawn in that year.
25. If only one such case had been withdrawn in a given year, a motivated intruder could easily match the name of the plaintiff with the amount of settlement they had received.
26. If two such cases had occurred in the same year, a motivated intruder may not necessarily be able to deduce which plaintiff had received which amount. However, both plaintiffs would know the amount that they received and, by comparing that amount with the total figure for that year, deduce what the other plaintiff must have received in their settlement.
27. In the circumstances of this case, having considered the actual information being withheld, the Commissioner is satisfied that these arguments do apply to some of that information. This information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
28. HS2 Ltd also argued that, where the figure for a particular year was zero, this might still relate to an individual if the individual was known to have accepted a settlement in that year. The Commissioner accepts this argument in principle but, as HS2 Ltd has been unable to point to any year where this did in fact happen, the Commissioner does not consider that any individual is identifiable from this data. Therefore, where the figure for any year is zero, it is not personal data and HS2 Ltd cannot rely on section 40(2) of FOIA to withhold it.
29. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

30. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

31. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

32. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

33. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

34. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>1</sup>.

35. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

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<sup>1</sup> Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
36. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
37. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
38. The Commissioner recognises that there is always a legitimate interest in public authorities being open and transparent about how they are spending taxpayers' money.

### **Is disclosure necessary?**

39. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
40. In its original refusal notice, HS2 Ltd informed the complainant that:
- "There is a wider legitimate interest for transparency, however, placing this information in the public domain would lead to an unwarranted level of interference with individuals' privacy. It is not necessary for us to consider the necessity for disclosure and, in this case, there is no pressing need for us to disclose the information. Therefore, a further balancing test is not required."
41. The Commissioner considers that HS2 Ltd has mixed up the steps here and applied the test incorrectly. Having determined (as it had done), that there is a legitimate interest, HS2 Ltd **was** required to consider whether disclosure of the information, to the world at large, was

necessary in order to achieve that legitimate interest – or whether other less-intrusive means of achieving the same interest were available.

42. In the circumstances of this case, the Commissioner is satisfied that the withheld information would be available to HS2 Ltd's internal and external auditors who would be able to check whether the settlements reflected good value for money. This does not require disclosure to the world at large and therefore disclosure is not the least-intrusive means of achieving the legitimate interest.
43. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
44. The Commissioner is thus satisfied that HS2 Ltd is entitled to rely on section 40(2) of FOIA to withhold the information specified in the confidential annex to this decision.

### **Section 43 – commercial interests**

45. Section 43(2) of FOIA states that

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

46. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure only "would be likely" to prejudice those interests. For the Commissioner to be convinced that prejudice "would" occur, he must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
47. In the Commissioner's view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party's commercial interests to engage the exemption. Nor is it sufficient for the other party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.



## **HS2's position**

48. In its original refusal notice, HS2 Ltd noted that disclosure of the withheld information would affect its ability to negotiate such settlements so as to receive value for money and would undermine the trust of third parties in HS2 Ltd to keep information confidential.
49. At the outset of the investigation, the Commissioner wrote to HS2 Ltd, noting that its arguments would only appear to apply if individual settlements could be derived from the overall figure. If this was not possible, it seemed unlikely that section 43 would apply.
50. HS2 Ltd responded to say that:

“As with the identification of an individual, it is possible to identify whether any information held relates to any specific company or organisation who had lodged a complaint with a Court (or Tribunal) and had reached a settlement out of court.

Litigation involving HS2 Ltd is subject to scrutiny by the public, by Government and by the media. Consequently information on Court cases involving the company can be found online with little effort.”

51. HS2 Ltd then drew the Commissioner's attention to a news article which discussed various court actions that had been brought against HS2 Ltd – including identifying instances of settlements having been reached.<sup>2</sup>
52. In addition, HS2 Ltd argued that, even in years where the figure for settlements was zero, that did not mean that no settlement had been agreed and therefore the withheld information could be matched with publicly available information to deduce that no monetary settlement had been involved.

## **The Commissioner's view**

53. Whilst the Commissioner recognises that HS2 Ltd's arguments appear strong in principle, they do not appear closely related to the content of the information that has actually been withheld.
54. Having looked at the article HS2 Ltd identified, only two companies are identified as actually having reached settlements with HS2 Ltd. Of these, the Talgo settlement appears to have been reached after the conclusion of the most recent financial year within the scope of the request. The Sydney & London Properties settlement falls within the time period

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<sup>2</sup> <https://www.railway-technology.com/analysis/siemens-mobility-joins-growing-list-of-complainants-against-hs2/>



covered by the request, but the article makes clear that this relates to a property dispute which, as HS2 Ltd has already noted, would have been dealt with by the Secretary of State for Transport.

55. As HS2 Ltd's submission was supposed to be its full and final submission and as no other settlement has been highlighted apart from those in the article, the Commissioner is unable to conclude that the commercial interests of either HS2 Ltd or any other party could be harmed by disclosure as no individual settlement figure can be deduced or linked to an identifiable company.
56. The Commissioner is therefore unable to accept that HS2 Ltd has demonstrated that section 43 is engaged and consequently it is not entitled to rely on this exemption to withhold information.

### **Procedural matters**

57. Section 10(1) of FOIA requires a public authority to communicate all non-exempt information within 20 working days of receiving a request.
58. Section 17(1) of FOIA requires a public authority to issue a refusal notice within 20 working days if it intends to rely on an exemption.
59. Sections 10(3) and 17(3) of FOIA allows a public authority to take additional time to communicate the non-exempt information or issue a refusal notice if it considers that a qualified exemption (such as section 43) applies and it needs more time to assess where the balance of the public interest lies.
60. There is no statutory limit on the amount of extra time that may be permitted – only what is "reasonable in the circumstances" – however, the Commissioner considers that, in practice, this will usually mean an additional 20 working days. Longer extensions should be fully justified.
61. In this case, HS2 Ltd took 57 working days to issue its response to the request – which the Commissioner considers to be excessive given the amount of information involved. However, as the Commissioner has noted above, section 43 of the FOIA did not apply to this information and therefore HS2 Ltd did not need to spend time considering the balance of the public interest. As section 40(2) is not a qualified exemption in these circumstances, no extension of time is permitted to consider this exemption.
62. The Commissioner therefore finds that HS2 Ltd both failed to communicate non-exempt information and failed to issue a refusal notice within 20 working days and therefore breached section 10 and section 17 of FOIA respectively.

## Right of appeal

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63. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

64. 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.
65. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**