

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 April 2022

Public Authority: High Speed Two (HS2) Limited
Address: Two Snowhill
Snow Hill
Queensway
Birmingham
B4 6GA

Decision (including any steps ordered)

1. The complainant has requested information relating to a drone flight carried out at a certain time on a particular day. High Speed Two Limited (HS2 Ltd) has refused to confirm or deny whether it holds any of the requested information under section 31(3) of FOIA, as it believes that to do so would cause prejudice to law enforcement interests protected by this exemption.
2. The Commissioner's decision is that HS2 Ltd is entitled to refuse to confirm or deny that it holds the requested information under section 31(3) of FOIA, and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 27 January 2021 the complainant made the following request for information:

"On Wednesday 27th January, 2021, at 14.40hrs your security operators flew a drone over Jones Hill Wood. The drone was flown well over the still privately owned area of the woodland.

- i. Did you seek permission from the landowner?*

- ii. Did you seek permission of those who make this their home?*
 - iii. Did you notify the local farmers who own livestock in the vicinity?*
 - iv. What reasoning can you offer for such a flight?*
 - v. I would like to see the full video footage from the flight please, so I can assess if my right to privacy has been breached."*
5. HS2 Ltd responded on 22 February 2021 and refused to confirm or deny whether the requested information was held, relying on section 31(3) of FOIA to do so (exemption for law enforcement). It also advised the complainant that if they would like to know whether HS2 Ltd held any personal data about them, they could make a subject access request under data protection law.
6. The complainant requested an internal review of HS2 Ltd's decision on the 22 February 2021.
7. HS2 Ltd sent the outcome of its internal review on 22 March 2021, in which it revised its position. HS2 Ltd maintained that section 31(3) had been correctly applied but advised that it was also relying on the exemption provided by section 40(5) of FOIA to refuse to confirm or deny whether HS2 held any information relating to the complainant.
8. The complainant responded on 25 March 2021, stating that HS2 Ltd had not answered 4 out of their 5 questions.
9. HS2 Ltd responded on 26 March 2021 confirming that it considered sections 31(3) and 40(5) of FOIA applied to all of the complainant's questions.

Scope of the case

10. The complainant contacted the Commissioner on 26 March 2021 to complain about the way their request for information had been handled.
11. The complainant has indicated in their submission to the Commissioner that they accept that they need to request any personal data under a subject access request.
12. The Commissioner considers the scope of this complaint is therefore to consider HS2 Ltd's application of section 31(3) of FOIA to refuse to confirm or deny whether any requested information is held.

Reasons for decision

13. When a request for information is made under FOIA, the first duty of a public authority under section 1(1)(a) of FOIA is to inform the requester whether it holds information of the description specified in the request. This is known as the duty to confirm or deny.
14. However, the duty does not always apply, and a public authority may refuse to confirm or deny whether it holds information through reliance on certain exemptions under FOIA.
15. Section 31(3) of FOIA exempts a public authority from complying with the duty to confirm or deny in relation to information if to do so would, or would be likely to, prejudice any of the functions listed in section 31(1).
16. HS2 Ltd has relied on sections 31(1)(a) (the prevention or detection of crime), 31(1)(b) (the apprehension or prosecution of offenders) and 31(1)(c) (the administration of justice) to 'neither confirm nor deny' or 'NCND' whether it holds the requested information.
17. When considering the application of a prejudice based exemption such as section 31, the Commissioner will:
 - identify the applicable interests within the relevant exemption;
 - examine the nature of the prejudice, the likelihood of it occurring and whether the prejudice claimed is real, actual and of substance; and
 - examine whether there is a causal link between confirming or denying and any prejudice claimed.
18. HS2 Ltd stated that the crimes that have been committed against organisations and individuals that are linked to HS2 Ltd, or on land obtained to build the railway, include:
 - Violent behaviour against individuals;
 - Squatting on HS2 Ltd acquired land;
 - Harassment and intimidation of companies and individuals associated with HS2 Ltd; and
 - Sett interference (as defined in the Protection of Badgers Act 1992).

19. In this case, HS2 Ltd has stated that revealing whether or not a drone had been used at the time and particular area requested would make it difficult to refuse future requests. It stated that this would allow a series of requests to reveal the extent and nature of the use of drones which it argued would undermine the ability of HS2 Ltd and law enforcement agencies to gather evidence and detect crime and would therefore prejudice the apprehension or prosecution of offenders and the administration of justice.
20. HS2 Ltd stated that releasing such information would allow offenders to know whether their behaviour had been detected and thereby allow them to continue their offending behaviour (if they had not been detected) or to destroy evidence and evade capture (if their behaviour had been detected).
21. HS2 Ltd also stated that regular release of this information would assist criminals in the planning and undertaking of criminal acts. It argued that criminals could piece together requests for different areas, which would allow protestors to pre-empt the strategy for detection of crime by mapping out the use of this technique. HS2 Ltd stated that recent acts have shown that protestors and organised criminals have the capacity and the will to undertake serious acts of violence.
22. HS2 Ltd referred to paragraph 33 of the ICO Decision Notice FS50121212¹ in which the Commissioner stated that:

"To allow a situation to occur whereby details of whether surveillance and / or investigations are taking (or have taken) place are routinely disclosed would be likely to prejudice the ability of the public authority to carry out the type of investigation which it has described to the Commissioner. By informing individuals whether they are subject of an investigation would potentially put the person in a position to modify his/her behaviour in accordance with that knowledge. This would, or would be likely to, prejudice the ability of the public authority to carry out the kind of investigation covered by the exemption".
23. HS2 Ltd stated that confirmation or denial that the requested information is held in this instance would undermine the detection, apprehension or prosecution of offenders and the administration of justice by allowing criminals to understand the measures being used

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2007/396340/FS_50121212.pdf

against them more fully, thereby making them more effective in countering any law enforcement actions, and in avoiding detection and/or prosecution.

24. The Commissioner accepts that the information requested relates to the prevention or detection of crime, and to the apprehension or prosecution of offenders, and that it is therefore an applicable interest in this case.
25. The Commissioner has then considered the extent to which confirming or denying would result in a real and significant likelihood of prejudice to the prevention or detection of crime, and to the apprehension or prosecution of offenders.
26. HS2 Ltd stated that it considers that the routine disclosure of the use of drones would undermine law enforcement.
27. HS2 Ltd stated that its sites have experienced a high level of protestor activity at multiple locations. It explained that undermining HS2 Ltd's counter activity by the release of this information would lead to an increase in the level and effectiveness of this protestor activity and undoubtedly lead to an increase in offences being carried out against HS2 Ltd staff and property.
28. HS2 Ltd explained that as the likelihood refers to future behaviour it is not possible to be absolutely certain that release will lead to the adverse effect. However, HS2 Ltd referred to the ICO Decision Notice FS50092069², in which the Commissioner decided that the evidence of past behaviour was sufficient evidence to conclude that there was a likelihood that individuals would be singled out for harassment, intimidation and possible violence by others in the future.
29. HS2 Ltd explained that those opposed to HS2 include organised pressure groups, protestors who are politically motivated and individuals directly impacted by the railway. It provided the Commissioner with the website links for some of these organised groups to support its position.
30. HS2 Ltd explained that organised groups have regularly attempted to disrupt HS2 Ltd's work on the railway at worksites. It provided the Commissioner with the following articles to support its position:

² https://ico.org.uk/media/action-weve-taken/decision-notices/2007/404180/FS_50092069.pdf

<https://lichfieldlive.co.uk/2020/11/04/protesters-move-into-into-woodland-near-lichfield-in-a-bid-to-stop-trees-being-cut-down-to-make-way-for-hs2/>

<https://www.bucksfreepress.co.uk/news/18765089.jones-hill-woods-hs2-protesters-stand-firm-treetop-protests/>

<https://www.independent.co.uk/news/uk/home-news/extinction-rebellion-hs2-trees-climb-colne-valley-hillingdon-a8889401.html>

<http://stophs2.org/news/17735-protesters-stop-risk-hs2-contaminating-london-water-supply>

<https://www.independent.co.uk/climate-change/news/stop-hs2-protest-camp-swampy-wendover-b1936322.html>

31. HS2 Ltd stated that there are numerous documented cases where offenders have used their knowledge of law enforcement techniques and procedures to try to avoid detection and/or prosecution. It explained that there is a wealth of evidence that organised criminals will try to gain knowledge of law enforcement capabilities, techniques and procedures to try to increase the efficacy of their criminal behaviour. It stated that given the organised nature of some of the groups opposed to HS2, it is probable that confirmation or denial in this case would lead to the precedent effect, and an undermining of HS2 Ltd's ability to gather evidence for law enforcement purposes.
32. HS2 Ltd stated that the behaviour of at least some of these individuals is known to be violent and provided the Commissioner with the following article to support its position :

<https://www.shropshirestar.com/news/uk-news/2020/10/02/hs2-protesters-launch-faeces-and-rockets-at-evictors-official/>
33. HS2 Ltd provided the Commissioner with a number of recent examples of violent and intimidatory behaviour being directed towards HS2 Staff:
 - 30 January 2021 - Two Security Officers and one Police Officer were assaulted;
 - 11 February 2021 - A catapult was used to launch a projectile at a security officer's vehicle;
 - 18 February 2021 - Fluids were thrown over security officers at Small Dean;
 - 24 March 2021 - Two Security Officers were bitten during a violent assault at Road Barn Farm;

- 24 March 2021 - Security Officer sustained a permanent hearing related injury due to the use of a megaphone next to his ear;
 - 26 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 (near Wendover), leaving eight people injured and one taken to hospital;
 - 14 September 2021 - Fuel and hydraulic lines on machinery cut, resulting in fuel leakage; and
 - 17 September 2021 - Security Officer kned in the groin by a protestor pretending to ask for directions.
34. HS2 Ltd explained that aggressive and intimidatory behaviour is not just confined to sites where HS2 is undertaking works. It explained that the targeting of companies associated with HS2 has taken a number of forms, which includes:
- Direct action onsite – visiting a business to directly intimidate them;
 - Direct action over the internet – a coordinated campaign of calling and emailing a business to intimidate them;
 - Doxing – publishing data on the internet that identifies a business and people involved that allows others to identify them as individuals, plus other data that could be used to target, e.g. vehicles, phone numbers, etc.
35. HS2 Ltd stated that there are also many examples of protestors interfering with HS2 Ltd conservation work in an attempt to block or delay the project. For example, protestors have interfered with badger setts (a criminal offence under the Protection of Badgers Act 1992) on HS2 controlled land.
36. HS2 Ltd has also provided to the Commissioner in confidence specific examples of the targeting of companies, sett interference and squatting.
37. HS2 Ltd argued that the examples above, and the confidential information provided to the Commissioner, show the level of violent and intimidatory behaviour that has been directed at organisations associated with the HS2 project. HS2 Ltd stated that it is worth noting that one protest group, 'HS2 Rebellion', encourages their supporters to use the website 'LinkedIn' to search for HS2 employees "and drop them a message":

<https://www.hs2rebellion.earth/online-actions/>

38. HS2 Ltd stated that the unstated but clear implication is intimidation and is of the view that it is likely that this group, or some other group, would use information in the public domain to increase their ability to intimidate, harass or abuse, those persons associated with the building of the railway.
39. HS2 Ltd referred to the ICO Decision Notice IC-40100-P6C4³ which concerned the release of addresses of properties owned by HS2 Ltd and the application of regulation 12(5)(a) of the Environmental Information Regulations to protect the information. In that case, HS2 Ltd presented evidence of incidents at those properties and the Commissioner was satisfied that the increased risk of harm from release would constitute an "adverse effect" and that "there is a causal link between the disclosure of the requested information and this adverse effect. That is, in [the Commissioner's] view, it is the disclosure of the requested information that would increase the risk" (paragraph 32).
40. HS2 Ltd also argued that the number and severity of incidents of violence against HS2 staff is increasing as work on the project increases. HS2 Ltd again referred to the ICO Decision Notice IC-40100-P6C4 in which the Commissioner stated in paragraph 54:

"[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. [The Commissioner] 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".

41. HS2 Ltd stated that the Commissioner's decision was upheld at Information Tribunal EA/2021/0098⁴, where the Tribunal, noting the evidence presented, stated at paragraph 28:

"...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".

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619629/ic-40100-p6c4.pdf>

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2922/Miles,%20David%20\(EA.2021.0098\)%20Dismissed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2922/Miles,%20David%20(EA.2021.0098)%20Dismissed.pdf)

42. Furthermore, the Tribunal stated that at paragraph 29:

“Having reached this conclusion, it seems obvious to the Tribunal that disclosure of a full list of HS2 Ltd properties, if it became generally available, would lead to more incidents at these properties whether involving basic criminal activity or HS2 Ltd related crime”.

43. HS2 Ltd acknowledges that the case cited above involves Regulation 12(5)(a) of the Environmental Information Regulations, rather than FOI. However, HS2 Ltd argued that it shows that the Information Tribunal accepts that those opposed to HS2 will use information in the public domain and gained through a request for information, to target violent behaviour more effectively against HS2 and those associated with the railway.

44. HS2 Ltd believes that there is a direct relation to this case. As criminal behaviour against HS2 is already happening. HS2 Ltd believes that releasing information which provides useful intelligence to protestors would lead to an increase in the number and effectiveness of criminal offences.

45. The Commissioner is satisfied that the envisaged prejudice is real and significant and that this would occur. Furthermore, he is satisfied that there is a causal link between the information requested and the prejudice claimed, and he therefore accepts that the exemption is properly engaged.

Public interest test

46. However, section 31(3) is a qualified exemption. Therefore, the Commissioner must consider the public interest test contained at section 2 of FOIA and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming whether or not the requested information is held.

Public interest arguments in favour of confirming whether or not the requested information is held

47. HS2 Ltd has argued that there is a general public interest in disclosure of information which contributes to the development of public debate and facilitates public understanding of an important public project and matters of public concern. In this case releasing information would arguably provide greater transparency and accountability around the action being undertaken by HS2 Ltd to counteract illegal protests.

Public interest arguments for maintaining the exclusion to confirm or deny whether the requested information is held

48. HS2 Ltd has argued that there is an inherently strong public interest in public authorities carrying out investigations to prevent and detect crime. It stated that the release of information that enables criminal acts is not in the public interest.
49. HS2 Ltd stated that releasing the information into the public domain would compromise the current and future law enforcement. It stated that it would likely allow offenders to change their tactics, or destroy evidence, in order to avoid detection and prosecution. HS2 Ltd argued that where law enforcement is compromised by the release of information, then this is unlikely to be in the interest of the public. It stated that in this case, providing operational and tactical capabilities would hinder the future prevention and detection of crime.
50. HS2 Ltd stated that confirming or denying that areas have, or are being monitored, would allow criminals to move their operations - thereby compromising law enforcement tactics, which consequently would hinder the prevention and detection of crime. It stated that more crime would be committed, and individuals would be placed at risk.
51. HS2 Ltd argued that disclosing locations of monitoring activity through a series of disclosures would allow campaign groups and protesters to target specific areas to try to disrupt or delay the HS2 project. It stated that such activity would constitute a danger to the protestors themselves, to the public in general, and to the personnel of HS2 Ltd and its contractors.
52. HS2 Ltd argued that confirming or denying whether this information is held could act as a deterrent for some landowners to co-operate with HS2 Ltd. HS2 Ltd stated that the request specifically asks whether landowner permission was gained. HS2 Ltd stated that to release such information would lead to intimidation of these landowners and impede the relationship of trust between HS2 Ltd and such individuals and will also make the prevention and detection of crime more difficult in the future.
53. HS2 Ltd also argued that confirmation or denial of whether this information is held would undermine its ability to protect organisations and individuals undertaking work on behalf of HS2 Ltd. HS2 Ltd explained that this would allow protestors to target the companies and their employees more effectively, thereby compromising their safety. This may be through vandalism or physical intimidation or via the internet (e.g. doxing or denial of service attacks). HS2 Ltd argued that the release would therefore lead to the intimidation of staff, either in

person or via the internet and is likely to endanger the safety of those individuals, either by direct action or by the publication of information leading to their identification.

Balance of the public interest arguments

54. HS2 Ltd stated that in considering the public interest in relation to this request the factors in relation to transparency and accountability have been balanced against the public interest in ensuring that offences are prevented, and crime is kept to a minimum.
55. HS2 Ltd stated that for a public interest test, issues that favour release need to be measured against issues that favour non-disclosure. The public interest is not what interests the public, or a particular individual, but what will be the greater good, if released, to the community as a whole.
56. HS2 Ltd stated that it recognises that the public interest in being open and transparent is of great importance and release of information may assist in the public being more aware of the work that HS2 Ltd is carrying out and how public funds are being spent.
57. HS2 Ltd stated that while the public interest considerations favouring disclosure are noted, this must be balanced with the impact any release would have on law enforcement. There is an inherent public interest in the detection of offences and the prevention of crime.
58. HS2 Ltd explained that as work on the new railway increases there has been a corresponding increase in the severity and frequency of violent attacks on individuals and organisations associated with HS2. As other methods of opposing HS2 become less likely to affect the building of the railway, it is logical to assume that, as they become more desperate, those opposed to HS2 will increasingly resort to intimidation and violence and will use whatever methods they can to avoid detection.
59. HS2 Ltd stated that undermining its crime prevention work, as described would lead to an increase in the amount and effectiveness of criminal behaviour. It stated that the violent nature of much of this protestor activity is outlined above. HS2 Ltd argued that the release of the information would lead to an increase in this behaviour being directed towards individuals at these locations. This is a very strong factor in favour of withholding the information.
60. Therefore in this instance HS2 Ltd stated that it will neither confirm nor deny whether the information is held because to do so would prejudice the prevention or detection of crime, the apprehension or prosecution of offenders and the administration of justice.

The Commissioner's decision

61. The Commissioner acknowledges the public interest in transparency and accountability around the HS2 project and the actions HS2 Ltd is undertaking to counteract criminal acts. This includes understanding the way in which HS2 Ltd uses potentially intrusive surveillance technologies, such as drones.
62. However, the Commissioner agrees that there is an inherently strong public interest in public authorities carrying out crime prevention work. This ensures that offenders are brought to justice and that the necessary processes are in place to safeguard public funds and resources. Public authorities clearly require the ability to conduct crime prevention work without individuals being alerted to this, otherwise individuals would be in a position to change their behaviours/methods to avoid detection of criminal acts.
63. The Commissioner has also considered the issue of the timing of the request and how this would affect the public interest considerations. It is clear from the request that any relevant information would relate to any crime prevention work which is ongoing (or at least in the very recent past) in the area requested. To confirm or deny whether information is held relating to any drone flights in the requested area is more likely to hinder the public authority's ability to carry out crime prevention work.
64. In view of the above, the Commissioner has concluded that the public interest in maintaining the exemption from the duty to confirm or deny whether the requested information is held clearly outweighs the public interest in favour of disclosing whether the public authority holds the information. Taking into account the factors in this case, the Commissioner is clear that the principle of allowing public authorities to carry out crime prevention work is a strong one. Clearly, confirmation of whether or not the requested information is held by the public authority might be of some assistance to the complainant in this instance. However, the wider public interest lies in protecting the ability of the public authority to conduct effective crime prevention work.
65. In view of the above, the Commissioner is satisfied that HS2 Ltd is entitled to rely on the exemption under section 31(3) to refuse to confirm or deny whether the requested information is held. The Commissioner therefore does not require HS2 Ltd to take any further action in relation to this request.

Right of appeal

66. 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@justice.gov.uk

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

67. 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.
68. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF