

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 17 August 2015

Public Authority: High Speed Two (HS2) Limited
Address: One Canada Square
London
E14 5AB

Decision (including any steps ordered)

1. The complainant requested a copy of 75 questions which the Major Projects Authority had put to High Speed Two (HS2) Limited. HS2 dealt with the request under FOIA and withheld the information under section 36 – prejudice to the conduct of public affairs.
2. The Commissioner's decision is that the requested information constitutes environmental information and therefore the request falls to be considered under the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To provide a fresh response under the EIR and either disclose the 75 questions under regulation 5(1), or issue a refusal notice in accordance with regulation 14.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 14 December 2012 the complainant contacted HS2 through the 'Whatdotheyknow' website. He quoted from a response Sir David Higgins

had recently provided to the House of Commons Governance Committee. That response revealed that the Major Projects Authority had asked HS2 75 questions. The complainant went to request information in the following terms:

“So, I would like to know what these 75 questions are.”

6. HS2 responded on 19 December 2014 by saying that it did not own the requested information and suggested he redirect his request to the Cabinet Office. On 22 December 2014 the complainant asked HS2 to review this decision under the EIR.
7. Following an internal review during which it is apparent that HS2 reconsidered the requested under FOIA, it wrote to the complainant on 19 February 2015. HS2 confirmed that it held the requested information but stated that it was now refusing the request under section 36, prejudice to the conduct of public affairs.

Scope of the case

8. The complainant originally contacted the Commissioner on 6 February 2015. He explained that he had requested an internal review under the EIR and was concerned about the length of time HS2 was taking to conduct that review.
9. However when the Commissioner came to consider the complaint, HS2 had completed its review. Therefore the Commissioner informed the complainant that his investigation would consider which access regime the request fell to be considered under and whether HS2 was entitled to rely on section 36 to withhold the information.
10. When writing to HS2 the Commissioner asked HS2 to explain why it considered the request should be considered under FOIA rather than EIR. When HS2 responded it maintained that the requested information was not environmental information and that it had been correct to handle the request under FOIA. It continued to rely on section 36 to withhold the information.
11. The first matter to therefore resolve is that of the appropriate access regime. If the Commissioner agrees with HS2 that the information is not environmental information he will go onto consider HS2's application of section 36. However if the Commissioner decides the 75 questions do constitute environmental information HS2 will be required to issue a fresh response under the EIR. Since HS2 dispute the information is environmental, and has not cited any grounds under the EIR for

withholding the information, the Commissioner is not able to determine whether the 75 questions would be exempt under the Regulations.

Background

12. HS2 is the company responsible for developing and promoting the UK's new high speed rail network. It is a major infrastructure project and as such is subject to scrutiny by the Major Projects Authority. The Major Projects Authority is part of the Efficiency and Reform Group in the Cabinet Office and works with government departments to provide independent assurance on major projects and. As part of that process the Major Projects Authority undertakes a Project Validation Review and a number of Project Assurance Reviews.
13. The requested information consists of 75 questions which the Major Projects Authority asked HS2 to address. The Commissioner understands that this was part of a scoping interview for a forthcoming Project Assurance Review.

Reasons for decision

Regulation 2(1) –Environmental information

14. The EIR only apply to environmental information. Regulation 2(1) of the EIR states that,

“ “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 elements of the environment referred to in (b) and (c);”

15. HS2 has argued that the,

“... Major Projects Authority’s review is concerned with the management and governance of the HS2 project not construction of the railway itself. It is concerned with matters such as the financial controls over the project; the adequacy of the business case for the project; the sufficiency of governance structures for the project; thus, in broad terms, with steps to ensure that the project is successfully delivered at the expected time and within the expected budget. Such information has no direct connection whatsoever with the state of the elements of the environment. Rather, it is the sort of information which would be generated by the oversight of any large project, whether impacting upon the environment or not. Such information is insufficiently proximate to the environment sensibly to fall within the definition of “environmental information” in reg. 2 EIR.”

16. The Commissioner accepts that the matters addressed by a project assurance review for the high speed rail link would be similar in scope to those considered as part of the oversight of any other major project. However the fact that information concerns the management and governance of the project does not in any way divorce the information from the nature of the project itself. Furthermore, having viewed the 75 questions, the Commissioner is satisfied that although they may tackle themes common to any major project, the actual questions are not generic questions, but are specific to the high speed rail link project itself.

17. The Commissioner has considered requests relating to project assurance reviews carried out by Major Projects Authority in two earlier cases FER0467548 and FER0536325. These can be found on the Commissioner’s website at:

<http://search.ico.org.uk/ico/search/decisionnotice>.

Both those notices dealt with requests for an actual project assurance review as opposed to the questions posed at a scoping interview. In both cases the Commissioner found that the review itself was environmental information and the requests fell to be considered under the EIR. This was on the basis that the high speed rail link to which those reviews related was clearly a measure, such as a plan or programme, which would affect the elements of the environment, or factors which themselves would affect the environment such as noise and waste. Therefore the review was captured by the definition of environmental information provided by regulation 2(1)(c) since it constituted information on that measure.

18. The Commissioner does not accept HS2's argument that the information is too far removed from activities that would impact on the environment. Although the information does not detail the actual physical constructions works which would affect the environment, as HS2 say, it is information concerning whether the project can be successfully delivered on time and on budget. These are significant issues which are capable of determining the ultimate impact which the implementation of the project will have on the environment.
19. Following the same rationale the Commissioner is satisfied that the 75 questions which are the subject of this request are also information on the high speed rail link and therefore constitute information on a measure likely to affect the environment.
20. The Commissioner finds that the information is environmental information as defined by regulation 2(1)(c). The request should have dealt with under the EIR. HS2 is required to provide a fresh response under the EIR and either disclose the 75 questions identified by HS2 as falling within the request under regulation 5(1), or issue a refusal notice in accordance with regulation 14.

Other Matters

21. Although not forming part of the formal decision notice the Commissioner will highlight areas of concern under 'Other Matters'.
22. The Commissioner recognises that the complainant has already suffered a considerable delay in having his request considered under the EIR. In light of this, in the event that his request is refused by HS2 under the EIR, the Commissioner would consider accepting a complaint from the complainant without expecting him to exhaust HS2's internal review procedures.

Right of appeal

23. 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

24. 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.
25. 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