

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

Decision notice

Date: 8 March 2016

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested information about HS2 project. The Department for Transport (DfT) refused to provide the requested information under section 35(1)(a), section 40(2) and section 43(1) of the Freedom of Information Act (FOIA), and as far as the withheld information is environmental, regulation 12(4)(d), 12(4)(e) and 12(5)(e) of the Environmental Information Regulations 2004 (EIR).
2. The Commissioner's decision is that the DfT was correct to deal with parts of the request under FOIA and parts under EIR. The Commissioner has numbered the documents in the order they appear on the 'Explanatory Spreadsheet' under each separate request which was provided by the DfT.

Part 1 of the request: the DfT correctly applied regulation 12(5)(e) EIR.

Part 2 of the request: the DfT correctly applied section 40(2) FOIA to the redactions made to document 1 and in part to document 9. It incorrectly applied this exemption to parts of document 9 and document 10 and 16 in full. It correctly applied regulation 12(4)(d) EIR to documents 8, 11-15 and 17-19. It incorrectly applied regulation 12(5)(e) EIR to documents 20 and 22-26.

Part 3 of the request: the DfT incorrectly applied regulation 12(4)(e) EIR to the five documents to which this exception has been applied. However the Commissioner pro-actively applied regulation 13 EIR to two paragraphs identified in the email dated 8 March 2013

Part 4 of the request: The DfT correctly applied regulation 12(4)(d) EIR to the eight documents to which this exception has been applied.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- The DfT should now disclose the following information:

Part 2 of the request: documents 9 (in part), 10, 16, 20 and 22-26.

Part 3 of the request: All five documents withheld apart from the two paragraphs identified in the email dated 8 March 2013 as the Commissioner pro-actively applied regulation 13 EIR to this information.

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 6 March 2015 the complainant requested information of the following description:
 1. Details of the total construction cost of Phase 1 of HS2 broken down by year, starting from commencement of construction until the line is operational.
 2. Please provide copies of any correspondence (email and written) between Philip (David) Prout of the Department for Transport and Simon Kirby of HS2 Limited in the period 1 January 2015 to 1 February 2015.
 3. Please provide copies of all emails sent to Philip Rutman of the Department for Transport from any director or employee of HS2 Ltd or Philip (David) Prout of the Department for Transport concerning proposals to construct station facilities for HS2 at Euston for the period 31 December 2012 to 1 February 2014.
 4. Please provide copies of any email sent to any civil servant in the Department for Transport by Andrew McNaughton of HS2 Limited in the period 1 July 2014 to 1 October 2014.

6. On 13 May 2015 the DfT responded. It provided the complainant with some information in the scope of the request but withheld information under section 35(1)(a), section 40(2) and section 43(2) FOIA.
7. The complainant requested an internal review on 17 May 2015. The DfT sent the outcome of its internal review on 7 July 2015. It revised its position. It said that whilst section 35(1)(a), 40(2) and 43(2) FOIA had been applied correctly to some of the withheld information, some of the information withheld was environmental and should have been considered under the EIRs. It withheld the environmental information under regulation 12(4)(d) and 12(4)(e) EIR.

Scope of the case

8. The complainant contacted the Commissioner on 6 August 2015 to make a complaint as he was dissatisfied with the application of the exemptions.
9. During the course of the Commissioner's investigation, the DfT additionally applied regulation 12(5)(e) to some of the withheld information. It also located some further pieces of information within the scope of the request, some of which it provided to the complainant, some was provided with redactions made and some was withheld in full.
10. The Commissioner has considered which legislation the request should have been dealt with under and whether the DfT was correct to rely on the exemptions/exceptions that have been applied to the withheld information. The Commissioner has also decided that it would be appropriate to pro-actively apply regulation 13 to some of the withheld information.

Reasons for decision

Part 1 of the request

11. The DfT explained that at internal review, further information in the form of a publically available spreadsheet was given to the complainant. In addition, it said that it does hold two further spreadsheets which contain the specific information requested. It continues to withhold these under section 43 (2) and section 35 (1) (a) of the FOIA or to the extent that the withheld information is considered environmental then it wishes to rely upon regulation 12(4)(d) and 12(5)(e).

12. The Commissioner has first considered whether the information withheld under part 1 of the request is environmental.
13. Regulation 2(c) EIR defines environmental information as “measures...such as policies, legislation, plans, programmes...and activities affecting or likely to affect” the state of the elements of the environment. In this case the withheld information relates to costings of the HS2 project, the two spreadsheets contain a year by year breakdown of the financing. The withheld information clearly relates to a measure which will or will be likely to affect the environment. The Commissioner does therefore consider that this information is environmental under regulation 2(c) EIR and this part of the request should be considered under EIR.

Regulation 12(5)(e) – confidentiality of commercial information

14. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
15. When assessing whether this exception is engaged the Commissioner will consider the following points:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

16. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for a profit.
17. The DfT considers that the information is of a commercial nature as it relates to a commercial activity – namely the projected financing for HS2, it also confirmed that procurement for phase 1 of the project has recently begun. The withheld information contains detailed information on the funding available for the project and of particular relevance at this stage financing for phase 1.

18. The Commissioner accepts that the nature of the information is commercial as it relates to a clear business activity in relation to which procurement for services has recently begun for Phase 1 of the project.

Is the information subject to confidentiality provided by law?

19. With regard to this element of the exception the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.

20. The ICO's guidance¹ on this issue states that:

"In contrast to the section 41 exemption under FOIA, there is no need for public authorities to have obtained the information from another. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. For purely internal information, the question will be whether the employees of the public authority are under an obligation of confidence imposed by the common law, contract, or statute."

21. For the common law of confidence, the guidance makes it clear that the three issues to consider are:

- Does the information have the necessary quality of confidence? This will involve confirming that the information is not trivial and is not in the public domain. Information may still keep its quality of confidence if it has been shared with a limited number of people, as long as it has not been disseminated to the general public. It is also possible for information to keep its quality of confidence even if it is all in the public domain, if it would take time and effort to find and collate it from multiple sources.
- Was the information shared (or provided to employees) in circumstances creating an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information. A useful test is to consider whether a reasonable person in the

¹ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

place of the recipient would have considered that the information had been provided to them in confidence.

22. It is not clear in this case whether the withheld information was created by HS2 or the DfT. However as the guidance makes clear, there is no requirement for a public authority to have obtained the information from a third party. The DfT has confirmed that the withheld information has not been put into the public domain and it is not trivial as it contains the year by year budget for the HS2 project. The Commission considers that the sharing of this information between HS2 or DfT officials would have carried an implied confidence as this is the reasonable expectation the recipients are likely to have had. HS2 has confirmed that it would not expect this information to be disclosed into the public domain.
23. The Commissioner considers the DfT is therefore relying on the information being subject to the common law duty of confidence. In establishing whether this is the case the Commissioner has taken into account the commercial nature of the withheld information, and the fact that the information was not trivial in nature as it related to a significant development project in its early stages. The Commissioner notes the information had not previously been made available and was shared in circumstances where there as an implied duty of confidence.
24. Taking this into account the Commissioner is satisfied there is a common law duty of confidence, particularly as the information is related to funding and provides a more detailed breakdown of potential costs. As such he is satisfied that the withheld information was imparted in circumstances importing an obligation of confidence.

Is the confidentiality required to protect a legitimate economic interest?

25. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
26. The DfT argued that disclosure would weaken DfT's and HS2 Ltd's negotiating position in future transactions and prejudice its ability to achieve value for money in relation to future procurement activities. It said that suppliers having sight of the financial information would enable them to use it to their advantage in a competitive market to adjust their prices when bidding for work based on the government's financial estimates of cost. It confirmed that HS2 Ltd has recently begun the procurement process for Phase 1. The DfT explained that it is an

ambitious procurement programme and the company is keen to engage with, expand and broaden the potential supplier market. It said that releasing this commercially sensitive information would damage the reputation of HS2 Ltd and DfT and therefore the confidence that both current and potential suppliers have in it, which may in turn affect their willingness to compete for tenders at value for money prices.

27. The Commissioner accepts that the withheld information consists of information which is of commercial value and which, if disclosed, may impact on the DfT and HS2's commercial interests, particularly their ability to negotiate with third parties to achieve the best value, particularly at this time in relation to the Phase 1 procurement. This would harm the legitimate interests of the DfT and HS2 and as such the Commissioner accepts that disclosure of the withheld information would prejudice their commercial interests.

Would confidentiality be adversely affected by disclosure?

28. As the first three elements of the test have been established, the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of the DfT and HS2. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

Public interest test

Public interest arguments in favour of disclosing the information

29. The DfT did not provide any public interest arguments in favour of disclosure.

Public interest arguments in favour of maintaining the exception

30. The DfT argued that if potential bidders for the Phase 1 procurement were provided with the withheld information, this would assist them in deciding how to pitch their submission and would impact on DfT/HS2 obtaining the best value for money.

Balance of the public interest

31. The Commissioner considers that the HS2 project is of significant public interest in terms of the cost to the public purse but also the number of people the project will affect.

32. However the Commissioner considers that disclosure of commercially confidential information, which could put potential bidders at a commercial advantage in relation to the Phase 1 procurement exercise, which has just gone out to tender, would not be in the public interest. This is because it would undermine DfT/HS2's commercial position as it would distort the balance of this process.

Part 2 of the request

33. The DfT confirmed that officials had reviewed all the correspondence that falls within scope of this part of the request. It provided the Commissioner with a file of unredacted disclosed and withheld correspondence. It provided a corresponding spreadsheet with details of exemptions / exceptions considered to be engaged. It confirmed that in the course of investigations, officials within the DfT's HSR team also identified 11 new pieces of correspondence which were not originally considered, 6 of which they released, with certain redactions made under section 40(2), to the complainant. The remaining 5 pieces of correspondence were withheld in full.
34. The Commissioner notes that there are 26 documents which fall within the scope of part 2 of the request. Documents 2-7 on the DfT's spreadsheet were disclosed in full to the complainant. The remaining documents were either withheld in part or in full. The Commissioner will consider these under the exemptions/exceptions that have been applied.

Section 40(2) – applied to redactions made to document 1 and to documents 9, 10 and 16 in full

35. Upon viewing the information withheld under this exemption, the Commissioner is satisfied that it is not environmental information and was therefore dealt with under the appropriate access regime.
36. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
37. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

“data which relate to a living individual who can be identified –

- (i) from those data, or
- (ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”

38. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
39. In relation to document 1, the DfT confirmed that this was disclosed to the complainant with redactions made to information relating to the personal life of Simon Kirby. Upon viewing the redacted information which the DfT has specifically referred to, the Commissioner considers that it does relate to a living individual who can be identified directly from that information.
40. In relation to document 9, the DfT has explained that it has applied section 40(2) as this document contains opinions of two individuals. Upon viewing the withheld information the Commissioner accepts that the contents of the emails dated 30 January 2015 at 02:15 pm, 18:18 and 18:20 contains information either about two specific individuals or their opinions. The Commissioner accepts that this information does relate to a living individual who can be identified directly from that information. However the contents of the email forwarded on 30 January 2015 at 11:33 does not relate to the opinions of two individuals. It does however contain the personal data of a new member of staff and therefore the Commissioner does consider that this would also be information relating to a living and identifiable individual.
41. In relation to document 10, the DfT has argued that this contains personal information relating to Simon Kirby. The Commissioner considers that it does relate to a living individual who can be identified directly from that information.
42. In relation to document 16, the DfT argued that this contained personal information relating to a potential new member of staff. The Commissioner considers that it does relate to a living individual who can be identified directly from that information.
43. As the documents are email strings, the Commissioner also notes that direct email addresses contained with any of the emails would also be information about living and identifiable individuals.
44. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed

fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.

Likely expectation of the data subject

45. Document 1 contains redactions relating to the private life of Simon Kirby. The Commissioner considers that even as the HS2 Chief Executive, he would have no expectation that information purely relating to his private life would be disclosed into the public domain.
46. Document 9 contains information about a new member of staff regarding his career history and current employment, it also contains personal comments about individual members of staff as well as stakeholder and official's names. It said that these individuals have a reasonable expectation that their personal information will not be placed into the public domain. The stakeholders and junior officials are not in public facing roles. However in relation to the information about a new member of staff, this is a general biography which the Commissioner considers is accessible via industry journals. The Commissioner does not consider that this individual would therefore have a reasonable expectation that this information would not be disclosed more widely.
47. Document 10 contains personal information relating to the professional life of Simon Kirby. The DfT accepted that this is more closely related to work but still considers it unfair to disclose it. Upon viewing the withheld information the Commissioner considers that it relates to the professional life of the Chief Executive of HS2. Given the seniority and public facing nature of this role, the Commissioner does not accept that the data subject would have a reasonable expectation that this information would not be disclosed into the public domain.
48. Document 16 contains information about a potential new member of staff regarding his career history and current employment. The DfT said that this individual would have a reasonable expectation that their personal information would not be placed into the public domain. Again this is a general biography which the Commissioner considers is accessible via industry journals. The Commissioner does not consider that this individual would therefore have a reasonable expectation that this information would not be disclosed more widely.
49. The Commissioner is satisfied that data subjects would not expect that direct email addresses would be disclosed into the public domain.

The legitimate public interest

50. The DfT said that it recognises that there is a legitimate interest in email exchanges between senior officials. It said that that interest can be met

(subject to other exemptions applying) without the need to disclose the identity of individuals. It considers disclosing the identity of the individuals discussed in these email exchanges would have an adverse impact on their privacy relating to their personal life.

51. The Commissioner considers that whilst this may be relevant in terms of document 1 which was disclosed in a redacted format, from the spreadsheet provided by the DfT explaining what information has been withheld and under which exemptions/exceptions, it appears that documents 9, 10 and 16 have been withheld in full without any other exemptions/exceptions having been applied.
52. In relation to the redactions made to document 1, the Commissioner considers that given that it either relates purely to the personal life of a senior official, he does not consider that any legitimate public interest in these email exchanges would outweigh the rights of the data subjects. However in relation to document 10 which contains information relating to the professional life of the Chief Executive of HS2, the Commissioner considers that the legitimate interest in viewing this email exchange, would outweigh the rights of the data subject. The HS2 project is something that will affect and is of interest to a large proportion of the population and therefore information relating to the professional life of the Chief Executive of the body responsible for this project is of legitimate public interest. In so far as document 9 contains personal comments about individual members of staff as well as stakeholder and official's names the Commissioner considers that the rights of junior, non-public facing officials outweigh any legitimate interest in disclosure of this information. However so far as document 9 relates to the professional life of a new employee and document 16 relates to the professional life of a prospective employee, this information is a general biography already available in industry journals and there is a legitimate public interest in knowing about the calibre of staff working on the project.
53. There is limited legitimate public interest in disclosure of direct email addresses and therefore this would not outweigh the rights of data subjects.
54. The Commissioner therefore considers that section 40(2) was correctly engaged in relation to the redactions made to document 1 and to the parts of document 9 which contain personal comments about individual members of staff as well as stakeholder and official's names. He does not consider that section 40(2) was correctly engaged in relation to document 9 (so far as it contains a professional biography of a new member of staff), 10 and 16 apart from so far as this information contains direct email addresses. Document 9 (in part), 10 and 16 should

therefore be disclosed to the complainant with direct email addresses redacted.

Regulation 12(4)(d)

55. Regulation 12(4)(d) has been applied to documents 8 and 11-14. Upon viewing the withheld information the Commissioner considers that it is environmental and was therefore dealt with under the correct access regime.
56. The DfT has applied section 35(1)(a) FOIA to documents 15, 17-19 and 21. Upon viewing this information, the Commissioner considers that it is environmental information. This is because it relates to a measure under regulation 2(c) (the HS2 programme) which is going to affect the environment. The Commissioner has therefore considered whether regulation 12(4)(d) applies to these documents as well.
57. Regulation 12(4) of the EIR states that for the purposes of paragraph(1)(a), a public authority may refuse to disclose information to the extent that – (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data.
58. The DfT explained that this is material which is still in the course of wider completion in conjunction with formulating and developing government policy.
59. It said that the withheld documents relate to one or more of the following issues and in relation to which policy formulation and development was still ongoing at the time of the request:
 - Ownership of HS2 stations
 - Integration of HS2 and DfT teams
 - Euston oversight development policy
 - Delivery of Phase 1 and 2
60. It went on that this is because at the time the original request was made the information related to live government policy discussions on a number of High Speed Rail matters including: policy discussion around the workings of a Euston terminal; ownership of HS2 stations; controlling costs; and Camden social housing post HS2. It confirmed that no final decisions had, or have since, been taken.
61. The DfT argued that ICO guidance makes it clear that whilst a particular document, or in this case, correspondence, may themselves be finished, they may be part of material which is still in the course of completion. In

this case, the information relates to material which is still in the course of completion because the DfT is still formulating and developing government policy on the specific aspects of the HS2 project to which the withheld information relates.

62. The Commissioner confirms that he has issued guidance on this subject². This states that:

*"The fact that the exception refers to both **material** in the course of completion and unfinished **documents** implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy."*

63. After viewing the withheld information and taking into account the DfT's submissions as set out above, the Commissioner considers that it is part of material which is still in the course of completion. The material relates to the formulation and development of the DfT's policy position on the specific aspects of the HS2 project which have not yet been decided upon. The Commissioner therefore considers that regulation 12(4)(d) EIR was correctly engaged in this case.
64. As regulation 12(4)(d) EIR is subject to the public interest test, the Commissioner has gone on to consider the public interest factors in favour of disclosure and the public interest factors in favour of maintaining the exception.

Public interest arguments in favour of disclosing the requested information

65. The DfT has explained that it believes the following public interest arguments favour disclosure:
- The Regulations make clear that there is a presumption in favour of disclosure of environmental information. This has been taken into account in reaching this decision. The Government has published environmental information on Euston, for example in the Environmental Statement associated with the London-West

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http://www.ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.ashx

Midlands (High Speed Rail) Bill which was introduced to Parliament in November 2013. Revised plans for London Euston station were introduced within Additional Provision 3 (AP3) to the HS2 Phase One hybrid Bill, which was deposited in September 2015. Alongside this, the Government published a Supplementary Environmental Statement (SES2), which includes full consideration of the alternative schemes for Euston and their environmental impacts. At the time the information request was made these policy questions were still to be determined by Ministers and in respect of which a decision had not yet been reached. It is in the public interest to provide this in a coherent package to enable informed debate.

Public interest arguments in favour of maintaining the exemption

66. The DfT has explained that it believes the following public interest arguments favour maintaining the exemption:

- As detailed in ICO guidance the Commissioner accepts that government needs a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. The timing of the request will therefore be an important factor. The need for a safe space will be strongest when the issues are still live, as was the case when this request was received in March 2015.
- Premature disclosure of the information would compromise the safe space within which Ministers and officials could freely consider HS2 policy options. This would potentially have negative consequences for the taxpayer by precluding better options due to premature disclosure.
- Good government depends on good decision making and this needs to be based on the best advice available. DfT officials and external stakeholders would be reluctant to provide their views and advice if they thought that it would be routinely disclosed.
- Disclosure of the information ahead of decisions being taken and announcements being made would lead to misinterpretation of the information or mislead the public into thinking decisions have been made. This carries a risk of unnecessarily blighting areas and again would have potentially negative implications for the tax payer and individuals living along or near the line of the route.

Balance of the public interest arguments

67. The Commissioner gives weight to the general public interest in the government operating in an open and accountable manner. He considers

that greater transparency leads to a better public understanding of particular issues and enables the public to assist in the decision making process where possible. The Commissioner also notes the significance and levels of public interest in any future decisions taken by the Government relating to HS2, including the overall environmental impact and cost to the public purse.

68. The Commissioner notes that policy decisions relating to specific aspects within the HS2 programme are yet to be taken. The Commissioner considers that effective policy making depends on good decision making which depends not only on sound evidence but candid communications that allow a full consideration of all the options without any concern over premature disclosure. Government policy needs to be thoroughly evaluated before it can be properly implemented and this can only happen when all parties have the confidence that there is no risk that those exchanges will be disclosed prematurely. The impact on these processes and weight to be given to these arguments must be determined on the circumstances of each case.
69. In this case the withheld information relates to policy decisions yet to be taken on a number of HS2 matters including policy discussion around the workings of a Euston terminal; ownership of HS2 stations; controlling costs; and Camden social housing post HS2, integration of HS2 and DfT teams and ongoing delivery of Phase 1 and 2. It has confirmed that final policy decisions have not yet been taken in these areas. This policy area was still therefore live at the time of request. Therefore there is a strong public interest in maintaining the safe space for Government to develop its ideas, debate live issues and reach decisions away from external interference. This also increases the likelihood and severity of the chilling affect arguments presented by the DfT in relation to the candour of advice available and therefore the quality of decisions being made.
70. On balance the Commissioner considers that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception. Regulation 12(4)(d) EIR was therefore correctly applied in this case.

Regulation 12(5)(e) – confidentiality of commercial information

71. The DfT has applied section 43(2) to documents 19-20 and 22-26. Upon viewing the withheld information again, the Commissioner considers that it is environmental information. This is because it relates to a measure under regulation 2(c) (the HS2 programme) which is going to affect the environment. The Commissioner has therefore considered whether regulation 12(5)(e) applies to these documents as the DfT has applied this exception in the alternative. The Commissioner has not however

considered the application of regulation 12(5)(e) EIR to document 19 as he has already found that this is exempt from disclosure under regulation 12(4)(d) EIR.

72. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
73. When assessing whether this exception is engaged the Commissioner will consider the following points:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

74. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for a profit.
75. The DfT considers that the information is of a commercial nature as it relates to a commercial activity – namely the programme cost estimates for HS2. The DfT has confirmed that procurement for phase 1 of the project has recently begun.
76. The Commissioner accepts that the nature of the information is commercial as it relates to a clear business activity in relation to which procurement for services has recently begun for Phase 1 of the project.

Is the information subject to confidentiality provided by law?

77. With regard to this element of the exception the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.

78. The ICO's guidance³ on this issue states that:

"In contrast to the section 41 exemption under FOIA, there is no need for public authorities to have obtained the information from another. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. For purely internal information, the question will be whether the employees of the public authority are under an obligation of confidence imposed by the common law, contract, or statute."

79. For the common law of confidence, the guidance makes it clear that the three issues to consider are:

- Does the information have the necessary quality of confidence? This will involve confirming that the information is not trivial and is not in the public domain. Information may still keep its quality of confidence if it has been shared with a limited number of people, as long as it has not been disseminated to the general public. It is also possible for information to keep its quality of confidence even if it is all in the public domain, if it would take time and effort to find and collate it from multiple sources.
- Was the information shared (or provided to employees) in circumstances creating an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information. A useful test is to consider whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.

80. The withheld correspondence is between the DfT and HS2. As the guidance makes clear, there is no requirement for a public authority to have obtained the information from a third party. The DfT has confirmed that the withheld information has not been put into the public domain and it is not trivial as it relates to the programme cost estimate. The Commissioner considers that the sharing of this information between HS2 or DfT officials would have carried an implied confidence as this is the reasonable expectation the recipients are likely to have had. HS2

³ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

has confirmed that it would not expect this information to be disclosed into the public domain.

81. The Commissioner considers the DfT is therefore relying on the information being subject to the common law duty of confidence. In establishing whether this is the case the Commissioner has taken into account the commercial nature of the withheld information, and the fact that the information was not trivial in nature as it related to a significant development project in its early stages. The Commissioner notes the information had not previously been made available and was shared in circumstances where there as an implied duty of confidence.
82. Taking this into account the Commissioner is satisfied there is a common law duty of confidence, particularly as the information is related to funding and provides a more detailed breakdown of potential costs. As such he is satisfied that the withheld information was imparted in circumstances importing an obligation of confidence.

Is the confidentiality required to protect a legitimate economic interest?

83. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
84. Upon viewing the correspondence being withheld under regulation 12(5)(e), the Commissioner does not consider that disclosure would cause economic harm if these documents were disclosed. This is because the correspondence and attached reports do not contain any specific financial detail in relation to the programme cost estimate. It relates more to higher level risks and assurances rather than any detailed costing analysis that would prejudice the DfT or HS2 in the Phase 1 procurement. The DfT has not therefore provided sufficient arguments to explain why disclosure of this information would cause harm to its own or HS2's economic interests.

Would confidentiality be adversely affected by disclosure?

85. As the third element of the test has not been established, the Commissioner is satisfied that disclosure into the public domain would not adversely affect confidentiality and thus the legitimate economic interests of the DfT and HS2. He therefore concludes that the exception at regulation 12(5)(e) is not engaged in relation to documents 20 and 22-26.

Part 3 of the request

86. The DfT explained that officials have reviewed all the correspondence that falls within scope of this part of the request. It provided the spreadsheet detailing its decision making and exemptions / exceptions considered to be engaged. It confirmed that in the course of investigations, officials identified 4 new pieces of correspondence which were unfortunately not originally considered by the case handler, all of which they judge should be withheld. It confirmed that no emails were sent to Philip Rutnam by any director or employee of HS2 Ltd concerning HS2 at Euston in the time period specified.
87. Upon viewing the withheld information and the DfT's spreadsheet, the Commissioner notes that there are 5 documents being withheld within the scope of part 3 of the request. Regulation 12(4)(e), internal communications, have been applied to all 5 documents in their entirety.
88. The Commissioner, in his dual role as regulator of the Data Protection Act as well as the FOIA and EIR, has proactively applied regulation 13 (third party personal data) to two paragraphs in an email dated 8 March 2013. These are the first two bullet points contained in that email. The Commissioner has therefore considered regulation 12(4)(e) in relation to all information other than the two paragraphs referred to above. These have been considered under regulation 13 at the end of this section.

Regulation 12(4)(e)

89. Upon viewing the information withheld under this exemption, the Commissioner is satisfied that it is environmental information and was therefore dealt with under the appropriate access regime.
90. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. It is subject to a balance of public interest test.
91. By virtue of regulation 12(8), communications between government departments will constitute internal communications for the purpose of the exception at regulation 12(4)(e).
92. The Commissioner's published guidance on this exception⁴ addresses the issue of internal communications. Essentially, an internal communication

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https://ico.org.uk/media/fororganisations/documents/1634/eir_internal_communications.pdf

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.

93. The DfT explained that the information contained within this correspondence has not been shared or copied to anyone outside of the DfT, apart from one email which was copied only to individuals at the Cabinet Office and No10.
94. The Commissioner's guidance confirms that communications between central government departments are expressly included as internal communications by virtue of regulation 12(8). In *Friends of the Earth v Information Commissioner and ECGD (EA/2006/0073, 20 August 2007)*, the Tribunal found that the Directive defined central government as one public authority for these purposes, and that communications between departments should be protected as internal communications.
95. As the correspondence has not been shared with anyone outside the DfT, other than the Cabinet Office and No.10, the Commissioner considers that this information does fall within the class of internal communications.
96. The Commissioner has seen the withheld information and is satisfied that it all clearly falls within the class of information described in regulation 12(4)(e). He is therefore satisfied that regulation 12(4)(e) is engaged. He has therefore gone on to consider the public interest test in relation to this information.

Public interest arguments in favour of disclosing the requested information

97. The DfT has explained that it believes the following public interest arguments favour of disclosure:
 - As in relation to regulation 12(4)(d) (set out in detail above), the DfT acknowledged that the EIR's make clear that there is a presumption in favour of disclosure of environmental information. It is in the public interest to provide environmental information in a coherent package to enable informed debate.

Public interest arguments in favour of maintaining the exemption

98. The DfT has explained that it believes the following public interest arguments favour maintaining the exemption:
 - The DfT argued that there is a public interest in the protection of internal deliberation and decision making processes. The exception protects a public authority's need for a private thinking space. It

said that the same arguments on the timing of the request, safe space and chilling effect as detailed above in relation to regulation 12(4)(d) are applicable for this exception.

Balance of the public interest arguments

99. Again the Commissioner gives weight to the general public interest in the government operating in an open and accountable manner. He considers that greater transparency leads to a better public understanding of particular issues and enables the public to assist in the decision making process where possible. The Commissioner also notes the significance and levels of public interest in any future decisions taken by the Government relating to HS2, including the overall environmental impact and cost to the public purse.
100. The Commissioner also considers that there is a strong public interest in allowing public authorities safe space to deliberate options within the wider decision making process of the HS2 project. However upon viewing the withheld information, the Commissioner notes that it relates to internal communications back in 2013. One piece of correspondence discusses the National Audit Office Report – a review of early programme preparation⁵. This report was published on 16 May 2013 and is publicly available. All of the correspondence relates to a far earlier stage in the project and pre-dates 25 November 2013, when the government deposited a hybrid Bill with Parliament to secure the powers to construct and maintain Phase One of HS2 between London and the West Midlands. The Bill is titled 'High Speed Rail (London - West Midlands) Bill'. Therefore these earlier internal communications cannot be said to relate to any ongoing live policy deliberations and therefore any public interest in protecting safe space is significantly diminished.
101. In terms of the DfT's chilling affect arguments, again as the internal communications cannot be said to be directly linked to any ongoing live policy debate, due to the fact that they are relevant to a much earlier stage in the life of the programme and due to the passage of time, the issues that were current at that time have moved on. Again this detracts from the weight afforded to this argument. Furthermore the individuals involved in the correspondence occupy very senior, public facing roles and would therefore be expected to make informed decisions based upon in-depth deliberation and discussion. Again minimising any chilling affect that disclosure would cause.

⁵ <https://www.nao.org.uk/wp-content/uploads/2013/07/Full-Report.pdf>

102. In summary the Commissioner does consider that there is a strong public interest in disclosure of information relating to the HS2 project, given that it will affect a large number of the population (both positive and negative), there has been/will be a significant cost to the public purse and the environmental impact the programme will have. Due to the age of the information and the fact that the HS2 programme has moved on since the time period to which the withheld information relates, the Commissioner considers that the public interest in favour of maintaining the exception is outweighed by the public interest in disclosure.

Regulation 13

103. As stated above the Commissioner has proactively applied regulation 13 to two paragraphs contained in the email dated 8 March 2013.

104. Under regulation 13, personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.

105. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

“data which relate to a living individual who can be identified –

(i) from those data, or

(ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”

106. The two main elements of personal data are that the information must ‘relate’ to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

107. In this case, upon viewing the two paragraphs referred to, the Commissioner is satisfied that they relate to living and identifiable individuals. Further information about what this information contains is set out in the confidential annex attached to this Notice.

108. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data

protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.

109. The Commissioner has considered the reasonable expectations of the data subject's and whether damage and distress could be caused by disclosure in the Confidential Annex attached to this Notice.

Legitimate public interest

110. The Commissioner considers that any information relating to the HS2 project which is going to provide a more detailed understanding around actions and decisions taken is a legitimate public interest.

111. However in this case the Commissioner does not consider that the data subjects would have a reasonable expectation that this information would be disclosed into the public domain and furthermore disclosure could cause damage and distress to the data subjects. Further detail of which is contained in the confidential annex attached to this Notice.

112. The Commissioner therefore considers that any legitimate public interest in this case is outweighed by the rights of the data subjects and therefore regulation 13 is applicable to the first two bullet points contained in the email dated 8 March 2013.

Part 4 of the request

113. The DfT confirmed that Officials have reviewed all the correspondence that falls within the scope of this part of the request. The DfT provided the Commissioner with a file of unredacted disclosed and withheld correspondence. It again provided a corresponding spreadsheet detailing its decision making and exemptions / exceptions considered to be engaged. In the course of investigations, it identified 4 new pieces of correspondence which were not originally considered by the case handler. All of which the DfT determined should be withheld.

114. Upon viewing the DfT's submissions, spreadsheet and disclosed/withheld information, the Commissioner notes that there are 10 documents that fall within the scope of this request. The DfT confirmed that documents 1 and 2 were disclosed to the complainant. In relation to documents 3, 9 and 10 the DfT applied section 35(1)(a) FOIA. In relation to documents 4-8 the DfT applied regulation 12(4)(d) EIR. Upon viewing the withheld information, the Commissioner considers that it is all environmental information. This is because it relates to a measure under regulation 2(c) (the HS2 programme) which is going to affect the environment. The Commissioner has therefore considered whether regulation 12(4)(d) applies to all documents withheld in relation to part 4 of the request.

Regulation 12(4)(d)

115. Regulation 12(4) of the EIR states that for the purposes of paragraph(1)(a), a public authority may refuse to disclose information to the extent that – (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data.
116. The DfT explained that this is material which is still in the course of wider completion in conjunction with formulating and developing government policy.
117. Upon viewing the withheld information, the Commissioner recognises that it relates to discussions about the HS2 project during the Bill's petition stage. The petitioning process gives those affected by HS2 the opportunity to raise issues and voice concerns about the plans for the route between the West Midlands and London. The final petitions are currently being heard in the House of Commons. The Government has explained that, "Over the last 17 months, the HS2 Commons Select Committee, chaired by Robert Syms MP, has heard almost 2,600 petitions, many of which have led to changes to the Bill. This will ensure that HS2 is designed in the best way possible."⁶
118. The Commissioner is therefore satisfied that during this petition period, government formulation and development in this area was ongoing. The withheld information is dated within the 'petition stage' of the Bill. For the same reasons set out at paragraphs 60-62 above, the Commissioner considers that regulation 12(4)(d) was correctly engaged in relation to this information. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

119. The DfT has explained that it believes the following public interest arguments favour of disclosure:
- The Regulations make clear that there is a presumption in favour of disclosure of environmental information. It is in the public interest to provide this environmental information in a coherent package to enable informed debate.

⁶ <https://www.gov.uk/government/news/hs2-moves-closer-to-construction-as-transport-secretary-officially-opens-birmingham-headquarters>

Public interest arguments in favour of maintaining the exemption

120. The DfT has explained that it believes the following public interest arguments favour maintaining the exemption:

- As detailed in ICO guidance the Commissioner accepts that government needs a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. The timing of the request will therefore be an important factor. The need for a safe space will be strongest when the issues are still live, as was the case when this request was received in March 2015.
- Premature disclosure of the information would compromise the safe space within which Ministers and officials could freely consider HS2 policy options. This would potentially have negative consequences for the taxpayer by precluding better options due to premature disclosure.
- Good government depends on good decision making and this needs to be based on the best advice available. DfT officials and external stakeholders would be reluctant to provide their views and advice if they thought that it would be routinely disclosed.
- Disclosure of the information ahead of decisions being taken and announcements being made would lead to misinterpretation of the information or mislead the public into thinking decisions have been made. This carries a risk of unnecessarily blighting areas and again would have potentially negative implications for the taxpayer and individuals living along or near the line of the route.

Balance of the public interest arguments

121. The Commissioner gives weight to the general public interest in the government operating in an open and accountable manner. He considers that greater transparency leads to a better public understanding of particular issues and enables the public to assist in the decision making process where possible. The Commissioner also notes the significance and levels of public interest in any future decisions taken by the Government relating to HS2, including the vast number of individuals and businesses directly affected, the overall environmental impact and cost to the public purse.

122. The Commissioner notes that policy formulation and development relating to the Bill is ongoing during the 'petition period'. The Commissioner considers that effective policy making depends on good decision making which depends not only on sound evidence but candid communications that allow a full consideration of all the options without

any concern over premature disclosure. Government policy needs to be thoroughly evaluated before it can be properly implemented and this can only happen when all parties have the confidence that there is no risk that those exchanges will be disclosed prematurely. The impact on these processes and weight to be given to these arguments must be determined on the circumstances of each case.

123. In this case the withheld information relates to policy discussion during the 'petition period'. Final petitions are currently being heard which could impact upon final policy decisions which have not yet been taken. This policy area was still therefore live at the time of request. Therefore there is a strong public interest in maintaining the safe space for Government to develop its ideas, debate live issues and reach decisions away from external interference. This also increases the likelihood and severity of the chilling affect arguments presented by the DfT in relation to the candour of advice available and therefore the quality of decisions being made.
124. On balance the Commissioner considers that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception. Regulation 12(4)(d) EIR was therefore correctly applied in this case.
125. The Commissioner notes that throughout the information provided within the scope of the request, there are references to attachments which have not been provided to the Commissioner. If this information is held, as no exemptions or exceptions have been applied this should also be provided to the complainant.

Right of appeal

126. 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

127. 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.

128. 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