

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

Decision notice

Date: 22 August 2018

Public Authority: High Speed Two Ltd (HS2)
Address: 1 Canada Square
London
E14 5AB

Decision (including any steps ordered)

1. The complainant has requested information on the cost differences between the route options that HS2 considered for the Sheffield Spur; specifically route options for connecting to the Erewash Valley line at Toton. HS2 has withheld this information under regulation 12(5)(e) of the EIR (confidentiality of commercial information).
2. The Commissioner's decision is that:
 - HS2 is correct to withhold the requested information under regulation 12(5)(e) and the public interest favours maintaining the exception.
3. The Commissioner does not require HS2 to take any steps to ensure compliance with the legislation.

Request and response

4. On 15 November 2017 the complainant wrote to HS2 and, as part of wider correspondence, requested information in the following terms:

- "9. *FOI 17-1838 Annex B (N) ; Slide 11 / page 16 of 18: Since hs2 are not prepared to divulge the costs of each option, please provide the difference in cost between the base option 00 and the options 01 and 02, since there is surely no commercial reason for non disclosure of that figure which is a key factor in the decision sought and taken ; as per FOI 17-1838 Annex A "on the basis of the increased journey time associated with the alternative options north of Toton."*
5. HS2 responded on 14 December 2017. It withheld the requested information under regulation 12(5)(e) of the EIR and said that the public interest favoured maintaining this exception.
 6. HS2 provided a review on 14 January 2018, in which it maintained its original position.
 7. During the Commissioner's investigation, on 30 July 2018, HS2 released to the complainant the percentage cost differential between the two alternative routes – options 01 and 02 – and the preferred spur alignment – option 00.

Scope of the case

8. The complainant contacted the Commissioner on 29 January 2018 to complain about HS2's response to request 9. He remained dissatisfied following HS2's communication of 30 July 2018.
9. The Commissioner's investigation has focussed on HS2's application of regulation 12(5)(e) to the information the complainant has requested, and the balance of the public interest.

Reasons for decision

10. In its submission to the Commissioner HS2 has provided the following background to the request. Between 15 November 2016 and 9 March 2017 it conducted a public consultation exercise on seven route refinements associated with the Phase 2b route from Crewe to Manchester and the West Midlands to Leeds. One of these route refinements concerned the route from Derbyshire to West Yorkshire, known as the M18 / Eastern route, where HS2 proposed a significant change from previous proposals to serve South Yorkshire high speed station at Meadowhall. The proposed M18 / Eastern route put forward for consultation contained a spur from the HS2 mainline near the A38 and Hilcote to enable 'classic compatible' trains to join the existing

railway near Clay Cross and service existing stations at Chesterfield and Sheffield Midland.

11. A number of consultation responses, including those from Derbyshire County Council and Bolsover District Council, asked HS2 to consider an alternative location for the spur to Sheffield, with the HS2 mainline connecting to the Erewash Valley line to the north of Toton. HS2 undertook this work, using its standard route sifting procedure to assess two potential alternative spur options that connected to the Erewash Valley line to the north of Toton against the preferred spur alignment proposed by HS2.
12. Following this work, HS2 recommended to Government that, whilst both of the alternative spur options would remove the sustainability and environmental impacts associated with the proposed spur alignment, both significantly increased journey time on the Phase 2b route from Long Eaton to Sheffield Midland station (by more than seven minutes), and increased the cost associated with the route because of the length of electrification that would be required on the existing Erewash Valley Line (greater than 20.5 miles / 33 km).
13. In July 2017 HS2 published the outcomes of this work, along with the recommendations of the rest of its work to review the seven proposed Phase 2b route refinements against the responses to the consultation. A copy of this document (*High Speed Two Phase 2b Crewe to Manchester, West Midlands to Leeds Route Refinements Advice to Government*) has been published. Paragraphs 14.3.59 to 14.3.64 detail the work that was undertaken by HS2 to assess the alternative spur options that were put forward in the consultation and the rationale for rejecting these.
14. On 15 September 2017 HS2 received a request from the complainant in which he asked for information on the decision making process associated with the above – HS2's reference FOI17-1838. HS2 provided relevant information, which included a 'Change Forum' PowerPoint presentation.
15. The current request is one of 10 requests that the complainant submitted on 15 November 2107 about the information HS2 had released in its FOI17-1838 response. HS2 had provided a response to the first eight requests. With regard to the current request (request 9) HS2 had advised that the estimated cost of the two options that were assessed to create a spur to the Erewash Valley line to the north of Toton were higher than the preferred spur alignment announced by the Secretary of State in July 2017. HS2 confirmed that it does hold the requested information on the difference in cost between the options considered but that it was withholding this under regulation 12(5)(e).

HS2 sought further clarification about request 10 from the complainant in order to better inform its eventual response.

Regulation 12(5)(e) – commercial or industrial information

16. Regulation 12(5)(e) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. Regulation 12(5)(e) is subject to the public interest test.
17. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

18. The Commissioner's published guidance on section 12(5)(e) advises that for information to be commercial in nature, it will need to relate to a commercial activity; either of the public authority or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information.
19. In its submission HS2 states that the withheld information relates to both the capital cost of all the options assessed, and the cost differences between the preferred Sheffield Spur alignment (Option 00) and the two alternative spur options (Options 1 and 2) that connected to the Erewash Valley Line to the north of Toton.
20. The Commissioner has reviewed the request; it is for "*the difference in cost between the base option 00 and the options 01 and 02*". The Commissioner disagrees that the request is also a request for the capital cost of all the options assessed, as such. The Commissioner understands the complainant to be asking how much more (or less) the Option 1 cost estimate was compared to Option 00 - so '£X,000,000', and how much more (or less) the Option 2 cost estimate was compared to Option 00 -

so '£Y,000,000'. The complainant is requesting the 'X' and 'Y' figures and has not requested the cost of Option 00.

21. However, the Commissioner considers the 'X' and 'Y' figures to be commercial in nature. They were cost estimates that HS2 considered as part of its sift of the three options, before deciding on the preferred option. The Commissioner is therefore satisfied that the first condition at paragraph 17 has been met.

Is the information subject to confidentiality provided by law?

22. In her guidance the Commissioner advises that, in this context, this will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute.
23. HS2 has not referred to any contractual obligation or statutory bar in its submission and so the Commissioner has considered whether the information is subject to the common law of confidence. In assessing whether the information has the necessary quality of confidence, the Commissioner has considered whether the information is more than trivial, whether or not it is in the public domain and whether it has been shared in circumstances creating an obligation of confidence. A useful test to consider with regard to the latter 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.
24. The information is certainly more than trivial, relating as it does to a multi-million pound national infrastructure project. In its submission, HS2 has indicated that it has not previously released any 'route refinement' cost information for other sections of the Phase 2b route. The Commissioner notes that HS2 has released specific, comparative cost information relating to the Phase 2a route (from the West Midlands to Crewe) and this matter is discussed elsewhere in this notice. The Commissioner understands that the specific information requested in this case is not currently in the public domain.
25. The Commissioner also considers that a reasonable person who was provided with the requested information from a supplier would consider that the information had been provided to him or her in confidence. This is simply because it concerns cost estimates for two route options and is part of a wider procurement process concerning the HS2 project. The Commissioner is therefore satisfied that the information in question is subject to confidentiality provided by law and the second condition at paragraph 17 has been met.

Is the confidentiality provided to protect a legitimate economic interest?

26. In his correspondence to the Commissioner, the complainant has disputed that particular estimated costs could be extrapolated if the information he has requested was released.
27. The First Tier Tribunal (Information Rights) confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosing the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
28. 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.
29. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors"
30. In this case the HS2 has indicated that the confidentiality is designed to protect its own legitimate economic interests and those of the taxpayer, ultimately.
31. In taking its decision to apply regulation 12(5)(e), HS2 says in its submission that it considered the large amount of detail and information already provided - in its response to FOI17-1838 - regarding the appraisal of the preferred route option and the two alternatives. The information provided includes the alignment of the routes under consideration, key engineering features and key differences between the routes, including the preferred route that has been taken forward into the preferred Phase 2b scheme, announced by the Secretary of State in July 2017. HS2 believes that, when combined with information on the difference in cost between the route options, it would be possible for potential suppliers that may want to compete for future work on the delivery of the Phase 2b scheme to effectively 'reverse engineer' the costs it has attributed to certain Phase 2b infrastructure assets.

32. HS2 has clarified the nature of its concern regarding the release of the X and Y figures. By way of a broad example, if Option 01 was costed at £100 more (X) than Option 00, and the Option 01 route included the building of one bridge, and Option 02 was costed at £200 more (Y) than Option 00 and the Option 02 route included the building of two bridges; this would give an indication of the proposed cost to HS2 of the building of a bridge, namely £100. HS2 has told the Commissioner that other information is already in the public domain about these routes which, when combined with the X and Y figures, would also help to indicate the cost to it of particular infrastructure assets (such as bridges, tunnels, platform turnouts). HS2 is concerned that it would be prejudicial to its commercial interests if it were known how much it is prepared to pay - the 'optimal costs' - for particular aspects of the HS2 route.
33. Following a request from the Commissioner, HS2 explained this matter further. It has referred the Commissioner to some of the information that is already in the public domain. This includes the route refinement advice to government¹, information about preferred route plans and profiles² (both published in July 2017), Geographic Information Systems/Computer-aided Design files that make up the July 2017 route, guidance on specifying the standard quantities to be assumed in professional estimating for new railways³ and the Change Forum PowerPoint slides that were previously released to the complainant under FOI17-1838.
34. HS2 says this material provides detailed information on the different options considered and precise descriptions of the infrastructure assets associated with each. To work out the 'rate' for individual infrastructure assets used in the two different estimates that have been requested,

1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628605/CS848_Phase_2b_201617_Route_Refinement_Advice_FINAL_WEB_170713.pdf

2 <https://www.gov.uk/government/collections/hs2-phase-2b-crewe-to-manchester-and-the-west-midlands-to-leeds>

3 <https://www.ice.org.uk/knowledge-and-resources/best-practice/civil-engineering-standard-method-for-measurement>

HS2 has told the Commissioner that quantities for each asset are needed. It is then necessary to compare the design each estimate relies on (for instance, the dimensions of the asset in each design, the design speed of the railway, the required clearances between the route and obstacles like roads and rivers) and, if routes are being compared, the net cost difference between them are needed.

35. Through the information that has already been published, the complainant – and the public more generally - already has access to: recommended quantities required for different asset types (through resources provided by the Institute of Civil Engineers), design detail (including the dimensions of each of asset, clearances to roads and rivers, design speed) through the Change Forum slides and the Plans and Profiles) and an explanation of the differences between the routes (the Change Slides and Route Refinement Advice discuss the need to electrify the Erewash Valley Line for the alternatives, the need for a grade separated junction etc). The missing part for working backwards to the rates for individual assets is the net cost difference between the two routes, which the complainant is now requesting.
36. HS2 says that if the disputed information was to be released, someone – particularly someone with a background in engineering or railways – could consider the infrastructure assets that options 01 and 02 have, for example the length of the platform turnouts and the length of viaducts, and ask themselves what assets do these have that option 00 does not have, that have generated particular cost estimates? Similarly, they could consider the differences between option 01 and option 02 and broadly deduce what particular infrastructure assets are likely to have cost. The information that is already in the public domain would facilitate this deduction.
37. As a non-departmental government organisation that is wholly owned by the Department for Transport (DfT), HS2 says it takes its responsibility to secure value for money for the taxpayer seriously. It believes its ability to do so will be impaired by releasing cost data into the public sphere that could prejudice future procurement activities, by showing HS2's assumed cost for different pieces of infrastructure. This would dis-incentivise potential bidding organisations from seeking out the most cost efficient means of designing and delivering the new railway.
38. HS2 says that, importantly, in undertaking its procurements HS2 is obliged to comply with section 36 *Utilities Contracts Regulations 2016*, which obliges it to treat all bidders equally. HS2 says that if the requested information was released (and was subsequently provided to a sub-set of potential bidders) then it would arguably be in the position of being unable to comply with the spirit of section 36 (in that certain bidders would have been given information that was not available to

other bidders). HS2 argues that this would inevitably result in an adverse impact on the competitiveness of the procurement process.

39. In its submission HS2 has gone on to explain that Phase 2b of HS2 covers over 280km of railway. The procurement programme to design and deliver this will be an extremely ambitious one, with both DfT and HS2 keen to engage with, expand and broaden the market of potential suppliers. HS2 says that releasing this 'commercially sensitive' information about the Phase 2b scheme at this stage would potentially undermine this objective. If the information is only cited by certain potential suppliers, it may in turn affect their willingness to compete for tenders at value for money prices.
40. HS2 has confirmed that it considers requests for cost information on a case-by-case basis and, as above, has not previously released any route refinement cost information for other sections of the Phase 2b route. It says that if it had to release the disputed information the commercial risk to HS2 would increase as it is likely it will face requests to release the route refinement cost information for other sections of the route that have different characteristics to the part of the route in question; for example viaducts or retaining walls.
41. With regard to its application of regulation 12(5)(e), HS2 says it recognises that the costing information it has withheld is high level but that it has taken into consideration the large amount of detail and information already published about the decision. This includes published details on its rationale to progress the preferred Sheffield Spur alignment and to reject the two alternative options that connect to the Erewash Valley line to the north of Toton, and further information disclosed as part of its response to FOI17-1838 regarding its appraisal of these options. As discussed, this information includes the alignment, key engineering features and key differences between the three routes under consideration, including the preferred route that has been taken forward into the preferred Phase 2b scheme.
42. HS2 has confirmed that it remains of the view that, when combined with information on the difference in cost between the route options, it would be possible for a potential supplier to work out the costs HS2 has attributed to certain elements of the Phase 2b route. The route for Phase 2b is at an early stage of development and HS2 says that releasing the requested information would impact on, and potentially cause harm to, its commercial position and would be likely to prejudice further procurements. HS2 has argued that disclosing the estimated costs for sections of the Phase 2b route would reduce its capacity to negotiate competitive rates. This would adversely affect HS2's financial position and potentially result in an undesirable outcome for the taxpayer.

43. Having considered the submission HS2 has provided the Commissioner is satisfied the third of the criteria at paragraph 17 has been met. She considers that disclosing the requested information would have the effects which are identified in the exception; namely, disclosure would adversely affect HS2's legitimate commercial interests. The HS2 project is still very much a live project. By piecing together the withheld information with the detailed information about the three routes in question, and the Phase 2b route in general, that is already in the public domain it would be possible to broadly work out the costs HS2 has attributed to certain infrastructure assets associated with the Phase 2b route. Armed with this information, potential suppliers could submit bids for future work on the HS2 project that do not necessarily reflect the best value for money. This would adversely affect HS2's commercial interests and those of the taxpayer.

Would the confidentiality be adversely affected by disclosure?

44. As the Commissioner has concluded that disclosure would adversely affect HS2's legitimate economic interests, it follows that the confidentiality designed to protect such harm would be adversely affected by disclosure.
45. Since the necessary four criteria have been met the Commissioner is satisfied that the information that HS2 has withheld engages the exception under 12(5)(e) and she has gone on to consider the public interest.

Public interest test

Public interest in releasing the information

46. As referred to above, the complainant has drawn the Commissioner's attention to a report published on 24 April 2018 which reviewed the HS2 Phase 2a route as it passes Hopton Village in Staffordshire. This summary report considers three alternative tunnel options which were assessed against the Proposed Scheme in terms of engineering, construction, environment and cost.
47. HS2 has addressed this matter in its submission. It says it is important to note the differences between the Hopton Tunnel Alternatives Summary Report and HS2's correspondence with the complainant. HS2 has explained that, having been asked by the Select Committee, and on legal advice from the Secretary of State's appointed Counsel, HS2 published the Hopton Tunnel Alternatives Summary Report on its website to advise Petitioners against the Phase 2a hybrid Bill, who are seeking a tunnel at Hopton, of HS2's position.

48. In that particular instance, HS2 was advised by Queen's Counsel that the public interest lay in releasing this comparative cost information in order to assist the Select Committee in its decision-making as failure to do so could result in an adverse decision from the Select Committee considering this evidence. HS2 was advised that its failure to present the Select Committee with the comparative cost information could result in the Committee instructing HS2 to include one of the Petitioner's tunnel options in the Phase 2a scheme. HS2 says it is clear from the report that the cost impact of such an adverse decision from the Select Committee could be to increase the cost of Phase 2a by an estimated £158m - £481m. Queen's Counsel advised HS2 that the public interest lay in disclosing this information to the public and the Select Committee. HS2 considered it is in the public interest not to incur an additional £150m - £480m of unnecessary cost to the public purse. It therefore agreed with Queen's Counsel and released that particular report.
49. HS2 considers that the two situations – publishing comparative cost information during the Phase 2a Select Committee process and the complainant's request for comparative cost information associated with a Phase 2b route refinement assessment during the route development stage of the project – are materially different and that the public interest demands a different response in each case.
50. HS2 has noted that, should Phase 2b deposit a hybrid Bill as planned, those who petition the Bill can request comparative cost data on alternative route options that have been considered. Should this occur, and should the Select Committee request that this is provided, HS2 says it will again seek legal advice on whether releasing this cost information at this stage is in the public interest, as has occurred on Phase 2a.
51. More generally, HS2 has also noted its legal obligations to assist applicants with their requests for information and to be transparent and accountable in respect of its operations and decision-making, especially where it involves the use of public funds.

Public interest in maintaining the exemption

52. HS2 argues that its calculations in developing costing estimates are commercially sensitive. Providing the details of engineering requirements for the route options in the public domain would compromise its ability to ensure value for money in future procurements - procurements such as the detailed design and building of the Phase 2b route, once this has been confirmed through the parliamentary process. Disclosing the estimated costs for sections of the Phase 2b route would reduce HS2's capacity to negotiate competitive rates as, by utilising information in the public domain, it will create market expectations in key rates and allowances. HS2 says that bidders will be able to develop

costing estimates for route specifications and adjust their bids accordingly. Disclosing information related to estimated costs would likely adversely affect incentives on suppliers to release efficiencies and reduce costs. This would impact on efforts to ensure the most cost efficient design and delivery of the railway.

53. HS2 also argues that there is public interest in HS2 being able to maintain the trust and confidence of future bidders in order to negotiate favourable contracts and rates in the future. The procurement programme to design and deliver the Phase 2b scheme will be an extremely ambitious one, with both DfT and HS2 keen to engage with, expand and broaden the market of potential suppliers. Releasing the requested information may damage the trust such companies place in HS2 as a client and may discourage them from tendering in the future. This would be to the detriment of the project and the public interest in seeing that HS2 is developed with the best advice and services, and at favourable and competitive rates.
54. HS2 says that it considers that the public interest in transparency and accountability is, to a significant extent, met by the mass of information about the project that is already in the public domain. This includes details about the recommendation that was made to Government in July 2017 to progress with the preferred Sheffield Spur alignment, ahead of the two alternative spur options. HS2 has supplemented the publicly available information around this decision by releasing further information pertaining to its assessment and appraisal of these options in response to FOI17-1838. HS2 considers that the public interest associated with further release of the cost differential information associated with this decision is outweighed by the prejudicial commercial effects of disclosure as set out above.
55. HS2 has confirmed that its view has not changed following its decision to publish the Phase 2a Hopton Tunnel Alternatives Summary Report during the Phase 2a hybrid bill Select Committee process. It believes that these two situations are materially different and that the public interest test demands a different response in each case.

Balance of the public interest

56. The Commissioner recognises the scale of the HS2 project and the public interest in it generally. She recognises too that the requested information may be of interest to the complainant, and that HS2 may have previously released similar information in relation to the Hopton Tunnel Alternatives. However, the Commissioner considers that any wider public interest that there may be in the particular refinement options considered as part of the Phase 2b route have been met by the large amount of related information that has already been published,

which now includes the percentage cost differential between option 01 and 02, and option 00.

57. The Commissioner has not been made aware of any specific concerns about the options considered that might have tipped the balance in favour of disclosing the requested information, and has not been provided with arguments that would suggest that the information does have a wider public interest. In the absence of these, the Commissioner is satisfied on this occasion that there is a stronger public interest in HS2 withholding the requested information. This is so that it can protect its 'optimal costs' in order to secure the best value for itself and the tax payer, as the project progresses.

Right of appeal

58. 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

59. 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.
60. 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

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