

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

Date: 10 January 2022

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

Decision (including any steps ordered)

1. The complainant has requested HS2 to disclose copies of the results of environmental surveys and related reports for the worksite containing Grims Ditch for the three months preceding 18 November 2020. HS2 disclosed some information and withheld the remainder under regulations 12(5)(g) and 13 of the EIR.
2. The Commissioner's decision is that HS2 is entitled to refuse to disclose the remaining withheld information in accordance with regulation 12(5)(g) of the EIR. He does not require any further action to be taken.

Request and response

3. On 17 November 2020, the complainant wrote to HS2 and requested information in the following terms:

"Would you please supply (under the Environmental Information) copies of the results of Environmental Surveys and related reports, for your worksite containing Grims Ditch (near Hunt's Green, The Lee) for the three months preceding 18-Nov-2020."

The request was received by HS2 on 30 November 2020.

4. HS2 responded on 30 December 2020. It disclosed some information but refused to disclose the remainder citing regulation 12(5)(g) of the EIR. It also applied regulation 13 of the EIR to the personal details of the surveyors.
5. The complainant requested an internal review on 3 January 2021. He stated that his request relates to the woodland which previously surrounded the Grims Ditch ancient monument, and this environment no longer exists, as HS2 contractors have felled the trees and removed the undergrowth. He confirmed that disclosure of the withheld information cannot therefore result in any further harm.
6. HS2 carried out an internal review and notified the complainant of its findings on 1 February 2021. It upheld its previous application of regulation 12(5)(g) of the EIR.

Scope of the case

7. The complainant contacted the Commissioner on 1 March 2021 to complain about the way his request for information had been handled. He disagrees with the application of regulation 12(5)(g) and believes HS2 has reached the wrong conclusion.
8. During the Commissioner's investigation, HS2 identified that some information was incorrectly redacted from the information it disclosed to the complainant. HS2 rectified this by sending a revised response to the complainant.
9. The Commissioner considers the scope of his investigation to be to determine whether HS2 is entitled, or not, to withhold the remaining withheld information, withheld under regulation 12(5)(g) of the EIR.
10. The complainant confirmed at the internal review stage that he was happy for any personal data to be redacted under regulation 13. The Commissioner has therefore excluded any personal data considerations from this investigation.

Reasons for decision

Regulation 12(5)(g) – protection of the environment to which the information relates

11. Under regulation 12(5)(g) of the EIR a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the protection of the environment to which the information relates.
12. In general terms, making environmental information available to the public ultimately contributes to a better environment, by increasing people's awareness and understanding of environmental issues. This principle is recognised in EU Directive 2003/4/EC on Protection of the environment (regulation 12(5)(g)) – EIR guidance 20120516
Version: 1.1 4 public access to environmental information, which the EIR implement.
13. However, there may be situations when disclosing the information would actually have an adverse effect on the environment. The Directive says that a request may be refused if disclosure would adversely affect "the protection of the environment to which such information relates, such as the location of rare species" (Article 4(2)(h)). So if, for example, a public authority holds information about the breeding site of a rare bird species and disclosing the location of the site would expose the site to interference or damage, then the exception may be relevant because disclosure could adversely affect the protection of the environment.
14. The information that HS2 is withholding under regulation 12(5)(g) is information that would enable the location of protected species to be identified.
15. To refuse a request for environmental information under the exception in regulation 12(5)(g), public authorities will need to establish:
 - that the information in question relates to the aspect of the environment that is being protected;
 - how and to what extent the protection of the environment would be affected; and
 - that the information is not on emissions.
16. HS2 confirmed that its proposals and works require that ecological surveys are undertaken in order to understand likely impacts and to

meet relevant regulations. Ecological surveys are undertaken to identify protected or notable species and habitats that are present, or potentially present, within a site or the surrounding area. It stated that information collected from ecological surveys can inform ecological assessments of a site and help identify requirements for mitigation design and to assist in designing appropriate site management practices. It explained that depending on the type of survey undertaken, surveys to assess protected species will often need to be undertaken by qualified specialists licenced by Natural England.

17. HS2 explained further how regulation 2(1)(a) of the EIR lists the elements that describe what constitutes the environment. This list does not refer to animals, plants or other living organisms rather "biological diversity and its components". It referred to the Commissioner's guidance on 12(5)(g)¹ and how this confirms that this exception is about the protection of biodiversity, "that is, living organisms as part of the environment and their interrelation with the other elements of the environment". It also referred to an element of the guidance where it states, too, that this "would include the protection of a badger sett or the location of a rare plant, in so far as they are part of the natural environment of a particular area".
18. It argued that the remaining withheld information contains sensitive information relevant to 12(5)(g) as it provides information that would allow for the identification of the location of a protected species. It therefore directly relates to the environment that is to be protected. HS2 confirmed the protected species in question and outlined the relevant legislation under which that species is given the associated protection.
19. It argued that the protection of the environment is likely to be adversely affected by releasing sensitive information relating to the location of protected species as illegal activity is highly likely to occur as a result. HS2 provided written evidence to support its view.
20. With regards to the third bullet point of paragraph 15 above, HS2 confirmed that the withheld information does not relate to emissions.
21. Dealing with the complainant's argument that because HS2 felled the trees and removed the undergrowth, there is no longer any

¹ <https://ico.org.uk/media/for-organisations/documents/2021/2619008/12-5-g-protection-of-the-environment-31122020-version-12.pdf>

environment to protect at Grims Ditch, HS2 confirmed that this location is not a site in isolation but part of an integrated landscape. Any protected species moving on from this specific site would be likely to be found in nearby habitats including hedgerow and woodland. Therefore disclosing any data on any such species found at the specified site would provide, as a minimum, a starting point for those interested in such species and encourage a nearby exploration of the area, disturbing those species and others that may be in the vicinity, whether accidentally or on purpose. HS2 stated that it has a legal requirement to protect the populations of such species, not just any individual(s) found.

22. The Commissioner cannot comment on what the protected species may or may not be or exactly how the remaining withheld information could be used by those wishing to cause harm or disruption to the area and species in question. To do so would reveal some of the withheld information and therefore defeat the application of the exception in this case and what it is designed to protect. However, he is satisfied from the remaining withheld information and the submissions HS2 has provided that disclosure would adversely affect environmental protection. He is therefore satisfied that regulation 12(5)(g) is engaged.
23. The complainant believes if HS2's application of regulation 12(5)(g) is upheld in this case it would effectively be saying that the EIR would not apply to any environment where protected species were believed to be present. This is not the case. This exception is subject to the public interest test and all public authorities are required to apply a presumption in favour of disclosure in accordance with regulation 12(2). It is only if the public interest in favour of maintaining the exception outweighs the public interest in disclosure that the information should not be disclosed.

Public interest test

24. HS2 argued that there are the general public interest arguments in favour of greater transparency and accountability around the progress of the HS2 programme. It stated in this case disclosure would help facilitate general public understanding of the steps HS2 is undertaking to understand, and therefore mitigate the effects on, animal life in the Grims Ditch area.
25. However, it considers the public interest rests in maintaining the exception. The information relates to surveys for species in Grims Ditch and reveals the location of a protected species. Revealing the location would enable those who wish to interfere with or cause harm to that species to target their behaviour at these specific locations. It

also said that disclosure would introduce the risk of campaigners deliberately interfering with the protected species in an attempt to disrupt the HS2 works. HS2 argued that disruption of the mitigation works in this way would interfere with the ability of HS2 to protect this aspect of the environment, directly affecting the safety of the protected species in question.

26. HS2 stated that whilst it acknowledged the public interest in disclosure, it did not consider it is in the public interest to disclose information that would lead to the disruption or harming of a protected species. It also commented that it has disclosed the majority of the requested information to the complainant and proactively publishes survey data which it collects (except that which may cause harm to a protected species).
27. The Commissioner appreciates that the complainant has a personal interest in the withheld information and may be of the opinion that the withheld information has wider public interest too. He also accepts that there is a public interest in HS2 being transparent in how it identifies, manages and mitigates risks to protected species and the natural environment.
28. However, it is noted that HS2 disclosed what it was able to disclose to the complainant in relation to this request and proactively publishes the survey data it collects, which goes some way to meeting the public interest identified. It is also noted that HS2's work with the natural environment and protected species is undertaken by professionally qualified experts under licence from Natural England and there is independent oversight of the process of protecting particular species.
29. It cannot be in the public interest for any protected species, if present, to be at greater harm of disturbance or harm as a result of the information requested in this case being published. It is also not in the public interest for work on the high speed rail line to be disrupted.
30. The Commissioner has considered the balance of the public interest and he has decided that the public interest favours maintaining the exception in this case.

Right of appeal

31. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

32. 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.
33. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF