

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 February 2020

Public Authority: High Speed 2 (HS2) Limited
Address: Two Snow Hill
Snow Hill Queensway
Birmingham
B4 6GA

Decision (including any steps ordered)

1. The applicant has requested information relating to communications between a number of MPs and HS2 Ltd.
2. The Commissioner's decision is that HS2 Ltd has correctly applied section 40(2) to part of the withheld information. She further finds that HS2 Ltd has also correctly applied to section 41 to part of the withheld information.
3. However, the Commissioner has concluded that HS2 Ltd incorrectly cited section 41 with regard to other parts of the withheld information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the applicant with the correspondence detailed in the confidential annex subject to further redactions under section 40(2).
5. 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

6. On 11 February 2019 the applicant made the following request for information under the FOIA for:

"I would be grateful if you could provide copies of all communications, including letters, emails and records of oral conversations, between HS2 Ltd and the following MPs:

- 1) Andrea Leadsom
- 2) David Lidington
- 3) John Bercow
- 4) Graham Brady
- 5) Jeremy Wright
- 6) Jo Johnson

Please restrict your searches to communications from January 29 2018 to today, and only those involving the following members of staff at HS2 Ltd:

- a) Mark Thurston
- b) Chris Rayner
- c) Jim Crawford
- d) Tom Kelly

Please include communications into which these four individual have been copied, as well as those sent to/by them directly."

7. HS2 Ltd responded on 11 March 2019 and provided some information within the scope of the request, that is the correspondence from Andrea Leadsom and David Lidington, with the exception of their signatures which were redacted under section 40(2). It further refused to provide the remaining information also citing section 40(2) of the FOIA as its basis for doing so.
8. Following an internal review HS2 Ltd wrote to the applicant on 7 May 2019 and upheld its original position. In addition HS2 Ltd cited section 41 of the FOIA to all the remaining withheld information.

Scope of the case

9. The applicant contacted the Commissioner on 14 May 2019 to complain about the way his request for information had been handled. In his correspondence he stated:

"I requested an internal review, pointing out that there is a distinction between material that has been provided by constituents, and that which is MPs providing their own view on a matter.

As such, I said that if covering letters were among the communications we would expect those to be released, albeit with any personal information (names, addresses, information that would identify addresses/individuals etc) redacted. HS2 Ltd's original response made no mention of covering letters, nor did it provide any justification for having withheld such material if it was held.

HS2 upheld its original decision, citing the ICO's guidance that, "If an MP has written to a public authority passing on information from or relating to a constituent, the presumption should be that the information is not disclosed"

But, as my request for an internal review made clear, I am not seeking information provided by or relating to individual constituents. I would respectfully suggest that if MPs' own observations about HS2 or its approach (i.e. where such observations are not specifically in relation to an individual constituent) are included within the withheld communications then those comments should be released just as if they were standalone communications without any link to constituency correspondence."

10. The application of section 40(2) to signatures has not been contested and has therefore not been considered in this decision notice. In addition, the correspondence to MPs from their constituents is not under consideration as the applicant has indicated above that he is not seeking this information.
11. The Commissioner therefore considers the scope of this case is to determine if HS2 Ltd is entitled to withhold the MPs covering correspondence to HS2 Ltd and its responses based on the exemptions it has cited.

Reasons for decision

Section 40 personal information

12. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

13. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

16. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that part of the information relates to the data subjects, that is, names and addresses of constituents. As the applicant has indicated he does not require this information it has not been considered further.
21. However, the Commissioner recognises that the letters in themselves are likely to contain the personal data of the MP and/or the constituents and /or employees of HS2 but once any correspondence which identifies

¹ As amended by Schedule 19 Paragraph 58(3) DPA

these parties is redacted including names and addresses the correspondence cannot be attributed to an individual and cannot therefore constitute personal data.

22. HS2 Ltd has argued that once the personal data has been redacted from the correspondence it would 'render the document meaningless'. The guidance states:

"Redaction is the separation of disclosable from non-disclosable information by blocking out individual words, sentences or paragraphs or the removal of whole pages or sections prior to the release of the document. In the paper environment some organisations will know redaction as extracts when whole pages are removed, or deletions where only a section of text is affected."

23. The Commissioner has reviewed the withheld information and finds that parts relating to constituents and MPs can be redacted and the remaining part of the letters would still be meaningful in that they outline some of the areas of complaint. She considers that despite these redactions the letters should still retain the substantive nature or issue of complaint.
24. With regard to HS2's responses to MPs, some of the personal data is the constituents' information and the signatory of the correspondence. The applicant has not requested this information and it is therefore not considered further.
25. However, some HS2 responses also include names and job titles of employees. This information is clearly the personal data of those employees, and the Commissioner has therefore considered if HS2 has correctly cited section 40(2) to that part of the information as well.
26. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

29. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
30. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

31. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child" ².

32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
 - i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
 - ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
33. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

34. In considering any legitimate interests in the disclosure of the requested information under the FOIA, the Commissioner recognises that such

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

35. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
36. In this case the Commissioner recognises that the subject matter of the request is of wide public interest and concern to those impacted by the development of HS2. She is therefore satisfied that there is a legitimate interest in disclosure.

Is disclosure necessary?

37. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
38. The Commissioner has taken into consideration the specific circumstances of this case and has determined that it is not necessary for HS2 to provide this information in order to satisfy the applicant's request. The applicant has advised that he does not require any personal data and it can be redacted from the correspondence within the scope of the request.
39. Given the above, the Commissioner is satisfied that as disclosure of the information is not necessary there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
40. As disclosure would not be lawful, the Commissioner does not need to go on to separately consider whether disclosure would be fair or transparent. The Commissioner is therefore satisfied that has correctly applied section 40(2) to part of the withheld information including the names and job titles of HS2 staff contained on its responses to the MPs correspondence.
41. As the Commissioner has found that once redacted the remaining information is not exempt under section 40(2), she will now consider if section 41 of the FOIA may be applicable to this specific information.

Section 41(1) – information provided in confidence

42. HS2 Ltd advised that 33 documents were captured by the request. Eight of these documents were released to the applicant in a redacted form and 25 were withheld. **It stated that the information is the personal data of the constituents, the MPs and employees of HS2 Ltd.** It was provided to the MPs in confidential circumstances. The issue of personal data has been detailed on the preceding paragraphs.
43. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

44. Section 41(1)(a) requires that the requested information must have been given to the public authority by another person. The Commissioner's guidance³ explains that the "term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity."
45. The Commissioner has viewed the withheld information and notes it consists of a number of letters/emails to MPs from constituents, and covering correspondence to HS2 Ltd.
46. The information being considered is the covering correspondence from MPs. It is clear that the information was originally provided from another person(s), that is MPs, and therefore the Commissioner is satisfied that this criteria is met.

Would disclosure constitute an actionable breach of confidence?

47. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and

³ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-inconfidence-section-41.pdf>

- whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

48. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
49. HS2 Ltd explained that in each of the cases the information is regarding issues (whether genuine or not) that the constituent has with the actions of HS2 Ltd, or its contractors, and the affect that this has had on their financial position or their personal or family life. It is considered important enough for the constituent to raise the matter with their MP. It is therefore not trivial as far as the constituent is concerned. The information has not been made public and is not more widely available.
50. Having viewed the withheld information, the Commissioner accepts that some of the information is neither trivial or accessible by other means. The withheld information has not been disclosed and the duty of confidence cannot be considered as having been waived. The Commissioner therefore considers that part of the withheld information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

51. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
52. The test set out in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 is useful:

"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".

53. HS2 Ltd stated that the information was provided to the MP by their constituent in circumstances that indicate that it is confidential. It

referred to the Commissioner's guidance⁴ on requests for MPs' correspondence relating to constituents, which notes that MPs often assure constituents that their dealings with them are confidential and there is usually in any event a legitimate expectation by the constituent that information disclosed in their dealings with their MP will be treated as confidential. This means that letters sent on behalf of a constituent may be subject to a duty of confidence (paragraph 13). HS2 Ltd considered this to be the case with all of the withheld information with respect to this request. HS2 Ltd has an obligation to honour the confidence provided through the MP/Constituent relationship.

54. The Commissioner acknowledges that part of the information has been provided by constituents, however as discussed above, that information is exempt by virtue of section 40(2). The Commissioner is satisfied that there would have been no reasonable expectation on behalf of the confiders, that is, the MPs that this may be put into the public domain in the future.

Would disclosure would be an unauthorised use of the information to the detriment of the confider?

55. HS2 Ltd explained that unauthorised disclosure of this information would provide detailed information regarding the finances and/or the personal situation of the constituents. Again, it should be noted that this information is not under consideration here and the Commissioner notes that there is scope to redact information that would identify specific constituents and properties. Therefore, there is no detriment to the constituents or the MPs as personal data can be redacted.
56. As the Commissioner has found that there is no detriment to the MPs, she has not gone on to consider whether there is a public interest defence for disclosure?.
57. It is clear that the information has been obtained from another person and the Commissioner accepts that all of this meets the requirement of section 41(1)(a) of FOIA as it was provided to HS2 Limited by a third party. With regard to the requirements of section 41(1)(b), the Commissioner is satisfied that the covering correspondence from MPs meets the first two limbs. That is to say, the information has the quality of confidence because it is not otherwise available and is more than trivial. However, as discussed above, the Commissioner does not accept

⁴ https://ico.org.uk/media/for-organisations/documents/1645/guidance_on_dealing_with_requests_for_mps_6_august.pdf

that there was an implied obligation on HS2 that all the MPs covering correspondence, would be treated confidentially.

58. The Commissioner notes that although HS2 Ltd has referred to her guidance it has not provided any indication of whether the relevant MPs were contacted to consider if they were content for any information to be disclosed (para 5) which states:

"In all cases public authorities should consult the MP(s) concerned when information about their correspondence has been requested under the Act. The MP may in turn want to consult their constituent. The public authority should not contact the constituent directly unless the MP suggests this would be appropriate. This consultation is important so that

- the MP is aware that a request has been made; and*
- the MP can, where it may not be apparent from the correspondence, give the public authority information about the correspondence and the potential effects of releasing it."*

59. Paragraph 8 states:

"Where an MP's letter contains personal data about a constituent, it will generally be unfair to release that information. Release would be likely to be a breach of the first data protection principle."

60. It is clear that where that correspondence contains details about the constituents it is the personal data of those constituents and should not be disclosed.
61. The Commissioner has reviewed all the withheld information and as noted earlier there is scope to redact personal data. HS2 Ltd has not specifically identified what information is covered by each exemption, rather it appears to have applied blanket exemptions.
62. For the majority of the information which has been withheld on the basis of section 41(1), the Commissioner is not persuaded that the disclosure of this would result in a detriment to the confider. In reaching this finding the Commissioner notes that HS2 Ltd has not made any specific points in its submissions to explain why or how such detriment would occur.
63. Furthermore, having considered the content of the withheld information although the Commissioner accepts that the information is more than trivial, she is not clear how disclosure of it would in reality result in any real or obvious detriment to the confider, especially as any personal data would be redacted.

64. The Commissioner has concluded that HS2 has not demonstrated that section 41(1) is applicable to the MPs' covering correspondence. Therefore this information should be disclosed, subject to the redaction of personal data. Details of the specific items to be disclosed are contained in a confidential annex.

Other matters

65. During the course of her investigation it became clear to the Commissioner that HS2 had not accurately identified the information requested as it had included the constituents' correspondence in the scope of the request. The applicant had made it clear at the internal review stage that he did not require any of the constituent's correspondence to be included.
66. This was also evident in the information provided by HS2 when responding to the Commissioner's enquiries.
67. The Commissioner would expect HS2 to refer to her guidance⁵ to identify the personal data for redaction.
68. Finally, the Commissioner notes that HS2 did not specifically identify what information was covered by each exemption. Instead it appears to have applied both exemptions in a 'blanket' fashion rather than considering and identifying the relevant exemption for the individual parts of the correspondence.

⁵ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

70. 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.
71. 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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