



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2020/0007V**

**Before**

Judge Stephen Cragg Q.C.

**Heard via the Cloud Video Platform on 28 and 29 January 2021**

**Between**

**High Speed Two (HS2) Limited**

Appellant

and

**The Information Commissioner  
Malcolm Griffiths**

Respondents

The Appellant was represented by Timothy Pitt-Payne QC

The Commissioner was represented by Laura Elizabeth John

Mr Griffiths represented himself

## DECISION AND REASONS

### DECISION

1. The appeal is allowed in part and a substituted decision notice is issued. Further directions are made in relation to outstanding information.

### MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an agreed open bundle of evidence comprising 581 pages, a further bundle of 1256 pages, a closed bundle and written submissions from all the parties.

### BACKGROUND

4. On 18 January 2019 Mr Griffiths made a request to HS2 Limited (HS2) in the following terms (they have been termed requests 1, 2, and 3 in this appeal):

“If in the next few years productivity continues at recent levels and the OBR decide to reduce their long term growth forecast to a more prudent and defensible 1% per year (about 5 times higher than the average productivity growth since 2007) then the benefits of HS2 reduce to about £50bn resulting in the project giving a loss to the nation of about £32bn. **(Request 1)**

Given this, but acknowledging that my analysis maybe incorrect, please will you provide recent information that shows that HS2 Ltd are aware of this risk and their quantification of the level of benefit

reduction that results from the changes in GDP and productivity forecasts since July 2017. **(Request 2)**

Please provide information that shows that HS2 Ltd has brought the issue to the attention of the DfT, the Treasury and the Cabinet Office. Please also provide information that shows what steps HS2 Ltd have taken in response to the OBR's warning about the uncertainty of their productivity forecast and what level of further downside risk HS2 Ltd are taking into account in their analysis?" **(Request 3)**

5. HS2 responded on 15 February 2019 providing links to several documents. Mr Griffiths requested an internal review of this decision on 16 February 2019. He stated HS2 had not answered his request and asked HS2 to confirm if it had carried out an assessment of the changes since July 2017 and briefed Ministers.
6. An internal review was conducted and a response sent to Mr Griffiths on 7 April 2019. HS2 considered it had already stated that it had informally liaised with the Department for Transport (DfT) to provide economic case advice but acknowledged it did not address the request to be provided with the analyses. HS2 confirmed these were held but considered this information exempt from disclosure on the basis of section 36 of the Freedom of Information Act 2000 (FOIA).
7. Mr Griffiths contacted the Commissioner on 11 May 2019 to complain about the way his request for information had been handled. During the investigation the Commissioner decided that the applicable regime was that under the Environmental Information Regulations 2004 (EIR) and not the FOIA. Although HS2 disputed that categorisation, by the time this appeal came to be heard, it was common ground that the EIR applied.
8. During the course of the Commissioner's investigation, HS2 stated if the request were to be considered under the EIR it would seek to apply the exceptions in regulation 12(4)(d) and regulation 12(4)(e) EIR.

## THE LEGAL FRAMEWORK

### 9. Pursuant to reg 12 EIR:-

#### **12.— Exceptions to the duty to disclose environmental information**

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if-

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) ...

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-

(a) ...

(b) ...

(c) ...

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

....

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest...

## THE DECISION NOTICE

10. In the decision notice dated 21 November 2019 the Commissioner explained that the withheld information is a report which constitutes economic case advice to the DfT based on a range of demand forecasts, including high and low GDP growth scenarios.

11. That report has featured in these appeal proceedings and is known as a step-through report (STR) of which it is the fourth of a number of draft versions, known as 'Rev04'. The report is described in more detail later in this decision, along with other documents which have become relevant.

12. The Commissioner's decision was that HS2 had incorrectly engaged regulation 12(4)(e) EIR (internal communications) but had correctly engaged regulation 12(4)(d) EIR (unfinished documents) but that the public interest favoured disclosing the information.

13. In relation to reg 12(4)(d) EIR the Commissioner concluded:-

27. The Commissioner accepts the report is material still in the course of completion as it is clear the information is still an unfinished document. Whilst a draft can be a finished document, in this case it seems this was a working draft sent to the DfT as an update with no intention of this being published until the final version was completed. The document shows the revision history and demonstrates that the document has continued to be worked on during its lifecycle and that a final revision would be made for publication. The Commissioner is satisfied that the document was intended as a foundation for further discussion and the version of the report being considered here was material in the course of completion.

28. The Commissioner therefore considers that regulation 12(4)(d) of the EIR was correctly engaged.

14. In going on to consider the public interest balance, the Commissioner said:-

37. The Commissioner gives weight to the general public interest in HS2 operating in an open and accountable manner. She 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 relating to HS2, including the overall environmental impact and cost to the public purse.

38. The Commissioner also recognises that HS2 does require a degree of safe space in which to engage with other parties, in this case the DfT, to analyse various scenarios. This type of exchange and advice-gathering does carry some need to be without undue scrutiny to preserve the quality of the advice and views being offered.

39. That being said, HS2 has placed the greatest emphasis on the argument that disclosing this information would be misleading and divert resources from its core functions to deal with attention the disclosure might generate. This is not an argument the Commissioner apports more than a slight weight to - if the information would be misleading then the public authority can provide explanatory text to support the information and ensure it is clear but it is not for the Commissioner to be concerned with the accuracy or clarity of the information that is being considered for disclosure.

40. HS2 has not expanded further on the safe space arguments so it is not clear to the Commissioner how likely or extensive the impact of disclosing the report would be on the future free and frank advice that the DfT would provide to HS2 would be. Whilst the Commissioner can acknowledge there is some weight to be given to the general argument that a safe space is required without specific detail she also has to weight this against the fact that given the high profile, high budget nature of the HS2 project, advice on the economic impact of HS2 Phase 1 would continue to be asked for and provided regardless of disclosure. If this advice became more guarded or lessened in quality as a result of disclosure and prejudiced the project in any way this would of course not be in the public interest; however the Commissioner considers the likelihood of this to be low as the large scale nature of this project and the funding required is significant enough that those engaged in it

would be unlikely to put this in jeopardy by providing lesser quality advice for fear of public scrutiny.

41. The Commissioner recognises there is a significant public interest in the HS2 project in general and more specifically in the budget and finances of the project. This is due to the publicly-funded nature of it and the media reports and speculation about the project going over budget. At the time of the request it had been reported that HS2 was allegedly over-budget and its Chairman had resigned. As pointed out by the complainant the last published set of HS2 economics was in July 2017 and there is therefore a strong argument for the disclosure of the report which shows that HS2 Ltd was seeking advice and updating its economic models as a result of the OBR's updated economic forecasts. This would provide the public with assurances that HS2 was considering the economic impact of Phase 1 following the OBR's revisions and was being fiscally responsible with a large-scale publicly funded project. This is a particularly strong argument given the lack of published economic information since July 2017 and the increased speculation at the time of the request about the over-spending on the HS2 project.

15. Taking all of that into account, and considering the presumption in favour of disclosure inherent when considering environmental information, the Commissioner found on balance that the public interest arguments in favour of disclosure outweighed the public interest arguments in favour of maintaining the exception, and therefore regulation 12(4)(d) EIR had been incorrectly applied in this case.

#### THE APPEAL AND RESPONSE

16. HS2 disagreed with the response of the Commissioner and filed an appeal against the decision notice. As explained below, at the hearing HS2 accepted that the case should be considered pursuant to the EIR (as opposed to FOIA), and therefore the relevant grounds of appeal are:-

Ground 3: if the request is dealt with under the EIR, the Commissioner erred in concluding that the public interest balance under Regulation 12(4)(d) EIR lies in favour of disclosure;

Ground 4: if the request is dealt with under the EIR, the Commissioner erred in concluding that Regulation 12(4)(e) is not engaged; and

Ground 5: if the request is dealt with under the EIR, HS2 contended for the first time that Regulation 12(5)(e) EIR was engaged.

17. At the hearing, HS2 did not rely upon reg 12(5)(e) EIR.

18. In response, the Commissioner raised for the first time the possibility of further documentation within the scope of the request.

In particular:

(a) On its face, the Disputed Information indicates that multiple earlier versions of this 2019 document exist. It also appears to be likely that there are multiple versions of an equivalent 2018 document. All such versions would fall within the scope of Request 1 (which the Commissioner understands to be concerned with 'recent', i.e. post the 2017 economic case and 2017 step through report, information);

(b) As to Request 2, no information has been identified which shows the Disputed Information was sent to the DfT; nor has any explanation been provided of whether it was also provided to the Treasury and/or Cabinet Office both of which are covered by Request 2. The Commissioner would expect to see at least one email within the scope of this Request (sent to the DfT and attaching the Disputed Information); and

(c) As far the Commissioner understands the contents of the Disputed information, it does not respond to Request 3. No other information has been identified within the scope of that Request.

19. HS2 responded to this as follows to say:-



- (a) It is correct that the Disputed Information is identified as the fourth version (i.e. "Rev04") of the relevant report, and refers on its face to three earlier versions ("Rev01", "Rev02" and "Rev03"). The information that is responsive to the request is the most recent version of the report (Rev04): the request, properly construed, does not seek disclosure of all successive versions of any relevant report held by HS2.
- (b) There is no equivalent 2018 document corresponding to the Disputed Information; still less are there multiple versions of such a document.
- (c) The Disputed Information was sent to the DfT (but not to the Treasury or the Cabinet Office). HS2 holds a communication under cover of which the Disputed Information was sent to the DfT: that communication is itself exempt from disclosure under EIR regulation 12(4)(e) ....
- (d) HS2 has not identified any other information held by it and falling within the scope of Mr. Griffiths' request.

## THE APPEAL HEARING

20. HS2's skeleton argument for the appeal hearing made a number of points about the scope of the Mr. Griffith's request, pointing out that (a) although the request refers to productivity, this is because of the impact of productivity on GDP; (b) the same item of information may be responsive to more than one limb of the request; (c) the request was for information which illustrated HS2's position, not for all information; (d) the request refers to 'recent' information but that would not go back to 2017 (although the request mentions changes in GDP and productivity forecasts since July 2017); (e) the request (especially at Request 3) appears to be based on an understanding that it is for HS2 to decide what assumptions it should make about future GDP when assessing the overall likely benefits of the HS2 Project.

21. HS2 urged the Tribunal to consider that the scope of the appeal extended only to whether the Rev04 of the STR should be disclosed. HS2 also argued, apparently for the first time, that only parts of Rev04 were in fact within scope.
22. HS2's skeleton set out in detail the business case development process (described more fully below). In the course of that, HS2 described a procedure whereby data inputs from DfT are pushed through an analytical computer model known as the PLANET Framework Model (PFM) which leads to PFM Outputs and Output Summaries (the latter in the form of a PowerPoint presentation), and these are building blocks for the development of the Business Case. Whilst the Business Case is a separate document, a copy of the final version of the STR was published alongside the Business Case to allow the public to understand the reasons for changes from the previous version of the Business Case.
23. The Commissioner further pursued the issue of what information was within scope in her skeleton argument for the appeal hearing.
24. In relation to whether the whole of Rev04 was within scope or not the Commissioner wanted to explore that in evidence at the appeal hearing. In the end (see below) the Commissioner agreed that only some of Rev04 was within scope, but there was a smaller dispute between the parties as to whether that included a number of additional paragraphs or not.
25. In relation to Rev01, Rev02 and Rev03, the Commissioner contended that they also represented 'recent' information as requested by Mr. Griffith as he was seeking information since 2017. The Commissioner noted that in fact there was some different information in these 'Revs' when compared with Rev04, and that even if Rev01 and Rev02 did not explicitly mention GDP (as claimed by HS2) the information does show a 'quantification of the level of benefit reduction'.

26. The Commissioner also alighted upon the description of PFM Outputs and Output summaries (see above and below) and was of the view that these also may be within scope.

27. Finally, the Commissioner addressed the issue of communications between HS2 and DfT. She noted that an email dated 28 January 2019 had been disclosed but it was not clear whether other emails sharing relevant information existed and recommended that HS2 should carry out further searches in this regard.

### THE APPEAL HEARING

28. HS2's skeleton argument set out the issues before the Tribunal as follows:-

- (a) What information is held by HS2 Ltd and falls within the scope of the request?
- (b) Are the following EIR exceptions (or either of them) engaged in relation to those exceptions:
  - (i) Regulation 12(4)(d): the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
  - (ii) Regulation 12(4)(e): the request involves the disclosure of internal communications.
- (c) Does the public interest in maintaining any applicable exception outweigh any public interest in disclosure?

29. The Tribunal heard evidence in open and closed from Mr. Grigg about the business case development process as HS2 said that it was important to understand the nature of the information that HS2 holds and that falls within the scope of Mr. Griffiths' request for information. The main points were summarised in HS2's skeleton argument and the following

description is largely drawn from that skeleton argument provided by HS2.

30. For each Phase of the HS2 Project, there is a Business Case. The responsibility for keeping this under review and up to date rests with the DfT rather than HS2. The respective roles of HS2 and the DfT in this regard are dealt with in the Development Agreement between these two parties. HS2's role is to support the DfT in the DfT's development of the Business Case.
31. The Business Case for each Phase of the HS2 Project contains five key components. In relation to the issues raised by Mr. Griffiths' request, the relevant component is the economic case (i.e. that the HS2 Project demonstrates value for money). This section of the Business Case contains information as to the Benefit Cost Ratio (BCR), i.e. whether the expected benefits of the HS2 Project will exceed the anticipated costs.
32. There are various data inputs that the DfT requires HS2 to utilise (the DfT Data Inputs) in connection with HS2's support for the Business Case development process. The requirement to utilise the DfT Data Inputs applies both to the DfT itself, and to HS2 when supporting the DfT with its development of the Business Case.
33. The DfT Data Inputs include the following:
  - Transport Analysis Guidance (TAG) and related WebTAG.  
This includes actual and predicted GDP figures from the Office for Budget Responsibility (OBR).
  - Guidance on the sensitivity treatment of such data, including in respect of the uncertainty of any GDP data forecast.
34. Hence the key parameters that input into the economic case and the Business Case generally are determined by the DfT, including what GDP

assumptions any benefits modelling should be based on. HS2 provides advice to the DfT with regard to calculating the benefits of the HS2 Project, based on the assumptions and other guidance required by the DfT in the DfT Data Inputs.

35. The way in which HS2 carries out its support role in relation to the development of the Business Case, is that it takes the DfT Data Inputs and pushes them through the PFM. This process creates the following:-

- “PFM Outputs” (raw quantitative data generated by the PFM);

and

- “PFM Output Summaries” (usually in the form of a PowerPoint presentation which aggregates and summarises the relevant PFM Outputs and provides an explanatory comment in bullet points).

36. The PFM Output Summaries are periodically shared with the DfT by HS2. The PFM Outputs and PFM Output Summaries together act as “building blocks” for the development of the Business Case (specifically, the economic case) by DfT. There is a process of collaborative working and mutual sharing of advice between HS2 and DfT in the process of developing the economic case.

37. HS2 also prepares a step-through report, or STR. The nature and significance of the STR is central to this appeal, since – as indicated above – the information that has been identified by HS2 as being responsive to Mr. Griffiths’ request consists of a particular version of a STR (Rev04).

38. The STR outlines (and provides an audit trail for) the incremental effect of changes in HS2’s approach to quantitative analysis which informs the economic case for the HS2 Project. It traces, amongst other things, the impact on the benefit calculations of any changes in the OBR GDP forecasts. It is the only tangible document that reflects, in a single record

up to a particular point in time, all of the relevant DfT Data Inputs and the resulting building blocks that have gone into the quantification of benefits expected from the HS2 Project (which informs the economic case).

39. New versions of the PFM are created as the DfT Data Inputs change over time. Thus the PFM moved from v7.1 (i.e. version 7.1) in 2017, through to PFMv8 in 2019 and then PFMv9 in 2020. In July 2017, a STR was published, reflecting information in PFM Output Summaries based on PFMv7.1. In January 2019, HS2 prepared various iterations of a further STR setting out the work that HS2 had undertaken since July 2017 on the quantification of the expected benefits from the HS2 Project. Such work was based on PFMv8. Mr. Grigg referred to four successive versions of the STR that were prepared in January 2019:

- Rev01 and Rev02: these were created before Mr. Griffiths' request was received on 21 January 2019;
- Rev03: this was created on 24 January 2019; and
- Rev04: this was created on 29 January 2019.

40. Each of Rev01-04 are based on the same underlying analysis, DfT Data Inputs and PFM Output Summaries. Each of them reflects underlying analytical work carried out by HS2 before 11 January 2019 (when Rev01 was created). After Rev04 was sent to the DfT on 29 January 2019, a further ten working draft revisions of the STR were created by HS2.

41. It is on the basis of this description that HS2 says the appeal should be considered. Firstly, it says that it explains why the information held by HS2 in relation to Mr. Griffiths' request is relatively limited, because it is the DfT not HS2 that determines what assumptions should be taken into

account when quantifying the expected benefits from the HS2 Project (and, therefore, in preparing the economic case). Secondly, the description also helps to explain why HS2 has treated STR Rev04 as containing the information that it holds that is responsive to Mr. Griffiths' request. Thirdly, the description explains the working relationship between HS2 and the DfT, and some of the "safe space" considerations to which they give rise.

42. Mr. Grigg went over these points in his oral evidence. He said that the PFM model produced large output spreadsheets of data which even he could not interpret, and that it is a model which is a continually changing piece of work. There are excel spreadsheets, retained by HS2, for things like passenger numbers, benefits and revenues which are discussed with the DfT. The records are used by the transport modelling team to produce summaries which are also retained. These cannot be accessed by DfT. They are shared with DfT with a covering email from time to time, and any significant changes might be shared with DfT in a phone call or email, or in a meeting.

43. In relation to searches for this request Mr. Grigg said that records available to him and the leader of the transport modelling team had been searched and this included PFM summaries not shared with the DfT. The outputs themselves were in a large number of files and it would be a big task to search them. Any information published by DfT based on PFM summaries and outputs would have been based on information provided by HS2.

44. In relation to emails Mr. Grigg explained that there were similar emails to that dated 28 January 2019 between HS2 and DfT. He said that the email in the closed bundle dated 28 January 2019 was broadly typical as just being a covering email, and that main discussions would take place in an actual or virtual meeting where sometimes formal minutes would be

taken, for example the Tripartite Analytical Group (TAG) made up of HS2 and DfT analysts. Mr. Grigg confirmed that minutes of TAG and standard management meetings had not been considered in relation to this request. He said there might not be comprehensive records in a shared area, and the records would be held in a folder for an analysis team of about twenty people.

45. Mr. Grigg confirmed that advice given by HS2 to the DfT would cover matters such as the robustness of results, risks and uncertainties, and how output had changed. He said that triggers for STRs would include whether or not the need for a business case was approaching, but there was not a fixed timetable.

46. In January 2019 when the request was made it would have been public knowledge that a business case was due for the notice to proceed decision of HS2 at some point (with an STR to be published alongside it), but not *when* this would be issued. STRs were required for specific stages but the dates for these stages were uncertain. An STR might also be produced to develop good practice and ensure an audit trail as changes happened.

47. Mr. Grigg also gave evidence in a closed session about the documents described in the above section. Following that closed session the following gist was provided in open court:-

1. Mr. Grigg was asked questions about Rev04 and the contents were compared for differences with the STR published in May 2020.
2. Mr. Grigg was asked questions in detail about Rev04 to explore which particular parts of it were potentially responsive to the requests relating to changes in GDP.
3. Questions were asked which compared the contents of Revs01-03 and Rev04 and the differences in the documents, and also which compared the contents between Revs 01-03 themselves.
4. Mr. Grigg was asked further about any specific concerns if disclosure was made in addition to those raised in evidence in open.



5. Mr. Grigg was asked about the content of public announcements in relation to benefits and whether these were supported by the contents of Rev04.
6. Lastly, Ms. John (on behalf of the Commissioner) and the Tribunal looked at Mr. Griffiths' list of areas of concern raised in the appeal to check we had asked all the relevant questions raised by him.

48. Mr. Griffiths made submissions which addressed the nature of the documents which might be covered by the requests and the fact that PFM outputs and summaries were used to inform the production of the various revisions to the STR.

### The exceptions

#### 12(4)(d) EIR

49. It was common ground that the Revs 01-04, the PFM outputs and PFM summaries would all be covered by the exemption in reg 12(4)(d) EIR as the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

50. HS2 argued that any emails which accompanied or were linked to such documents were also covered by the exemption. However, the Commissioner argued that such documents were material which was completed or were finished documents.

#### 12(4)(e)

51. If the emails between HS2 and the DfT are not covered by reg 12(4)(e) EIR, then HS2 claim that there is an exception to their disclosure because they amount to internal communications. HS2's case was also that the different iterations of the STR could also amount to internal communications, in particular in relation to those not sent to the DfT.

52. However, there was a dispute in the case about whether the 'internal communications' exception could apply to communications between HS2 and the DfT. I was referred to two decisions of the FTT which appear to reach different conclusions in relation to whether communications between a government department and a non-departmental public body (NDPB) are 'internal communications' for the purposes of reg 12(4)(e) EIR.
53. In *Thornton v IC and HS2 Ltd* EA/2018/0111, HS2 was able to rely on the internal communications exemption in Regulation 12(4)(e) EIR to withhold information passing between it and the DfT .
54. The Tribunal noted that the Aarhus Convention (which the EIR implements in UK law) is 'indifferent' to the structures of government: one of its objectives is to ensure that access to environmental information held by public authorities is not hindered by the involvement of private entities in the provision of public services. In the light of this overarching objective, and given that HS2 was a wholly-owned and controlled entity, the Tribunal concluded as follows:-

23. It is clear that the Convention and the implementing regulations need to be interpreted purposively and as a whole. The function of the Convention is to ensure that governments and other public authorities with governmental functions which hold environmental information should disclose it to the public when requested. However, HS2 is not a public authority in its fundamental nature, it is a limited company whose governing law is the Companies Act like many hundreds of thousands of other private companies. It is not of its basic constitution subject to the disclosure requirements of EIR. It is subject to disclosure because it is owned, funded and controlled in great detail by a government department. It holds environmental information because of that control and the disclosure obligation arises from that control. The purpose of the Convention is not to determine the structures of government, it is indifferent to them, the provision which brings HS2 within the scope of EIR is not intended to create greater access within one structure than another, but to ensure comparable access irrespective

of structure. The implementation guide is explicit on the approach of the Aarhus Convention to questions of government structure:-

“Recent developments in privatized solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public information, participation or justice.”

24. The tribunal is therefore satisfied that the provision which allows for the possibility of non-disclosure on the basis of the information being part of the internal communications of a government department should, given the neutrality of the Convention with respect to Governmental structures, apply to a wholly-owned and controlled entity such as HS2.

55. However, the decision in Thornton does not refer to an earlier FTT decision of *Portmann v Information Commissioner* EA/2012/0105. This case dealt with another NPPB called the Marine Management Organisation (MMO) where the MMO was communicating with the Department for Environment, Food and Rural Affairs (Defra). The FTT rejected the argument that communications between the two were ‘internal’ as follows:-

26. ...However Defra, or the MMO, viewed their relationship...the MMO was deliberately established as a non-departmental public body rather than as a departmental one, or a government agency. We disagree with Defra’s submission that it would be a strange outcome if the result of a change in the machinery of Government were to have the effect of rendering formerly “internal” communications “external” when in substance the nature of the dialogue between the parties was materially unaltered. The “change in machinery” was far wider than simply renaming the MFA the MMO. The MMO has separate accountability and can be called before a select committee for example. If Parliament had intended a non-departmental public body in general, or the MMO specifically, to be included within the definition in regulation 12(8) EIR as to the extent of “internal” in the governmental context it would have done so in the framing of the regulations or by amending them at a later date. This is entirely consistent with the sea change brought about by the introduction of the Freedom of Information Act 2000 and the EIR.

56. Both these cases are discussed further below.

### Public interest factors

57. The Commissioner largely relied upon the public interest factors set out in the decision notice above to justify disclosure. These can be summarised as (a) the general public interest in HS2 operating in an open and accountable manner; (b) the significance and levels of public interest in any future decisions relating to HS2, including the overall environmental impact and cost to the public purse.

58. The Commissioner recognised the need for a safe space to engage with DfT to analyse various scenarios without undue scrutiny to preserve the quality of the advice and views being offered. But the Commissioner was of the view that the advice on the economic impact of HS2 Phase 1 would continue to be asked for and provided regardless of disclosure, especially given the nature and scale of the project.

59. The Commissioner recognised the argument that disclosing this information would be misleading and divert resources from its core functions to deal with attention the disclosure might generate, but did not apportion great weight to it, because HS2 could always publish explanatory notes to accompany the information.

60. Ultimately the Commissioner relied upon the factors set out in paragraph 41 of the decision notice (see above) as justifying disclosure in the public interest of all the information said to be within scope of the request but within the reg 12(4)(d) EIR exception.

61. Against this HS2 emphasised the public interest in favour of maintaining the exception relating to the need to maintain a safe space for internal deliberations and for communication between HS2 and the DfT.

62. It was argued that Mr. Grigg's evidence showed a compelling public interest in avoiding premature disclosure of material that records the analysis and exchange of views between HS2 and the DfT because it is essential to protect the full and frank exchange of views between these parties, so as to ensure that quantification of the expected benefits and hence the development of the economic case and the overall Business Case of which it forms a part is as robust as possible.
63. Premature disclosure of such information would have a wide range of other harmful consequences and would mislead and confuse public debate, rather than informing it. Such disclosure would also have an adverse impact on procurement underway at the relevant time, and place additional pressure on HS2 in dealing with resultant correspondence and media enquiries.
64. In evidence at the hearing in relation to the public interest in disclosure or non-disclosure Mr. Grigg said that he was concerned that disclosure would affect the ability of HS2 and the DfT to freely exchange and discuss the PFM output summaries when developing the business case, and if there was a risk of premature disclosure then other methods of communication would be needed. If STR revisions and PFM summaries could not be exchanged then that would diminish the quality of the interaction between HS2 and the DfT. Mr. Grigg said that he had not discussed this issue with the DfT but this was based on his experience of working for HS2 and with DfT for six years.
65. He was also emphasised concern that disclosure of the STR revisions during the process of working up a business case and without the background context could have an impact on procurement companies working with HS2 if they had access to partial and potentially misleading information.

66. Mr. Griffiths made submissions to the effect that disclosure would have greatly assisted the public understanding of the economic issues in 2019 and would certainly not have misled the public and confused public debate as claimed by HS2.

## DISCUSSION

### **Scope**

67. The decision notice of the Commissioner concerned only Rev04 of the STR. At that stage the approach taken by the Commissioner was that Rev04 in its entirety was sufficient to meet the request by Mr Griffiths, and that although an exception under the EIR applied, Rev04 should be disclosed after taking public interest factors into account.

68. By the time the hearing of the appeal had been completed the Commissioner had accepted that not all of Rev04 fell within scope of the request, but those parts that did should still be disclosed after taking into account public interest factors.

69. Following questioning and submissions in the closed session there was a fairly good level of agreement as to which parts of Rev04 were within scope.

70. However, there were additional parts of Rev04 which the Commissioner argued were within scope but HS2 did not agree. HS2 claimed that parts of Rev04 discussed other factors alongside GDP in a way that made it impossible to determine whether a change of benefit resulted from changes in GDP or other factors.

71. I agree with the submissions of the Commissioner that these passages in Rev04 are also within the scope of the request. Although they involve

discussions of other factors than GDP, changes to GDP are included, they indicate HS2's awareness of the risks identified in the request, and that the issue has been considered together by HS2 and the DfT (information also sought in the request).

72. In relation to Rev01 to Rev03 of the STR it is impossible to say, in my view, that the comparable parts of these documents are out of scope. My interpretation of Mr. Griffiths' request is that when he refers to 'recent' information he is referring to the period since 2017 and that date is mentioned in his request. Therefore, these previous Revs are also included as they fall within the relevant time period.

73. As the Commissioner has identified, Rev01 to Rev03 are not identical to Rev04 and there is some different information in each.

74. In relation to the PFM *outputs*, I accept the evidence of Mr. Grigg and the submissions of HS2 that these are not responsive to the request and are so are not within scope. As Mr. Grigg explained, these are the raw data which has been used to extract useful and understandable information, such as that in the PFM summaries and ultimately Rev04 (and the other Revs). Mr. Grigg confirmed for example that he would not be able to interrogate these himself for useful information.

75. However, it seems to me that PFM *summaries* must be within the scope of the request as they present in understandable form what has been extracted from the outputs.

76. In relation to the emails, I note that the email which accompanied Rev04 to the DfT from HS2 (dated 29 January 2019) has now been disclosed and described in Mr. Grigg's open statement at paragraph 66. This indicates the communications which passed between HS2 and the DfT about the

subject matter of the request with specific reference to Rev04 and therefore is within scope.

77. There is one other email in the closed bundle dated 28 January 2019 and the evidence of Mr. Grigg is that is typical of a number of other emails which neither the Tribunal nor the Commissioner has seen. To the extent that any emails relate to the other information that I have found to be within scope then in my view these emails are also within scope.

78. Finally, in relation to the minutes and records of meetings that were referred to in the hearing (see above paragraph 44), it seems likely that they are within scope as the evidence indicated that they will include discussions of issues covered in the request, but at this point it is impossible to be sure because the information is not available.

#### **Exceptions: reg 12(4)(d) EIR**

79. For all this information described above that is within the scope of the request and which has been properly identified in this appeal, (other than the emails) it is not disputed that reg 12(4)(d) EIR is engaged as an exception to disclosure subject to the public interest test.

80. In relation to the emails which I have found are within scope, I note that the wording of reg 12(4)(d) EIR is directed at considering whether the 'request relates to material which is still in the course of completion, to unfinished documents or to incomplete data ...' The question is whether an email which is to do with such material is also covered by the exemption.

81. I note that the Commissioner's guidance on this issue<sup>1</sup> states that:-

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1637/eir\\_material\\_in\\_the\\_course\\_of\\_completion.pdf](https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf)



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. In this case, an officer may create an 'aide memoire' note which is not intended to be a formal record but is nevertheless part of the on-going process of developing a particular policy. If this aide memoire note is within the scope of a request, the exception may be engaged because the request relates to material which is still in the course of completion.

82. In my view emails connected to the material covered by reg 12(4)(d) EIR will be in the same position: they are not meant to be formal records but they are nevertheless part of the ongoing process of developing the STR in this case. Thus, reg 12(4)(d) EIR applies to any such emails.

**Public interest: reg 12(4)(d) EIR**

83. In relation to Rev04 I agree with the Commissioner that the balance of the public interest is in disclosure in relation to those parts of Rev04 which I have found are within scope. I accept that there is a degree to which there is a need for a safe space for HS2 and DfT to discuss and develop the issue of economic benefit, and that to a degree this may be hampered if it is known that there is a possibility that the latest conclusions on this issue might be subject to disclosure. But I also agree with the Commissioner that it is very likely that these discussions will continue nonetheless, given the importance of the issue to the HS2 project. Other than Mr. Grigg's evidence there is nothing further (for example from those who might be involved in procurement exercises) to support the view that the procurement process might be compromised by disclosure of some ongoing calculations. As the Commissioner states, HS2 can always issue explanatory notes if it is concerned about this.
84. My view is that at the time of the request there was a very real public interest in the consideration that was being given to the economic benefit of the HS2 project. There had been no business case issued since 2017 and

although there was reason to believe that an STR would be issued with the next business case, it was not known when this would be. Rev04 was the most up to date version of the STR. The scale and nature of the HS2 project, together with the changing economic picture at the time of the request meant that the public interest in disclosure of the parts of Rev04 relevant to the request was overwhelming.

85. However, I do not think that the same can be said for the previous iterations of the STR. It seems to me that HS2 is entitled to rely on public interest factors to limit its disclosure of the information which was most relevant at the time of the request. It also seems to me that there is little public interest in disclosing Rev01 – Rev03. By the time of the request the thinking in those documents has been superseded by what is in Rev04, as HS2 says, and I note that Revs01-03 had not even been sent to the DfT. The balance of the public interest is therefore against disclosure.

86. I am also of the view that it is not in the public interest, on balance, for the additional parts of Rev04 which have been identified by the Commissioner (and as I have accepted) as within scope, to be disclosed. The reason for this is that they do not further assist Mr. Griffiths in relation to showing that HS2 is aware of the risk identified in his request, or as to the quantification by HS2 of the level of benefit reduction that results from the changes in GDP. Mr. Griffiths will have this information from the parts of Rev04 which are disclosed. The additional parts of Rev04 are concerned with quantifications which include changes in GDP but not in a way that can be extrapolated from other issues.

87. I take the same approach when considering the public interest in disclosure of the PFM summaries which I have found are within scope. If Mr. Griffiths has the relevant parts of Rev04 which show the latest thinking on economic benefit there is little public interest in disclosure of the summaries

of the data which led to the production of Rev04, or at least any public interest that there is does not outweigh the public interest concerns identified by HS2.

88. Finally, in relation to the emails which I have found are covered by the reg 12(4)(d) EIR exception the same public interest analysis as set out above leads to the conclusion that the emails should not be disclosed.
89. I have also considered the presumption in favour of disclosure having made these decisions about the public interest in non-disclosure for some of the information within scope. In my view, in circumstances where Mr. Griffiths will be provided with the main information he seeks in relation to his request, and the subsequent low public interest in disclosure of further information, the presumption does not alter the decisions I have made.

**Exceptions: reg 12(4)(e) EIR**

90. If I am wrong about the application of reg 12(4)(d) EIR then in my view, reg 12(4)(e) EIR would not assist HS2 in excepting the emails from disclosure. Although I am not bound by either of the FTT decisions discussed above, I prefer the analysis in the *Portmann* case to that in the *Thornton* case. I bear in mind the need to interpret the exceptions in the EIR restrictively (see Article 4(2) of Directive 2003/4/EC which the EIR implement), and the presumption in favour of disclosure. It seems to me that in *Thornton* the Tribunal did not take into account either of these factors. It also has not referred to reg 12(8) EIR which provides the only extension to the 'internal communications' exception in the EIR and which does not cover communications in a case such as this.
91. I agree with the Commissioner that if the government decides to set up an arm's length body with its own responsibilities under the EIR, then it is not a correct interpretation of the EIR that communications between the two

separate bodies is described as 'internal'. I can see that it would have been possible for the DfT to keep the HS2 project 'in house', but that is not what has happened, and the Tribunal has to deal with the reality that there are, in fact, two separate bodies, however closely they might work.

92. The Commissioner accepted that Rev01-03 could be seen as internal communications if accessible to staff within HS2, but as I have decided that Rev01-03 should not be disclosed - applying the reg 12(4)(d) EIR exception which it was agreed would apply if these documents were within scope- I do not need to deal further with this issue.

### **Minutes and records of meetings**

93. Thus, the loose end in this appeal relates to documentation which Mr. Grigg said would exist but which has not been searched for, namely the minutes and records of meetings between HS2 and the DfT to discuss the issues raised by Mr. Griffiths. It seems to me that these are potentially directly relevant to Mr. Griffiths' request for information that shows that HS2 has brought the issues raised to the attention of the DfT.

94. In my view it is necessary for HS2 to carry out a search for such information and to disclose this to Mr. Griffiths to the extent that is assessed to be within scope and to the extent to which it is not argued that any exemptions under the EIR apply.

### **CONCLUSION**

95. On that basis this appeal is partly allowed (on the basis that some of Rev04 is now exempted from disclosure) and a substitute decision notice is issued which requires only those parts of Rev04 as identified by HS2 as within the scope of the request to be disclosed.

96. I direct that the Commissioner and HS2 should agree the information to be disclosed to Mr. Griffiths in line with this decision.

97. I also make a direction that searches are carried out for minutes and records of meetings which it is decided are within the scope of the request with a view to disclosure subject to HS2's submissions that exceptions under the EIR apply.

98. I should be grateful if the parties would propose a timetable for such searches and written submissions for determining the applicability of any exceptions.

99. The parties are invited to suggest other directions which may be necessary to bring this case to a conclusion.

**Stephen Cragg QC**

**Judge of the First Tier Tribunal**

**26 March 2021.**

**Promulgated**

**30 March 2021.**

**Amended pursuant to rule 40 on 9 April 2021**

