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

**Appeal Reference: EA/2018/0111**

**Heard at Field House, London**
**On 19,20 November**

**Before**

**JUDGE CHRIS HUGHES**

**TRIBUNAL MEMBERS**

**MELANIE HOWARD & MIKE JONES**

**Between**

**DR PAUL THORNTON**

Appellant

**and**

**INFORMATION COMMISSIONER**

First Respondent

**HIGH SPEED 2 (HS2) Ltd**

Second Respondent

**Appearances:-**

**Appellant: In person**
**First Respondent: Eric Metcalfe**
**Second Respondent: Timothy Pitt Payne QC**

## DECISION AND REASONS

1. This is a case under the Environmental Information Regulations (EIR). The EIR have their origin in the Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters (Aarhus Convention) 1998 a treaty prepared through the United Nations Economic Commission for Europe which has been ratified by the UK and the European Union. The European Union adopted Directive 2003/4/EC which in Recital 5 explained the reason for the adoption of the Directive:-

> *"(5) On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"). Provisions of Community Law must be consistent with that Convention with a view to its conclusion by the European Community."*

The Explanatory Memorandum to the EIR states

> *"4. Legislative background (i) The Regulations will implement Directive 2003/4/EC (the Directive) on public access to environmental information and repealing Council Directive 90/313/EC."*

It is clear therefore that the EIR should be interpreted in a way consistent with the Aarhus Convention and the tribunal if faced with ambiguities, uncertainties, paradoxes or lacunae should have regard to the Convention and the guidance published by the United Nations "The Aarhus Convention And Implementation Guide".

2. The Convention gives rights of access to information held by public authorities subject to specific exceptions. A public authority is defined by Article 2.2:-

*"2. "Public authority" means:*
*(a) Government at national, regional and other level;*
*(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;*
*(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;"*

3. The definition of public authority in EIR is similar:-

*"(2) Subject to paragraph (3), "public authority" means –*

*(a)government departments;*
*[public authorities listed or defined in the Freedom of Information Act]*
*(c)any other body or other person, that carries out functions of public administration; or*

*(d)any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –*
*(i)has public responsibilities relating to the environment;*
*(ii)exercises functions of a public nature relating to the environment; or*
*(iii)provides public services relating to the environment."*

4. The Implementation guide makes clear the practical challenges which led to this wide definition (page 46):-

   *"The definition is broken into three parts to provide as broad coverage as possible. 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."*

5. It is clear therefore that 2(2)(c) of the Convention is in essence an anti-avoidance measure to ensure that where a government department within 2(2)(a) arranges its public services in relation to the environment so that they are discharged through an entity caught by 2(2)(c) i.e. an entity under the control of the government department; then that entity is within the scope of the Convention – the purpose of the provision is to make the precise nature of the arrangements under which a government department carries out its functions irrelevant; environmental information under the control of a government department should be subject to disclosure under the Convention.

6. HS2 Ltd is in terms of its legal status a private company limited by guarantee – no different from any other private company. As such it would not be subject to the Aarhus Convention in the same way that any other private construction company would not be subject to these provisions. However, from an examination of the actual arrangements the position is otherwise. The single member of the company is the Secretary of State for Transport, its funding is voted by Parliament and it is subject to the scrutiny of the Public Accounts Committee. The appointment of its senior staff is under the direct control of the Department of Transport and a complex governance framework provides little autonomy for HS2 with all significant decisions made by the civil servants of the Department of Transport acting on behalf of the Secretary of State for Transport within the overall mesh of Treasury and Cabinet oversight subject to the scrutiny of Parliament.

7. This case arose out of that process of Parliamentary scrutiny. Dr Thornton, who is concerned about the impact of the HS2 project and had been monitoring its progress wrote to HS2 Ltd. on 4 April 2017:-

   *"I refer to the oral evidence session of the House of Commons Public Accounts Committee on Monday 11 Jul 2016 in which the witnesses were Philip Rutnam, Permanent Secretary, Department for Transport, David Prout, Director General, High Speed Rail Group, Department for Transport, and Simon Kirby, Chief Executive, HS2 Ltd. The record of this*

*session is at this link:*
*http://data.parliament.uk/writtenevidenc...*
*(http://data.parliament.uk/writtenevidence/committeeevidence.svc/evid*
*encedocument/public-accountscommittee/ high-speed-2/oral/35001.pdf)*

*At question 55, in response to a follow up question from Sir Amyas Morse [the Comptroller and Auditor General], Mr David Prout advises that an MPA report has assessed that one of the key risks "is whether or not we are trying to do it (the HS2 project) too fast." He continues "We have therefore invited the company to make proposals and to offer us advice on whether or not we should extend the programme by up to 12 months. We have not received that advice yet."*
*At question 58, Mr Simon Kirby confirms that to respond to the DfT request above, HS2 Ltd "will be producing a report in the Autumn."*
*Under the provisions of the Environmental Information Regulations, I would be grateful if you would provide*
*1. The information contained in the request submitted to HS2 Ltd described by Mr Prout, along with any accompanying or referenced documentation provided to HS2 Ltd in relation to that request.*
*2. The information contained in the report anticipated by Mr Kirby or any alternative equivalent response that was eventually provided.*
*3. The information contained in any subsequent communications between HS2 Ltd and DfT that relates to the information contained in 2. above.*"

8. HS2 Ltd resisted the request relying on the provisions of FOIA s36(2) (b)(ii) and (c). On internal review it maintained the position that the request should be dealt with under FOIA but indicated that it considered that the information was exempt from disclosure under EIR 12(4)(d). Dr Thornton complained to the Information Commissioner. HS2 confirmed that under FOIA it would also rely on s36(2)(b)(i) and s43(2), and if the analysis were under EIR then also on Regulation 12(5)(e).

9. Following an investigation, the Commissioner concluded that Change Notices relating to phase One and a review relating to a Change Notice were part of HS2 and the HS2 programme was a measure affecting the environment and should be considered under EIR. She examined the arguments in favour of disclosure, noting the need for transparency and accountability about a major public project. She considered HS2's arguments that the Main Works Contracts for phase 1 were awarded in July 2017 and the detailed design of phase 1 was still open to consideration. She recognised the argument in favour of a safe space for that consideration and that releasing information while policy was still developing risked misleading the public and that even if the information was contextualised there was still a risk of misleading people as to the extent that they would be affected and noted HS2's argument *"It is contrary to the public interest to disclose information reflecting possibilities considered before a decision has been made. Disclosure would mean HS2 would have to expend public resources on explaining and justifying information on possibilities before final decisions have even been taken."* In weighing the balance she noted the significance of transparency and the extent of public interest in HS2, its environmental impact and costs:-

*"27. The Commissioner notes that policy decisions relating to specific aspects within the HS2 programme are yet to be taken, in particular in this case in relation to Phase One, Stage One. The Commissioner considers that effective policy making depends on good decision making which depends not only on sound evidence but candid communications that allow a full consideration of all the options without any concern over premature disclosure. Policy decisions, such as in relation to the HS2 project need to be thoroughly evaluated before it can be properly implemented and this can only happen when all parties have the confidence that there is no risk that those exchanges will be disclosed prematurely. The impact on these processes and weight to be given to these arguments must be determined on the circumstances of each case.*

*28.In this case the withheld information relates to policy decisions still under consideration relating to Phase One, Stage One of the HS2 project. It has confirmed that final policy decisions have not yet been taken in this area. Furthermore, in this case the request was made prior to the awarding of the MWCC's for Stage One in July 2017. This policy area was still therefore live at the time of request. Therefore, there is a strong public interest in maintaining the safe space for public officials to develop ideas, debate live issues and reach decisions away from external interference.*

*29.On balance the Commissioner considers that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception. Regulation 12(4)(d) EIR was therefore correctly applied in this case."*

10. In his appeal Dr Thornton argued that the IC had incorrectly interpreted regulation 12(4)(d) which on a proper construction of the Aarhus Convention could not apply to actual documents which had been completed simply because they include information created as part of the process of formulation and development of policy even where that process was incomplete. Even if the exemption applied there was no indication that there was a need for a "safe space" indeed if the information was very sensitive there was a greater interest in publication in order to inform the public.

11. In resisting the appeal the IC noted that 12(4)(d) allows for refusal of disclosure where "*the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data*" She submitted that the Aarhus Implementation guide was consistent with her approach to interpretation and safe space arguments could apply to the consideration of changes following a period of public and parliamentary scrutiny where the project was extensive and subject to scrutiny over time.

12. In supporting the IC's position HS2 explained that it was an executive non departmental public body formed and sponsored by the Department for Transport (DfT). It has a single member (the Secretary of State for Transport) and operates within the financial framework of the DfT. HS2 agreed with the IC that 12(4)(d) was engaged and that decisions of the tribunal supported the proposition that documents which had been completed could be part of material in the course of completion. The material had been prepared to inform DfT and enable it to determine the optimal delivery programme for HS2 which was not

decided at the time of the request, since that decision was not complete the documents fell within 12(4)(d). HS2 further argued on the basis of IC guidance that the relationship between HS2 and DfT was so close that communications between them should be seen as not between a public authority and a third party but as internal communications and the Directive was not intended to create a false segregation between different parts of the same Government accordingly the material fell within 12(4)(e). Since the decision-making was not complete there was a strong argument to allow officials to develop ideas and options away from external interference.

13. Mr Yass who has significant responsibilities within HS2 gave evidence of the structure of HS2 and its relation to the Secretary of State (SoS). It is a large complex organisation with the role of procuring a railway which will be built by contractors. It is subject to detailed control, including through a Development Agreement in accordance with which HS2 prepares Baseline Cost Models and Baseline Delivery Schedules to enable the SoS to exercise control over HS2's work programme and costs. He explained (witness statement paragraph 30) that the Department could instruct HS2 by issuing it with a Change Notice requiring it to provide advice with respect to a potential change to the works or services set out in the Development Agreement and, having received that advice the Department could issue a Change Confirmation Notice which would incorporate the changes to the plan that HS2 was contracted to provide. Following a review by the Cabinet Secretary known as the Periodic Update potential costs savings and other changes were identified to improve the programme. HS2 did not receive a copy of the Periodic Update, however it caused the issuing of a Change Notice (CN0013) by which HS2 was asked to provide advice in relation to some of the findings of the Periodic Update. HS2 prepared and provided a scope of work document and a project execution document detailing what it would do to respond to the CN, the Response and associated documents. The DfT then issuedCN0014 directing HS2 to provide a Baseline Cost Model and baseline delivery Schedule for Phase 1 of the HS2 project. The material within scope of the request was CN0013, the response to it and CN0014.

14. On the balance of public interest with respect to 12(4)(d) Mr Yass explained that the information dealt with a potential change to the timing of the start of passenger services and disclosure would risk affecting the fullness and frankness of such advice in the future, which would contribute to poorer and less auditable decision-making, in addition wider disclosure would require further resources to be devoted to addressing public inquiries before any change to timescale was agreed, which would increase uncertainty and stress for those affected by the plans. Furthermore, contractors who might be affected by changes to the scheduling of work might seek to exploit this financially or make contractual claims against HS2.

15. With respect to 12(5)(e) he argued that disclosure would adversely affect the confidentiality of commercial information. There were a number of contracts in place following extensive price negotiations on defined work packages. These

very large contracts had been won by a small number of consortia. If there was confusion over the construction schedule then these contracts would become more difficult and there was a potential for claims for additional costs on the basis that HS2 was delaying the work. There were numerous further procurements still to be put in place for phase 1. If any bidder could access HS2's baseline cost model this could prejudice HS2's ability to ensure the best financial outcome from the procurement and undermine the procurement itself, if one potential contractor had access to the information but not other possible bidders.

16. In closed session the tribunal explored with Mr Yass the impact of specific issues with respect to timing and extent of works and the potential commercial impact of disclosure.

17. In this appeal brought by Dr Thornton three exemptions under EIR Regulation 12 need to be considered 12(4)(d) and (e), and 12(5)(e). In addition, 12(3) is relevant to the names of individuals. The Regulation 12 is headed Exceptions to the duty to disclose environmental information and provides (so far as is relevant):-

*"12.—(1) … 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) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.*

*(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*
*…..*
*(d)the request relates to material which is still in 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;"*

18. The two exceptions contained in regulation 12(4) derive from Article 4 of the Convention Access to Environmental Information which provides that a request may be refused:

*"…*
*3. A request for environmental information may be refused if:*
*…..*
*(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure."*

19. It is clear that the two exceptions in the Regulation 12 are contained within one in the Convention and is dependent on protection for "material in the course of completion or concerns internal communications of public authorities" being present in "national law or customary practice". In the UK rules with respect to the disclosure or release of the information held by public authorities these are now contained in the Freedom of Information legislation applying to the various parts of the UK and accordingly it is appropriate, for a case relating to England and Wales, to consider FOIA 2000. The most relevant provisions in FOIA which deal with somewhat similar issues are s22 (which protects information intended for future publication which is conceptually similar to be material in the course of completion), s35 which protects information held by a government department relating to the formulation or development of government policy and s36 protecting information to avoid prejudice to the free and frank provision of advice. These provisions protect information which is the subject of internal communications within a government department. It is clear therefore that the Convention protection is an exemption within UK national law.

20. The Implementation Guide (second Edition page 85) explored the provision. It drew attention to a decision where "material in the course of completion" was given a restrictive interpretation with respect to raw data on air pollution, which should be liable to disclosure, if necessary with an explanation highlighting that the processes of correction and validation had not been carried out. It suggested that *"drafts of documents such as permit, EIAs, policies, programmes, plans and executive regulations* ***that are open for comment under the Convention*** *[the tribunal's emphasis] would not be materials in the course of completion"*.

21. The guidance also draws attention to a 2007 case before the Conseil d'Etat (the superior French Court for Administrative Law) which concluded that a "provision excluding preliminary documents produced in the course of drawing up an administrative decision from the right of access to environmental is not compatible with article 3 paragraph 3 of Directive 90/313/EEC" (this Directive being the precursor of Directive 2003/4/EC):-

*"Article 3*
*…*

*3. A request for information may be refused where it would involve the supply of unfinished documents or data or internal communications"*

However, what is not clear from the note of the case within the guidance is the nature of the "administrative decision" and the statutory framework within which it is made or the status of the preliminary documents within that administrative framework.

22. The Implementation Guide does not cite any caselaw with respect to the interpretation of the second limb of the exception "internal communications" and notes that State Parties may wish to define "internal communications". The text implies that the State Parties have different approaches and indicates various categories of material which would not fall within the exemption and continues "*Neither can studies commissioned by public authorities from related, but independent, entities*". Here the relationship of the Secretary of State and HS2 is crucial. HS2 is formally separated from the Secretary of State, however the intensity of control exercised means that HS2 is very far from being independent.

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. Similarly the structure of the decision-making means that the DfT asks questions of HS2, which in turn carries out analysis and provides answers to the Department. That material

leads to decision-making within the Department which results in a decision to change the procurement activities to be carried out. These documents are therefore part of material in the course of completion.

25. The tribunal is therefore satisfied that the exemption for material in the course of completion and the exemption for internal communications 12(4)(e) are both engaged.

26. In considering the balance of interest between the disclosure and the withholding of the information the Information Commissioner correctly noted that there are clear arguments in favour of transparency in respect of the information on this major project and enabling the public to understand the development of thinking about the project which in turn promotes accountability. However the tribunal would add that the value of the information which would be disclosed is, within the scheme of information available to the public about the route, the environmental impact and the economic consequences of the project very limited and as the officials were still developing ideas and debating live options uncertain as to the impact that these options might have on the environment. In these circumstances the tribunal considers there is real force in the concerns about the impact on decision making and that the public interest in non-disclosure protected by the exemption in 12(4)(d) (incomplete material) and 12(4)(e) (internal communications) outweighs any benefit in disclosure. On this occasion the need for a safe space for a limited period is clear.

27. Furthermore, the commercial impact of disclosure of the information would be very considerable. It would create the potential for claims against HS2 from contractors, would make more complicated negotiations which were underway and it could very possibly undermine aspects of the tendering process requiring a further exercise because of differential information to differing contractors. In all disclosure would create a serious risk to the public purse. The tribunal is satisfied that these considerations are weighty and far outweigh the interest in disclosure.

28. The tribunal is therefore satisfied that the Information Commissioner's decision is correct in law, the appeal is without merit and is dismissed.

**Chris Hughes**
**Judge of the First-tier Tribunal**

**Date: 14 February 2020**

**24 April 2020, Paragraph 25 amended under Rule 40 (Clerical mistakes and accidental slips and omissions) of the General Regulatory Chamber Rules**