



Appeal number: EA/2021/0070V

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

PETER FALLON

Appellant

- and -

THE INFORMATION COMMISSIONER

**First
Respondent**

- and -

HS2 LIMITED

**Second
Respondent**

**TRIBUNAL PANEL: JUDGE ALEXANDRA MARKS CBE
TRIBUNAL MEMBER ROGER CREEDON
TRIBUNAL MEMBER MICHAEL JONES**

**Determined at a remote hearing via HMCTS Cloud Video Platform on 6 October
2021**

Mr Fallon was self-represented

The Information Commissioner was neither present nor represented at the hearing

**HS2 Limited was represented by Carl Bird (Senior Manager Briefings, Correspondence
and Information) and Ben Rule (Infrastructure Management Director)**

DECISION

The appeal is dismissed.

REASONS

Background to Appeal

1. The Appellant, Peter Fallon, made a request on 9 October 2019 to HS2 Limited (HS2L) for information about the HS2 rail-link project querying particular statements made in various publications, including a video which appeared on YouTube.

2. The full text of the request is set out in Appendix 1 to this decision – and extracts of Mr Fallon’s response to HS2L’s request for clarification set out in Appendix 2. In essence, the still disputed elements of the request are:

(i) Q3: Could you provide the information held by HS2L on how and where removing one intercity train would release capacity for eleven new fast commuter or freight trains on existing track?

(ii) Q4(i): An exposition of the term “much closer together”; and

(iii) Q4(ii): Quantification of the HS2-enabled closer-togetherness on the:

(a) Birmingham New Street – Rugby; and

(b) Willesden – Rugby

sections of the West Coast Main Line.

3. On 4 December 2019, HS2L responded to the request. In response to Q3, HS2L said there was an error in the HS2L Chairman’s Stocktake 2019 report (to which the question related) and that an updated version of the report had now been published. In response to Q4(i), HS2L explained how the term ‘much closer together’ had been used, and said that there would be ongoing analysis, before eventual ministerial decisions, of how service patterns and other factors would be optimised. In relation to Q4(ii), HS2L said that it did not hold information.

4. Mr Fallon asked HS2L to review its responses. With regard to Q3, he said he did not understand the capacity claims made in the updated version of the Chairman’s Stocktake report. With regard to Q4, he said that he did not consider that HS2L had provided any relevant information.

5. On 16 January 2020, HS2L wrote to Mr Fallon confirming it considered its responses to Q3 and Q4 had been appropriate. Regarding Q3, HS2L explained how transferring intercity services from the existing network would release capacity but as it was not responsible for decisions about how network capacity is utilised, it does not hold any information on that particular matter. With regard to Q4, HS2L confirmed that it does not hold information on the quantification of ‘much closer together’ and that it had provided a clear explanation of what was meant by that phrase.

6. Mr Fallon contacted the Information Commissioner ('the Commissioner') on 6 March 2020 to complain about the way his request had been handled.

7. On 11 February 2021, the Commissioner issued Decision Notice IC-42626-R6K3 which set out the Commissioner's conclusions that:

(i) For Q3, she was satisfied with HS2L's submission that the reference to 'capacity for 11 new trains on existing track being released' was a drafting error and the statement in the Stocktake report had since been amended to reflect this. Consequently, HS2L could not have held information about the release of 'capacity for 11 trains' at the time of the request and had complied with s. 1(1)(a) of the Freedom of Information Act 2000 (FOIA).

(ii) In response to Q4(i), HS2L had provided an explanation of the phrase 'much closer together', and since the request was for an explanation rather than a request for recorded information, it did not fall within the scope of FOIA.

(iii) On the balance of probabilities, and having consulted relevant areas of the organisation, HS2L does not hold information about the quantification of 'closer-togetherness' as requested by Q4(ii) and had complied with s.1(1)(a) FOIA by informing Mr Fallon of this.

(iv) For completeness, had the requests been considered under the Environmental Information Regulations 2004 (EIR) rather than the FOIA regime, Regulation 12(4)(a) would have been engaged. This entitles a public authority to refuse to disclose information that it does not hold when a request is received. Although technically, Regulation 12(4)(a) is subject to the public interest test, it would have been illogical to apply this test as it is not possible for the public interest to favour disclosure of information that is not held.

8. Mr Fallon was dissatisfied with the Commissioner's decision, and on 10 March 2021, Mr Fallon submitted his Notice of Appeal.

Appeal to the Tribunal

9. Mr Fallon's grounds of appeal are summarised in paragraph 17 below.

10. The Commissioner's Response dated 11 May 2021 is summarised in paragraph 18 below, maintaining the analysis set out in the Decision Notice.

11. HS2L did not submit a written response to Mr Fallon's appeal. Its submissions at the oral hearing are summarised in paragraph 20 below. In summary, HS2L submits that it does not hold the specific information requested as explained in its correspondence with the Commissioner.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

12. Public authorities' duty to disclose information is set out in s.1(1) FOIA:

'1 (1) Any person making a request to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request...'

The powers of the Tribunal

13. The powers of the Tribunal in determining appeals against the Commissioner's decisions are set out in FOIA, as follows:

's.57 Appeal against notices...

(a) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...

s.58 Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.'

The burden of proof

14. The burden of proof rests with Mr Fallon in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion.

Evidence

15. Before the hearing, Mr Fallon and the Commissioner had submitted written material. This was contained in an Open Bundle of 95 pages (including an Index). The Panel was also supplied with:

- (i) Case Management Directions from the Tribunal's Registrar dated 16 June 2021;
- (ii) Mr Fallon's reply dated 25 May 2021 to the Commissioner's response to his Appeal Notice, attaching four copy documents namely:
 - (a) the Development Agreement dated 8 December 2014 (amended on 17 July 2017 and 26 November 2018) made between the Secretary of State for Transport and HS2L relating to HS2;
 - (b) the Department of Transport's (DfT) response F0018555 and F0018587 dated 3 July 2020 (the Peters response) to J Peters' FOIA requests dated 5 and 18 June 2020;
 - (c) PLANET Framework Model: PFMv9 Model Description Report (Planet Model) dated June 2020; and
 - (d) An extract from HS2L's website headed 'Capacity – helping reduce overcrowding' as at 25 May 2021;
- (iii) Mr Fallon's Skeleton Argument dated 30 June 2021; and
- (iv) Further Case Management Directions from the Tribunal's Registrar dated 15 September 2021.

16. Unfortunately, as HS2L had only lately joined the proceedings, it had not had sight of the items listed in (ii) above but was willing to continue with the hearing without them (all but item (b) being familiar to HS2L).

SUBMISSIONS

Mr Fallon's submissions in his Appeal Notice dated 11 February 2021

17. In summary, Mr Fallon's appeal is on the basis that:

- (i) The Commissioner overly relied on the account given to her by HS2L in correspondence.
- (ii) Given HS2L's task of managing the delivery of HS2 and managing the Planet Model (which was 'developed by HS2L as a tool to forecast the demand and benefits of HS2'), one benefit of HS2 according to HS2L is increased capacity on existing railways. Thus HS2L would have a business purpose for holding information about that topic.

(iii) HS2L is, in effect, in the position of advising DfT on rail capacity issues. The train service capacity diagrams reproduced in Annex A of the Peters response would need to have taken account of the spacing required between trains of different types.

(iv) On its website, HS2L's animated video film says '*Once HS2 is operating, services can run much closer together, meaning there can be more rush hour trains, helping to relieve overcrowding*'.

(v) However, in its correspondence with the ICO, HS2L provided a divergent account, namely that '*the additional capacity is derived from train service planning – balancing variation in speed, and stopping patterns against maximum capacity – rather than by [...] 'closer togetherness'..*'

(vi) Contrary to the Commissioner's finding on Q4(i), HS2L has not provided a 'clear explanation' of the phrase 'much closer together'.

(vii) Also contrary to the Commissioner's finding on Q4(i), the original request made clear that information *held* i.e. already in existence, was being sought, not an explanation which required the creation of new information.

(viii) The change to the Chairman's Stocktake report (mentioned in paragraph 3 above) did not revert to the original draft but effectively reversed the meaning of that early draft. A change of this type would have involved more than one person, a shared understanding of the meaning of terms such as 'much closer together' and the creation of written records of some kind.

(ix) HS2L may therefore hold information relevant to the request which it deemed not to be relevant.

(x) Because, in Mr Fallon's view, on the balance of probabilities HS2L is likely to hold further relevant information, HS2L should be directed to engage with the request, and give further and better particulars.

Submissions on behalf of the Commissioner dated 11 May 2021

18. In summary, the Commissioner's response is that:

(i) She investigated and asked appropriate questions of HS2L to establish what information it holds. HS2L outlined the steps it had taken to locate the information, and cogently explained why it is not held.

(ii) The Commissioner is entitled to accept the responses of a public authority at face value unless there is some reason not to, for example that the Commissioner is being misled.

(iii) The Commissioner can only consider whether HS2L has complied with FOIA and whether, on the balance of probabilities, HS2L holds the information requested at the time of the request.

(iv) As regards Q3, HS2L had explained to the Commissioner they had approached those who oversaw the production of the Chairman's Stocktake report and those responsible for any analysis supporting statements made in that report. A drafting error quickly became apparent, so HS2L gave Mr Fallon details of how the relevant paragraph should read and had rectified the error in the report itself.

(v) There would be no business purpose for HS2L to hold the information requested because it was based on an error which had since been corrected.

(vi) HS2L was able only to answer questions it had been asked at the time of the request, and as the statement had been amended since the request, it did not exist at the time of the request so the request could not relate to it.

(vii) As for Q4(i), FOIA provides a right to information held (i.e. recorded) by public authorities, not an obligation to produce additional information or provide explanations unless this is held in a recorded form.

(viii) Neither the Commissioner nor the Tribunal can reach a finding whether HS2L 'should' hold relevant recorded information. Instead, it is necessary to consider whether, on the balance of probabilities, HS2L *did* hold the relevant information at the time of the request.

(ix) Given the way in which Mr Fallon responded to HS2L's request for clarification of Q4(i) as *'[it] can be taken as a request for an exposition of the term 'much closer together''*, the Commissioner considers the request was for an explanation, not a request for information.

Mr Fallon's oral submissions at the hearing on 6 October 2021

19. In summary, at the hearing, Mr Fallon made the following additional points:

(i) Essentially, he is asking for an explanation of HS2L's claims of increased capacity.

(ii) What HS2L has told the Commissioner, namely that increased capacity will be achieved by train planning, is at odds with its public statement – via its website – that trains will run 'much closer together'. HS2L continues to use this phrase without properly explaining what it means, particularly as use of the adjective 'much' implies that quantitative information is held.

(iii) Further, HS2L told the Commissioner that its explanation why information is not held is that its *'staff may have found through experience that there is not practical need to record the sort of information captured by the request.'* Mr Fallon has not seen evidence of HS2L's claim of 'widely accepted fact' about increased capacity, and if HS2L has no purpose in holding information about the quantification of

increased capacity, how can HS2L create the economic case based on such increased capacity?

(iv) The Peters response includes capacity diagrams created by HS2L which would have required the information he seeks. These diagrams do not show that trains will run ‘more closely together’ once HS2 has opened.

(v) HS2L misled the Commissioner as to the facts, and the Decision Notice was produced without Mr Fallon being given an opportunity to point out HS2L’s erroneous statement. The issue is therefore whether the Decision Notice should stand, given it is based on misinformation.

HS2L’s oral submissions at the hearing on 6 October 2021

20. The following submissions were made by Carl Bird and Ben Rule on behalf of HS2L:

(i) In respect of Q3, Mr Bird said that HS2L could only answer the question asked and – as that related to an admitted drafting mistake which had since been corrected – HS2L could not and did not hold information to back up a mistake in drafting.

(ii) As for Q4(i), Mr Bird reported that HS2L’s communications manager wrote the script for the YouTube video on HS2L’s website based on general knowledge and understanding, not any specific background data or information. When asked by the Commissioner to ‘explain’ the term ‘much closer together’ used in the video, HS2L had understood this in the context of an enquiry about the information used to create that script – not the meaning of the phrase ‘much closer together’ itself. In simple terms, the phrase means ‘less distance between trains’ which is the common understanding of generally accepted facts of train planning rather than based on specific information which, in this case, does not exist and would have to be created. Mr Bird said that on this point, and in respect of Q4(ii), Mr Rule would be able to provide further submissions.

(iii) Mr Rule explained, by reference to a generic train planning graphic readily available on the internet, the elements that make up how ‘close’ trains can be, and therefore the capacity the network can provide.

(iv) Essentially, the graphic shows trains’ departure times from a given point as close together as can be – as governed by the signalling system which restricts trains to being no closer than three minutes apart for safety reasons. The signalling system is the responsibility of Network Rail, not HS2L, so Network Rail rather than HS2L holds this information.

(v) However, the consequence of signalling and safety constraints means if faster trains are using the same track, there must be a larger timing gap between the fast train and the slower train which precedes it because the fast train would otherwise soon catch up the slower one.

(vi) So if there were, say, four slow trains each setting off from the same station with a three minute gap between them, there would need to be a gap of say 15 minutes until a fast train could set off from that same station to ensure it did not catch up the last of the slow trains too soon. During that 15 minute period, five slower trains *could* have set off from the same station: hence removing that one fast train from the timetable would release capacity for an extra five slower trains.

(vii) Overlaid on this basic principle of train planning theory is the complexity of overall timetabling of different trains travelling at different speeds and with different stopping patterns. If, for example, the first of a group of slower trains were to call at stations nearer to the departure station than the train behind it, a greater timing gap than three minutes would be required to ensure the later departing train does not catch up the earlier one.

(viii) West Coast Mainline (WCML) is a mixed line, carrying express, semi-fast, commuter (i.e. frequently stopping) and freight trains. Because the stopping patterns and speeds vary, the timetabling is not uniform. However, for train planning purposes, the average closeness together over an hour period is used as a tool.

(ix) This ‘average closeness together in an hour’ has, for HS2 modelling purposes, been set by the Department for Transport (DfT) through its specified timetabling assumptions for HS2. Those timetabling assumptions are publicly available and have been applied by HS2L to the Planet Model. In short, HS2L has not decided (nor yet has anyone else) the future frequency, speeds and stopping patterns of trains using the existing track (as well as the new HS2 lines).

(x) However, it is a well understood tenet of train planning that the greater the mix of trains – in terms of type, speed, and frequency – the greater the limitations on capacity overall. Removing just one type of train from the mix therefore narrowing down the complexity of the timetable, and creating more consistency of use by the remaining trains, increases capacity. In summary, the more consistent the mix of trains using the same track, the more trains on average per hour can use that track. Thus removing, for example, express trains from the existing line and running them instead on the new HS2 line will create more capacity for other trains on the existing line. This is all based on train planning theory, not specific ‘information’ held by HS2L.

(xi) Mr Rule considers that Mr Fallon is now taking issue with the general quantum of released capacity yet the original request was for ‘quantification of the HS2-enabled closer-togetherness’ on sections of the existing WCML, and HS2L does not hold that information: the calculation of additional capacity has been based on train planning theory and assumed timetables produced by the DfT, not ‘information’ held by HS2L. HS2L has not quantified the release of capacity because it does not hold the information to enable it to do so.

Mr Fallon's response to HS2L's submissions

21. Mr Fallon's response, in summary, to HS2L's submissions were:

(i) the replacement of inter-city trains on the existing line with commuter and freight trains would *reduce* capacity on that line because of 'co-mingling' of 110-120mph fast trains with much slower trains such as freight trains. The diagrams attached to the Peters response from DfT shows that capacity on the existing line will be lower once trains of varying speeds are 'co-mingled'.

(ii) Because changes in capacity have an economic value – and HS2L is providing the analysis to enable government to make the final decisions about HS2 – HS2L must hold information which is both quantifiable and monetisable in order to make the economic case for HS2. How otherwise can HS2L show that replacing one inter-city train creates capacity for more than one commuter train?

(iii) In its online video, HS2L claims trains will be able to run 'much closer together' once the HS2 line opens. HS2L must hold information in order to make this claim. At the moment, the fast WCML carries 15 trains per hour in peak times (the technical limit considering the signalling system of three minute intervals gives a maximum of 20 trains per hour, which for safety reasons is reduced by 25%). This number of trains cannot be increased – due to the signalling system – and so the current arrangement is near optimal.

(iv) HS2L claims that removing fast trains will release capacity for 'up to 11' commuter and freight trains per hour, but this is problematic in view of the diagrams attached to the Peters response from DfT. These show, for the afternoon peak as at May 2019, a total of 11 slots for West Coast inter-city trains (all on the fast lines) and 11 slots for generally slower West Midlands trains (four on the fast lines, and seven on the slow lines). However, once HS2 is open, the diagram shows there will be only four West Coast inter-city trains, and 17 West Midlands trains – one fewer in total than there are now.

(v) Trains cannot safely run with less distance between them – so the expression 'much closer together' has not been properly explained. If the statement is true, then HS2L must have written information on it i.e. information already in existence, not needing to be created in order to provide the explanation sought.

(vi) The diagrams attached to the Peters response are instructive because that request was about capacity and if what HS2L now says is true, would have involved taking account of train spacing ('closer togetherness'). This 'closer togetherness' is within HS2L's remit, and thus it is likely (indeed, more likely than not) that HS2L does hold information about it.

Discussion

22. The Panel considered the evidence and submissions before it in order to decide whether the Commissioner had made an error of law or should have exercised her discretion differently. To do this, the Panel asked itself whether - more likely than not - HS2L holds information:

- (i) on how and where removing one intercity train would release capacity for eleven new fast commuter or freight trains on existing track (Q3);
- (ii) on the meaning of the term “much closer together” (Q4(i)); and
- (iii) on the quantification of the HS2-enabled closer-togetherness on the:
 - (a) Birmingham New Street – Rugby; and
 - (b) Willesden – Rugbysections of the West Coast Main Line (Q4(ii)).

23. Taking each of these in turn:

Does HS2L hold information on how and where removing one intercity train would release capacity for eleven new fast commuter or freight trains on existing track?

24. In the Decision Notice, the Commissioner found that the reference in the Chairman’s Stocktake report to capacity for 11 new trains on existing track being released had been a drafting error and this statement in the report had since been amended accordingly. The Commissioner was therefore satisfied that HS2L could not have held information about the release of “capacity for 11 trains” at the time of the request and had complied with section 1(1)(a) FOIA with regard to Q3 of Mr Fallon’s request.

25. The Panel notes there is no suggestion that the originally published statement in the Chairman’s Stocktake report was other than a drafting error. After the date of Mr Fallon’s request, the statement was amended to read *‘Intercity trains removed from the West Coast Main Line (WCML) release capacity for up to 11 new fast commuter or freight trains per hour, by reducing the disparity in speed between different services.’*

26. In the Panel’s view, the amended version differs significantly from the originally published version: instead of 11 new fast trains for **each** intercity train removed, it is claimed that **up to** 11 new fast trains can take the place of **all** intercity trains removed. HS2L’s submission to the Commissioner was that the request was asking for evidence to support an error in drafting – and that HS2L did not and could not hold information to support this erroneous statement.

27. Mr Fallon submits that *‘A change of this type [to the Stocktake report] would have involved more than one person, a shared understanding ... and the creation of written records of some kind.’* The Panel has not been presented with any evidence in support of this submission. But even if written records of some kind did or do exist

about the change made to the report, Mr Fallon's request was for information about the **originally published**, erroneous statement – not for information about the error being corrected which took place after the date of his request.

28. In the Decision Notice, the Commissioner recorded HS2L's response to her enquiry as follows:

'...in its internal review of its response to Q3, it had explained that HS2 Ltd is not responsible for decisions regarding capacity utilisation on the existing network. It had explained why specific quantification for the lines in question had not been undertaken by HS2 Ltd, that it has no business purpose for such quantifications and therefore no relevant information was held.'

29. On the basis of the evidence and submissions considered by the Panel, we are satisfied that HS2L could not have held information about the original erroneous statement that '*...each intercity train removed releases capacity for 11 new fast...trains...*' because that statement was not correct and is therefore not based on any information.

30. The Panel concludes that the Commissioner made no error of law, nor should she have exercised her discretion differently, in deciding that HS2L does not hold the information requested by Q3.

Does HS2L hold information on the meaning of the term "much closer together"?
(Q4(i))

31. In the Decision Notice, the Commissioner considered this question to have been a request for an explanation and that HS2L had already provided an explanation in its correspondence to her, stating:

'The description of trains running "much closer together" was used to explain the speed differential of the different types of rolling stock operating on the existing rail network. Optimisation of service patterns, mix of trains and timetabling, and specific geographic utilisation of the classic network will be subject to ongoing analysis and eventual ministerial decisions.'

32. The Commissioner considered that as the request was for an explanation rather than a request for recorded information, she did not include Q4(i) in the scope of her investigation.

33. In light of HS2L's oral submissions, the Panel took a slightly different approach. The Panel considered (a) whether HS2L had explained the meaning of trains running 'much closer together' and (b) whether it holds information on this issue.

34. Looking at (a) first, having heard submissions from Mr Fallon and HS2L, the Panel noted that HS2L responded to the Commissioner's enquiry about the searches it had carried out for information falling within the scope of Mr Fallon's request. HS2L

had said that “...*the additional capacity is derived from train service planning – balancing variation in speed and stopping patterns against maximum capacity – rather than by quantification of ‘closer togetherness’ ...*”.

35. The Panel does not accept Mr Fallon’s contention that this is a ‘divergent account’ but instead concludes that ‘much closer together’ is essentially a simplification of the train planning theory briefly summarised in paragraph 34 above, and more fully described in paragraph 20 (iv)-(vii) above.

36. The Panel notes the context in which HS2L used the expression ‘much closer together’ – namely on its website and in its 90 second video on ‘*Capacity – helping to reduce overcrowding*’. Taking this into account, the Panel regards it as understandable that HS2L used a plain language expression to convey in a simple way to the public the complexity of the underlying concepts of train planning theory.

37. The Panel notes too HS2L’s submission to the Commissioner that, in line with her guidance on ‘*Determining whether information is held*’ the requests in this case fall within the ‘*reasonable explanation of why information may not being held*’ namely that ‘*the public authority’s staff may have found through experience that there is no practical need to record the sort of information captured by the request.*’

38. Turning to (b), the Panel notes Mr Fallon’s submission that ‘*use of the adjective “much” implies that quantitative information is held*’. However, the Panel found compelling Mr Rule’s description of train planning theory, especially as summarised in paragraph 20(viii)-(x) above. This, in the Panel’s view, explains why the removal of fast trains from existing track releases paths for several slower trains running on a consistent pattern.

39. This is supported by the diagrams appended to the Peters response – though these diagrams are explicitly only indicative (see paragraph 44 below). These demonstrate that removing several fast trains from the existing WCML lines enables an increased number of commuter trains (with varying and patterns of station stops) to use the existing lines.

40. Overall, the Panel is satisfied that – on the balance of probabilities - HS2L does not hold ‘information’ on the exact meaning of trains running ‘much closer together’ nor where on the classic network this would happen. Instead, this phrase was used for public-facing communications to explain in a simplified way how HS2 would increase capacity on the existing rail network, not just on the new HS2 lines themselves.

Does HS2L hold information on the quantification of the HS2-enabled closer-togetherness on the Birmingham New Street – Rugby; and Willesden – Rugby sections of the West Coast Main Line? (Q4(ii)).

41. In the Decision Notice, the Commissioner stated that:

‘...[HS2L] has approached the Infrastructure Management Director, the Model Development Lead and the Sponsorship Directorate, as they would be

responsible for any analyses or production of such quantification, if it was required by HS2 Ltd. They confirmed that they have not undertaken any analyses of the sort the complainant has requested. HS2 Ltd confirmed that the information has not been created, is not held and no searches would uncover any relevant data.

42. The Commissioner went on to state that she was:

'...satisfied that HS2 Ltd has adequately considered Q4(ii) of the complainant's request, how it is phrased and whether it would hold any relevant information. This has included consulting the relevant areas of the organisation. It has confirmed that it does not hold any relevant information and, having considered the circumstances, the Commissioner accepts this is the case. She has decided that, on the balance of probabilities, HS2 Ltd does not hold recorded information within the scope of Q4(ii) of the request and HS2 Ltd's response to this part complied with section 1(1)(a) of the FOIA.'

43. In the Panel's view, the Commissioner was entitled to rely on HS2L's account of the searches and enquiries it had carried out for the reasons set out in her submissions summarised at paragraph 18.

44. The Panel notes that DfT stated in the Peters response:

'No decisions have been made as to the train service that will operated on the West Coast Main Line once HS2 begins operations...No final decisions on the train service will be made until...the recommendations [of the franchisee of the WCML service] have been reviewed and publicly consulted on. In the meantime, the Department is using indicative train service assumptions to model the benefits of the scheme and inform the business case...'

'...The business case for HS2 is informed by the Planet Framework Model (PFM). The model uses economic forecasts and data on existing rail passenger demand to forecast future demand and calculate the economic benefits of the HS2 project...'

45. Mr Rule persuasively explained – as summarised in paragraph 20 – that the claims of additional capacity on existing lines are based not on quantification of 'closer-togetherness'; rather, the claims derive from the application of train planning theory, and the application of DfT specified assumptions about train timetabling to the Planet Model.

46. This explanation, supported by the DfT's statements in paragraph 44 above, satisfies the Panel that, on the balance of probabilities, there has been no 'quantification' of 'closer-togetherness' on the sections of WCML to which Q4(ii) relates.

General observations

47. On the basis of the evidence and submissions before us, and for the reasons given above, we do not accept Mr Fallon's arguments that the Commissioner '*relied overly on the account given by HS2 Ltd in correspondence with ICO*'; nor that HS2L's submissions to the Commissioner '*contradict the position taken...in its communication with the public at large*'; nor that HS2L '*misled the Commissioner on matters of fact*'.

48. As for Mr Fallon's objection that the Commissioner gave HS2L the opportunity to comment on the case prior to publication of the Decision Notice, but no equivalent opportunity was offered to him, in the Panel's view the oral hearing gave Mr Fallon full opportunity to present his evidence, comments and submissions as he chose to do.

49. For completeness, Mr Fallon does not challenge – and nor does the Panel – the Commissioner's conclusion that had the requests been considered under the EIR rather than the FOIA regime, Regulation 12(4) would have entitled HS2L to refuse to disclose information that it does not hold when a request is received. While Regulation 12(4)(a) is subject to the public interest test, there would have been no purpose in applying this test as it is not possible for the public interest to favour disclosure of information that is not held.

Conclusion

50. Overall, Mr Fallon has not satisfied the Panel that in the present case the Commissioner's decision was wrong in law in finding that HS2L did not hold the information requested of it by Q3 and Q4(ii). In light of the Panel's finding that, on the balance of probabilities, HS2L does not hold information requested by Q4(i), we are not satisfied that, had the Commissioner exercised her discretion differently by including Q4(i) within the scope of her investigation, there would have been any practical difference in outcome of her Decision Notice.

51. For the above reasons, we uphold the Commissioner's Decision Notice and dismiss the appeal.

(Signed)

ALEXANDRA MARKS CBE

DATE: 8 November 2021

Promulgation Date: 18 November 2021

Appendix 1

Original request for information sent via email by Mr Fallon on 9 October 2019 to HS2L (HS2Enquiries@hs2.org.uk)

Dear HS2 Ltd

I would like to make the following queries regarding the High Speed Two rail scheme.

- (1) In a press article dated 8 Sep 2013, (<https://www.independent.co.uk/news/people/profiles/douglas-oakervee-i-think-the-name-hs2-is-unfortunate-8803430.html>) the then-chairman of HS2 Ltd, Douglas Oakervee, was quoted as saying:

"It would be catastrophic for the UK actually [if HS2 were cancelled]. What it is going to mean is that the services on the West Coast Mainline initially and East Coast Mainline will rapidly deteriorate. We estimate on the mainline up to Birmingham that for every 10 people seated there will be 10 standing, and you get the same pattern having developed to Manchester by the mid-2020s or 2030."

(Q1.) Could you provide the supporting information and analysis held by HS2 Ltd, regarding the statement that 'on the mainline up to Birmingham that for every 10 people seated there will be 10 standing and you get the same pattern having developed to Manchester by the mid-2020s or 2030.'

- (2) According to Railnews (30th October 2013) <https://www.railnews.co.uk/news/2013/10/30-threat-to-hs2-is-a.html>

"Douglas Oakervee, the outgoing chairman of HS2 Ltd, said the budget for phase one of the line from London to Lichfield, including a spur line to Birmingham city centre, was set at £17.6 billion, and he was 'not interested' in any of the £14.4 billion contingency that the Treasury had insisted should be added."

(Q2.) What information is held by HS2 Ltd regarding correspondence with the Department for Transport and HM Treasury on the level of contingency of the HS2 project, and 'pushback' from HS2 Ltd on Treasury imposed contingency.

- (3) In the 'HS2 Chairman's Stocktake' (dated August 2019, and published 3 September 2019) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/828771/hs2-chairmans-stocktake.pdf) it is stated that:

'Each intercity train removed releases capacity for 11 new fast commuter or freight trains, by reducing the disparity in speed between different services. The most efficient use of capacity is where all trains operate at the same speed—as is the case on HS1 and traffic on a managed motorway.'

The words 'Each intercity train removed' would presumably refer to the existing West Coast Main Line railway.

(Q3.) Could you provide the information held by HS2 Ltd, on how and where removing one intercity train would release capacity for eleven new fast commuter or freight trains on existing track.

(4) According to the HS2 Ltd description of the video 'Upgrading Britain's railways' at <https://www.youtube.com/watch?v=xwOxwG-od6E>

“Britain’s new high speed railway, High Speed 2, is a game changer for our rail network and will improve your journey, even if you don’t use our trains. Building HS2 frees up a massive amount of space on the existing railway by placing high speed services on their own pair of tracks. Once HS2 is operating, services can run much closer together, there will be space for future growth in passenger numbers and more freight can travel by rail.”

(Q4.) As the PFM v7.1 models fewer (rather than more) passenger trains on West Coast South, could you provide the information held on the exact meaning of trains running 'much closer together', and where on the classic network this would happen. What is the quantification of 'much closer together' on the sections of line (a) Birmingham New Street - Rugby, and (b) Willesden -Rugby, with more freight services operating.

Yours sincerely

P Fallon

Appendix 2

Extract from response by Mr Fallon to HS2L's request on 5 November 2019 for clarification of his original request for information sent via email on 6 November 2019 by Mr Hastings to HS2L (HS2Enquiries@hs2.org.uk)

...

In 'The Independent' news article written by Mark Leftly (8 September 2013) <https://www.independent.co.uk/news/people/profiles/douglas-oakervee-i-think-the-name-hs2-is-unfortunate-8803430.html>

HS2 Ltd then-chairman Douglas Oakervee is quoted as saying [if HS2 were cancelled] "We estimate on the mainline up to Birmingham that for every 10 people seated there will be 10 standing, and you get the same pattern having developed to Manchester by the mid-2020s or 2030."

Presumably, "We" in this case, is a reference to "HS2 Ltd".

Query Q1 could be satisfied by a release of the corroborating analysis behind the estimates mentioned in the above quote from Mr Oakervee.

....

Query Q2 may be taken as a request for:

- (i) correspondence in 2013 between HS2 Ltd and the government departments Department for Transport and HM Treasury regarding the level of contingencies attached to the HS2 project
- (ii) material held by HS2 Ltd at that time (i.e. the year 2013) regarding HS2 contingency levels, used to inform correspondence with government departments on that topic.

...

Query Q4 can be taken as:

- (i) a request for an exposition of the term "much closer together" and
- (ii) a quantification of the HS2-enabled closer-togetherness on the (a) Birmingham New Street - Rugby, and (b) Willesden - Rugby sections of the West Coast Main Line.