

NCN: [2023] UKFTT 00115 (GRC)



Appeal Number: EA/2021/0356

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

Between:

High Speed 2 (HS2) Limited

Appellant:

and

The Information Commissioner

First Respondent:

and

Mark Keir

Second Respondent:

Date and type of Hearing: 14 November 2022 on the Papers.

Decision given on: 13th February 2023

Panel: Brian Kennedy KC, Marion Saunders and Stephen Shaw.

Representation:

For the Appellant: Carl Bird, on behalf of HS2 Ltd.

For the First Respondent: Helen Wrighton, Solicitor.

For the Second Respondent: Mark Keir, as a litigant in person.

Result: The Tribunal allow the appeal in part and provide a Substitute Decision

OPEN DECISION

REASONS

Introduction:

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 2 November 2021 (reference IC-95788-T2N0), which is a matter of public record.

Factual Background to this Appeal:

- [2] Full details of the background to this appeal, the Second Respondent’s request for information and the Commissioner’s decision are set out in the DN. The appeal concerns the Second Respondent who requested information from High-Speed Two Ltd (HS2), the Appellant about the number and location of saplings it intended to plant in the winter of 2020/21. HS2 responded by providing the numbers and location by county but refused to provide more specific sites. The information it did not provide was withheld under regulation 12(5)(a) – (public safety). Later, HS2 also cited regulations 12(5)(b) - (adversely affect the course of justice) and 12(5)(g) – (protection of the environment). The DN held that none of the exceptions cited and relied upon were engaged. The Commissioner required HS2 to take the following steps to ensure compliance with the legislation: “ - *disclose the information that was withheld and was provided to the Commissioner under the heading ‘Data’*. The Commissioner required the public authority to take these steps within 35 calendar days of the date of the DN.
- [3] The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to dismiss same.

History and Chronology:

- [4] On 8 January 2021 the Second Respondent made the following request for information under the Environmental Information Regulations 2004 (the EIR”) –

I believe from press reports that you are aiming to plant 300000 tree saplings this winter (2020/2021). Please could you tell me all the sites where you intend planting and how many saplings at each of the sites. Thank you.

In addition, I note with some alacrity that your introduction in the Whatdotheyknow website states “High Speed Two (HS2) Ltd is the company set up by the UK Government to consider the case for new high speed rail services between London and Scotland.” Is it a bit late to “consider the case” given the destruction already wreaked”

- [5]** HS2 responded on 5 February 2021 and provided the requested information by County. HS2 withheld the specific sites where saplings have been planted and where it planned to plant saplings in the future under regulation 12(5)(a) EIR (public safety). HS2 also explained that the Second Respondent would need to ask “Whatdotheyknow” questions about its website.
- [6]** On 6 February 2021 the Second Respondent asked for an internal review, questioning why he could not be provided with the withheld information.
- [7]** HS2 provided an internal review on 25 February 2021 in which it maintained its original position but provided more detail about why this decision had been reached and also provided links to information already in the public domain. The internal review held by the public authority decided that the public interest in withholding the information outweighed the public interest in releasing it.
- [8]** The Second Respondent contacted the Commissioner on 21 March 2021 to complain about the way his request for information had been handled.
- [9]** HS2 added two further exceptions regarding the requested information when it responded to the Commissioner – regulation 12(5)(b) EIR – (adversely affecting the course of justice) and regulation 12(5)(g) EIR – (protection of the environment). HS2 also informed the complainant of the additional exceptions.
- [10]** The Commissioner considered the scope of the case to be HS2’s, citing of regulations 12(5)(a), 12(5)(b) and 12(5)(g) and whether these exceptions have been correctly cited. If they have, the Commissioner intended to look at whether it is in the public interest to release or withhold this information.

Legal Framework:

Regulation 2(1) of the EIR defines environmental information as any information in any material form on:

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

Regulation 12(5)(a) – international relations, defence, national security or public safety 14.

Regulation 12(5) states: ‘For the purposes of paragraph (1)(a) a public authority may refuse to disclose information to the extent that its disclosure would adversely affect – (a) international relations, defence, national security or public safety’.

Commissioner’s Decision Notice:

- [11]** The Commissioner investigated the matter and held that HS2 are unable to determine whether these proposed sites are classed as ‘sensitive’ in a biodiversity

context. The examples that the Commissioner cited in their guidance are those that relate to the protection of a rare species of plant or an endangered bird. The Commissioner explained that clearly, when it comes to a rare or endangered plant or creature, disclosing the exact location could result in the stealing of or interference with a protected species. The Commissioner did not accept that the planting of thousands of saplings is a direct comparison or, more importantly, that any adverse effect would be more likely than not. The Commissioner did not base her decision on the issues surrounding the HS2 project and mitigation to the environment, or whether the level of locational detail is necessary. The Commissioner based her decision on whether HS2 has provided enough relevant evidence regarding this particular information and the extent of the adverse effect that might ensue from its release. Though the potential exists for an adverse effect, HS2 has not satisfied the Commissioner that it would be more likely than not with regard to the withheld information. For that reason, the Commissioner did not go on to consider the public interest.

Grounds of Appeal:

[12] The Appellant's Grounds of Appeal are as follows:

- (I) Ground One: Previous decisions had recognised that people working for HS2 Ltd are the target of violent action*
- (II) Ground Two: The HS2 provided further evidence of violent behaviour against HS2 Ltd*
- (III) Ground Three: Publication of the information would endanger [REDACTED].*
- (IV) Ground Four: The principle of an adverse effect on the course of justice, contained within the exception 12(5)(b), is wide enough to cover any adverse effect on law enforcement (including information that would facilitate offences).*
- (V) Ground Five: The exception 12(5)(g) supports withholding information that would prejudice carbon mitigation measures such as planting hundreds of saplings, whether those saplings are endangered.*

The Commissioner's Response:

- [13] The Commissioner stated that the requested information is already in the public domain. Further, the withheld information does not give the location details of the sites. In addition, the Commissioner argued that HS2 Ltd has not provided all of the relevant information with respect to this request. The Commissioner responded to the HS2's grounds of appeal as follows:
- [14] The Commissioner stated that neither she nor the Tribunal are bound by earlier decisions of the First-tier Tribunal. Instead, each case needs to be considered on its own merits and circumstances as confirmed in an earlier judgment of the First-tier Tribunal in the case of Natural England v Information Commissioner & Tom Langton (EA/2017/0160, 24 January 2018). Further, the Commissioner is not bound by a previous indication of their position in relation to a different request to HS2 which did not reach the stage of a formal decision notice. The Commissioner stated that the issue is whether the disclosure of the requested information would specifically lead to the prejudice claimed and it is the Commissioner's position that regulation 12(5)(a) is not engaged in this instance.
- [15] In response to regulation 12(5)(b), the Commissioner argued that this exception is not aimed at the prevention of crime but rather prejudicing law enforcement in the sense of allowing the processes of legal investigations; proceedings and enforcement to proceed unimpeded. The Commissioner maintained that regulation 12(5)(b) is not engaged. The Commissioner also maintained that regulation 12(5)(g) is not engaged. Further, the '*open statement*' from the Interim Chief Security and Resilience Officer is not a formal witness and does not deal with the points raised in the Response.

Appellant's Reply to the Commissioner's Response

- [16] The Appellant stated the withheld information could be used by a motivated individual in combination with the tools and information already made available by the Appellant to target planting sites more accurately to harm those working there, damage or interfere with the planting of saplings, or otherwise negatively affect works on HS2. The withheld schedule information shows specific sites, the size of the planting plans (i.e. the number of trees scheduled) and the timing of that planting.

- [17] The Appellant continued to argue that previous Tribunals have found that the issue in question when considering prejudice is the effect of the release of that specific information, regardless of whether some information is available, or at least not hidden. When considering releasing the locations of Automatic Number Plate Recognition (ANPR) cameras, the Tribunal noted that, although the information is not hidden (and a well-informed member of the public could identify them), if the locations were released in the form requested, it would allow criminals to use the information and lead to the prejudice referred to in that case (EA/2010/0174). While that case was considered under the FOIA, the consideration of the prejudice, in that case, is applicable here.
- [18] The Appellant contended that in EA/2021/0098 the Tribunal felt that harm would occur through the release of the requested information (locations of properties owned by HS2 Ltd), *“even if disclosures have been made in the past of similar information”* (Paragraph 29). That case considered the application of 12(5)(a) of the EIR in much the same circumstances as it is being considered here.
- [19] The release of this information would lead to the prejudice outlined by the Appellant, and the Commissioner has erred, the Appellant argues, both in suggesting that the requested information is already in the public domain and that its release would not cause prejudice to public safety, compromise the national interest in enforcing the rule of law and adversely affect the environment. (*In response to the contention that the withheld information does not give the location details of the sites*).
- [20] The Commissioner, commenting on the withheld information, states that the data does not provide information in a format that would allow specific sites to be identified. The Commissioner is incorrect, the Appellant argues, in assuming that the data could not be used to locate specific sites. Excepting two references, the information does allow for the easy identification of specific sites. Refer to Appendix B (closed). The same data further contains scheduling information that in the Appellant’s submission, it would be harmful to disclose. (*In response to the argument that HS2 has not provided all of the relevant information with respect to this request.*)
- [21] The information provided to the First Respondent during their investigation is the information that was held at the time of the request. The withheld data represents a

point in time during the season based on information received from HS2 Ltd's contractors. *(In response to the Commissioner's argument at ground A of the Appeal.)*

- [22] The Commissioner is incorrect, the Appellant argues, to assume that the disclosure of this specific information would not lead to the prejudice occurring. The Commissioner's conclusion is based on a failure to fully understand the request, the withheld information and the information that is in the public domain. *(In response to the Commissioner's argument at ground B of the Appeal.)*
- [23] This assumption by the Commissioner the Appellant argues is incorrect. Contractors are expected to follow The National Plant Specification - Handling and Establishment *(Published by The Committee for Plant Supply and Establishment, Revised edition, November 1995¹)* which provides industry standards guidance on the processes of plant handling and establishment for large-scale planting projects. Saplings cannot simply be planted and left to grow without further work. HS2 Ltd's contractors maintain the planting locations regularly, undertake tree surveys to assess the quality of the planting and tree protection, and undertake monitoring to establish failures from the previous planting to inform re-planting deliveries and programmes. *(In response to the Commissioner's argument at grounds C and D of the Appeal.)*
- [24] The locations intended for planting during 2020/21 are not in the public domain. Release of the requested data would allow the planting sites, and activity at those sites, to be identified. This ground, the Appellant argues, is therefore based on a lack of understanding of the data.
- [25] The release of the planting schedule, not just the exact planting locations, would give rise to an adverse effect, as it would allow or encourage those with malicious intent to target relevant HS2 sites and those working at them with more accuracy. Consequently, revealing where planting is planned, or conversely where planting is on hold (and therefore is planned for the future), would lead, the Appellant argues to harm in this case. *(In Response to the Commissioner's argument at ground E of the Appeal.)*
- [26] The case here, the Appellant argues, differs fundamentally from EA/2017/0160 in a number of important aspects that are relevant to this assessment of risk. The probability of active harm against individuals (or groups of individuals) is much more likely in this case, as evidenced by the closed submissions. The number of

incidents in EA/2017/0160 was small and the nature of the protest groups was changing, making the prejudice less likely to occur. *(In response to the Commissioner's argument at ground F of the Appeal.)*

- [27]** HS2 Ltd agrees with the Commissioner when she states that she is not bound by previous indications of a position, particularly where the appeal did not reach the stage of a formal Decision Notice. However, as with previous First-Tier Tribunal decisions it is the Appellant's view that, while not binding, they offer an insight on the Commissioners' previous approach to the adverse effect in this situation.
- [28]** There is no basis, the Appellants argue, to the Commissioners' suggestion that the distance between saplings could be accurately determined by simple observation at distance with the use of binoculars from public land. Firstly, there are obvious limitations to any individual's ability to accurately judge the small distances in question here without mechanical aid. Secondly, the assumption that measurements could be taken without the need to trespass, appears to be based on the idea that all the planting sites in question fall within proximity to public land and therefore could be assessed without entering land owned by HS2 Ltd. This is not the case. Thirdly, as demonstrated in Appendix F, the number of saplings being planted make it impossible for any more than the first few rows to be seen clearly, regardless of the limitations of being able to accurately measure the distances in question.
- [29]** We refer (Paragraphs 30 – 33 inclusive herein) to additional supporting evidence, which relates to events post request and in any event is not covered by the request, of the destruction of newly planted trees, interference with bat mitigation and protestor behaviour and incidents at non-construction sites was provided with the further submission to demonstrate that the Commissioners' assumptions regarding protestor behaviour and the likelihood of incidents occurring at such sites had not been demonstrated.
- [30]** With specific reference to damage to saplings, the offenders have not been identified, and so it is not possible to be certain that these incidents were caused by protestors. However, as evidenced by previous submissions, including Annex A, Annex B and Appendix D (closed) of this submission, such behaviour is consistent with their approach to the project. Protestors have interfered with and caused damage to mitigations measures, Ancient Woodland and archaeological sites which is

inconsistent with the Commissioner's position that these protestors are unlikely to cause damage to mitigation measures because they profess to care about the environment.

- [31]** Annex B is an extract from the database is used to record incidents. The data represents all incidents recorded where the HS2 activity is ecological mitigation, and the table supplies the data by incident type and date (year). The other pages provided within Annex B are brief descriptions of each incident to give an overview of what is in the table. These were supplied to give an indication of the data and were not intended to give the detail of each incident.
- [32]** Annex A supplies detail of selected incidents. They have been drawn from a different source than Annex B and so may be duplicates. However, Annex B provides statistical data on incidents (with very brief descriptions) and Annex A provides summary level detail of selected incidents including dates, locations, descriptions and in some cases, photographic evidence. Photographs of the effects of a protestor camp within ancient woodlands and a very public protest at HS2 Ltd offices were included at the end of Annex A purely to provide a graphic indication of the effects of protestor behaviour at non-construction sites.
- [33]** A letter was provided as the informed opinion of someone who deals with the violent and disruptive behaviour of those opposed to HS2, on a daily basis. A very similar letter was provided with HS2 Ltd.'s submission to the Tribunal in EA/2021/0098 with no such comments by the First Respondent. The letter was provided to represent the point of view of someone with a wealth of experience of dealing with the kind of behaviour they are seeking to prevent in this case.
- [34]** Release of the data, in this case, will lead to violence and intimidation against HS2 staff, as well as damage to the environment through the intentional disruption of mitigation measures. These need to be weighed as a whole, against the public interest in openness and transparency and the very specific issue of allowing for the measurement of the distance between planted saplings. The benefit provided by these factors is significantly moderated by the fact that HS2 Ltd is already open regarding its plans and is monitored by Parliament and the independent Ecological Review Group on its progress against the mitigation plans. HS2 employs experienced and qualified specialists in its mitigation works and there is little public interest in

allowing these works to be disrupted by the release of the specific information in question in this case.

[35] The Second Respondent addressed the appeal as follows:

Response 1 to the Appeal

[36] The Second Respondent stated that HS2 wish to withhold information that on the surface might seem insignificant. However, the Second Respondent suggested the very act of withholding that information points to a far-reaching significance. The Second Respondent argued that HS2 has been dishonest in their approach to disallow his request for this information is allowing HS2 to proceed dishonestly and inappropriately *“marking their own homework”*. The Second Respondent contended that have lied to the public about the number of saplings planted in Bowood Lane, the outcome of that planting and the maintenance of that planting, and as a campaigner running up and down the whole route, the Second Respondent stated that he has seen little evidence of hundreds of thousands of saplings planted, certainly not the 700,000 claimed by HS2. The Second Respondent believes, HS2 must be held to account, such that all involved authorities, including Parliament, might be alerted to the sustained systemic dishonesty that a project such as this engenders. Further, those authorities also realise the part they play in such a fiasco. The Second Respondent is of the view that the public, has every right to access the requested information, to use that information as evidence, and to help bring to light a vast seam of dishonesty regarding all development and its *“mitigation”*. In addition, the Second Respondent averred that the public must have a right to encourage a sustainable future for us and our children. The Second Respondent argued that public pay for HS2 and similar projects. Further, they pay for the mistakes, the neglect, the intransigent ignorance and the crimes too. It’s time they were allowed to realise how badly misled they are.

Response 2 to the Appeal

[37] The Second Respondent stated If HS2 are genuine about their fears of what this information release will entail, then they are fearing further antagonism from: *“-- a growing band of ruffians --”* ready to attack every sapling and every tree planter. The Second Respondent referred to the security level exhibit for the purposes of

arguing the same. The Second Respondent stated if they are not genuine about these fears, then there can only be one reason. The Second Respondent argued that HS2 are petrified of being exposed. The Second Respondent contended between Euston and Aylesbury HS2 have planted approximately 13,000 saplings, perhaps outside 16,000. The Second Respondent stated that this is a fifth of the entire Phase 1. The Second Respondent averred that assuming planting rates are similar for the rest of the route there would be a total of between 65,000 and 80,000 plants. The Second Respondent detailed that HS2 claim to have planted over 700,000. The Second Respondent claimed that if he is about to uncover another blatant dishonesty, then it must be brought out, as a matter of public safety. The Second Respondent argued that he already knows of those discrepancies at Bowood Lane. The Second Respondent detailed that he would find out about the rest.

Appellant's Closing Submissions:

- [38] The Appellant responded as follows: the Appellant's Notice of Appeal and subsequent submissions to the Commissioner and to this Tribunal explained why EIR Regulation 12(5)(a), Regulation 12(5)(b) and Regulation 12(5)(g) are applicable in this case. The Appellant stated that they provided evidence to support those arguments. The Appellant's further submissions are detailed below:

Regulation 12(5)(a) – Public Safety

- [39] HS2 Ltd would like to stress again that its decision to withhold the information is based on an assessment of the adverse effect that the release of the information into the public domain (i.e., to the world at large) would have. The identity of the Second Respondent is not a relevant consideration when making this assessment.
- [40] The Second Respondent's Further Submission (Submission 2) provides details of violence at HS2 sites and claims that the violence is always instigated by HS2 security staff. While unable to comment on specific incidents, HS2 Ltd would always encourage anyone to report to the proper authorities any violence that they believe has been instigated by HS2 Security staff or the Court-appointed National Eviction Team. Nevertheless, regardless of what prompted any disorder, the Further Submission does not provide any evidence that the release of information

on HS2 sites will not lead to the adverse effect as described in the exception. It does quite the opposite.

- [41] HS2 Ltd has provided evidence that anti-HS2 protestors have damaged ecological sites in the past to counter the First Respondent's assumption that these sites will be treated differently by the protestors. There has been no evidence provided during this appeal process to alter the Appellant's belief that these sites will be targeted by those protestors who seek to protest using illegal means. As detailed in previous submissions, the Appellant is currently applying for a Route Wide Injunction due to the impact of illegal protestor action against the HS2 project.
- [42] While this Tribunal may agree that the Commissioner is not bound by previous decisions, there has been no cogent evidence to show why this particular request has been treated differently to other decisions made by the First Respondent. A Decision Notice issued subsequent to IC-95788-T2N0 is included at Appendix A. It shows that the Commissioner is sensitive to the risk to individuals and companies linked to HS2 who are not directly involved in construction activities. It is unclear why the Commissioner believes that power stations using woodchip from HS2 will be targeted by protestors, but those companies planting saplings will not. Confidential Appendix B provides further evidence of the level of intimidation suffered.

HS2 Ltd.'s Ecological Measures

- [43] The Second Respondent's Further Submission provides a large amount of information which the Second Respondent believes points to deficiencies in HS2 Ltd.'s ecological measures and specifically the planting of saplings. This belief appears to be based on a view formed without the full knowledge and understanding of the complexities of how HS2 manage the planting and maintenance of saplings. The assertions made below seek to provide some explanation of the subject matter that may assist the Tribunal's understanding of the ecological mitigation measures that HS2 is undertaking and the information that has been requested.
- [44] For Phase One, HS2 has committed, through an Act of Parliament, to plant and then maintain up to seven million trees and shrubs between London and Birmingham.

- [45] All tree-planting sites are planted and maintained by HS2 Contractors. Contractors used for planting and tree care are required to have appropriate qualifications and experience. All sites are subject to assessment and monitoring and any plant failures are replaced to ensure that the commitment to plant and maintain seven million trees is met.
- [46] Following prior site surveys, any replacement planting is then undertaken when saplings are dormant. Replacement planting is therefore an activity undertaken within the tree planting season (between November to March). Consequently, the activity of site monitoring and re-planting of trees is a regular occurrence and requires contractor staff to undertake activities within certain months of the year.
- [47] The basis of HS2's approach to tree planting and woodland creation is: The National Plant Specification - Handling and Establishment (*Published by The Committee for Plant Supply and Establishment, Revised edition, November 1995*). This publication provides industry-standard guidance on the processes of plant handling and establishment for large-scale planting projects.
- [48] Failures of saplings should be expected in the early years following planting, especially on large planting schemes. Aligning to industry guidance, HS2 Ltd expects failure rates of new trees and shrubs across its construction sites to be within the industry best practice guidance range of 5-15 percent. Variations are to be expected due to variable site conditions (within and between sites) as well as other factors such as weather conditions, rainfall etc. For example, HS2 experienced a high loss of sapling failures (22%) as a result of the summer of 2018. This was the hottest and driest summer on record in England resulting in the need for HS2 to replant over 89,000 saplings as a result of the exceptionally dry conditions. It should be noted that this loss was fully consistent with the planting carried out by other, non-HS2 schemes; for example, the Forestry Commission increased its own Woodland Grant funds to schemes and landowners to cover the expense of these additional losses.
- [49] Due to the high number of trees and planting sites that HS2 maintains it would not be possible to undertake watering during prolonged periods of low rainfall. In the case of the loss of trees during 2018, each sapling costs an average of £1.50, meaning a cost of around £130,000 to replace all of the trees lost in 2018. HS2

estimates concluded it would have cost around £2 million of public money to water trees during the drought period and replacing those plants lost was considered a far more cost-effective solution, as well as being a far more ethical use of public water resources during unprecedented conditions at the height of summer.

[50] Due to the typical industry-wide failures of a proportion of newly planted trees during the first several years, the Forestry Commission advise that the success of tree-planted areas should be assessed after five years from the initial planting when the plantation should by then be as near to 100 per cent of the original planting.

[51] HS2 is accountable for the success of its tree-planted areas and reports its performance to an independent review group. The HS2 Ecological Review Group (ERG) was set up following the Environmental Audit Committee's review of HS2 in 2014 and the Committee set the requirements that this group be established with the primary function to scrutinise monitoring data arising from ecological mitigation and compensation measures put in place by HS2. This requirement forms part of the Phase One Act and is described in the Phase One EMRs.

Second Respondents' Closing Submissions:

[52] The Second Respondent give an overview of planting works next to Jones' Hill, looking at the translocation site for ancient woodland, and the neighbouring compensation planting site. In both cases, HS2 offered a dismal prospect of poor conception, poor planning, poor workmanship, poor oversight and poor regulation. The line of 37 pot-grown semi-mature specimens ranged in a line along the northern flank of both sites shows little hope for survival beyond a few years of the majority of specimens. Each and every one of these trees was pot grown in a nursery, and presumably therefore in rude health and full of vigour. Not one of the specimens now be considered to be in good health. Sparse foliage, small, wrinkling and limp foliage all demonstrate plants destined for a short life. As seen by those snapped off by HS2 personnel it is clear some already have. This snapping appears to be the only intervention by HS2 personnel since the planting exercise last year.

[53] The Second Respondent referred to the photograph of the tree block which he stated clearly shows slots for inserting the rubber ties through, which would hold

the stem of the tree fast, without chafing, and without damage to bark or growth. In every other photo, this simple precaution has been utterly ignored.

- [54] The Second Respondent argued that Picture 1 shows the quality of hedgerow planting at the site. These were one or two-year-old whips, presumably supplied in rude health by the nursery. This is HS2's attitude to ecology in one picture, according to the Second Respondent. Further, the Second Respondent stated Picture 2 shows the ancient hedgerow translocated from the southern edge of the Wood. In addition, Picture 3 shows the graveyard that is the "translocated" ancient woodland. Picture 6 shows a very clear long narrow patch of foxglove that arrived with "translocated" soil from the Wood, and demonstrates quite clearly that the soil was not distributed evenly. Picture 5 shows 9000 saplings supplied in rude health by the nursery and stuck in the ground somewhere out there by HS2.
- [55] The Second Respondent contended HS2 are not operating with due diligence or care and neither are Natural England. Current estimates of the cost of HS2 banded around in Parliament run to £150bn, and even as high as £240bn. The Second Respondent exclaimed that this money is from the public purse. Further, the money is being squandered on the ill-conceived, ill-prepared, ill-conducted, project with no effective regulation other than people like the Second Respondent.
- [56] The Second Respondent argued that HS2 cannot be trusted to operate honestly and in the public interest. They certainly cannot be trusted to Mark their own homework. Natural England appears not to be interested in operating honestly in the public interest. The public deserves to know where and how their money is being spent and squandered. The public must be given the information the Second Respondent has requested, he contended.

Commissioner's Closing Submissions:

- [57] The Commissioner understands HS2 to refer to the planting of saplings in years prior to 2020/21. However, this point when combined with the other underlined comment made in the Appellants' refusal notice prompted the Commissioner to reconsider what amounts to an objective interpretation of the scope of the request.
- [58] To this end, it is noted that the Second Respondent only commented as follows in relation to paragraph nine of the Reply (see A574OB):

"...Absolutely. For very good reason. I don't believe you. For very good reason..."

- [59] The Commissioner notes that the email of 8 January 2021 refers to the stated aim of planting 300,000 trees over the 2020/21 winter season which would presumably include those already planted before the date of the request as well as those planned for after the request. However, that stated aim only appears to be the preamble to the actual request itself which appears to refer to future action i.e. "*...could you tell me all the sites where you intend planting ...(underlining added)*".
- [60] Accordingly, the Commissioner proceeds on the basis that an objective interpretation of the request is that it only seeks details of where the Appellant intended to plant any saplings, and how many, for the remainder of the winter season i.e. from the date of request on 8 January 2021 until an unspecified date being the end of the winter planting season.
- [61] Should the Tribunal take a different view on the scope of the request; the Commissioners' position refers to his earlier Response (see A45OB) save they would add the following comments.
- [62] In relation to regulation 12(5)(a), the Appellant's case is that it is "*...the release of the schedule of planting, not just the exact planting locations, that would give rise to the adverse effect, as it would allow or encourage those with malicious intent to target relevant HS2 sites and those working at them with more accuracy. ...(underlining added)*" (see paragraph 41 of its Reply). As such, this undermines its argument that ad hoc attendance at the specific sites by HS2 contractors in the months and years following planting would pose the same risk.

The withheld information

- [63] Based on the above, the withheld information falling within the scope of the request would now appear to be between January and the unspecified end of the winter programme.
- [64] However, the Appellant also confirmed in its Reply that the requested information was and could only be a snapshot of the position as it existed at the time of the request in January 2021.

[65] Accordingly, the withheld information may have already been outdated by the time of the Appellant's refusal notice in February 2021 in any event.

[66] However, even assuming that some, or all, the information remained correct, the Commissioner disputes that the withheld information sets out a "- *detailed programme of works...*" and a "...*schedule...*" of the planting.

Information already in the public domain

[67] In relation to the information the Commissioner identified as already in the public domain, the Appellants' position in its Reply (see paragraphs 12; 14; 16 - 20) was that whilst that information may be of: " ...some *relevance to the request* or provide"...some *location data...*"; it does not confirm:

(I) specific site locations; and

(II) that trees will be planted at those specific locations in the winter 2020/21 planting season: and

(III) the number of trees to be planted at those sites.

[68] Dealing with the last point first, the Commissioner accepts that the specific number of trees to be planted at any one site has not been made publicly available but would make the point that, in the absence of more, it is unclear why this detail, in itself should be withheld if (i) and (ii) are publicly available.

[69] So, turning to points (i) and (ii); the Commissioner notes that the Appellant has made publicly available details of when and where tree planting activity for the areas in dispute will take place.

Timing

[70] The Appellant accepts that some of the incidents on which it relies post-date the request and goes on to explain further in its Reply.

[71] The Second Respondent agrees with the Appellant on this point - see paragraph 104 of his submissions dated 19 April 2022 on page **A581OB**.

[72] The Commissioner agrees with the Appellant that a public authority can raise a new exemption/exception in course of its' investigation and can also do so before the Tribunal, subject to its case management powers.

[73] However, the issue here is the time at which to consider the circumstances both

in terms of whether an existing or late claimed exception is engaged and, if so engaged, where the balance of the public interest test lies.

- [74] On 5 May 2022, the Upper Tribunal issued its judgment in the case of Montague v Information Commissioner and the Department of International Trade [2022] UKUT 104 (AAC). This binding judgment looked at the issue of what a public authority is obliged to do in responding to a request under the Act and it considered that it was obliged to deal with a request within the statutory time for compliance which includes making a decision on where the balance of the public interest test lies and which, the Commissioner considers, must also include deciding whether an exemption is engaged.
- [75] The Commissioner then considers that it is prudent to adopt the same approach under the Regulations.
- [76] It is only in rare cases where events which post-date the relevant time as indicated above can be taken into account, for example, where a new law has been introduced between the time for compliance with the request and, for example, a decision notice which would mean that disclosure was permitted at the earlier time but would be illegal by the time of the decision notice. In this case, the Commissioner (and Tribunal) would have discretion as to what steps to order.
- [77] Accordingly, the Commissioner is of the view that the correct time at which to consider the circumstances as to whether an exception is engaged and were.

Tribunals Conclusions:

- [78] The Tribunal accept the revised interpretation of the scope of the request as submitted by the Commissioner in their Open and Closed Further Submissions at ***para 21-37 ICO*** and accordingly, we must dismiss the appeal in respect of those sites which fall within the auspices or scope of the request and allow the limited information to be made available for disclosure.
- [79] The Tribunal accept and agree with the Commissioners' analysis of the information which was publicly available at the time regarding planting schedules and locations. The Tribunal also accept and adopt the Commissioners' concession that the number of trees to be planted at those sites falling within the request, as now interpreted, was not available. However, like the Commissioner we cannot see any

reason for this information to be withheld on the facts of this case pertaining to these two sites.

[80] The Second Respondent provides significant information focusing on what he describes as poor environmental management of tree planting by HS2 and he argues that it is in the public interest that he and others should be able to monitor the planting and tending of the saplings to ensure value for money. We acknowledge the presence of Public Interest but do not take it into account as we find the exemption is not engaged in all the circumstances.

[81] The Second Respondent did submit a final submission also dated 1 July 2022 in which amongst other things he says (using his internal paragraph numbering):

30“The public deserve to know where and how their money is being spent and squandered.

“31. The public must be given the information I have requested.

32.It cannot be countenanced that the public are of lesser importance than a few apparent hustling wheeler dealers in an office in Central Birmingham.

[82] The Appellant provided cogent arguments explaining the ecological measures they take to ensure best practice within the planting schemes.

[83] The Appellant further provide examples in defence of their claimed exemptions, but on the basis that for those plots remaining within the interpretation of the request the majority of the information was already within the public domain, it was not necessary for the Tribunal to consider these on the facts of this case. Our decision is particular to this case and does not necessarily translate to future or similar requests. Each case must be decided on its merits, and we are satisfied that on the evidence before us that the substituted decision we put forth is appropriate in this case.

[84] This Request on 8 Jan 2021, was as follows: *“I believe from press reports that you are aiming to plant 300000 tree saplings this winter (2020/2021). Please could you tell me all the sites where you intend planting and how many saplings at each of the sites. Thank you”.* (Tribunal’s emphasis)

[85] The impugned Decision Notice of 2 Nov 2021: “Required the release of all the withheld information under the heading of ‘Data’. [REDACTED]”

[REDACTED]

In subsequent submissions dated 1 July 2022 the Commissioner sought to narrow the scope of the request [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[87] The Tribunal agrees with the narrowing of the scope and that, as a result, only the reduced number of sites in the [REDACTED] [REDACTED] are within scope of the request.

[88] The Commissioner goes on to illustrate that the location of these sites and the timing of planting had been put into the public domain by HS2 Ltd as part of its communications to keep residents and stakeholders informed as to its plans and progress on its activities (para 21-37 ICO Closed Further Submissions)

[89] The Tribunal accepts this analysis. It notes that the specific number of saplings to be planted at each of the sites was not in the public domain, but we have not been persuaded by any of the material evidence before us, why this information should be withheld, given that the location and timing had previously been published by HS2 We note this reflects the understanding of the Commissioner as above.

[90] The Tribunal notes that information regarding these sites had been put into the public domain by HS2 despite its wider concerns submitted in this appeal in respect of public safety and security in relation to potential targeting of sites in the Schedule. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[91] The Tribunals' substituted decision therefore requires the Appellant Public Authority to release the Closed information which is within the amended scope as

identified by the Commissioner and as agreed and adopted by this Tribunal relating to those sites (see Paragraphs 87 to 90 above) within 30 days of the expiration of the time allowed to appeal this substituted Decision.

Brian Kennedy KC

23. December 2022.