IN THE FIRST-TIER TRIBUNAL **Case No. EA/2012/0201**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50435213
Dated: 5 September 2012

Appellant: IAN HELSTRIP

First Respondent: THE INFORMATION COMMISSIONER

Second Respondent: HIGH SPEED TWO (HS2) LIMITED

Heard at: Field House

Date of hearing: 21 January 2013

Date of decision: 29 January 2013

Before
CHRIS RYAN
(Judge)
and
MARION SAUNDERS
PAUL TAYLOR

Attendances:

For the Appellant: The Appellant in person assisted by Malcolm Griffiths
For the First Respondent: Hannah Slarks of Counsel
For the Additional Party: Robin Hopkins of counsel

Subject matter: Prejudice to effective conduct of public affairs s.36(2)(c)
Commercial interests/trade secrets s.43

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Case No. EA/2012/0201

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed and the Decision Notice dated 5 September 2012 is substituted by the following notice:

Decision Notice

Public Authority **High Speed Two Limited**
Address **2nd Floor, Eland House,**
Bressenden Place
London SW1 5DU

Complainant **Mr Ian Helstrip**

For the reasons set out in the Tribunal's decision of 29 January 2013 the Public Authority is directed to disclose to the Complainant the information requested under paragraph 2) of his information request dated 20 January 2012 within 35 days.

REASONS FOR DECISION

Summary

1. This decision concerns the Exceptional Hardship Scheme ("EHS") operated by High Speed Two Limited ("HS2"), the company responsible for the government's proposed high speed rail route between London and the West Midlands, the High Speed Two project. We have decided that HS2 was not entitled to withhold information about the distance between the route of the proposed line and the property, which was furthest away from it, but had nevertheless qualified for assistance under EHS. The information was claimed to be exempt from disclosure because it was covered by the Freedom of Information Act 2000 ("FOIA") section 36 (prejudice to the conduct of public affairs) and section 43 (prejudice to commercial interests) and because the public interest in maintaining each of those exemptions outweighed the public interest in disclosure. We have concluded that section 36 was engaged, but that section 43 was not, and that the public interest in

maintaining the section 36 exemption did not outweigh the public interest in disclosure. We have decided that, if we were wrong on the engagement of section 43, the public interest in favour of maintaining that exemption (even if aggregated with the public interest in maintaining the section 36 exemption) would not outweigh the public interest in disclosure. It follows that the decision notice of the Information Commissioner dated 5 September 2012, in which he decided that the information did not need to be disclosed, must be substituted by one that directs disclosure.

Background to EHS

2. It was accepted on all sides that as soon as a major new railway such as High Speed Two is announced, property on or close to the route will become harder to sell and will lose some of its value. HS2 presented credible evidence, which the Appellant did not challenge, that property prices tend to recover, albeit after a considerable length of time, once the project has been completed and its real impact on the environment has become evident. That, according to the evidence presented to us, was the experience after the high speed rail link from London to the Channel Tunnel commenced operations.

3. In the case of High Speed Two it has been proposed that those whose property is not required for the project, but who can show, one year after the line comes into operation, that it lost value as a result of the physical impact of the line's operation (e.g. increased noise, vibration or light pollution) will be able to claim for such loss of value. Those who are able to hold on to their property until that stage is reached may therefore find, either that the value is not reduced, (because the operation of the line does not have as much impact as had been feared), or that they are entitled to compensation. However, those whose circumstances force them to sell during the period when fear and uncertainty causes an artificial drop in value may suffer significant loss. A loss that may be particularly painful if they subsequently see their purchaser secure a windfall profit when prices recover.

4. The EHS was introduced in August 2010 for the express purpose of helping those caught in this situation. It is a discretionary scheme that provides for the Government to purchase the property of any owner who can satisfy certain criteria set out in published guidance. The criteria having relevance to this appeal are that:
    a. The property is either directly on the line of the proposed route or "i*n such close proximity to the proposed route that it would be likely to be substantially adversely affected by the construction or operation of the new line…"* ("the Location Criterion");
    b. All reasonable efforts have been made to sell the property but that no offer has been received which equals or exceeds 85% of the price which expert valuers say would have been achieved before the project was announced ("the Effort to Sell Criterion"); and
    c. The owner has a pressing need to sell the property and would suffer exceptional hardship if he or she had to wait until the project had been

confirmed by Parliament and long term compensation schemes brought into effect (the "Exceptional Hardship Criterion")

5. The EHS is operated by HS2 on behalf of the Department for Transport. The scheme provides for a secretariat to manage the process of receiving applications and assembling material for a panel to consider. The panel consists of one representative of HS2 and two individuals selected from a group of independent professionals. It makes a recommendation to the Secretary of State as to whether or not the property in question should be purchased, but it is the Secretary of State who makes the final decision.

The Appellant's request for information and the Information Commissioner's decision that HS2 had been justified in refusing it.

6. On 20 January 2012 the Appellant sent HS2 a request for information under FOIA. It included a question as to:

   "*…what the greatest distance is from the HS2 line that a property has met the EHS criteria and the owner's application progressed".*

7. FOIA section 1 imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

   "in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

8. HS2 refused the request. It said, first, that the exemption provided by FOIA section 36(2)(c) applied. The relevant part of that provision reads:

   " (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –
   [..]
   (c) would otherwise prejudice , or would be likely otherwise to prejudice, the effective conduct of public affairs."

9. Section 36 is a qualified exemption and HS2 also informed the Appellant that it was of the view that the public interest in maintaining the exemption outweighed the public interest in disclosure.

10. HS2 also refused the request under FOIA section 43(2) which reads:

"(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

This, again, is a qualified exemption and HS2 asserted that the public interest in maintaining it outweighed the public interest in disclosure.

11. Following a remarkably quick internal review, which came to the same conclusion, the Appellant complained to the Information Commissioner about the way in which this part of his information request had been handled.

12. On 5 September 2012 the Information Commissioner, having investigated the complaint, published his decision notice. He decided that FOIA section 36 was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosure. He found that the balance was a fine one but that the public interest in reducing the risk of strain on the resources available to the scheme (particularly at a time of increasing limitations on the public purse) did outweigh the public interest in transparency. Having reached that decision, and determined that HS2 had been entitled to refuse disclosure, he did not go on to consider whether it would have been entitled, also, to refuse under section 43.

The Appeal to this Tribunal

13. The Appellant filed an appeal to this Tribunal on 18 September 2012. He exercised his right to have his appeal determined at a hearing rather than on the papers alone. Directions were given for HS2 to be joined as Second Respondent and for an agreed bundle to be prepared. After HS2 had been joined it asked for further directions as to the filing of witness statements and for a small amount of material to be included in a closed bundle. We agreed to this as its disclosure would have had the effect of pre-judging the appeal.

The issues to be decided on appeal

14. The issues for decision that emerged from the Grounds of Appeal and the Responses filed by the Information Commissioner and HS2 were:
    a. Was section 36 engaged? There was no challenge as to the identity of the Qualified Person who expressed the opinion (it was the Chief Executive of HS2), but the Appellant challenged whether the opinion was reasonable in the conclusion reached. After he had seen the evidence as to the circumstances in which the opinion was given he also focused attention on the apparently informal manner in which the process had been undertaken and argued that this threw further doubt on the reasonableness of the opinion emerging from it.
    b. If section 36 was engaged, did the public interest in maintaining the exemption outweigh the public interest in disclosure?
    c. Was section 43 engaged in respect of the commercial interests relied on, namely those of the property owners affected by the scheme and the Estate Agents operating in the area?

d. If section 43 was engaged then, again, did the public interest in maintaining the exemption outweigh the public interest in disclosure?
e. If the application of the public interest test applicable to each exemption did not lead to a conclusion in support of maintaining either of them, should those factors be aggregated and, if so, would that produce a result in favour of withholding the requested information?

15. Before dealing with each of those questions, we review the evidence we received.

The evidence

16. Sebastian Jew, who is a Community and Stakeholder Adviser in the employment of HS2 and was responsible for the handling of the Appellant's information request. He explained that it was he who took the initial view that, although HS2 held the requested information, the section 36 and 43 exemptions were potentially available. He then explained the circumstances in which the factors under section 36(2)(c) were referred to Alison Munro, HS2's Chief Executive, and the oral advice he gave on the issue. Mr Jew disclosed that his advice was not recorded in writing and nor was Ms Munro's opinion, but he said that it was to the effect that disclosure would adversely affect the integrity of the EHS scheme and that the effective conduct of public affairs would be prejudiced as a result.

17. Helen German, who is the Manager of the EHS scheme. In her witness statement she explained the operation of the scheme, the time taken over each application and the number of applications handled to date. She then added that:
    a. The scheme had been publicised in a number of ways. This included a mailing to the approximately 11,000 property owners with a post code that fell within 1km of the proposed route, though in some cases this meant that leaflets would have been received considerably beyond that distance and, according to the appellant, up to 1.5km away. Also through a series of consultation events.
    b. All relevant estate agents in the areas close to the route had become fully aware of the scheme's operation and were therefore in a position to inform potential applicants.
    c. The Location Criterion was not defined only in terms of distance from the line. It allowed the panel to take account of all the relevant variables, such as whether the property was rural or urban, the topography of the land (e.g. a flat plain or hilly) and the precise nature of the route in that location (such as whether it was on a viaduct or in a cutting).
    d. Disclosure of the requested information would, in her view, lead to those with properties closer to the line misunderstanding its significance and making applications (or, if previously refused, re-applications) in the belief that they satisfied the Location Criterion and would therefore be accepted under the scheme overall. This fear was

supported by complaints received from people who knew of successful applicants whose property was located further away from the line and who complained that the complainants own property should therefore have been accepted into the scheme.

e. The availability of a significant quantity of explanatory material describing how the various criteria are considered by the scheme panellists had not had the effect of reducing the level of misunderstanding among the public.

f. HS2 accepted:

> *"that a number of properties along the route are blighted (i.e. may be accepted under the* [Effort to Sell Criterion]), *but not all of these would be likely to be substantially adversely affected by the construction or operation of the railway to the extent that an application would be successful under the* [Location Criterion]."

However, the panel did have a discretion to recommend that an application should succeed even if not all the criteria were satisfied.

g. An appropriate level of scrutiny of EHS already existed. Information on the number of applications received and properties purchased was provided on the HS2 website and it had also disclosed information in response to other information requests, as well as to Parliamentary questions.

h. Disclosure would lead to a significant increase in the number of applications, many of them unmeritorious (because they would arise out of a misunderstanding of the relevance of a bald distance figure). This would delay the process for other applicants.

i. Property owners, faced with a degree of speculation as to the likely effect of the line's operation, frequently sought assurance from EHS staff that a property more than a specified distance from the route would not be adversely affected, even though it is made clear to them that it is not possible to give a definite answer based solely on distance, without the other features of location and topography being taken into account. Information on distance alone would operate, in the public perception, as a threshold figure, defining the point beyond which detrimental impact from the operation of High Speed Two would not be experienced. This would be the case "*no matter what caveats we tried to explain around that".*

j. Those located beyond the "threshold" distance would be discouraged from applying even though they might have been entitled to help when assessed by reference to all the other factors relevant to the Location Criterion.

k. It would not be possible for HS2 to publish all the information that would be needed to clarify the correct context of the distance number "*because the only information that would fully explain this would be the addresses of each accepted property …"* which would lead to a breach of confidence in respect of the sensitive issue of the current or future hardship to which the individuals in question were exposed. As each case was unique it would not be possible to provide summary

statistics which would adequately reflect all of the considerations that the panel takes into consideration, without also risking a breach of confidence.

l. Some property owners had failed to secure any buyer interest in a property because of the public perception of the impact of the line, even in areas which were a significant distance from the proposed route. Others had said that estate agents had refused to market a property in those areas. Publication of a distance number would imply that anyone living closer would be affected by the line, which would create blight for all those property owners.

Ms German concluded:

"The EHS was established to help mitigate the extent of such blight on the property market, and I firmly believe that to publish the disputed Information would not further this objective. Rather, it would needlessly add to any adverse effect on the property market."

18. Stephen Walker, who is a chartered surveyor and a Senior Director of CBRE Ltd. He is a specialist in the area of compulsory purchase and competition, having previously been involved in advising the company which promoted and delivered the high speed railway link between London and the Channel Tunnel ("High Speed One"). He is currently providing consultancy and advice to HS2, including advice on potential compensation liabilities. This experience had made him an expert in how property markets respond to plans like High Speed Two and the purpose of his witness statement was to give a professional opinion on the background to the creation of blight, the likely effect of releasing the requested information and how the property market would be likely to react to such release.

19. The evidence in Mr Walker's witness statement was that:
    a. The word "blight" had a statutory meaning, but it was commonly used to describe the adverse effect on property values caused by the anticipation of a major development. It was capable of changing over time in response to changing circumstances, including route modifications or the availability of other information. The level of uncertainty surrounding a project had a significant impact, particularly as the property market was not scientific and was affected by the perceptions, and possibly misperceptions, of those whose property might be affected. For these reasons blight had the potential to spread out of control, with the public perception of the negative impact of a project becoming exaggerated.
    b. It was vital for HS2 to manage carefully the nature and extent of information in the public domain because the risk of spreading blight into areas not affected by the project proposals was very real.
    c. Blight would in most cases be of only temporary duration and this had certainly been the case with High Speed One, with the permanent diminution in value proving to be less severe, and less extensive in distance terms, than had been anticipated before the line had been

built and brought into operation. Schemes like EHS are therefore designed to help only those property owners who were forced to conclude a sale in the short term, while values were artificially reduced.

d. The Location Criterion was not simply a distance measurement. It took account of the overall physical relationship between the line in operation and the property said to be affected, including topography, alignment of new infrastructure, and the presence of existing buildings and infrastructure.
e. In that context the release of the requested information could be very easily used as an over simplified comparator for the consideration of applications for assistance. It could be taken as the definition of the line, inside which the Location Criterion would be met and outside which nobody could expect to succeed with an EHS application, no matter how strong the case might be by reference to other criteria. This would distort the scheme and make it less fair.
f. If the requested distance information were to be released the only appropriate way to do so, in order to avoid greater public uncertainty, would be to provide additional information, including the postal address of the property in question. This would enable those receiving the information to assess every aspect of the Location Criterion, as it had been applied in the panel's consideration of the successful application.
g. Simple figures were more likely to be picked up by the public than more complex factors and more likely to remain in the public consciousness even after further updates on the project were published. Releasing outdated and incomplete information into the public domain would increase uncertainty and prevent blight from diminishing.
h. The period of uncertainty in the case of the High Speed Two route had coincided with a weak phase of the economic cycle in the property market. Although local estate agents would generally be aware of any property purchased under the EHS scheme and would know the published proposals for the area, they would not be able to use that knowledge to reassure property owners (and thereby reduce the impact of blight) if faced with reports by the media or action groups that focused only on the "qualifying" distance information. The commercial interests of both property owners and estate agents would not be best served by "*exacerbating generalised blight outside the physical corridor of the railway which will in the longer term … considerably diminish.*"

20. Mr Walker's witness statement declared that its purpose was to provide a professional opinion and it included the customary expert's declaration as to the objectivity of his opinions and his duty to the Tribunal rather than to the party on whose behalf he was appearing. We were concerned that the evidence was served late in the process (although in compliance with the directions referred to in paragraph 13 above) and without any previous notice

that expert evidence was to be adduced, let alone an application to the Tribunal for leave to do so. Counsel for HS2, Mr Hopkins, said that the evidence was not being put to us in the form of "classic" expert evidence. There was no suggestion, he said, that we should treat Mr Walker as an entirely unconnected expert, whose opinions might be pressed on the Tribunal as ones they should adopt in the absence of any expert evidence in support of the Appellant's case. HS2 was simply putting forward the most expert person it had, who had been involved throughout, and who could help the Tribunal understand the way in which the property market works; in particular the impact on it of perception and emotion and the consequential difficulty in trying to prevent overreaction to the disclosure of information, such as that requested by the Appellant. We accept Mr Hopkins' invitation to us to take seriously the evidence on Mr Walker's experience of the behaviour of the market during a period of uncertainty, such as that caused by the announcement of the High Speed One and High Speed Two projects. However, Mr Walker went further than provide us with the benefit of his past experience. His evidence included a degree of speculation as to the likely effect of something that has not yet happened – the disclosure of the distance figure at the date of the Appellant's information request. Where his judgment is clearly based on similar events that he has witnessed in the past, we can see the weight of his opinion. But we are less comfortable as to the weight his evidence should bear on any point where, in the absence of an opportunity to hear evidence from an expert engaged by the Appellant, his opinion does not have that level of direct, historical support.

21. The Appellant asked each of the HS2 witnesses to be available at the hearing for questioning. In the event, Mr Jew was abroad and unable to attend. One of his colleagues, Ms K MacKnight signed a short witness statement dealing with her discussion with Mr Jew and Ms Munro, as well as her review of the file at the time when HS2 prepared a detailed statement to the Information Commissioner's investigation. On that basis she supported the more direct evidence set out in Mr Jew's witness statement. The other witnesses all attending the hearing and answered questions posed by Mr Griffiths, on behalf of the Appellant, and by the Tribunal.

First issue: is section 36(2)(c) not engaged due to procedural lapses?

22. It was common ground that, for the exemption to be engaged, it is necessary for the public authority relying on it to have followed a procedure, that is, obtaining an opinion from the appropriate qualified person. The Appellant was concerned that the qualified person in this case was recorded as having been satisfied that the prejudice in question would arise, but the HS2 legal team appeared to be relying on the alternative argument that the prejudice would be likely to arise, a slightly easier test. However, there was nothing inappropriate in HS2 presenting its case in this way.

23. The Appellant also criticised the manner in which the qualified person's opinion appeared to have been discussed, delivered and recorded. He was

clearly concerned that HS2 had an established approach to the sort of request he had submitted and that the process for obtaining the opinion had been purely procedural, with no, or no adequate, consideration of the particular factors affecting his case.

24. The availability of the section 36 exemption creates a powerful weapon for a public authority seeking to resist an information request. Once an opinion has been given the person requesting the information faces the heavy burden of showing, not just that the opinion was incorrect, but that no reasonable person in the position of the qualified person could have reached it. Any public authority wishing to rely on the exemption should ensure that the process of obtaining and recording it is carried out with care and rigour, so that it may be seen that proper consideration was given to the anticipated prejudice and that suspicions, such as those harboured by the Appellant, may easily be assuaged. It is particularly unfortunate to find that, in this case, neither the issues placed before the qualified person, nor the opinion reached, were incorporated into any form of contemporaneous record – a failure of office discipline that might be regarded as fundamental for matters of far less consequence than a section 36 opinion, not least in light of records management obligations under the Lord Chancellor's Code of Practice issued under FOIA section 46.

25. One consequence of not following proper procedure is that time and money is expended during hearings, such as this appeal, considering whether or not the (quite basic) procedural requirements had been satisfied. Another possible consequence may be that the public authority risks failing to satisfy the Information Commissioner or this Tribunal that, on a balance of probabilities, an appropriate opinion had been obtained at the time. That, more severe, consequence does not arise in this case because, even without Mr Jew being available for questioning, we were satisfied that an opinion had been obtained from the appropriate person, and that it was in terms that satisfied the statutory requirement.

Second issue: is section 36(2)(c) not engaged because the qualified person's opinion was unreasonable?

26. As we have said, the test of reasonableness is whether the qualified person's opinion was one that no reasonable person in her position could have reached. The Information Commissioner concluded in his Decision Notice that it was reasonable for the qualified person to have formed the opinion that disclosure of the requested information would, or would be likely, to lead to more applications and complaints and that this would increase the administrative burden on those responsible for the handling of claims and divert resources. We think, on the basis of the evidence of Ms German about how EHS is operated, that the Information Commissioner's conclusion was correct. Although the Appellant has put forward criticisms of the opinion, his arguments do not persuade us that the opinion was not a reasonable one to have reached.

27. We conclude, therefore, that the exemption is engaged.

Third issue: is the balance of public interest in favour of maintaining the section 36 exemption?

Public interest in favour of maintaining the exemption.

28. The Information Commissioner relied upon the public interest in the burden on the EHS scheme becoming excessive as a result of disclosure.

29. The starting point for HS2's case on the resource implications of disclosure is that the information would be so misunderstood by the public that those with properties closer than the disclosed distance would believe that they had a good chance of satisfying the Location Criteria and that this would lead to an increase in applications or re-applications (many of them without merit), as well as complaints. As similar information has not been disclosed in the past there is an inevitable degree of speculation inherent in the argument and, although it would not be so wild a speculation as to undermine the reasonableness of the qualified person's opinion, we are not convinced that the risk is as great as HS2 asserts.

30. The evidence placed before us included a number of facts that would in our view reduce the risk of the information being misunderstood. First, HS2 accepted that estate agents in the area would be aware of purchases made under EHS and the nature and location of the properties involved. Applicants are likely to involve estate agents in assisting with an application (the EHS published guidelines explain the role they are required to play in respect of the Effort to Sell Criterion) and may therefore be expected to receive a more rounded view of the factors likely to be taken into account in assessing the Location Criterion than they might acquire from media reports or less formal distribution of news about distance information. Over a period of time, the accumulation of information available to estate agents (or even interested property owners direct) may be expected to increase by virtue of the public nature of Land Registry records disclosing local sales to the Government. We were told that the Land Registry was an unreliable source of information because recorded sales may have been made for other reasons, such as highways' improvement. However we would expect estate agents, in particular, to be able to distinguish sales made for that reason by considering the precise location of the property in question. It is also possible that the more determined investigator could cross refer Land Registry sales against publicly available planning information to determine which were relevant to HS2.

31. We were also told that each EHS applicant is given written reasons for the success or failure of an application. Some of that information is also likely to find its way into the public domain or, at the very least, to be disseminated

among those with an interest in the subject of EHS assistance. The dissemination of that information.

32. The resulting accumulating body of information may also be expected to be contributed to by the availability of documents such as an academic study that was shown to us, which included some anonymised data about property purchased under the scheme and its distance in each case from the proposed route of the line. This was said, again, to be unreliable because the properties included in the very small survey that had been carried out were spread over a wide distance along the route, so that the aspects of location other than distance would be likely to be very different from one property to another.

33. The criticism of these alternative sources of information does not alter the fact that, over time, an expanded body of information will become available through one means or another. It is a development that may have been expected to occur at the time of the information request, although clearly the amount of available information will increase as time passes and more properties are purchased under the scheme. In these circumstances we believe that the release of a distance figure, representing the furthest extent of any EHS purchase up to the time of the information request, will not have so great an impact on the public's perception as HS2 has asserted. Neither do we think that a better informed public will misunderstand the limited significance of the information, in isolation, to the extent that HS2 has asserted.

34. The Appellant argued that there were other elements of information available to the public that might further reduce the impact of disclosure. First, those training to sit on the panels were told, (in a presentation that has been made public as a result of an earlier freedom of information request) that no property further than 600 metres away from the line of High Speed One had been purchased under a similar scheme connected with that project. Secondly, mailings from HS2 about the project in general had been distributed to all properties in any postal code that included land within 500m of the proposed route. This had led, it was said, to properties as far away as 1.5km receiving the materials. Although this was general information, it cannot be doubted that those in receipt would have had a heightened awareness of potential blight and would be more alert to connected schemes, such as EHS.

35. In both cases we believe that the information would contribute less to the public's perception as to the area affected by blight than that of the other sources of information we have identified. However, those sources alone would, in our estimation, have had the effect of reducing the risk of the public misunderstanding the limited significance of a bald distance number and overburdening the EHS scheme with unmeritorious applications as a result.

36. We think, too, that HS2's expressed fear about the public's inability to understand the disclosed information does not give the public enough credit for its ability to delve behind over-simplified media headlines or slanted statements from pressure groups. Even if a distance figure might be misunderstood initially, we cannot believe that it is a misunderstanding that would last, for most people, beyond the initial stage of reviewing the questions needing to be answered on the EHS application form, particularly in view of the clear format of, and thorough explanations embodied in, that document. This is not to say that there will not be unmeritorious claims made. The parties are agreed that property owners become very anxious about the impact of major infrastructure projects on their homes and it may be expected that schemes such as EHS will receive many applications driven by desperation rather than sound logic. However, we were not convinced that the disclosure of the information in question would, on its own, cause a significant increase in the number of applications.

37. We were not convinced, either, that, the perceived risk to the effectiveness of the EHS scheme could not be managed in a way that reduced hardship on other applicants who might be waiting for a decision.

38. During the hearing we put to both Mr Walker and Ms German that the difficulty they saw in trying to put the bald distance measurement into context, without disclosing the confidential information of those who had made the application in question, was not as great as they feared. They were both adamant that it was. However, we find it very difficult to understand why the existing guidance could not be supplemented by appropriately anonymised (and possibly even fictionalised) case studies illustrating why, for example, one application failed, even though the property in question was relatively close, due to the location, topography and nature of the line at that point, whereas another, further away, succeeded, due to the impact of those, or other, factors. We are forced to the conclusion that public misinterpretation of the requested information is a risk that HS2 has the ability to ameliorate and that it could do so by the simple means of supplementing its existing, excellent guidance with an explanation of how the various factors contributing to the Location Criterion have been taken into consideration during the consideration of applicants adjudicated upon to date. The solution to the problem identified in HS2's evidence therefore lies in the company's own hands. It does not require information to be withheld from the public as though, in the words of the Appellant, the public was not sufficiently grown up to be trusted with it.

Public interest in favour of disclosure

39. The public interest factors in favour of disclosure, as identified in the Decision Notice, were that there was a need to demonstrate that the scheme was operated with integrity, with particular regard to the assessment of the Location Criterion. The Appellant also argued that disclosure would serve the public interest by informing public debate, demonstrating accountability,

(especially in relation to the expenditure of public funds) and assisting the public to understand decisions that affected people's lives.

40. As to integrity, the Appellant did make various allegations about the integrity of the scheme, suggesting that its purpose was more to reduce the project's vulnerability to public criticism than to assist those suffering blight and that the panel's recommendations tended to favour HS2. We find that he did not establish any of those criticisms and our impression of the HS2 officers who appeared before us was that they were trying very hard to operate a scheme that provided a fair compensation package for those trapped in blighted property, without increasing the severity or geographical spread of the blight. Indeed, we believe that, as indicated below, it is their honest attempts to act in a responsible manner, as they see it that provides some support for the case in favour of disclosure.

41. All parties accepted that:
    a. the EHS scheme was intended to help those who own a blighted property at a time when other circumstances are forcing them to sell;
    b. the property market is not entirely rational and uncertainty about a planned project may temporarily undermine property values across an area that is much larger than that in which such values will be seen to have been permanently reduced, once the project has been completed.

42. We also received evidence, which was not seriously challenged by HS2, to the effect that estate agents in the area close to the Appellant's property considered that prices had been significantly reduced across an area extending up to three miles either side of the proposed route.

43. In those circumstances it may be of concern to some members of the public that the Location Criterion imposes an unnecessarily strict limitation on qualifying properties, in that it requires proof, not that the property in question is suffering a temporary price deterioration due to market <u>perceptions</u> of the likely effect on it of High Speed Two, but that it will <u>actually</u> be "substantially adversely affected" by it. This would seem to us to give rise to the real possibility that market misperception will lead to individuals, with an urgent need to sell a property (thus satisfying the Hardship Criterion), finding it impossible to sell a property (satisfying the Efforts to Sell Criterion), and yet not qualifying for EHS assistance because the panel decides that, ultimately, the adverse effect will not be as great as is currently assumed.

44. The evidence of the HS2 witnesses, as supplemented by the answers they gave to questions posed during the hearing, suggested to us that the terms of the Location Criterion assisted in maintaining what they perceived as a responsible attitude to not exacerbating blight. Yet it seems clear from the official explanation of the purpose of EHS that it was not created in order to control blight, but to provide redress wherever blight occurred, regardless of what may have caused it. Public misperceptions may cause blight to extend

across a wider area than HS2 think is really necessary, but the harm suffered by those trapped within it at a time when they are forced to sell is no less real for that. All that is different is that HS2 will ultimately stand a much better chance of recovering its outlay than in the case of properties closer to the planned route.

45. There must, of course, be some common sense limit to the area in which EHS relief may be available. We do not have the expertise to determine what it is. Nor is it within our jurisdiction to make that assessment, or to judge whether or not EHS has been operated fairly, either generally or by reference to the Appellant in particular. However, our concerns as to HS2's perception of the blight management aspect of the scheme lead us to conclude that there is considerable public interest in the public debate on the subject being better informed about the way in which the Location Criterion is assessed. The disclosure of the requested information, although limited to a particular point in time, would contribute to the dissemination of information relevant to that topic. This was, of course, a factor that the Information Commissioner took into account. However, for the reasons we have given, we would attribute to it greater weight than the Information Commissioner considered appropriate.

46. HS2 argued that, as a great deal of information about EHS was already in the public domain to assist the public to scrutinise its operation, the addition of the requested information would not advance the objective of transparency and accountability. However, we focus on the particular information requested, as opposed to more general information, and believe that it does have significance to the particular issue of the operation of the Location Criterion and that the other information that has been made available to the public did not have that effect.

Our conclusion on the balance of public interest

47. The Information Commissioner concluded that there was considerable public interest in disclosure but that, on a finely balanced assessment, it was outweighed by the public interest in avoiding resource strain within the scheme. For the reasons we have given we have concluded that the public interest in maintaining the exemption is not as great as has been claimed and that the public interest in disclosure is at least as great as the Information Commissioner thought it was. In those circumstances, we find the balance tipped in favour of disclosure.

Fourth issue: is section 43 engaged?

48. HS2 argued, on the basis of Mr Walker's assessment, that the likely reaction to disclosure was to cause more properties to be blighted than would otherwise have been the case. The effect on property values and the volume of sales would be to the detriment of individuals, businesses and communities. The businesses of estate agents were particularly highlighted, although no evidence was adduced to demonstrate that those in that

profession considered that the disclosure of the requested information, as opposed to the general impact of High Speed Two, would have a deleterious impact on their commercial interests. In fact, the Appellant provided evidence to the contrary in the form of a letter from a local estate agent which stated that it did not believe disclosure of the requested information would have this affect. The area covered by blight seems already to be regarded by local estate agents as being more extensive than may logically be justified. That is the result of the limited information that it has been possible, so far, to provide to the public and the uncertainty that therefore remains as to the precise extent and gravity of detriment likely to be suffered by individual properties. We do not think that, in those circumstances, the disclosure of a single piece of information, as requested by the Appellant, is likely to have such a deleterious effect on the relevant commercial interests as has been claimed, even if the public were to misunderstand it to the extent that HS2 fears. In the circumstances we do not think that HS2 has made out a case that commercial interests would, or would be likely to be, prejudiced by the disclosure requested.

49. In those circumstances we conclude that the exemption is not, therefore, engaged.

Fifth issue: is the balance of public interest in favour of maintaining the section 43 exemption?

50. In light of our conclusion in paragraph 49 it is not strictly necessary for us to consider the public interest test under section 43. However, we propose to do so in case our decision on engagement is overturned.

51. HS2 argued that the private interest of those at risk of commercial disadvantage, on which it relied to establish the exemption, carried through to a public interest in protecting the many people who were involved in property transactions along the whole route of the line. The result of blight spreading, it was said, was that financial harm would be suffered by many and that no financial compensation would be available to them.

52. We can envisage that, were the relevant level of risk to commercial interests to have been established, its impact would be widely felt. But in view of our earlier conclusion that the risk of disclosure distorting the property market was relatively small, we do not accept that disclosure would lead to a public interest capable of bearing any significant weight in the public balancing exercise. It would certainly not bear sufficient weight to overcome the public interest in disclosure.

53. It follows therefore that, even if HS2 had established that the section 43 exemption was engaged, the public interest in maintaining that exemption would not outweigh the public interest in disclosure.

Sixth issue: should the public interest factors be aggregated

54. HS2 argued that if we considered that both the section 36 and section 43 exemptions were engaged but the public interest factor relied on in support of maintaining each one of them fell short of the public interest in disclosure, we should consider them together. That is to say we should aggregate the various factors in order to create a composite basket to be weighed against the advantages said to be likely to result from disclosure. Ms Slarks, representing the Information Commissioner, suggested that it was not appropriate to aggregate in this way because the case law permitting it (in particular the decision of the European Court of Justice in case C-71/10 [2011] 2 Info L.R. 1) applied only to the Environmental Information Regulations 2004 and the language of FOIA did not support a similar interpretation where that Statute was concerned. Mr Hopkins' response was that the case law established that it was permissible for a tribunal to take into account, cumulatively, a number of the available grounds for refusal relied upon and that if it would have been right to do so if the case had fallen under the Environmental Information Regulations it was appropriate to do so in an FOIA case.

55. We would be inclined to prefer Mr Hopkins' interpretation, but it is not necessary for us to reach a final view because we have already concluded that, even if the public interest factors in favour of maintaining the section 36 exemption had been aggregated with those in favour of maintaining the section 43 one, they would still not, in combination, outweigh the public interest in disclosure.

56. We conclude, unanimously, that HS2 was not justified in refusing the Appellant's request for information and that it should be disclosed to him.

57. Our decision is unanimous

[Signed on original]

Chris Ryan
Judge
29 January 2013

Corrections made to decision on 13 February 2013 under Rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009