



Appeal numbers: EA/2016/ 0087 & 0088

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

**THOMAS CRANE**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**First  
Respondent**

**-and-**

**THE DEPARTMENT FOR TRANSPORT**

**Appellant and  
Second  
Respondent**

**TRIBUNAL: JUDGE ALISON MCKENNA  
Dr HENRY FITZHUGH  
Ms MARION SAUNDERS**

**Sitting in public at Alfred Place on 17 November 2016**

**Mr Crane appeared in person**

**Karen Steyn QC and Julian Milford of counsel appeared for The Department  
for Transport**

**Robin Hopkins of counsel appeared for the Information Commissioner**

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## DECISION

1. The appeals are each allowed in part. The Decision Notice is varied as follows:  
Part 2, document 20 is to be released in redacted form (see paragraph 74 below)  
Part 3, document 2 is not within the scope of the information request.

## REASONS

### *Background to the Appeal*

2. This appeal concerns an information request about the HS2 Project. HS2 is the proposed Y-shaped high speed rail network linking London, the West Midlands and the North of England. It has a budget of over £55 billion.
3. Mr Crane made an information request to the Department for Transport (“the Department”) on 6 March 2015. He requested information in four parts<sup>1</sup>:
  - “1. Details of the total construction cost of Phase 1 of HS2 broken down by year, starting from commencement of construction until the line is operational.*
  - 2. Please provide copies of any correspondence (email and written) between Philip (David) Prout of the Department for Transport and Simon Kirby of HS2 Ltd in the period 1 January 2015 to 1 February 2015.*
  - 3. Please provide copies of all e mails sent to Philip Rutman of the Department for Transport from any director or employee of HS2 Ltd or Philip (David) Prout of the Department for Transport concerning proposals to construct station facilities for HS2 at Euston for the period 31 December 2012 to 1 February 2014.*
  - 4. Please provide copies of any e mail sent to any civil servant in the Department for Transport by Andrew McNaughton of HS2 Limited in the period 1 July 2014 to 1 October 2014.”*
4. The Department responded on 13 May 2015. It confirmed that it held information in relation to each part of the request. It provided some of the information requested but withheld other information in reliance upon s. 35 (1) (a)<sup>2</sup>, s. 40 (2)<sup>3</sup> and s. 43 (2)<sup>4</sup> of the Freedom of Information Act 2000 (“FOIA”). Following

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<sup>1</sup> In this decision, the request is referred to by each of its constituent “parts”.

<sup>2</sup> Formulation of Government policy - see paragraph 16 below

<sup>3</sup> Data protection

<sup>4</sup> Prejudice to commercial interests - see paragraph 17 below

an internal review the Department maintained its position not to disclose the withheld information but considered that some of the information requested related to “environmental information” within the meaning given to that term by the Environmental Information Regulations 2004 (“EIRs”), refusing disclosure in reliance upon regulations 12 (4) (d)<sup>5</sup> and 12 (4)(e)<sup>6</sup> EIRs.

5. The Information Commissioner (“IC”) issued Decision Notice FS50592334 on 8 March 2016, upholding the Department’s decision in part but requiring disclosure of additional information within the scope of the request. The steps required to be taken were:

*“The DfT should now disclose the following information*

*Part 2 of the request: documents 9 (in part), 10, 16, 20 and 22-26*

*Part 3 of the request: all five documents withheld apart from the two paragraphs identified in the email dated 8 March 2013 as the Commissioner pro-actively applied regulation 13 EIR to this information”.*

### ***Appeal to the Tribunal***

6. Both Mr Crane and the Department filed Notices of Appeal to the Tribunal.

7. Mr Crane’s Notice of Appeal dated 5 April 2016 disputed the engagement of all the FOIA exemptions and the EIRs exceptions. He argued that the balance of public interest should have led the IC to order disclosure of the withheld information.

8. The Department’s Notice of Appeal dated 5 April 2016 submitted that the IC had erred in ordering disclosure of the information referred to in the steps required to be taken.

9. The Information Commissioner’s Responses to both appeals maintained her analysis as set out in the Decision Notice, save that she invited us to amend the Decision Notice in respect of part 3 of the information request, as to scope. However, by the time of the hearing, her position was “under review” in a number of other respects and she had, by the close of evidence, altered her position on some of the information.

### ***The Hearing***

10. The two appeals were listed for an oral hearing together on 17 and 18 November 2016. In the event, the hearing was concluded on the first day, largely due to the release of additional information by the Department and the narrowing of the issues for the Tribunal to decide. We are indebted to both counsel for their clear oral and written submissions and to Mr Crane, who faced the difficulty of being a litigant

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<sup>5</sup> Unfinished material - see paragraph 21 below

<sup>6</sup> Internal communications - see paragraph 22 below

in person in a room full of lawyers, but who made his case with both courtesy and clarity.

11. The Tribunal had before it an Open Bundle and a Closed Bundle. Mr Crane was provided with the Open Bundle and a redacted index to the Closed Bundle, but not its contents.

12. The hearing was conducted in open session so far as possible. The Tribunal heard evidence from the Department's witness Mr Prout in both open and closed session. He had sworn open and closed witness statements which stood as his evidence in chief. Mr Crane was able to test Mr Prout's evidence in the open session. Mr Hopkins, on behalf of the IC, tested Mr Prout's evidence further in the closed session, adopting the IC's role of guardian of the legislation, as referred to by the Court of Appeal in *Browning v IC* [2014] EWCA Civ 1050. Although Mr Crane left the hearing room for that part of the evidence, the Tribunal gave him the gist of what had occurred in his absence when he returned and offered him the opportunity to ask Mr Prout some more questions, which he did.

13. The closing submissions of the Department and the IC were given in open session in Mr Crane's presence. As noted above, the IC's final position had altered in a number of respects having heard the evidence, and we were grateful to receive written confirmation of this following the hearing. We have indicated her final position in relation to each part of the request below.

### ***The Legal Framework***

14. There was some disagreement between the Department and the IC in this case as to whether the applicable regime was FOIA or EIRs in relation to each part of the request. All parties agreed that the applicable regime would make no difference to the outcome in this case. We have set out in our Conclusion below our finding as to the applicable regime in relation to each part of the request.

### ***FOIA***

15. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

*"In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –*

*(a) the information is exempt information by virtue of a provision conferring absolute exemption, or*

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

16. The categories of exemption relied upon under FOIA in this case are: s. 35 (1) (a), s. 40 (2) and s. 43 (1) FOIA. S. 40 (2), where engaged, provides an absolute exemption falling under s. 2 (2) (a). The other exemptions relied on here are so-called

qualified exemptions giving rise to the public interest balancing exercise required by s. 2 (2) (b). S.35 (1) (a) FOIA provides as follows:

*“(1) Information held by a government department...is exempt information if it relates to –*

*(a) The formulation or development of government policy”.*

17. Section 43(2) FOIA provides that:

*“(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).”*

*EIRs*

18. The EIRs define “environmental information” as follows:

*“..any information in written...form on –*

*(a) The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites...*

*(b) Factors such as substances, energy, noise, radiation or 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) ...*

*(d) ...*

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

*(f) ...”*

19. The EIRs set out exceptions to the duty to disclose environmental information as follows:

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

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

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

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

20. The categories of exception relied upon in this case are: regulations 12 (4) (d), 12 (4) (e), 12 (5) (2) and 13.

21. Regulation 12 (4) (d) EIRs provides that:

*“for the purposes of paragraph 1 (a) a public authority may refuse to disclose information to the extent that –*

...

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

22. Regulation 12 (4) (e) EIRs provides as follows:

*“(4) for the purposes of paragraph 1 (a) a public authority may refuse to disclose information to the extent that –*

...

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

23. Regulation 12 (5) (e) provides that:

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

...

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

### *Powers of the Tribunal*

24. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA (as applied by regulation 18 EIRs where relevant), as follows:

*“(1) If on an appeal under section 57 the Tribunal consider -*

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

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

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

25. We remind ourselves that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant in each appeal.

### **Evidence**

26. The Tribunal heard evidence (in both open and closed session) from Mr Prout, who is a Senior Civil Servant at the Department for Transport and since January 2013 has been Director General of the High Speed Rail Group with Senior Responsible Owner responsibilities for the High Speed Rail project. He had made an open witness statement dated 28 October 2016 and a closed witness statement dated 14 November 2016. Mr Crane was provided with a copy of the open witness statement only.

27. Mr Prout's open witness statement sets out some contextual detail about the HS2 project and describes the manner in which information about it has been made available to the public. He discusses the information in dispute between the parties and describes the basis for the exemptions and exceptions relied upon by the Department in these appeals. In his closed witness statement he gave the Tribunal additional details of the areas of policy still to be resolved in phase one and explained the contingency calculations in the withheld financial information. He gave the Tribunal a detailed commentary in relation to each redacted or withheld document.

28. Mr Prout explained in his open evidence that the Government's intention is to build HS2 in two phases. Phase one will link London Euston with a new station in Birmingham and phase two will divide the line in two, creating the "Y" shape with lines to Manchester and Leeds. The Government's first announcement to Parliament about the project was in 2010, and the High Speed Rail (Preparation) Act received Royal Assent in November 2013. This authorised essential expenditure ahead of the hybrid Bill which would in turn authorise the construction of the railway. The Bill required annual reports to Parliament on financial expenditure against budget. The first hybrid Bill, authorising the construction of phase one, was deposited in Parliament in November 2013. That Bill has been through the petitioning process in the House of Commons and is currently before the House of Lords, which will hear further petitions.

29. Mr Prout's open evidence was that HS2 is due to start construction in 2017 and that the first trains are due to run in 2026. The complete network is due to be running by 2033. He explained that there are still many policy development milestones to be met, including hybrid Bills for each phase. As noted above, phase one is currently



being considered by the House of Lords Select Committee. He explained that the House of Commons Select Committee stage had taken 19 months to complete. He described the Parliamentary programme as “ambitious but on track”. His evidence was that there were a number of significant issues still to be resolved in phase one, some of which were interrelated with issues in phase 2.

30. Mr Prout described in open evidence how the HS2 project was subject to a continuous cycle of consultation, approval and both programme and project management assurance. He said there have to date been 26 public consultations, 2586 petitions, and 159 days of evidence before the Select Committees. Five additional provisions and nearly 400 amendments have been made to the Bill and approximately 1600 undertakings and assurances have been given to petitioners. He described a systematic approach to the disclosure of environmental information on the project and provided the Tribunal with a schedule of the 18 Command Papers and 12 Business Cases published about the project to date.

31. With respect to the disputed information, we summarise both Mr Prout’s open and (to the extent possible) his closed evidence about each part of the requested information<sup>7</sup> in the following paragraphs.

32. In respect of **Part one** of the request, Mr Prout explained that the Department does not agree with the IC that this is “environmental information” because it takes the view that budgetary information does not of itself have an impact on the environment.

33. His evidence was that he was particularly concerned with the commercial prejudice that disclosure of the information in part 1 would cause. His professional remit involves obtaining best value for the project and he explained that the withheld information, which related to construction costs, would reveal the contingencies built into the overall project financing. In his view, disclosure of this information would create the risk that contractors would adjust their bids upwards rather than pricing them competitively. He explained that the Department has released extensive financial material about the costs of Phase 1, but that this information has been disclosed in a manner which would not prejudice the Government’s commercial position in relation to the many contractors tendering for work. He was “strongly” of the view that the public interest required the information to be withheld for this reason.

34. In cross examination, Mr Crane put to Mr Prout that there had been criticism in the media and by the Public Accounts Committee of the lack of transparency of the HS2 project. Mr Prout responded that “*we can always do better, but in our view it has been adequate*”. Mr Crane pointed out that the information he had requested in part one of his request had been published on the Department’s website in 2011/12 but was now being withheld. Mr Prout responded that this was because the closer the Department came to procurement, the more likely it was that the publication of certain information would affect its ability to negotiate. This was because the negotiations

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<sup>7</sup> For the terms of the request in each part, see paragraph 3 above.

were with parties who knew more and more about the Department's assumptions. He confirmed that whilst the total projects costs were in the public domain, there had been a conscious decision not to publish more granular information, such as the costs of construction. He said that, put simply, he preferred to negotiate without the tenderer knowing how much he had in his pocket.

35. With regard to **Part two** of the request, Mr Prout's evidence about the correspondence requested was as follows:

Document 1 contains private information about Simon Kirby which has nothing to do with HS2 and should be redacted.

Document 8 is concerned with sensitive information about the Euston area and the station redevelopment. Policy in this area was incomplete at the time of the request and the Department needed to be able to develop its thinking without being hindered by the premature release of information. The public interest favours withholding this information.

Document 9 is an email exchange about the appointment of a new member of staff in HS2. It contains personal data about a junior official without a public-facing role. There is no public interest in releasing this information.

Documents 13 and 14 are e mail exchanges concerning Euston, involving live policy issues still under consideration. Document 13 contains personal comments about a third party's employee, which may be regarded as personal data. The public interest favours maintaining a safe space in which policy options can be tested within Government.

Document 15 redacts the personal e mail address of a HS2 Board member.

Document 16 is an email exchange referring to an individual who was looking for a job. The information relayed was obtained through a conversation the individual had with Mr Prout and not in a formal process. There is no public interest in disclosing the personal data of an individual who was not hired in any event.

Document 19 is redacted in relation to certain live policy options only. Mr Prout said it is part of his remit to test the Government's position, and safe space is needed for this. (The remainder of the document was no longer withheld by the time of the hearing in view of the passage of time and the further development of policy since the request).

Document 20 has been redacted in relation to certain financial information as the disclosure of the costs information it contains would undermine the effectiveness of the Department's procurement exercise and damage its ability to secure value for money, for example by revealing the Government's assumptions about inflation. The release of this information would prejudice the Department's commercial interests.

Document 21A points to assumptions about costs and contingencies, the release of which could prejudice negotiations with petitioners. The Select Committee stage in the House of Lords is on-going so the issues remain live.

Document 22 is redacted in relation to “advice on costs and benefits on a range of scenarios controlled for cost and scope”. This part of the document arose from the Department’s consideration of the effect that changing the scope of the scheme would have on various project requirements. Mr Prout’s evidence was that the testing of alternative scenarios in this way was part of the process of Government policy development.

Documents 23 and 24 are also redacted in relation to the testing of alternative scenarios as part of the process of policy development.

Documents 26 and 26A relate to the commissioning of others by Mr Prout to consider alternative policy “scenarios”. This work involved issues which were still the subject of live policy discussions at the time of the request. His evidence was that critical external attention to this process would make it difficult for officials to engage in future scenario planning and he maintained that there was no public interest in knowing about the consideration of scenarios not adopted by Government.

36. Mr Crane asked Mr Prout how long a period of time must elapse before the “safe space” argument was no longer in play. Mr Prout responded that it was difficult to answer that question in relation to matters where there was continuing policy consideration or in respect of which the thinking never went further. In any event, he added, much of the information requested related to decisions not yet taken.

37. In cross examination, Mr Prout was taken by Mr Hopkins to document 20 and asked to describe specifically how the redacted information could be used against the Department in negotiations. Mr Prout said that the tender documents include a schedule of works, so the bidder knows what they are expected to do year by year. If they compare that document with the withheld information, they could work out the funding available for procurement. At the time of the request, contracts for professional services were being negotiated, so this information would allow an interested party to deduct the construction costs from the overall budget and know what figure had been set aside for professional services. This applied not only to initial procurement but also to the on-going management of services, in relation to which it would be disadvantageous to reveal the Department’s “elbow room”, as increased fees could be asked for by existing contractors. Mr Prout’s evidence was that everything the public needs to know is in the public domain and that the withheld information, taken cumulatively, would reveal commercially sensitive information about how budgets are calculated and managed. He explained that in the context of an overall project costing billions of pounds, these sensitivities could affect the budget by tens or hundreds of millions. He said “*there is real cash damage to be done, it’s not just a matter of principle*”.

38. Turning to the petitioning process, Mr Prout's evidence in reply to Mr Hopkins was that in relation to the part of the Bill affecting private interests, the Select Committee had looked at the impact of HS2 on some 12,000 land owners. Petitioners might be a landowner or an interested organisation, for example concerned to preserve ancient woodland. As a result of this process, a tunnel might be extended, a footbridge placed differently. The Department has to keep an eye on the public purse in deciding which requests for changes to the project it can tolerate and fund. His view was that the redacted information would strengthen the hands of petitioners in the negotiating process that goes on outside the Select Committee.

39. In the closed session, Mr Hopkins tested Mr Prout's evidence further in relation to the commercial sensitivities of the procurement market. Mr Prout accepted that it was public knowledge that there was an element of contingency in any financial planning but maintained that the information previously disclosed had been at a high level whereas the redacted information here would permit a more granular analysis.

40. With regard to the correspondence at **part three** of the request, Mr Hopkins asked Mr Prout more in closed session about the process of benchmarking the official project plan against hypothetical alternative scenarios. Mr Hopkins took Mr Prout to each of the documents in part three of the request, asking him to explain the context of the communications.

41. Mr Prout's evidence was as follows:

Document 1 is an internal communication from Mr Prout to the Permanent Secretary, it is an example of private thinking only and does not represent the Department's position.

Document 2 is similarly an example of a private communication sent from Mr Prout to the Permanent Secretary, including a candid assessment of key stakeholders. This involves personal data. This type of personal assessment could not be given in writing if it were to be released, so its disclosure would have a chilling effect.

Document 3 is a personal record of some "blue sky" thinking discussed at a meeting, recorded in an e mail from Mr Prout to the Permanent Secretary.

Document 4 is a personal communication from Mr Prout to the Permanent Secretary, reflecting on a discussion with the Directors the DfT High Speed Rail Group. This involves matters which are still the subject of ongoing policy discussion. Ideas which were not ultimately proceeded with are described here, there is no public interest in disclosure.

Document 5 is an e mail from Mr Prout to the Permanent Secretary concerning Euston and thus concerns a matter of live policy development.

42. As to the correspondence in **part four** of the request, Mr Prout explained that the Department considers documents 3, 7, 9 and 10 to contain non-environmental information and documents 4-6 and 8 to contain environmental information.

43. Mr Prout's evidence on the individual documents was as follows:

Document 3 is a short communication between Andrew McNaughton (the Technical Director at HS2) and Department officials about a board paper. This concerns matters under live policy development.

Document 4 concerns internal governance arrangements for the approval of documents by way of correspondence in relation to the hybrid Bill for phase one of HS2. This is a live policy area because the Parliamentary process was at the time of the request (and is as yet) incomplete.

Documents 5, 6, 7, 8 and 10 all concern the Select Committee process, which is on-going in the House of Lords.

Document 9 is a briefing by Andrew McNaughton to a senior Department official and has been redacted only in relation to the personal data of a junior official.

***Argument: the Parties' Positions***

44. The parties' submissions on each part of Mr Crane's request were as follows.

*Part One*

45. The Department has provided Mr Crane with a publicly-available spreadsheet giving a year-by-year breakdown of the costs of Phase one of HS2. This was before the Tribunal. The Department confirmed that it held two further spreadsheets containing a more detailed breakdown of the lower level costs, including construction costs. These it was withholding.

46. As to the applicable regime, the IC's Decision Notice concludes that it is the EIRs. The Decision Notice states (paragraphs 28 and 32) that the Department had correctly identified EIR regulation 12 (5) (e) as being engaged, and further that the balance of public interest favoured maintaining the exception. The Department's appeal against that conclusion was on the basis that the information requested was not properly defined as "environmental information" within the meaning given to that term by the EIRs and that s.43 (2) FOIA was engaged. At the hearing, the IC maintained the approach taken in the Decision Notice but conceded that if the Department was right that the applicable regime was FOIA, the information would be exempt from disclosure under s.43 (2) in any event.

47. Mr Crane's submission was that neither the exemption nor the exception was engaged. He maintained that there was little or no realistic risk of prejudice to the Department's commercial interests during the procurement process for phase 1 of HS2. He argued that the effluxion of time between the preparation of the information requested and his request had reduced the commercial sensitivity of the cost estimates. He also submitted that such was the complexity and scale of the HS2 project that it was implausible to suggest that any recipient of this information would be capable of "reverse-engineering" it so as to un-pick the contingency costs of the

overall project and have the prejudicial effect claimed by the Department. He said that bidders were principally concerned with bidding against each other. He referred us to a number of other First-tier Tribunal decisions which had taken his approach.

48. Mr Crane submitted that the public interest in disclosure is particularly strong in relation to this appeal, given the controversial nature of the HS2 project and the number of people on whom it will have a direct impact. He explained his view that there was insufficient transparency about HS2, which is unprecedented in scale and size, involving 20 years' construction with an inevitable personal and environmental impact on hundreds of thousands of households. He asked us to consider the public interest in the context of the magnitude of the cost of HS2 (which exceeds the costs of the highways budget and that of network rail). He submitted that the public interest in disclosure was enhanced by the fact that the Department was making cuts elsewhere but financing HS2 and that there was considerable public concern about the impact of "Brexit" on the projected costs of HS2.

49. Ms Steyn responded to this last point, reminding the Tribunal that the balance of public interest test was to be applied as at the time of the request. She described Mr Prout's evidence giving his concerns about the damage that disclosing this information would cause as "compelling".

#### *Part Two*

50. The Department identified 26 emails and letters between Mr Prout and Simon Kirby over the relevant period falling within part two of the request. Documents numbered 2-7 were disclosed in full, the remaining documents were withheld in part or in total. Subsequent to the Decision Notice, the Department released documents 10-12, 17-18, 21 and 25. Documents 9, 15, 19, 20, 22, 23 and 24 were disclosed in redacted form. Documents 8, 13, 14, 16, and 26 were withheld. The Department also considered Mr Crane's request for attachments to emails<sup>8</sup>, numbered 19A (released), 21A (released in redacted form) and 26A (withheld).

51. The Department and the IC once again disagreed over whether FOIA or the EIRs provided the applicable regime for consideration of part two of the request, but did agree that the result would probably be the same whichever regime applied. The Decision Notice states (paragraph 56) that the applicable regime is EIRs.

52. The Department relied upon three exemptions under FOIA in relation to part two of the request. The first was s. 40 (2) of FOIA (or regulation 13 of EIRs, expressed in similar terms with respect to the disclosure of personal data). The IC's Decision Notice found that the correct approach had been taken to the issue of personal data and this issue was no longer in dispute by the time of the hearing, as all parties agreed that information constituting personal data should be redacted from the documents.

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<sup>8</sup> These requests post-dated the IC's Decision Notice.

53. Secondly, in relation to documents 15, 17-19 and 21, the Department relied upon s. 35 (1) (a) of FOIA. The Decision Notice (paragraph 63) stated that EIR regulation 12 (4) (d) had been correctly applied to documents 8 and 11-14. However, it concluded (paragraph 56) that the information in documents 15, 17-19 and 21 was environmental information within the meaning given to that term by the EIRs, that regulation 12 (4) (d) was engaged (see paragraph 63) and that the public interest favoured maintaining the exception (paragraph 70).
54. Thirdly, the Department relied upon the commercial prejudice exemption at s. 43 (2) FOIA in respect of documents 19-20 and 22-26. The IC disagreed and the Decision Notice (paragraph 85) held that EIR regulation 12 (5) (e) applied to these documents as the information held was environmental. However, the conclusion was that not all elements of the exception were engaged so that documents 20 and 22 to 26 must be disclosed.
55. Mr Crane's submission in respect of part two was that all documents should be disclosed to him in un-redacted form, save that (as noted above) he did not pursue his request for the disclosure of personal data in relation to junior civil servants. He viewed the Government's policy in relation to phase one as having been settled by the time of his request and submitted that the public interest favoured disclosure of the information requested.
56. Documents 21A and 26A had not been before the IC when she issued her Decision Notice, as these were discovered by the Department subsequently. The IC reserved her position on these until after she had heard the evidence and submissions of the Department at the hearing. Her final position was that document 21A should not be redacted except in respect of the monetary figure appearing in paragraph 15 and subsequently. She accepted that document 26A had been appropriately withheld for the reasons given by the Department.
57. With regard to the other documents falling within the scope of part two, the IC's position by the close of the hearing was as follows:
- She did not oppose the redactions in documents 1 – 19.
  - She did oppose the redactions in document 20 (pages 36 and 37 of the closed bundle) but not the remaining redactions to that document. Her view of this information was that the redacted information was at too high a level to engage Mr Prout's concerns about commercial prejudice.
  - She opposed the redaction of document 22.
  - She maintained that document 23 should be redacted.
  - She opposed the redaction of document 24 as she did not regard Mr Prout's evidence as to the risk of harm as persuasive.
  - She maintained her view that document 26 should be withheld.

### *Part Three*

58. The Department identified five emails which fell within the scope of part three of the request. It withheld them all in reliance upon regulation 12 (4) (e) EIRs.

59. The IC's Decision Notice held that the regulation 12 (4) (e) exception was engaged (see paragraph 96) but that the public interest favoured disclosure (paragraph 102) of all the documents. In her Response to the appeal she doubted that the communications concerned had properly been described as "internal" but, having seen the Department's evidence and submissions she finally maintained her position as set out in the Decision Notice, which was to direct disclosure subject to the redaction of personal data in the form of the names and email addresses of junior officials. This was because, having explored the content of the information and considered its comparative age at the time of the request, she was not persuaded by Mr Prout's evidence as to the likelihood that disclosure would cause undesirable behavioural changes.

60. The IC's final position was that documents 1, 3, 4 and 5 should be disclosed but that document 2, properly viewed, was outside the scope of the request. She was content for us to amend the Decision Notice in this respect.

61. Mr Crane's submission in relation to part three was that the Department was seeking to rely on "safe space" arguments in respect of decisions that had already been made and that the Decision Notice was wrong to permit this approach. He also resisted the notion that the personal views of civil servants should not be disclosed.

### *Part Four*

62. The Department identified 10 emails falling within the scope of part four of the request. Documents 1 and 2 were disclosed but documents 3-10 were withheld. The Department relied upon regulation 12 (4) (d) EIRs in respect of documents 4-8 and s.35 (1) (a) FOIA in respect of documents 3, 9 and 10.

63. The IC took the view that all the documents in part four of the request contained environmental information (paragraph 114). The IC's Decision Notice upheld the Department's decision in respect of the withheld information because in her view regulation 12 (4) (d) was engaged (see paragraph 118) and the balance of public interest favoured maintaining the exception (see paragraph 123). She maintained this view at the hearing.

64. In respect of part four, Mr Crane told the Tribunal that he found it "disturbing" to hear the Parliamentary petitioning process described by counsel for the Department as a form of arbitration. He submitted that there is a huge public interest in learning what the promoter of the HS2 scheme can and cannot do by way of mitigation of the impact on individuals and businesses and, as there is little or no guidance available to the public about petitioning, there is a strong public interest argument in favour of disclosure. He noted that phase 2 of HS2 was about to start and that the same difficulties with the petitioning process would recur. He submitted that whilst the Parliamentary petitioning process was on-going in the House of Lords, it did not



follow that disclosure of the requested information would prejudice governmental decision making and that, in any event, the petitioning process in the House of Commons is now complete. He submitted that the Department's policy was settled and that the petitioning process involved marginal amendments to it only.

### ***Conclusion***

65. The Tribunal makes its Decision in relation to the following documents which, by the close of the hearing, remained in dispute between the parties:

*Part 1: all information held.*

*Part 2: the redacted documents 1, 9, 15, 19, 20, 21A, 22, 23 and 24.*

*Part 2: the withheld documents 8, 13, 14, 16, 26 and 26A.*

*Part 3: all information held.*

*Part 4: documents 3-10.*

66. The Tribunal's Decision is as follows:

***Part One – the Decision Notice is upheld. All the information identified as falling within the scope of the request may be withheld.***

67. The Tribunal's conclusion is that the applicable regime in relation to part one of the request is the EIRs. We follow the Upper Tribunal's reasoning in *The Department for Energy and Climate Change v Information Commissioner and H* [2015] UKUT 0671 (AAC) and take the view that there is a sufficiently close connection between the withheld information and the overall HS2 project for us to look beyond the precise issue with which the disputed information is concerned and to have regard to the "bigger picture". We are satisfied that the HS2 project is a "measure" which affects or is likely to affect the elements and factors referred to in regulation 2 (1) EIRs and that the documents breaking down the budget information into sub-categories is information on an integral, rather than an incidental, aspect of that measure.

68. We conclude that regulation 12 (5) (e) is engaged. The disputed information is commercial in nature and attracts duties of confidence at common law. Those duties protect the Department's commercial interests.

69. As to the public interest, we accept Mr Prout's (open) evidence as to the likelihood that disclosure of this information would provide bidders with insights which would allow them "*artificially to cost their bids rather than bidding competitively*". We give weight to his assessment as a senior civil servant with oversight of the project in rejecting Mr Crane's submission that the risk identified was unrealistic. We heard no evidence to the contrary. We acknowledge the public interest in transparency in relation to HS2, which was well articulated by Mr Crane, but in this respect we note that there is already publicly available information about the costs which does not involve the risks to which the evidence refers. For these

reasons, in relation to part one of the request, we are satisfied that the public interest in maintaining the exception outweighs the public interest in disclosing it.

**Part Two – the Decision Notice is upheld in part:**

***Document 1 – the redactions may be maintained;***

***Document 8 – the document may be withheld;***

***Document 9 – the redactions may be maintained;***

***Documents 13 and 14 – the documents may be withheld;***

***Document 15 – the redactions may be maintained;***

***Document 16 – the document may be withheld;***

***Document 19 – the redactions may be maintained;***

***Document 20 – the document is to be disclosed in a revised redacted form. The information numbered i to vi in boxes on pages 36 and 37 of the Closed Bundle is to be un-redacted, the remainder of the redactions may be maintained.***

***Document 21A – the redactions may be maintained.***

***Document 22 – the redaction may be maintained;***

***Document 23 – the redaction may be maintained;***

***Document 24 – the redaction may be maintained;***

***Documents 26 and 26A – the documents may be withheld.***

70. We conclude that the applicable regime in respect of the information in part two of the request is EIRs. Whilst acknowledging the dangers of adopting an over-expansive definition of “environmental information”, we view the disputed information in this part as sufficiently closely connected to the HS2 project to form part of a “bigger picture” comprising a measure which affects or is likely to affect the necessary elements and factors.

71. We found Mr Prout’s detailed evidence about the documents in part two persuasive. In reliance upon it, we find as follows.

72. Documents 1, 9, 15, 16 contain personal data and regulation 13 EIRs applies.

73. Documents 8, 13, 14, 19, 22, 23, 24, 26 and 26A engage regulation 12 (4) (d) EIRs in respect of material still in the course of completion, unfinished documents or incomplete data. We accept Ms Steyn’s submission that this exception is engaged in relation to developing policy issues and note that this analysis is consistent with the IC’s own guidance (see paragraph 62 of the Decision Notice). We find that the public

interest test favours withholding such information in the circumstances of this case. We accept that there is a public interest in transparency about HS2, but we also take into account the fact that there are long-running issues of policy development in relation to a long-running project. We accept Mr Prout's evidence that these documents contain information about matters of policy which were still being developed at the time of the request and we reject Mr Crane's approach of segmenting the process of policy development. We accept that the development of policy in relation to legislation includes the adaptation of that policy throughout the course of the Parliamentary process in both Houses. We find that the public interest in maintaining the exception outweighs the public interest in disclosing these documents.

74. We are satisfied that document 20, and 21A engage regulation 12 (5) (e) in relation to commercial confidentiality. With the exception of one part of document 20, we accept Mr Prout's evidence that the disclosure of these documents would prejudice the Department's negotiating position with third parties. His evidence was tested rigorously by Mr Hopkins in cross-examination but we were satisfied by his detailed analysis except in relation to document 20, where we agree with Mr Hopkins' submission that, apart from the specific financial data given, the disputed information is at too high a level to engage the risk described. We conclude that the redacted information numbered i to vi in the boxes on pages 36 and 37 of the Closed Bundle should be disclosed. We are satisfied that in relation to the remaining information in this part of the request, the public interest in maintaining the exception outweighed the public interest in disclosure for the reasons given by Mr Prout.

**Part Three – the Decision Notice is upheld in part:**

***Document 1 – the document may be withheld;***

***Document 2 – the document may be withheld. The Decision Notice is varied as to the scope of the request.***

***Document 3 – the document may be withheld;***

***Document 4 – the document may be withheld;***

***Document 5 – the document may be withheld.***

75. We are satisfied that the applicable regime in respect of the information contained in part three of the request is EIRs. This is because we take the view that the disputed information is information on HS2, and is sufficiently closely linked to the "bigger picture" of HS2, which is measure having the requisite environmental impact.

76. We were satisfied by Mr Prout's evidence that regulation 12 (4) (e) EIRs was engaged because the correspondence in the scope of this part of the request is properly to be regarded as internal communications. We accept that document 2 is outside the scope of the request, so that there is no duty to disclose it.

77. We are satisfied that the public interest favours maintaining the exception rather than disclosure, because we were persuaded by Mr Prout's evidence (see paragraph 41 above) that documents 1, 3, and 4 involve hypothetical thinking which was never adopted by the Department. We regard it as being in the public interest to allow hypothetical thinking to be done without exposing it to public scrutiny so that, notwithstanding the strong public interest in HS2, we consider that the balance lies in favour of protecting safe space for such discussions. We have considered the Upper Tribunal's Decision in *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC) but it seems to us that the risk identified in that case (of Ministers and Officials "adjusting" information liable to disclosure for "presentational purposes") is quite distinct from Mr Prout's clear evidence, as an experienced public servant, that his own behaviour would be altered by disclosure in the specific sense that he could no longer commit blue sky thinking to written form. We take into account that there is a presumption in favour of disclosure under EIRs. Nevertheless, we were persuaded by his evidence that the public interest favours maintaining the exception in the circumstances of this case.

78. In respect of document 5, we accept Mr Prout's evidence that the internal communication (also "blue sky thinking") concerns a matter of live policy development and that the public interest favours maintaining the exception in those circumstances. This view is consistent with the approach taken to matters concerning Euston Station elsewhere in this decision.

**Part Four – the Decision Notice is upheld in part.**

***Document 9 has been released with redactions – the redactions may be maintained;***

***The remaining documents may be withheld.***

79. We take the view that the information in this part of the request is "environmental information" so that the EIRs are the applicable regime. As with the other parts of the information request, we find that the disputed material is inherently closely connected with the HS2 "bigger picture" and is information on a measure affecting the relevant elements and factors.

80. We find that regulation 12 (4) (d) is engaged in respect of all of the documents in this part except for document 9, because we accept Mr Prout's evidence that the disputed material relates to matters of incomplete policy development, including the incomplete Parliamentary process.

81. For these reasons the appeals are each upheld in part and the Decision Notice is varied as set out at paragraph 1 above.

**ALISON MCKENNA**

**DATE: 16 January 2017**

**PRINCIPAL JUDGE**