

**TTP2207**

**Third Directions – 05 May 2023 (sent via email)**

A reference below to “HEOC” is to the Heathrow Express Operating Company.

HEOC has requested that none of the appendices to its Sole Reference Document (“SRD”) are disclosed "as part of this process". No reason was given other than they are "subject to confidentiality".

The documents annexed are (in summary):

- a. Emails from Network Rail attaching documents relevant to Network Rail’s assessment of the Decision Criteria
- b. An email from Network Rail on the subject of the GWML Sunday two track WTT
- c. An email from Network Rail on the subject of the week 11 “Informed Traveller Offer”
- d. A copy of the HS2 Supplemental Agreement dated 21 December 2017

The only appendix which is otherwise than routine is the HS2 Supplemental Agreement.

This document was provided in response to a direction from me to the Parties on 18 April 2023.

Everything else which HEOC has attached is similar to documents that the Committee routinely publishes on the website and which I would ordinarily expect to be disclosed as part of the process.

**Sharing with Panel members**

I note that there is no request that the appendices should not be shared with members of the Panel.

I remind myself that in the ORR’s appeal determination regarding TTP337/359/382, at paragraph 77, the ORR indicated that generally speaking it is best practice to provide all members of the Panel with the same information for the purposes of their decision making.

As hearing chair I rely upon advice and guidance from the members of the panel. In order that such advice can be given the members of the Panel will require to see the SRD and the attachments to it including the HS2 Supplemental Agreement. I will ask the Secretary to circulate it to members of the Panel, and in doing so to remind them of ADRR rules H55 and H56.

**Publication on website**

Two questions arise regarding: (1) the publication of the HS2 Supplemental Agreement on the website; (2) the publication of the other material provided in the annexes on the website.

If the annexes are published, interested parties will have an opportunity to study the material.

HEOC has asserted that the response and the attachments to it are “subject to confidentiality”. They have not explained why or on what basis.

ADRR rules H55 and H56 are material. H56 is a mandatory rule. That is clear from the use of the expression “... the following Documents **shall** be published ... on ... the website:

... (b) each request for further information from the Hearing Chair and **all responses** to such requests

... (c) all written submissions from all parties

...”

(Emphasis added).

The materials in question fall within sub-paragraphs (b) and (c).

Rule H55 provides some leeway in respect of documents not mentioned in Rule H56 which ought to be treated as confidential. In my judgement this is clear from the opening passage of Rule H55 which reads: “Except for anything published pursuant to Rule H56 ...”

The materials in question are of a type mentioned in Rule H56. It follows that the starting point is that they should be published on the website.

That starting point is subject to an overarching discretion in the Hearing Chair. Rules H26 - H31 under the heading ‘Documents’ are relevant. I need not set them out in full. Suffice to say that the Hearing Chair is required to exercise their powers in accordance with the Principles (H27); no party is obliged to produce any document which would be privileged from production in an action in the courts (H28) and the ‘Hearing Chair will consider ... commercial sensitivity ... (Rule H31).

Further it is implicit in rulings from the ORR that in certain circumstances commercially sensitive materials might be restricted to a limited circulation perhaps in an extreme case to a Hearing Chair alone and perhaps sometimes to a Timetabling Panel. See as an example paragraphs 72-77 of the ORR appeal decision in TTP337.

It follows that in certain circumstances a Hearing Chair may direct that documents or parts of them should not be published on the website.

What is said here, however, is that the appendices are confidential. This must have the meaning which applies in the general law. I am not aware that any relevant document is subject to a relevant contractual duty of confidentiality. It is generally accepted that for information to be protected under the equitable doctrine of confidentiality, three requirements must be met, as set out in *Coco v AN Clark (Engineers) Ltd* [1968] F.S.R. 415:

1. The information itself must have the necessary quality of confidence.
2. The information must have been imparted in circumstances importing an obligation of confidence.
3. There must be an unauthorised use (or misuse) of that information to the detriment of the rights holder.

Turning to the particular documents which are annexed to HEOC's SRD my preliminary observations are as follows:

1. HEOC has not not claimed that any of the annexes to its SRD was of a type that would be subject to privilege from production in civil litigation.
2. While I can readily appreciate that some parts of a commercial agreement might contain some confidential and/or commercially sensitive materials, in my view all commercial contracts are not by their nature confidential.
3. The documents which are summarised at points a – c above are not in my view confidential to HEOC. Those documents (or most of them) were sent (or comprise attachments which were sent) to a range of recipients other than HEOC's agents and employees, though I accept not all Timetable Participants on each occasion, and there is nothing in the mode of circulation which indicates that they were imparted in circumstances importing an obligation of confidence. To the contrary, they were imparted in circumstances where all recipients would have reasonably understood that an appeal might lie under the ADRR, and in which documents may be publicly available.
4. The contents of the HS2 Supplemental Agreement are in my view the usual elements of a commercial contract in this industry. I note that there is no provision made within the agreement relating to confidentiality which it would have been open to the parties to agree. Considered as a whole in my view this is probably because the purpose of the HS2 Supplemental Agreement is to apply certain parts of the Network Code by reference (which include the ADRR rules). A provision for confidentiality would be inconsistent with the obligations of the parties to the agreement under the Network Code (which, as I set above, starts from the position that some materials may become publicly available).
5. It follows that it is my preliminary view that the documents annexed to HEOC's SRD should be published on the website in the usual way.

If HEOC wishes to pursue the request it should be prepared to give clear and concise evidence/reasons to support it by **17:00 today (Friday 05 May 2023)**.

### **Response from HEOC (via email) to Third Directions**

*Dear Hearing Chair*

*We note your directions provided at 08:00 today (5 May 2023) regarding the confidential nature of the SRD appendices.*

*Respectfully, HEOC does not agree with your directions and requests that the SRD appendices, namely the HS2 Supplemental Agreement in particular, are not published online in the context of this dispute. HEOC maintain that the SRD appendices are confidential and wishes to provide a response to your directions with the necessary evidence / reasons (as requested).*

*HEOC is considering the directions that you have provided and requests that a short extension of less than one Working Day, until 16:00 on Tuesday 9 May, is granted to give HEOC sufficient time to provide a response (noting the Bank Holiday coronation weekend). HEOC does not consider that there is any public interest in the appendices being published prior to this weekend or that it will prejudice the dispute if a response is provided on Tuesday (9 May) instead.*

*HEOC would be grateful if you could confirm the entirely reasonable deadline extension of 16:00 on Tuesday 9 May 2023 by 16:00 today (5 May).*

*Kind regards*

### **Response from Chair to HEOC (via email)**

*The Hearing Chair has noted HEOC's request and is surprised - given HEOC made its application on 26 April and was able to assert on that date that relevant material was confidential - that HEOC is not now able to articulate clear and immediate reasons why it considers that the SRD appendices are confidential. The Chair believes that he has set out in his directions a clear statement of the position and it would help the administration of this reference to know as soon as possible whether HEOC agrees with the principles which are set out there.*

*Although the Hearing Chair considers that the request in his direction was reasonable (particularly in circumstances where the request for a direction came from HEOC), in the circumstances of the upcoming long weekend the Hearing Chair is exceptionally willing to extend the time for responses until **10:00 on Tuesday 09 May**. In so doing, he expects that for every appendix (and document comprising each appendix) which HEOC considers to be confidential, it provides a clear and cogent reason - in each case - why the appendix (and the documents which comprise it) should be considered confidential where no provision for express confidentiality appears to be made in relation to any relevant document or communication.*

*In making this direction the Chair has taken consideration of the interested parties, who he considers will suffer no prejudice from a short further delay.*

*The Hearing Chair is mindful that the ADRR is intended to be a transparent process, which is evident from the presumption in favour of publication set out in his Third Directions.*

## **Response from HEOC to Third Directions (via email on 05 May 2023)**

*Dear Hearing Chair*

1. *By a direction issued by the Hearing Chair on 5 May 2023, HEOC is required to provide evidence/reasons why documents which are being disclosed as appendices to the Sole Reference Document (“SRD”) should nevertheless remain subject to confidentiality and are being disclosed strictly on that basis. These are HEOC’s submissions.*
2. *HEOC is willing to accept that the appendices to the SRD other than the HS2 Supplemental Agreement dated 21 December 2017 (the “Agreement”) do not have the necessary quality of confidence and HEOC’s application for confidentiality in respect of them is withdrawn. However HEOC maintains that the Agreement is confidential and should not be put into the public domain.*
3. *The duty to treat information as confidential may arise from a principle of equity, that is, that information obtained in confidence cannot be disclosed without the discloser’s consent or misused to prejudice the disclosure. HEOC does not give such consent. In a commercial setting, this equitable principle will apply to the disclosure of sensitive or commercially valuable information such as that contained in the Agreement.*
4. *A useful overview of the position is set out in Seager v Copydex Ltd (No 1) [1967] 1 WLR 923; a person who has received information in confidence cannot take unfair advantage of it, and must not make use of it to the prejudice of the person who gave the information, without obtaining their consent. Equity acts on the recipient’s conscience to prevent them making an unauthorised use or disclosure of the information.*
5. *It is submitted that confidential information may take many forms but includes information on commercial operations as set out in the Agreement.*
6. *HEOC is satisfied that the Agreement can be shared with the Panel Members, provided that they treat the information as confidential and comply with ADRR rule H55.*
7. *HEOC agrees that in equity, three requirements must be met for a document to be considered as confidential as set out in Coco v A N Clark (Engineers) Ltd [1969] RPC 41. For the reasons set out below, HEOC submits that the claim for the Agreement to remain confidential is made out.*
8. ***Coco v A N Clark: three-limb test***

*The following three requirements must be met as set out in Coco v A N Clark:*

1. *The information itself must have the necessary quality of confidence.*
2. *The information must have been imparted in circumstances importing an obligation of confidence.*

3. *There must be an unauthorised use (or misuse) of that information to the detriment of the rights holder.*

*Taking each limb in turn:*

1. **Limb 1:** *Confidential information must "have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge" as per Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 R.P.C 203. The Agreement contains provisions of a commercially sensitive nature and refers to various other agreements including (i) the HEX TAA, (ii) the Deed of Waiver and Amendment, and (iii) the HS2 Compensation Agreement (as defined in the Agreement). These agreements (including the Agreement) have not previously been released into the public domain and the existence of some of these agreements is itself confidential in nature. To satisfy this limb, the information does not necessarily need to be commercially valuable. It is crucial to HEOC that the existence of the provisions of and reference to the connected agreements in the Agreement remain confidential.*
  2. **Limb 2:** *If two or more entities enter into negotiations with a view to entering into a contract, which leads to the execution of a contract, such contract will inevitably reveal the commercial position of the contracting entities. In this circumstance, the Agreement is the product of negotiations and discussions between Network Rail Infrastructure Limited ("**Network Rail**"), Heathrow Airport Limited ("**HAL**") and HEOC, and therefore the circumstances undoubtedly import an obligation of confidence. We note that the Agreement does not contain a confidentiality provision, but under Coco v A N Clark [1968] F.S.R. 415, the test is that "a reasonable [person] standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence". It is unclear and illogical that a contract, the product of commercial negotiations, can be considered suitable for public disclosure as negotiating commercial contracts provides the other party with confidential information which is only shared in the context of the negotiations.*
  3. **Limb 3:** *Confidential information can lose the protection of confidentiality as a result of disclosure. On the basis that the terms of the Agreement and the associated agreements (mentioned in Limb 1 above) have not previously been released in the public domain, HEOC submits that publishing such information now could have a commercially detrimental impact on HEOC in the context of future negotiations and such information could be misused by other interested parties / rail operators who also have a contractual relationship with Network Rail.*
9. *We refer to H28. Whilst we do not submit that the Agreement will be privileged from production in any proceedings in an action in the English courts, if the Agreement*

*was required to be disclosed in court proceedings, we would seek and we believe we would obtain, an order that the Agreement be redacted before disclosure pursuant to CPR Practice Direction 57AD – Disclosure in the Business and Property Courts (“PD57AD”) (paragraph 16) and be subject to a confidentiality order (PD57AD paragraph 15).*

- 10. We refer to H31. For the reasons set out above, HEOC submits that the Hearing Chair should consider the significant commercial sensitivity of the Agreement and should exercise his discretion not to grant disclosure of the Agreement at all. If the Hearing Chair is minded to grant disclosure, then it is the position of the HEOC that the Agreement be redacted to remove all commercially sensitive information before it is disclosed by publication on the website.*