

TTP2207

Sixth Directions – 16 May 2023

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

I am grateful to HEOC for its response to my Fourth Directions given on 9 May 2023 with requested details of the redactions which HEOC sought.

These directions concern the treatment of the HS2 Supplemental Agreement. As I indicated to the parties at the hearing on 10 May 2023 it was my provisional view that the hearing of the reference would turn on the material already set out in the parties’ SRDs rather than the full text of the HS2 Supplemental Agreement.

HEOC has to a degree changed the emphasis of its application and now primarily seeks to argue that certain contents of the HS2 Supplemental Agreement are commercially sensitive rather than confidential, though I understand HEOC to maintain its argument that the relevant parts of the agreement meet the requirements of Coco. HEOC seeks to strengthen its argument by a submission that the document (and agreements referenced within it) might be disclosable under the provisions of the Freedom of Information Act 2000 (“FOIA”). I accept that Network Rail is subject to the application of FOIA, but it may also be entitled to raise the defences set out within the Act.

As I have set out previously Rule H31 provides that the Hearing Chair will consider commercial sensitivity and may exercise a discretion to grant less than full disclosure. I note that HEOC draws my attention to Practice Direction 57AD paragraphs 16.1 and 16.2 but those provisions do not have effect between the Disputes Parties. The Practice Direction applies in the Business and Property Courts. In my view, the reference to documents in Rule H28 to documents which may be “privileged” means documents in connection with which legal professional privilege may be asserted. That factor does not apply here.

At its highest, I am willing to accept that there may be a potential risk that a third party might seek disclosure by application to Network Rail. I need to balance that against the fair disposal of this reference and consideration of which parts of the HS2 Supplemental Agreement are relevant to its disposal. In particular, all interested parties need to be aware of the hierarchy provisions in clause 2.5.3 because they are potentially material to HEOC’s entitlement to bring this reference.

I would not wish to give a view that the potential application of FOIA should be a decisive factor in connection with publication of a disclosed document generally under the Network Code but, taking into account the elements of the HS2 Supplemental Agreement which are required to decide this reference, on the facts of this reference my decision is as follows:

- (1) It is accepted by HEOC that the existence of the HEX TAA is in the public domain in circumstances which have no relation to this reference. Accordingly, I can see no basis for redacting references which simply repeat the fact that the agreement exists. That information has no quality of confidence.
- (2) The following redactions should be made:
 - (i) In background paragraph A the words in line 3 from “and a” to “2008”.

- (ii) In background paragraph D the words from “are” to “arising”.
- (iii) In background paragraph E the words from “the” in line 1 to “the parties”.
- (iv) In clause 1.2 the second and fifth definitions.
- (v) In clause 1.2, in the definition of HS2 Works Completion Date the words from “HS2” to the end.
- (vi) In clause 2.5.3 the words from “the” in line 1 to “this Agreement”.
- (vii) In clause 2.5.3(b) the words from “)” to the end.
- (viii) Clause 2.5.3(e).
- (ix) In clause 7.3.1 the words from “the” in line 1 to “which”.

(3) Subject to the above, the HS2 Supplemental Agreement should be published.

[Signed on the original]

Paul Stevenson

Hearing Chair TTP2207