

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 23 January 2013

Public Authority: Department for Transport
Address: Great Minister House
76 Marsham Street
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant made four separate sets of requests to the Highways Agency¹ from April to May 2012² for information in relation to how litter is managed on its road network.
2. The Commissioner's decision is that the public authority was entitled to rely on the exception at regulation 12(4)(b) of the EIR to deny the requests.
3. The Commissioner does not require the public authority to take any steps.

¹ The Highways Agency is an executive agency of the Department for Transport (DfT) and is not a public authority in its own right under FOIA or the EIR. Therefore, although the requests and subsequent correspondence from the Commissioner's office was handled by the Highways Agency, the DfT is named as the public authority for that reason.

² Three of the emails contain multiple requests.

Request and response

4. Between 25 April 2012 and 16 May 2012, the complainant made four separate sets of requests to the public authority. The requests are reproduced in Annex A.
5. The public authority provided a single response to the requests on 24 May 2012. All of the requests were refused on the basis that they were manifestly unreasonable within the meaning of regulation 12(4)(b) of the EIR.
6. Following an internal review the public authority wrote to the complainant on 23 July 2012. It upheld the decision to refuse to comply with the requests on the basis of regulation 12(4)(b).

Scope of the case

7. On 29 July 2012, the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The salient points from the grounds for his complaint are as follows:
8. The requests cannot be considered grossly oppressive in terms of time and resources needed to comply with them. The time estimate given by the public authority is excessive because the requests were not for a large number of documents. Given that they were for copies of documents, it would also not require the public authority to extract data, analyse and tabulate results.
9. There is no long history of similar requests showing no serious purpose. The requests are not motivated by a desire to cause a nuisance. They are not vexatious and do not relate to a non-existent litter problem. They infact relate to the public authority's obligations and there is evidence to show that his campaign to clean the Highway's Agency's road network had resulted in positive outcomes. The complainant highlighted the support his campaign had received from the public including his MP. He submitted there was clear evidence that since the campaign began, the level of cleaning on the Highways Agency's road network had increased.
10. The substantive scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to refuse to comply with the four separate sets of requests in Annex A on the basis of the exception at regulation 12(4)(b).

11. However, before considering the application of the exception, the Commissioner first considered whether the requests were handled under the correct information access regime (i.e. FOIA or EIR). The public authority made submissions in support of the decision to consider the requests under the EIR. The Commissioner is satisfied for the reasons given below that the EIR is the correct access regime for the information requested in Annex A.

Reasons for decision

Is the information requested 'environmental information'?

12. *'Environmental Information' is defined at regulation 2(1) of the EIR as any information in written, visual, aural, electronic or any other material form on-*
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
 - (d) reports on the implementation of environmental legislation;*
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c).....'*

13. In the Commissioner's view, the phrase 'any information.....on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. The Commissioner considers a broad interpretation of this phrase will usually include information concerning, about, or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
14. The Commissioner accepts that information requested is on measures, primarily administrative measures but also policies, affecting or likely to affect the amount of waste (in this case, litter) on land (i.e. Highways Agency's road network). He is therefore satisfied that the information relates to measures affecting or likely to affect the state of the elements and factors within the contemplation of regulation 2(1)(c).

Regulation 12(4)(b)

15. By virtue of regulation 12(4)(b), a public authority may refuse to disclose information to the extent that the request for information is '*manifestly unreasonable*' and in all the circumstances of the case, the public interest in maintaining the exception at regulation 12(4)(b) outweighs the public interest in complying with the request.³
16. According to the public authority, the requests are manifestly unreasonable because they are part of numerous requests from the complainant on the subject of litter which have resulted in a significant diversion of resources from its core duties. It also argued that the volume and frequency of the requests could be fairly characterised as obsessive. In view of the previous history of requests from the complainant on the subject matter, it also claimed that responding to the latest requests would have likely led to further requests from the complainant on the same subject.
17. The public authority provided the Commissioner with records from its Correspondence Recording System showing all of the previous requests for information by the complainant. It confirmed that all the requests, with the exception of one (to the Department of Transport) were about litter on the road network. The records show that from January to June 2011, the complainant made at least 20 sets of requests for information to the Highways Agency on the subject of litter on the Highways

³ The public interest test requirement is specifically mentioned in regulation 12(1)(b)

Agency's road network. In June, August and September 2011, he made three sets of requests to the Department of Transport, two of which were on the subject of litter on the Highways Agency's road network. Between February and March 2012, he made three further sets of requests to the Highways Agency on the same subject matter. A significant number of the requests were made two to three weeks apart from each other. The records also indicate that the public authority responded to all of the requests.

18. The Commissioner is of the view that regulation 12(4)(b) provides an exception to the duty to comply with a request for environmental information in two circumstances: 1) where it would likely incur unreasonable costs for the public authority or an unreasonable diversion of resources and 2) where it can reasonably be categorised as vexatious.⁴
19. The public authority estimated (and it provided a breakdown in support) that it would take a total of 72 hours just to provide the information required for three requests randomly selected from the requests of 30 April 2012 and 3 May 2012. As mentioned, these emails contain multiple requests. It explained that the maintenance and operation of the strategic road network in England is managed by the Highways Agency's Network Delivery & Development Directorate which includes seven regional divisions. It would take a total of 10 hours to collate information from one regional division alone for the three randomly selected requests and an additional two hours for the central coordination of the regional responses bringing it to a total of 72 hours (10 x 7+2). It submitted that this would place a significant burden on its resources and would also constitute a significant diversion of resources from its core duties.
20. In the Commissioner's view, the 72 hours estimate seems slightly excessive given the nature of the requests in question. They were for copies of documents which should have been readily available within a structured records management system and he is not fully persuaded from the breakdown provided that it would take a total of 10 hours for a regional division to comply. It is also unclear whether the remaining requests would actually require input from all of the seven regional divisions. Nevertheless, he is mindful of the number and the frequency of the previous requests made by the complainant to the public authority regarding litter on its road network. Against that backdrop, the

⁴ However, that is not to say that the exception is limited to these two circumstances only. There may well be other situations where regulation 12(4)(b) can apply.

Commissioner is persuaded that complying with the requests at Annex A would continue a pattern of requests which has resulted in a significant diversion of the public authority's resources from its core functions. The fact the requests at Annex A were made within 3 weeks of each other would have further added to the burden on the public authority's resources had it complied with the requests.

21. The public authority also explained that a response relevant to the request of 16 May 2012 was provided to the complainant as part of ongoing litigation i.e. a litter abatement order he had sought against the public authority at Wycombe and Beaconsfield Magistrates' Court. The public authority was keen to stress that the response was not provided under the terms of the EIR. In other words, by responding, it had not inadvertently waived its entitlement to rely on regulation 12(4)(b) with respect to this request. The Commissioner is satisfied that the response to the complainant as part of the ongoing litigation was not made under the terms of the EIR.
22. One of the factors the Commissioner considers in determining whether a request is vexatious is whether the request can fairly be characterised as obsessive, taking into account its context and history. As mentioned, the public authority is of the view that the volume and frequency of the requests at Annex A could be fairly characterised as obsessive. It also argued that in light of the history of the requests he has already made on the subject matter, responding to the requests would have likely led to further requests from the complainant.
23. The Commissioner accepts that the complainant's requests relate to a serious purpose which is to keep the public authority's road network free of litter. He accepts that the requests are not motivated by a desire to cause a nuisance and from all the evidence he has seen, the complainant's persistence had a positive outcome on the cleanliness of the road network. However, a point comes when the volume and frequency of requests go beyond the reasonable pursuit of information and beyond persistence. It is clear from the evidence the complainant himself has provided that the public authority responded to his campaign by taking steps to ensure that the road network remains free of litter. As mentioned, the complainant also sought a litter abatement order against the public authority in relation to the M40. The Magistrates' Court found in favour of the public authority.
24. In the Commissioner's opinion, the volume and frequency of the requests at Annex A is demonstrable evidence of requests that have gone beyond the reasonable pursuit of information and beyond persistence. This is in view of the number of previous requests the complainant had already made on the subject; the fact that the Magistrates' Court did not uphold his application for a litter abatement

order; and in light of the steps the public authority was taking to address the matter, steps which the complainant himself acknowledged. He therefore finds that the requests can be fairly characterised as obsessive.

25. The circumstances of this case do not represent a gross or flagrant example of vexatious requests in the Commissioner's view. Nevertheless, the significant amount of resources already expended on responding to the complainant's requests cannot be ignored. The Commissioner's view in light of the circumstances of this case is succinctly summed up in a statement by the Information Tribunal (the Tribunal) in relation to the application of section 14 FOIA (vexatious requests) which the Commissioner believes equally applies in this case. According to the Tribunal:

*'Inherent in the policy behind section 14 (1) is the idea of proportionality. There must be an appropriate relationship between such matters as the information sought, the purpose of the request and the time and other resources that would be needed to provide it.'*⁵

26. In considering the time and resources needed to respond to a request, it must be judged against the backdrop of what preceded it and it is in that sense that the context and history of the requests is especially relevant in the circumstances of this case.
27. In view of the above, the Commissioner finds that the requests at Annex A are manifestly unreasonable and the public authority was therefore entitled to engage the exception at regulation 12(4)(b).

Public Interest Test

28. As mentioned, regulation 12(4)(b) is subject to a public interest test. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighed the public interest in complying with the requests at Annex A.
29. To assist the Commissioner in considering where the balance of the public interest lies, the public authority helpfully provided sample copies of documents relevant to the requests of 25 April, 30 April and 3 May. It provided a copy of correspondence relevant to the request of 25 April, a sample audit report relevant to the requests of 30 April and a copy of

⁵ Wise v IC [GIA/1871/2011] at Paragraph 10

correspondence relevant to the requests of 3 May. The Commissioner does not consider that the provision of these documents undermines the public authority's arguments regarding the application of regulation 12(4)(b) in the circumstances of this case.

30. In favour of disclosure, the public authority acknowledged that given its legal obligation to comply with the Environmental Protection Act 1990, there is a public interest in disclosing information (as in this case) that demonstrates it is meeting its obligations.
31. It also acknowledged that there is a public interest in accessing information on the performance of service providers in relation to their contractual obligations in relation to litter clearance and how the Highways Agency monitors that performance.
32. In favour of maintaining the exception, the public authority strongly argued that it was not in the public interest to divert further resources to address requests from the complainant on the same subject matter. It explained that it had already published information and statistics on litter and had provided information related to its service contracts. It also intends to launch a dedicated litter page on its website. It was therefore not in the public interest to divert resources for one individual when it could provide information to all in an open and transparent way.
33. Given the strong likelihood that responding to the requests at Annex A would have led to further requests from the complainant, the public authority also strongly submitted that it is not in the public interest to dedicate its resources to an issue which it was already addressing by ongoing monitoring and assessment of the performance of its service providers.
34. The Commissioner recognises the public interest in ensuring that the public authority's road network is kept clear of litter and refuse, not least for health and safety reasons. He is satisfied from the sample documents provided that the information requested would likely contribute to discussions as to whether the public authority is meeting its obligations. However, he is persuaded that there is a strong public interest in not diverting significant resources from the public authority's core functions to comply with the complainant's requests. He is mindful of the fact that the public authority is taking steps to address the concerns raised by complainant and is determined to be more transparent in the dissemination of information to the public regarding the clear up of litter on its road network.
35. In view of the above, the Commissioner finds that, on balance, in all the circumstances of the case, the public interest in maintaining the

exception at regulation 12(4)(b) outweighed the public interest in disclosure.

Right of appeal

36. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A

Requests

25 April 2012

'I have received a letter from Lord Taylor of Holbeach It can be seen at:

www.cleanhighways.co.uk/wp-content/uploa...

He refers to the Highways Agency taking reasonable steps to keep their network free from litter and then says that "They have also recently reminded their Service Providers of their contractual responsibilities on this issue.

No doubt this was based on information provided to him by the Agency and you will therefore know what he is referring to. I assume recently means within the last 12 months.

Can you please let me have copies of the communications with each service provider (i.e. reminding them of their contractual responsibilities with regard to litter) that he was referring to.'

30 April 2012

'Please refer to this parliamentary about the cost of clearing litter from the Highways Agency's network

<http://www.theyworkforyou.com/wrans/?id=>

Please let me have:

- 1. A copy of the calculation which formed the basis of the estimate of £40 per sack and £9.6 million.*
- 2. A copy of the last 4 monthly audits of environmental amenity referred to.*
- 3. The last such audit performed which includes junction 1 of the M40.*

3 May 2012

Could you please send me copies of:

- 1. The last 4 communications between the Highways Agency and the relevant local authority directing the latter's attention to the littered state of, and/or the need to clean, that part of the A31 in Dorset which is part of your network.*

2. The last 4 communication between the Highways Agency and any local authority directing the latter's attention to the littered state of, and/or the need to clean, any trunk road in your network.

In both cases please include communications made on your behalf by your contractors.

You do not need to include any communications which are more than 2 years old.

16 May 2012

Please provide the following information in respect to the verges and embankments alongside slip roads of Junction 1 of the M40 motorway and the verges and embankments alongside the roundabout under the junction known as the Denham roundabout.

In the last 12 months:

1. How many times has inspection been carried out by Highways Agency personnel (as opposed to an employees of a contractor) to assess the degree of cleanliness or otherwise?

2. On what dates did they take place?

3. Please provide copies of the resulting inspection reports or other documents recording of the condition of the land, and any follow up communications/ meeting minutes etc including those with the relevant contractor(s)?.