

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

Decision notice

Date: 1 July 2019

Public Authority: Department for Infrastructure

Address: Clarence Court
10-18 Adelaide Street
Belfast BT2 8GB

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Infrastructure ('DfI') in relation to service changes relevant to the provision of public transport. The DfI disclosed some information to the complainant, withheld some information under regulation 12(5)(e) of the EIR and stated that it did not hold the remaining requested information.
2. The complainant has made no complaint to the Commissioner in respect of regulation 12(5)(e). In relation to the other parts of the requests raised in internal review, i.e. 1), 2(a) and 2(d), the Commissioner is satisfied that on the balance of probabilities the DfI does not hold information within the scope of these. Therefore, the DfI was entitled to refuse parts 1), 2(a) and 2(d) of the complainant's requests under regulation 12(4)(a) of the EIR, however it incorrectly refused part 2(f) under that regulation and in that respect has not complied with its duties under regulation 5(1) of the EIR.
3. The Commissioner requires the DfI to take the following steps to ensure compliance with the legislation:-
 - Disclose the information it does hold within the scope of part 2(f) of the complainant's request, or, if any exception(s) under the EIR apply to

that information, issue a fresh refusal notice in accordance with regulation 14 of the EIR stating this.

4. The DfI must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant requested the following information on 27 July and 31 October 2017:-
 1. "As the Department is aware, the vehicle provision on the current Translink 212/x212 Regular Stopping Services is in stark contrast with the service we applied to provide. The Department ought to be aware that a sizeable proportion of the Translink services are not operated by lowfloor/low-entry buses. We would ask the Department to provide us with the exact breakdown.
 2. [The complainant] would request that the Department provides all the evidence that it commissioned, cited or referred to during its deliberations. The information requested includes, but is not limited to:
 - a. [The complainant] asks the Department to provide detailed information on all the specific material and evidence it used to challenge the evidence of demand for the service supplied by [the complainant] within its submissions in support of its application.
 - b. [The complainant] asks the Department to provides detail of all specific material and evidence it used to come to its conclusion that "the granting of a service permit for this application would have a negative impact on current Translink services."
 - c. [The complainant] specifically requests that the Department provides evidence of relevant and individual subject matter expertise it had access to during its deliberations.

This information should include, but is not limited to, the specific relevant qualifications and experience of any Subject Matter Expert the Department used, referenced, cited or consulted at any stage of its deliberations or consultation process."

- d. "[The complainant] requests the Department provides the specific and detailed expert estimates of shift in demand /

displacement it used to come to its conclusion that “the granting of a service permit for this application would have a negative impact on current Translink services.”

- e. [The complainant] requests that the Department provide a breakdown of all passenger journeys made over the past 5 years along the Derry-Londonderry to Belfast Regular Stopping Service bus route operated by the 212/x212. The information should be specific to each stop, the direction of travel, the ticket type and the class of passenger travelling [for clarity class of passenger travelling in this context means Adult, Child, Over 60 pass, Over 65 pass, etc]
- f. [The complainant] also requests the Department provides similar [to d above] specific and detailed expert estimates of shift in demand / displacement and any economic appraisals it referred to, carried out or commissioned in relation to the hourly train service between Derry-Londonderry and Belfast which the Department / Translink introduced in July 2017.
- g. [The complainant] also requests full details of any other expert evidence of transport economics and demand stimulation it considered in coming to its overall conclusion.”
3. “[The complainant] also requests that the Department provide copies of all Economic Appraisals in relation to Capital Investment and funding of the Park and Ride sites along the Derry-Londonderry to Belfast Regular Stopping Service bus route operated by the 212/x212. For clarity, this includes any Economic Appraisals carried out internally by the Department or commissioned by it. It also includes all Economic Appraisals submitted to the Department by Translink / Ulsterbus or other stakeholders.”
6. The DfI responded to the complainant on 18 December 2017. It provided the complainant with some information in relation to his requests, stated that it was withholding some information under regulation 12(5)(e) of the EIR, and stated that it did not hold the remaining requested information.

7. On 2 January 2018 the complainant requested an internal review of the DfI's decision in relation to parts 1, 2(a), 2(d) and 2(f) of his requests, as he believed that its response was incomplete. The result of that review was provided to him on 22 February 2018. The reviewer clarified some information in relation to part 1 of the requests and stated that the DfI does not hold any further information in relation to parts 2(a), 2(d) and 2(f) of the complainant's requests other than what had already been provided to him.
8. Following the Commissioner's intervention, seeking further clarification as to why information is not held in relation to part 2(f) of the complainant's requests, the DfI wrote to the Commissioner on 22 May 2019.
9. The Commissioner's letter asked specifically why the DfI did not hold information in relation to the evidence of demand for the introduction of an hourly train service between Derry/Londonderry and Belfast. The Commissioner referred to the terms of the Service Level Agreement between Translink and the DfI, which state that, when service changes constitute more than a 3% change to the scheduled mileage, Translink must notify the DfI of such changes. The Commissioner stated that, given this provision, information should have been held by the DfI in relation to this, which forms part of the complainant's requests.
10. In its response to the Commissioner of 22 May 2019, the DfI stated that the relevant change in service was agreed outside the corporate planning process, due to a request from the then Minister for Infrastructure, Chris Hazzard. The Service Level Agreement between Translink and the DfI specifies that, when such a request comes from a Minister, notwithstanding any other provisions of the Service Level Agreement, the DfI may propose permanent service changes to Translink, take account of Translink's views on these, then implement them in writing to Translink. The DfI provided the Commissioner with three pieces of correspondence in relation to this issue, with redactions made where the information is not relevant to this particular service change. The Commissioner considers that these redacted letters are within the scope of part 2(f) of the complainant's request.

Scope of the case

11. The complainant contacted the Commissioner on 10 April 2018 to complain about the way the DfI handled his requests for information.

12. The complainant has made no complaint with regards to the DfI's application of regulation 12(5)(e) of the EIR. The Commissioner's investigation has therefore focused on the issues raised in the complainant's request for an internal review. To clarify, the concerns raised at the internal review stage related to parts 1, 2(a), 2(d) and 2(f) of requests and were that the complainant believes the DfI holds further recorded information to that already provided.

Reasons for decision

Regulation 5(1) – duty to make environmental information available on request

Regulation 12(4)(a) – information not held

13. Regulation 5(1) of the EIR says that a public authority that holds environmental information shall make it available on request.
14. Regulation 12(4)(a) says that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.

Regulation 12(4)(a) EIR

15. By virtue of regulation 12(4)(a), a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
16. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – in accordance with a number of First-Tier Tribunal decisions – applies the civil standard of the balance of probabilities. In other words, the Commissioner will determine, on the balance of probabilities, whether the public authority holds additional information within the scope of the complainant's request.

17. In making her decision, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
19. The Commissioner asked the DfI what steps it had taken to determine what recorded information is held relevant to the scope of the request and to provide a detailed account of the searches that it had conducted to determine this.
20. The DfI informed the Commissioner that the information requested focused on an application to run an express service from Belfast to Derry. This is a formal application process under the Transport Act (Northern Ireland) 2011.
21. The above legislation details the matters to which the DfI must have regard when determining an application. Due to the statutory nature of the decision, all information taken into consideration in the determination, and indeed related to the application in any way, is stored in one location in the DfI's records management system ('TRIM'), a networked electronic storage resource.
22. The complainant raised two issues in his Internal Review request on 2 January 2018:
 - Firstly, he sought an exact breakdown of the vehicles used on Translink bus services, indicating whether the vehicles were low-floor/low-entry.
 - Secondly, he sought additional information in respect of the evidence of demand for the introduction of an hourly train service between Derry/Londonderry and Belfast.

23. In respect of the first issue, the DfI has informed the Commissioner that searches were carried out on TRIM in the relevant containers for information relevant to Metro and Ulsterbus fleet replacement that would contain all relevant material for economic appraisals for this business area. As detailed in the DfI's response to the complainant's request for internal review, the allocation of individual vehicles is an operational matter for Translink and, as such, the searches found no further information relevant to the complainant's query.
24. The DfI also states that there is no evidence of any information being stored elsewhere within the Department, and the information has not yet reached the age where it would be considered for destruction. There is also no requirement or reason for the DfI to create or hold any information in addition to that provided.
25. In respect of the second issue raised in the internal review request, which relates to part 2(f) of the complainant's request, the Commissioner has already established that the DfI holds information within the scope of this part of the request for the reasons already provided in paragraphs 8 to 10 above.

Conclusion

26. In relation to parts 1, 2(a) and 2(d) of the complainant's requests, the Commissioner is satisfied that on the balance of probabilities the DfI does not hold any further recorded information to that already provided. For these elements the DfI is entitled to rely on 12(4)(a) of the EIR.
27. In relation to part 2(f) of the requests, the Commissioner has decided that DfI does hold recorded information falling within scope and this information should be disclosed to the complainant. In relation to this element of the request, the DfI has not complied with its duties under regulation 5(1) of the EIR.
28. Therefore, the Commissioner concludes that the DfI does hold information within the scope of part 2(f) of the complainant's request, however, on the balance of probabilities, it holds no further information in relation to parts 1 and 2(d) of the complainant's requests other than that which has already been provided to the complainant. Therefore in its response to the complainant, the DfI has not complied with its duties under regulation 5(1) of the EIR.

Right of appeal

29. 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: 0870 739 5836
Email: Grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.
31. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF