

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

**Date:** 2 April 2019

**Public Authority:** Highways England Company Ltd (Highways England)

**Address:** Bridge House  
1 Walnut Tree Close  
Guildford  
GU1 4LZ

**Decision (including any steps ordered)**

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1. The complainant requested information regarding penalties incurred by a particular contractor.
2. The Commissioner's decision is that Highways England Company Ltd ("HE") failed to issue a refusal notice, citing all the exemptions it eventually came to rely upon, within 20 working days. It therefore breached Regulation 14 of the EIR.
3. The Commissioner does not require any steps to be taken.

**Request and response**

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4. On 11 June 2018, the complainant contacted HE via the [whatdotheyknow.com](http://whatdotheyknow.com) website and, referring to previous correspondence he had received, requested information in the following terms:

*"Please let me know in respect to the current and previous 4 years (you may choose financial or calendar years):*

*[1] The total amount of the financial penalties applied by Highways England?*

*[2] How much of this was in respect to litter clearance?*

*[3] The total amount of performance points allocated by Highways England?*

*[4] Again, how much of this was in respect to litter clearance?"*

5. HE responded on 9 July 2018. In respect of elements [3] and [4] of the request, it provided some information. In respect of the remaining elements, it stated that it was withholding information – citing Section 43 (commercial interests) of the FOIA.
6. On 26 July 2018, the complainant sought an internal review in respect of elements [1] and [2]. He argued that the information was environmental and therefore should have been looked at under EIR. He subsequently broadened the terms of his review to complain that HE had not set out why any exemptions applied or provided details of the public interest considerations it had carried out.
7. Following an internal review, HE wrote to the complainant on 21 August 2018. It accepted that the request should have been looked at under the EIR and provided some information which it felt came within the scope of element [2] of the request. In respect of element [1], it refused to provide the requested information, but did not cite an exception under the EIR.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 5 September 2018 to complain about the way his request for information had been handled.
9. The complainant considered that elements [3] and [4] had been answered satisfactorily, but not elements [1] and [2].
10. At the outset of her investigation, the Commissioner asked HE to revisit the request and issue a refusal notice covering elements [1] and [2]. HE issued this fresh refusal notice on 1 February 2019. In relation to element [1], it stated that it wished to rely on Regulation 12(5)(e) (commercial confidentiality) to withhold information. In respect of element [2], it argued that it had provided everything it held within the scope of the request.
11. The Commissioner then wrote to HE asking it to set out its arguments as to why Regulation 12(5)(e) was engaged and the public interest arguments it had considered. Having reconsidered the request a third time, Highways England now informed the Commissioner that it held no

information within the scope of element [1] (and, by implication, element [2]). It thus issued a final refusal notice on 6 March 2019 in which it refused these elements of the request citing Regulation 12(4)(a) of the EIR (Information Not Held).

12. The complainant has accepted that HE holds no further information but was unhappy about the delay in bringing the case to a resolution.
13. The only remaining matter for the Commissioner to look at is whether HE's refusal notice was adequate.

## Reasons for decision

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*Is the requested information environmental?*

14. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;*
15. In this case the requested information concerns the clearance of litter, therefore it is likely that it would be information about "measures", affecting "factors", affecting the elements of the environment. Whilst this does not affect whether information is held, for procedural reasons, the Commissioner has assessed this case under the EIR.
16. Regulation 5(1) states that: "*a public authority that holds environmental information shall make it available on request.*"
17. Regulation 12 states that:

- (1) *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.*
  - (4) *For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*
    - (a) *it does not hold that information when an applicant's request is received;*
18. Regulation 14 states that:
  - (1) *If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.*
  - (2) *The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.*
  - (3) *The refusal shall specify the reasons not to disclose the information requested, including—*
    - (a) *any exception relied on under regulations 12(4), 12(5) or 13; and*
    - (b) *the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).*
19. Unlike with the FOIA, there is no explicit duty to confirm or deny holding information under the EIR. However, the EIR does contain an exception which a public authority may cite to refuse a request where it does not hold the requested information.
20. In this particular case, HE first cited Section 43 of FOIA, then cited no exemption/exception at all, then Regulation 12(5)(e) of the EIR before finally settling on Regulation 12(4)(a).
21. The Commissioner's view is that HE failed to identify accurately the information it held within the scope of the request when it issued its first refusal notice. This fault was not corrected and therefore HE did not

begin relying on the correct exception to refuse the request until 8 months after it should have complied with the request.

22. The Commissioner therefore finds that HE failed to issue a refusal notice, citing the correct exception, within 20 working days. It therefore breached Regulation 14 of the EIR.

## Right of appeal

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23. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

24. 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.
25. 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 .....**

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**