

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

**Decision notice**

**Date:** 16 December 2019

**Public Authority:** Highways England  
**Address:** Piccadilly Gate  
Store Street  
Manchester  
M1 2WD

**Decision (including any steps ordered)**

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1. The complainant has requested a list of structural reports where the structure's condition was most recently described as "dangerous." Highways England ("HE") refused the request because it estimated that the cost of complying would exceed the appropriate limit.
2. The Commissioner's decision is that HE should have dealt with the request under the EIR, but that the request was Manifestly Unreasonable and the public interest favours maintaining the exception. HE was therefore entitled to rely on Regulation 12(4)(b) to refuse the request. She also finds that HE complied with its Regulation 9 duty to provide advice and assistance.
3. The Commissioner does not require any further steps.

**Request and response**

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4. Between 6 August and 8 August 2019, the complainant and HE engaged in several emails as the complainant attempted to refine his request. HE advised the complainant that the term "dangerous" was not a descriptor it used to classify the condition of a particular structure. The complainant argued that the adjective "dangerous" was used in some reports and therefore HE must hold some relevant information. HE responded to say that it would hold information but that this would require a manual review of all the reports it held.

5. On 8 August 2019, the complainant settled on the wording of his request as follows:
  - "[1] Please send me a list of names (or other identifying details) of structures you class as "bad" or "poor" on the basis of the last inspection.
  - "[2] Please also send me a list of the names (or other identifying details) of structures that your consulting engineers describe as "dangerous" in any part of their report - from the last inspection."
6. HE responded on 28 August 2019. It stated that it wished to treat the request as "business as usual". It provided information within the scope of element [1]. In relation to element [2], it noted that it would have to search through "tens of thousands" of reports to locate information within the scope of the request.
7. The complainant responded the same day to demand a proper refusal notice so that he could "decide what to do next". HE issued a formal refusal notice on 4 September 2019. It refused the request and relied on section 12 of the FOIA to do so.
8. Following an internal review HE wrote to the complainant on 27 September 2019. It upheld its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 29 September 2019 to complain about the way his request for information had been handled.
10. At the outset of her investigation, the Commissioner wrote to HE to say that she considered it likely that some of the reports would either be or contain environmental information. As the complainant had asked for a list of reports, she considered that any list of environmental information would itself be environmental. As well as seeking details of how it had arrived at its cost estimate for complying with the request, the Commissioner therefore also asked HE to provide public interest arguments so that, were she to determine that the information was environmental, she could consider whether the request was Manifestly Unreasonable without having to seek further submissions.
11. Whilst HE did provide public interest arguments, it contested that the Commissioner's view that the information was environmental.

12. The Commissioner considers that the scope of her investigation is to determine firstly, which information access regime the request should have been handled under and secondly, whether HE has made a reasonable estimate of the burden of complying with the request.

## Reasons for decision

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*Is the requested information environmental?*

13. 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;*
  - (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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
14. HE helpfully supplied a sample report for the Commissioner to consider. The Commissioner noted that the particular report in question mostly contained observations about the state of two sections of fencing as well as photographs of the structure itself and its surroundings.

15. However, the Commissioner is conscious that she has only seen a single report. She considers it highly likely, given their nature, that other reports might be expected to contain details of how the structures had been affected by weather, subsidence or other environmental factors. She also noted that there were data fields within the report to record information about fly-tipping and rights of way (either across or under the structure) – both or which she has previously found to be environmental information.
16. The Commissioner is therefore satisfied that the reports contain information falling within several of the various categories of environmental information listed in Regulation 2(1) of the EIR.
17. The request itself did not seek copies of the reports – it sought a list. However, that list could only be compiled by consulting the original information – which is environmental. The Commissioner therefore considers that any list would itself be environmental information and thus the request should have been dealt with under the EIR.

Regulation 12(4)(b) – Manifestly Unreasonable (burden)

18. Regulation 5(1) states that:

*"a public authority that holds environmental information shall make it available on request."*

19. Regulation 12 of the EIR states that:

*(1) Subject to paragraphs (2), (3) and (9), 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.*

*(2) A public authority shall apply a presumption in favour of disclosure.*

*(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*

*(b) the request for information is manifestly unreasonable;*

20. The Commissioner considers that a request can be manifestly unreasonable for two reasons: firstly, if it is vexatious and secondly

where it would incur unreasonable costs for a public authority or an unreasonable diversion of resources.

21. The EIR do not provide a definition of what constitutes an unreasonable cost. This is in contrast to section 12 of the FOI Act under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the "appropriate limit". This appropriate limit is defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") as £600 for central government departments and £450 for all other public authorities.
22. Although the Regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference when public authorities argue that complying with a request would incur an unreasonable cost and therefore could be refused on the basis of regulation 12(4)(b).
23. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
  - Determining whether the information is held;
  - Locating the information, or a document which may contain the information;
  - Retrieving the information, or a document which may contain the information; and
  - Extracting the information from a document containing it.
24. HE explained that its contractors did not categorise structures as "dangerous." Whilst it accepted that the word "dangerous" might appear in some of the free-text fields of the reports, this would not necessarily mean that the report itself would fall within the scope of the request. For example, the sample report HE provided to the Commissioner referred to gaps in fencing as being "dangerous."
25. In order to satisfy the request, HE argued that a manual review of its files was necessary to establish which the most recent version of the report for each structure was, whether that report included the word "dangerous" and, if it did, whether the word was used in reference to the actual condition of the structure.
26. HE is responsible for maintaining in excess of 3,000 structures throughout the country.
27. HE informed the Commissioner that each report was stored in one of 26 folders, depending on which letter of the alphabet the structure in question's internal reference number begins with. It noted that its "A"

folder contained 2,681 reports and its "B" folder in excess of 5,100 records. It therefore calculated that it held around 45,000 reports in total, or approximately 15 reports per structure.

28. HE then noted that it had carried out a sampling exercise:

*"This was based on folder A. The search took 1 hour and 33 minutes and identified 8 reports containing the word 'dangerous'. These 8 involved three different structures (5 reports for one structure, 2 for one structure and one for another structure)."*

29. Having identified eight reports as including the word "dangerous", HE noted that none of them would fall within the scope of the request as the word was not used in reference to the condition of any of the structures.

30. Whilst it had initially estimated that it would take in excess of 750 hours to identify relevant information, based on its sampling exercise, HE concluded that it would take a total of 39 hours to identify all the information it held within the scope of the request. It noted that this was in addition to the time it had spent answering element [1] of the request (although it did not quantify how much time it had spent on element [1]).

#### *The complainant's view*

31. As well as arguing that HE's original estimation was exaggerated, the complainant further argued that:

*"Highways England have sought to limit my request and interpret it to refer to their own internal classification system when I am interested in the words of their subcontracted consulting engineers who actually produce the safety reports....Even if it was true that there were different ways that the word 'dangerous' was used within the reports, they could have simply released the database with a proviso that the context had not been established or helped me to reword a request to get the correct information."*

32. He also noted that:

*There is an overwhelming Public Interest in the information being released. Many of the large structures in the Historical Railways Estate are bridges, viaducts and tunnels. Some cross working railway lines, some cross public roads, some have buildings on them. It is therefore of critical importance for the public to be able to hold Highways England, Government Ministers and other elected officials to account for the management of any structure in their*

*locality which has been determined to be "dangerous" by an engineering safety inspection."*

*The Commissioner's view*

33. The Commissioner considers that the request was burdensome and therefore Manifestly Unreasonable.
34. The Commissioner accepts HE's argument that the way in which the complainant's request is worded necessitates a manual search of the reports it holds in order to determine what information would fall within the scope of the request. It is the complainant who, having presumably had regard to HE's advice and assistance, chose the particular wording of the request. HE has not reinterpreted the request, nor has it sought to restrict the request. If the complainant wanted a list of all reports which used the term "dangerous" in *any* context, he could have requested that.
35. Whilst she notes that HE's initial estimate of the time required to identify relevant information has shrunk considerably, the Commissioner does consider that HE has now arrived at an estimate which is supported by evidence. Whilst there is no set limit beyond which a request becomes Manifestly Unreasonable, the Commissioner considers that 39 hours to respond to a request is unreasonable – especially when set against the £450 (18 hour) limit that would have been applied had the request been for non-environmental information.
36. The fact that the sampling exercise did not identify any relevant information strengthens the Commissioner's view that the request is Manifestly Unreasonable, as the considerable amount of time spent on searches would be likely to produce only a small amount of relevant information.
37. The Commissioner is therefore satisfied that Regulation 12(4)(b) of the EIR is engaged in relation to the request.

*Public Interest Test*

38. As the complainant has identified, there is clearly a strong public interest in identifying any structures which pose a potential risk to the public. This is in addition to the inherent public interest in bodies which spend taxpayers' money being transparent about the way that money is spent.
39. However, set against that, HE argued that answering the request would:



*place a disproportionate burden and cause an unjustified level of disruption to a team that is very small and would impact their ability to carry out their other work.*

40. The Commissioner's view is that, in this case, the balance of the public interest favours maintaining the exception. Whilst recognising that public safety is a substantial public interest, the Commissioner is not convinced that responding to this particular request would be likely to add significantly to public understanding – especially when set against the burden on HE in responding.
41. HE has explained that the term "dangerous" is not a categorisation that it uses in relation to the condition of its structures. Therefore, it is quite possible that the structures which would be identified by this request would not necessarily be those which would give the greatest cause for concern – a structure referred to as being "risky", "hazardous" or "in imminent danger of collapse" might well give greater cause for concern but would not be within the scope of the request.
42. The Commissioner has also noted the relatively small amount of relevant information uncovered during the sampling exercise which, again, reduces the overall public interest in responding to the request.
43. Having considered the various factors, the Commissioner therefore considers that the public interest favours maintaining the exception.

*Presumption in favour of disclosure*

44. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner & Government Legal Department* [2019] UKUT 247 (AAC), "*If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...*" and "*the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations*" (paragraph 19).
45. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.



## Regulation 9 – Advice and Assistance

46. Regulation 9 of the FOIA requires a public authority to provide “reasonable advice and assistance” to those making or wishing to make a request.
47. In cases where a public authority considers that a request could not be answered without imposing a manifestly unreasonable burden, the Commissioner would normally expect advice and assistance to be provided to help the requestor bring their request within a more reasonable limit.
48. The complainant, in his grounds of complaint, argued that:

*“Highways England claim that I was unwilling to limit the scope of this request. Without some assistance from Highways England as to the use of the term “dangerous” within the documents, it is impossible for me to know how to limit it. If they had told me which reports contained the term, I could have further scoped the information by requesting the full reports in question to read for myself the context.”*
49. Whilst HE did not provide advice and assistance as part of its formal refusal notice, the Commissioner notes that, by the time the refusal notice was issued, HE had already exchanged a great deal of correspondence with the complainant to assist him in refining his request.
50. For example, on 6 August 2019, HE informed the complainant that it:

*“must point out that ‘dangerous’ is not a term or classification that is used in our management of the Historical Railways Estate and so cannot be applied in our search for any information which may fall within the scope of your request.”*
51. On 8 August 2019, prior to the formal request itself, it went on to say that:

*“when each report is received it is reviewed by an experienced engineer in our team. As a result after each received examination the engineer records their opinion of the structures current condition based upon the report. The condition is classed as Bad, Poor, Good or Fair. It is this classification which then drives our prioritisation of future maintenance works when overlaid with the consequence of failure of the structure. Would that be more of an indication of the information that you are seeking?”*

52. The Commissioner considers that it would be unreasonable to expect the majority of requestors to have a detailed knowledge of the precise information a public authority holds and the manner in which it is recorded. Part of the purpose of the duty to advise and assist is to require the public authority to explain to a requestor how best to frame a request to capture the information which is of interest.
53. In the above case, the Commissioner considers that HE had set out, quite clearly, the way in which its reports were categorised. It had already explained that, whilst the term "dangerous" might appear in a particular report, structures were not classified in this manner. Thus the adjective would appear in the body of a report and might or might not refer to the structure itself.
54. In the Commissioner's view, the complainant was provided with ample advice and assistance which he could have used to make a request which would not have been burdensome.
55. It is the right of the complainant to word his request in any way he sees fit. However, if he chooses not to take account of the advice and assistance he has been provided with, he runs the risk that his request will not succeed. That does not mean though that he was not provided with adequate advice and assistance in the first place.
56. The Commissioner therefore finds that HE complied with its Regulation 9 duty to provide advice and assistance.

## Right of appeal

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57. 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](mailto:grc@justice.gov.uk)

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

58. 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.
59. 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 .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**