

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 2 June 2020

**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 from Highways England the underlying data regarding bridge condition index scores for the five years prior to his request. Highways England, having provided some summary information in response to his initial request, refused to provide the underlying data, withholding it under sections 24 and 36 of the FOIA.
2. The Commissioner's decision is that Highways England responded to the request under the wrong access scheme and that the response should have been in line with the EIR. She also finds that Highways England's application of Regulation 12(5)(a) is not engaged. Additionally, the Commissioner has found that the public authority breached Regulation 14(2) of the EIR by failing to issue a refusal notice within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the datasets containing individual bridge conditions for the last five calendar years prior to the request.
4. The public authority 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

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5. On 22 March 2019 the complainant made the following request for information under the FOIA:

*"Please provide a copy of the bridge condition index score for all bridges maintained by Highways England, all fields held in your recording database, including any free text fields, and a copy of guidance on how the bridge condition index is calculated by your agency.*

*If held, please provide the index score for bridges for each of the the last five calendar years."*

6. Highways England responded on 25 April 2019 and provided some information without providing the underlying data.
7. On 7 May 2019 the complainant wrote again to Highways England as follows:

*"However, if you produce aggregate statistics on bridge condition, you must hold a dataset recording individual bridge conditions to allow you to collate this aggregate data, which is what my request was for. As such, I'd be grateful if you could provide this underlying data."*

8. Highways England responded on 2 July 2019 stating that it held the information but was withholding the *"Details and locations of all bridges and condition data relating to each structure"* under sections 24 (safeguarding national security) and 36 (prejudice to the effective conduct of public affairs) of the FOIA.
9. On 8 July 2019 the complainant requested a review. In his review request the complainant suggested that the data could be released in an anonymised fashion including the underlying data on structural performance. He suggested that this could be achieved by removing the locating fields from the dataset and retaining all other fields.
10. Highways England provided an internal review on 9 August 2019, in which it reviewed the requests but maintained its original position.
11. During the subsequent investigation, the Commissioner invited Highways England to reconsider the request under the EIR. Although Highways England did not accept that the request fell under the EIR it cited Regulation 12(5)(a)(international relations, defence, national security or public safety) if the Commissioner decided that the FOIA was not the correct access scheme to have responded under.

## Scope of the case

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12. The complainant contacted the Commissioner on 18 August 2019 to complain about the way his request for information had been handled.
13. Firstly, the Commissioner considers the scope of the case to be whether the public authority handled the request under the appropriate legislation and secondly, whether the requested information has been appropriately withheld, either under sections 24 and 36 of the FOIA or Regulation 12(5)(a) of the EIR.

## Reasons for decision

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### Regulation 2: environmental information

14. Regulation 2(1) of the EIR provides the following definition of environmental information:

*"...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);”*

15. The Commissioner has published guidance about what constitutes environmental information.<sup>1</sup> Her view is that public authorities should adopt a broad interpretation in line with *The Aarhus Convention An Implementation Guide*<sup>2</sup>.

16. In the *Information Commissioner v Department for Transport and Hastings*[2018] UKUT 184 (AAC) the Tribunal gave guidance on the approach to take when documents include environmental and other information which endorsed the Commissioner’s own three stage methodology (only the first two stages apply in relation to this requested information<sup>3</sup>):

*69. First, the starting point for a Tribunal’s analysis is that “environmental information” in regulation 2(1) of the EIR must be construed broadly...*

*70. Second, the documents containing the requested information must be considered as a whole. Tribunals should ask themselves whether the requested information as a whole is information ‘on’ one or more of the matters identified in the regulation 2(1) EIR definition.*

17. Highways England’s view is that the requested information does not fall under the EIR. The public authority explains that the request is for bridge condition scores that are calculated using a statistical algorithm. The information is at a high level and is a periodic inspection of every highway structure. Highways England explains that the bridge condition indicators are only used in reporting the performance of structures at a strategic level and are not used for operational reasons. Inspectors record the factual condition of each element and component of a structure, the nature and location of the defects, and their extent and severity. The condition indicators are calculated based on the structures asset database which records the extent and severity of defects. Highways England further explains that, although there are environmental factors (weathering, climate change, high and low temperatures, high rainfall and associated flooding) that have an effect

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf)

<sup>2</sup> <https://www.unece.org/environmental-policy/conventions/public-participation/publications/public-participation/2014/the-aarhus-convention-an-implementation-guide-second-edition.html>

<sup>3</sup> The third stage does not apply as the requested information has not been disaggregated.

on the structural condition of the bridges, there are many more non-engineering factors that are assessed. Highways England argues that it is not possible to separate out the environmental from the non-environmental factors.

Why is this information environmental?

18. The Commissioner notes that the factors that have gone into calculating the bridge condition scores and the rest of the information recorded on the database do not itemise the individual factors. Nonetheless, in taking a broad view, the Commissioner has concluded that the very fact that there are environmental factors in the bridge condition calculations that cannot be separated from the non-environmental factors (even if the non-environmental factors exceed them) does not mean that the information falls outside the scope of the EIR.
19. Similarly, although Highways England considers the information is on a strategic rather than an operational level, it is probable that it forms part of the public authority's plan of action to achieve the overall aim of instituting measures to repair or replace bridges which is likely to have an effect on the elements of the environment, including land and landscape as defined in Regulation 2(1)(c).
20. The Commissioner considers that the information also relates to "built structures" as set out in Regulation 2(1)(f) to the extent that they are or may be affected by the state of the elements of the environment.
21. For the reasons given above, the Commissioner has not gone on to consider Highways England's citing of sections 24 and 36 but has solely considered the scope of this case to fall under the EIR and the public authority's citing of Regulation 12(5)(a).

**Regulation 12(5)(a) – international relations, defence, national security or public safety**

22. As explained earlier in this decision notice, Highways England cited national security and public safety as its reasons for withholding the requested information. The Commissioner has had sight of the spreadsheets that contain the information withheld from the complainant.
23. Regulation 12(5) states:  
  
*'For the purposes of paragraph (1)(a) a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –  
(a) international relations, defence, national security or public Safety'.*

24. The public authority's view is that it does not release locational details of all its structures and that to do so would be a risk to national security. It argues that road infrastructure is one of the UK Critical National Infrastructure (CNI) sectors and that there is a defined terrorist threat, as outlined in the UK National Risk Register. Highways England's view is that once information about structures is released, it is in the public domain and available to anyone to use or misuse. Highways England acts as steward for the assets on the Strategic Road Network (SRN). Structures assets are critical infrastructure. The public authority states that release of this information would assist terrorists in planning and conducting an attack against that infrastructure to severely disrupt the normal operation of the network. The release of the names and locations of structures as well as particular vulnerabilities could assist in any terrorist targeting.
25. Additionally, Highways England argues that the information, if released, would pose a public safety risk. The information would be of benefit to organised criminal groups such as metal thieves and various urban explorer and sport groups who seek to gain unauthorised access to structures. They would then put themselves and others at significant safety risk, including Highways England's own employees.
26. Highways England contends that it acted reasonably by providing summary information of the condition indicators for previous years and guidance on how the condition indicators are calculated. It uses these summary figures to assess the overall changes in the condition of the stock of structures on the Strategic Road Network, internally and externally, by reporting to the Department of Transport and the Office of the Rail and Road Regulator.
27. The complainant argues that Highways England provides no explanation as to how disclosure would actually pose a security risk, what the security risk is and how that could be weighed against the public interest.
28. The complainant provided evidence that the same type of information is available in other countries (providing data from the United States) and questions why this would have been published if it was a genuine security threat. He contends that it is highly unlikely that the information would be of practical use to a terrorist as it would require a more detailed analysis and training in explosives which the information would not provide.
29. His opinion is that a lack of proper maintenance of public infrastructure can have deadly effects if maintenance processes are not subject to public scrutiny and he cites the Genoa motorway bridge as evidence. This kind of scrutiny would allow the public to have greater confidence in using it without fear of incidence. He suggests that Highways England

could explain the limitations of the information and that there are other factors that are taken into account.

30. The Commissioner's guidance<sup>4</sup> to Regulation 12(5)(a) explains that there are many threats to national security and that they extend beyond military defence. Nonetheless there have been a limited number of cases where Regulation 12(5)(a) has been engaged because of a threat to national security. The guidance makes it clear that the exception sets a high threshold. The public authority needs to make a convincing case that the alleged harm that would occur is more probable than not, were the information to be released.
31. Ofcom argued successfully that disclosing a database of base stations for mobile phones would assist criminals wanting to steal cabling and other materials which, in turn, would adversely affect public safety.<sup>5</sup> The Tribunal also accepted that the information would be of use to terrorists intending to disrupt the country's communication system.
32. Similarly, [FS50585724](#) concerned the disclosure of the location of fire hydrants where the Commissioner concluded that the exemption was engaged and that the public interest in maintaining it outweighed the public interest in disclosure. This decision notice was also the subject of an Appeal<sup>6</sup> which upheld the Commissioner's decision. However, the threshold to justify non-disclosure is high and, although that threshold was met in relation to the location of fire hydrants and the database of base stations for mobile phones outlined in paragraph 31, she does not consider that the threshold has been met here.
33. At internal review the complainant suggested that the information could be anonymised by the removal of the location fields and the disclosure of the other fields. Although Highways England confirmed to the Commissioner that it had considered this possibility it explained that, even without the locational information, it did not want to release information concerning the condition of the structures.

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1633/eir\\_international\\_relations\\_defence\\_national\\_security\\_public\\_safety.pdf](https://ico.org.uk/media/for-organisations/documents/1633/eir_international_relations_defence_national_security_public_safety.pdf)

<sup>5</sup> *The Office of Communications and the Information Commissioner and T-Mobile (UK) Limited* (EA/2006/0078 4 September 2007).

<sup>6</sup> *Andy Mabbett v IC* EA/2015/0288 16 November 2015

34. The Commissioner's view is that road bridges are a very visible part of our infrastructure, therefore they are potential targets, either by terrorists or members of the public wishing to gain illegal access without requiring a data spreadsheet to do so. The condition of the bridges is recorded as a score and a high level generic condition which is indicative rather than specific and she finds it unlikely that national security or public safety could be undermined by releasing this information, without more persuasive argument to suggest otherwise. The Commissioner does not consider that Highways England has presented arguments that the alleged harm regarding the release of this particular information is more probable than not and therefore the threshold has not been reached to engage this exception.
35. As the Commissioner does not accept that the exception is engaged she has not gone on to weigh the public interest in this matter.

### **Regulation 14(2)**

36. Regulation 14(2) of the EIR states that a refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.
37. In this case, the complainant made his request on 7 May 2019 but Highways England did not respond until 2 July 2019, well beyond the statutory timeframe.



## Right of appeal

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38. 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)

39. 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.

40. 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 .....**

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