

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 28 June 2021

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

Decision (including any steps ordered)

1. The complainant has requested information from Highways England (HE) about the costs associated with damage from a road traffic incident in 2016 and audits, inspections and examinations of the damaged highway structure and matters pertaining to its replacement. HE refused to provide the requested information, citing section 14(1) – that the request was vexatious. HE later accepted the Commissioner’s view that the information was environmental and that regulation 12(4)(b) – manifestly unreasonable was the appropriate exception to cite.
2. The Commissioner’s decision is that Regulation 12(4)(b) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request that does not rely on regulation 12(4)(b) of the EIR.
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

5. On 16 July 2020 the complainant made the following request for information:

"With regard to the structure: Bridge and Parapet At: Higham Road A45 Named: Higham Road A45 BO 79 Involved in an incident on: [date redacted] I am seeking he (sic) following information since 01/01/2015:

- 1. All incidents at the location*
 - 2. All audits, inspections, examinations of the structure*
 - 3. All pre and post loss reports, concerns, considerations about the structure*
 - 4. all tenders for the replacement intended, the need for this and scope of the works*
 - 5. All correspondence between HE and the contractor and HE and GLD and internal to HE about the costs involved in replacement and costs associated with repairing the damaged section only*
 - 6. why the full replacement structure sum was considered appropriate to pursue following the DoL incident, as opposed to a charge for the area of damage only and all exchanges pertaining to this."*
6. HE responded on 14 August 2020 citing section 14(1) – vexatious request.
7. On the same date the complainant asked for a review.
8. Following an internal review, HE wrote to the complainant on 2 October 2020 and maintained its original position. HE stated that the complainant should seek recourse through court and that freedom of information was an inappropriate forum.

Scope of the case

9. The complainant contacted the Commissioner on 6 October 2020 to complain about the way his request for information had been handled.

He stated that he had not implied what HE said he had implied and that his request was not vexatious.

10. During the course of the Commissioner's investigation she wrote to HE to suggest that the request should have been dealt with under the Environmental Information Regulations 2004, rather than the FOIA 2000 which was then accepted by HE.
11. The Commissioner therefore considers the scope of this case to be HE's citing of Regulation 12(4)(b) – manifestly unreasonable.

Reasons for decision

Is the requested information environmental?

12. 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);"

13. The Commissioner considers that the requested information is environmental because it relates to repairs or reconstruction of a highway structure which falls under regulation 2(1)(c) above.

Regulation 12(4)(b) – manifestly unreasonable

14. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
15. This exception can be used:
- When the request is vexatious; or
 - When the cost of compliance with the request would be too great.
16. The exception is subject to the public interest test which also means that a public authority must demonstrate that the public interest in maintaining the exception outweighs the public interest in favour of disclosure.
17. Regulation 12(2) stipulates that a public authority shall apply a presumption in favour of disclosure.
18. HE has stated that it considers the request to be vexatious.
19. Following the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC [2012] UKUT 442 (AAC)*, the Commissioner considers that there is, in practice, no difference between a request that is vexatious under the FOIA and one which is manifestly unreasonable under the EIR – except that the public authority must also consider the balance of public interest when refusing a request under the EIR. The analysis that follows looks at vexatiousness.
20. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield [2012] UKUT 440 (AAC)*. It commented that "vexatious" could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.

21. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
22. Dransfield also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of:

"...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests." (paragraph 45)

23. The term 'vexatious' is not defined in the FOIA. The Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests. In short they include:
 - Abusive or aggressive language
 - Burden on the authority
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance
24. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
25. The Commissioner's guidance suggests that if a request is not patently vexatious the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner

considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.

26. Where relevant, public authorities may also need to take into account wider factors such as the background and history of the request.

Highways England's view

27. HE provided some background information to help explain the reasons why it had cited section 14(1). The Commissioner is unable to provide some of this detail because it could identify or could lead to the identification of the complainant. However, HE believes the complainant is collaborating with another individual in a professional capacity and it has cited section 14(1) several times regarding the complainant's 'collaborator'.
28. HE argues that the complainant has asked for numerous pieces of information relating to a road bridge that has been damaged by a third party who he is acting for. HE's view is that the request is essentially an unsubstantiated allegation of wrongdoing, either by the contractor or HE itself by presenting charges in the claim that were not related to the incident that resulted in charges for repairs. It is HE's opinion that using the legislation in this way is not the appropriate route to challenge what may be perceived as unfair costs. The appropriate action would be a challenge in court. Further details were provided to the Commissioner regarding what HE considers to be the reasons behind the request and suggests that the complainant is fishing for information and making unsubstantiated allegations for commercial reasons.
29. HE points out that the legislation says that a requester should not make unsubstantiated allegations¹ against a public authority or specific employees which is what HE argues is being done here. The Commissioner notes that this point is made in her guidance, not the legislation. HE cites the complainant's 'colleague' as doing this on multiple occasions where it has refused his requests as vexatious. HE underpins its argument by referring the Commissioner to one of her decision notices [IC-43232-D3Y7](#) where she did not uphold the complaint but agreed with HE that the request was vexatious. Prior to this request, HE states that the individual it believes that the complainant is in collaboration with was told that requests making unsubstantiated allegations would be treated as vexatious. It is HE's opinion that the

¹ [dealing-with-vexatious-requests.pdf \(ico.org.uk\)](#)

complainant can be viewed as the same party and that the request can be seen as part of the same practice of making unfounded allegations in their requests. HE explained that the Commissioner supported it previously in [FS50716692](#) where she had accepted that the complainant was acting in concert with the complainant in that case.

30. Finally, HE stated again that the request is vexatious under the EIR legislation for the same reasons as under the FOIA. HE's intention is that any future requests where unfounded allegations are made will also be considered vexatious.

The complainant's view

31. The complainant argues that he did not imply that HE had undertaken work to repair damage that had not been caused by the incident referred to in the request, as he states that he does not know if that was the case. He accepts that damage was caused and that it was repaired. He says that he does not know if there was pre-existing damage elsewhere on the structure. He asked why the entire structure was replaced. The complainant believes that his request has been distorted.
32. He contends that, even if he had presented the request as alleged, it is not vexatious. He suggests that HE should have focused on whether the information could be disclosed, rather than the effect of providing the information to the individual requester. His view is that the request was refused because of his identity and employment and purpose whereas he states that the FOIA is applicant and motive-blind. Therefore he believes that HE's conduct is unreasonable and that it is seeking to keep embarrassing commercial information from him. The complainant says that he understands there to have been discussions about the size of the claim presented, the sums involved and the intention to try and have an insurer pay for the entire structure whereas they were only liable for a small proportion.

The Commissioner's view

33. If a public authority has reason to believe that several different requesters are acting in concert as part of a campaign to disrupt the organisation because of the sheer weight of requests being submitted, it can take this into account when determining whether any of the requests are vexatious.
34. Some of the complainant's argument above might appear to support HE's view that the request represents an unfounded accusation. However, the Commissioner's view is that the request is phrased in a circumspect way. Even in his complaint grounds to the Commissioner he

uses the word "understands" and does not make any direct accusations. There may be an implication in the request but it is politely implied and could be construed as trying to elicit the facts. The request for a review did have a more accusatory tone, though even here the language is careful – "*hope to evidence*", "*I understand*", "*it appears*", "*may have erred*".

35. The complainant may have a professional relationship with another individual who has made many requests to HE but each request must be looked at on a case by case basis, even if the Commissioner has previously upheld HE's stance. The requests that the Commissioner considered in FS50716692 were over two and a half years before the request that is the subject of this decision notice. The remaining 'evidence' is centred around the 'collaborator/colleague' which does not entirely make the case for HE. The warnings made to the 'colleague' have not been specifically made to the complainant, it would appear. The references that HE has made to specific decisions are with regard to the requests of the 'colleague' and not the complainant.
36. The Commissioner understands HE's view and the fact that there is a background and context to this matter. However, the Commissioner has not gone on to consider the public interest as she has decided that HE has not presented enough argument under any of the headings suggested in the Commissioner's guidance to engage the exception. The EIR allow public authorities to refuse a request for information that is manifestly unreasonable. The inclusion of the word "manifestly" means that there must be an obvious or clear quality to the unreasonableness which she has concluded has not been sufficiently evidenced. The exception is not engaged.
37. The Commissioner would like to note that, although she has not found the exception to be engaged on this occasion, this might not be the case in any future citing of "manifestly unreasonable".

Right of appeal

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: 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

Janine Gregory
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