

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

Decision notice

Date: 19 August 2015

Public Authority: Highways England
(formerly Highways Agency)

Address: Bridge House
1 Walnut Tree Close
Guilford
GI1 4LZ

Decision (including any steps ordered)

1. In two separate sets of requests, the complainant has requested information from Highways England about its monitoring of compliance with the Environmental Protection Act, and feedback it has received about litter on the road network. Highways England has refused to comply with the requests which it says are manifestly unreasonable under regulation 12(4)(b) of the EIR.
2. The Commissioner's decision is that, on this occasion, Highways England has incorrectly applied regulation 12(4)(b) to the requests.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
 - The Commissioner requires the public authority to respond to the requests by either providing the information or relying on an exception other than regulation 12(4)(b).
4. The public authority must take this step 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

Request 1

5. On 17 February 2015, the complainant wrote to HE and requested information in the following terms:

"1. Please provide me with 5 recent communications sent to local authorities by the Highways Agency asking for action to be taken when it felt that the standards set by the Environmental Protection Act were not being met.

2. Please provide me with 5 recent communications sent to local authorities by Highways Agency contractors asking for action to be taken when it felt that the standards set by the Environmental Protection Act were not being met.

3. Please send me 5 recent reports recording the monitoring of the cleanliness of the Highways Agency's network by the employee of the Highways Agency as opposed to by employees of their contractors.

4. Please send me 5 recent reports recording the monitoring of the cleanliness of those All Purpose Trunk Roads on the network where the local authority has responsibility for cleansing."

Request 2

6. On 18 February, the complainant requested the following:

"Could you please provide me with copies of all feedback received in January 2015 about litter on the Highways Agency's network.

Please note this should include all feedback which refers to litter however classified including those classified as Notifications, Complaints and Enquiries.

Where the feedback has been received by phone please send the document on which the comments of the caller was recorded."

7. HE responded to both requests on 17 March. It refused to comply with the requests which it said were manifestly unreasonable under regulation 12(4)(b) of the EIR. HE invited the complainant to a meeting to discuss litter on its road network and outlined some of the steps it is already taking to address this problem.
8. Following an internal review HE wrote to the complainant on 14 April. It maintained its position that the requests are manifestly unreasonable.

9. A meeting between the complainant and HE subsequently took place on 1 May and HE is of the view that the meeting was very positive and productive.

Scope of the case

10. The complainant contacted the Commissioner on 17 April to complain about the way his request for information had been handled.
11. The complainant is not satisfied with HE's application of regulation 12(4)(b) to his requests. He argues that the requests and the associated 'Clean Highways' campaign have a serious purpose because there is widespread public concern about litter on highways. The complainant says HE's arguments are ill considered and that it did not carry out a satisfactory public interest test.
12. The Commissioner has focussed his investigation on whether the HE is correct to categorise the complainant's requests as manifestly unreasonable under regulation 12(4)(b). He has also considered whether it satisfactorily handled the public interest test.

Reasons for decision

Is the requested information 'environmental information'?

13. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulation 2(1)(a) to 2(1)(f) of the EIR. The Commissioner considers the information in this case can be classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information. One of the elements listed is land.
14. The requests are broadly for information about litter on the road network. The Commissioner is therefore satisfied that, as these requests are for information concerning the use of land, it falls under the EIR.
15. Regulation 12(2) of the EIR says that a public authority shall apply a presumption in favour of disclosing environmental information.

Regulation 12(4)(b)

16. Regulation 12(4)(b) says that a public authority may refuse to disclose environmental information if the request is 'manifestly unreasonable'. There is no definition of manifestly unreasonable under the EIR, but its meaning has been held as essentially the same as the meaning of 'vexatious' under section 14 of the FOIA. The leading case on the meaning of vexatious is now *IC v Devon County Council & Dransfield* [2012] UKUT 440 (AC). The Upper Tribunal's analysis of section 14 FOIA is set out at paragraphs 24 to 39 of Dransfield. Whilst neither exhaustive or to be used as a formulaic checklist, the Commissioner has found it helpful to consider four broad issues: the burden (on the public authority and its staff); the motive (of the requester); the value or serious purpose (of the request) and any harassment or distress (of and to staff). The context and history of a case may also have some relevance to a public authority's application of 12(4)(b).
17. Where the exception is engaged it is subject to a public interest test under regulation 12(1)(b) to determine whether the information should be disclosed in spite of the exception applying.

Background

18. The context and history of the request has some relevance in this case. The complainant leads a campaign called 'Clean Highways'. On the campaign's website, it gives as its aim: 'Using the law to get our highways cleaned up'. HE has told the Commissioner that the campaign's aim is to hold Highways England to account in its duty to keep the road network as free of litter as is practicable under the Environmental Protection Act (EPA)(1989). The complainant has been corresponding with Highways England since 2010 and requesting information since 2011.
19. HE says that it maintains that it is fulfilling its duty under the EPA, and the complainant considers that it is not. The complainant took HE to court in July 2012 over this point. The judge in the case found in favour of the Secretary of State and ordered the complainant to pay costs. HE has acknowledged that since that time neither side has conceded their position and they are currently at something of an impasse.
20. Regulation 12(4)(b) applies where a request is either vexatious, or would be imposing a cost or burden on the authority to such an extent that it would neither be reasonable, nor in the public interest for it to comply with the request.
21. The Commissioner notes that Highways England (the Highways Agency at that time) applied regulation 12(4)(b) to a separate request from the

complainant in 2012. The information requested on that occasion was similar to the request that is the subject of this notice. In that case - [FER0458553](#) - the Commissioner found in HE's favour and decided that the request was manifestly unreasonable because of the cost and burden that dealing with the request would cause HE.

22. The complainant appealed that decision and the Information Tribunal upheld the appeal: EA/2013/0027. It considered that the Highways Agency (at that time) had over-estimated the length of time it would take it to respond to the complainant's request.
23. In this case, Highways England appears to consider the request primarily to be vexatious. It says that the weight of the complainant's correspondence with Highways England, and formerly the Highways Agency, has caused, and will continue to cause, a significant burden and that the Clean Highways campaign lacks serious value or purpose. HE considers it likely that the pattern of correspondence will not stop, that the complainant is unlikely to accept HE's arguments or explanations and that his correspondence will be likely to raise repeat issues.
24. HE has also told the Commissioner that the complainant confirmed to HE at the meeting in May that the approach of the Clean Highways campaign will not change, and that he does not intend to stop corresponding with HE.

Burden of the requests to Highways England

25. EA/2013/0027 found that of the 36 items of correspondence HE had received from the complainant since May 2010, only 13 were FOIA or EIR applications. The Tribunal did not consider this was excessive over a two and a half year period, in light of what it considered was the worthwhile nature of the complainant's campaign.
26. HE has provided the Commissioner with a log of its correspondence with the complainant since 2012. Of the 30 items of correspondence HE has logged from November 2012 to April 2015, 22 appear to be FOIA or EIR applications (the overwhelming majority concerning litter); averaging a little under one per month. The Commissioner notes the number of requests has risen and, while not wildly excessive, considers the number of requests that the complainant has submitted to HE is significant and, cumulatively, is likely to be burdensome to the HE and distract it from its other business. The Commissioner has gone on to consider whether the complainant's approach more broadly could be categorised as obsessive.
27. In line with its published Litter Strategy, HE says that its approach to litter on highways is to tackle it at source by influencing user behaviour

– if no litter is dropped, none will have to be picked up. The complainant's view is that HE should tackle the problem by continuously picking up the litter and prosecuting offending vehicles. The meeting mentioned at paragraph 7 was an attempt on the part of HE to progress beyond this stalemate. Whilst acknowledging that much was achieved at this meeting, HE is of the view that the complainant's opinions about how HE should manage litter are likely to remain unchanged and that he is likely to continue to correspond with HE on this matter.

28. In the Commissioner's view, the complainant does appear to have adopted a somewhat intransigent position. In FER0458554, the complainant provided evidence of the steps HE had taken in response to his Clean Highways campaign. HE suggested and hosted the meeting in May this year, with a view to progressing its relationship with the complainant. It also invited the complainant to join Transport Focus (discussed below).
29. In contrast, HE has told the Commissioner that the complainant's view of the approach HE should take to the litter problem remains unchanged and he has appeared to be unwilling to engage in what appears to the Commissioner to be a productive way forward. As mentioned, the complainant has been invited to join Transport Focus but HE has told the Commissioner that the complainant told it in their May meeting that he had not agreed to join because he could not be sure that litter would be on the group's agenda.

The requester's motives

30. Unlike HE, the Commissioner agrees with the complainant's and the Tribunal's view that the complainant's requests – and his associated campaign to keep the road network free of litter – *do* have a serious purpose. He accepts that there is widespread concern about litter on the road network. The Commissioner is therefore of the view that the complainant is not motivated by a desire to cause a nuisance.
31. HE has told the Commissioner that one of the complainant's historic complaints was that the Highways Agency had no regulator or independent scrutiny and that Clean Highways fulfilled that role. In his submission to the Commissioner, the complainant has asserted that Clean Highways is the *only* organisation that sets out to hold public bodies accountable for compliance against the EPA duty with regard to litter. HE has, however, explained that two bodies in fact now hold Highways England to account: one monitors the performance of its highways and is run by the Office of Rail and Road (ORR); a second - Transport Focus - champions the needs of road users and its stakeholders include the Campaign to Protect Rural England. HE will be reporting to both bodies on its performance on a range of matters,

including environmental concerns and will be proactively publishing related information online in the coming years. HE has also told the Commissioner that it has a close relationship with the Campaign for Better Transport and Keep Britain Tidy, which campaign on environmental matters, amongst other issues.

32. The Commissioner must also consider another possible motive; that the complainant enjoys the notoriety through the Clean Highways campaign and may be unwilling to give up his position as the face of this campaign by, for example, joining the Transport Focus group. Instead, the complainant has asked for a separate, regular series of meetings with Highways England.

The value and serious purpose of the request

33. Highways England has told the Commissioner it recognises that litter is a serious concern, both to Highways England and the general public. HE does, however, have concerns about the purpose of the complainant's campaign. It considers that the complainant's general, somewhat adversarial, approach has resulted in the aforementioned impasse, and that his campaign has consequently not yielded any positive results.
34. The complainant says that his campaign has gained increasing recognition from MPs, government, the media and support from the general public. He has provided the Commissioner with details of some of the campaign's activities, meetings and messages of support from the public that it has received.
35. As stated at paragraph 30, the Commissioner's view is that the campaign behind the request does have value and a serious purpose. He has, however, considered whether, given the Highways Agency's transformation into Highways England and the subsequent establishment of new reporting structures, the complainant's requests have the same degree of value.

Harassment and distress to staff

36. Highways England says that the weight of the complainant's correspondence has, and will continue to, cause it a significant burden. The Commissioner recognises that the complainant's ongoing correspondence is a burden, and a distraction, but notes that Highways England has not said that dealing with the correspondence harasses or distresses its staff. The Commissioner agrees with the complainant when he says that his correspondence with HE has been respectful. He therefore does not consider this issue – harassment and distress to staff – to be a consideration in this case.

Conclusion

37. Whether the requests are manifestly unreasonable is not clear cut and the case appears to the Commissioner to come down to the requests' value. In line with his published guidance in these cases, the Commissioner has considered whether the requests are likely to cause a **disproportionate** or **unjustified** level of disruption to Highways England.
38. The Commissioner considers that responding to approximately one EIR/FOIA request per month does amount to a burden to Highways England. Although it has been prepared up to now to consider the Campaign's views, Highways England has not been formally accountable to the Clean Highways campaign and is not now. In the Commissioner's view, HE is not required to effectively 'report' to Clean Highways – through responding to its high number of EIR and FOIA requests.
39. While he does not consider that the complainant's correspondence could be categorised as obsessive, in the Commissioner's view the complainant does have a very strong interest in, and concern about, the subject of litter on the highways. In light of the history of the requests he has already made on the subject matter, the Commissioner agrees that responding to these requests would be likely to lead to further requests from the complainant on the same subject.
40. The complainant holds a contrary point of view to HE and there is no evidence that he is likely to accept HE's approach to managing the problem of litter on the road network. The view point of Clean Highways however has been just *one* of a wide range of stakeholder views that the Highways Agency, and now Highways England, has considered as it has formulated its approach to managing the road network. A range of these stakeholders have now been assembled in the Transport Focus group. Highways England must formulate its approach having listened to the views of this wide range of stakeholders – not only those of Clean Highways.
41. The complainant has told the Commissioner that he has requested the particular information in this case because if the level and strength of complaints is low, then it would indicate that Highways England is complying with its obligations under the EPA. This again suggests to the Commissioner that the complainant submits requests in order to monitor Highways England's performance.
42. Highways England has argued that the Clean Highways campaign is no longer valid because Highways England is now obliged to report to ORR and Transport Focus. Highways England says that corresponding with the complainant separately will be an unnecessary further burden.

However, the Commissioner notes that ORR became the monitor on 1 April 2015 and Passenger Focus became Transport Focus on 30 March 2015 ie both came into force after the request was submitted on 17 February.

43. At the time of the request therefore, Highways England did not have these formal reporting obligations. Information about the effectiveness of its approach to litter on the road network may not have been readily accessible to the public and the complainant's campaigning website may have filled a gap. In the absence of formal monitoring at the time of the requests, complying with the requests may have put information into the public domain that is of some general interest to people who are concerned about litter on the road network and how well Highways England's activities reduce this problem.
44. The Commissioner recognises there are strong arguments on both sides in this case. However, after careful consideration of the complainant's and Highways England's submissions and all the circumstances of the case, the Commissioner has decided that, taking into account Highways England did not have formal reporting structures in place at the time of the request, on this occasion the two requests in question are not manifestly unreasonable and Highways England incorrectly applied regulation 12(4)(b) to them.
45. Up until 1 April 2015, there may have been a credible argument that the complainant's campaign and associated EIR and FOIA requests served to improve Highways England's accountability. The Commissioner notes again that Highways England's performance is, however, now formally managed through its reporting to ORR and through the Transport Focus group. The general interest and concern that the public has about litter on the road network – and how well Highways England's activities reduce litter on the roads – is in future likely to be satisfied by the monitoring information that ORR and Highways England will now proactively publish on their websites and therefore in the Commissioner's view this will reduce the serious purpose and value of the complainant's own campaign in the longer term.
46. Because the Commissioner has found that the exception is not engaged he has not gone on to consider the public interest arguments.

Other matters

47. The complainant argues that Highways England made only "passing references" to the public interest test in its initial response and its internal review and did not appear to have considered the weight of the public interest in disclosing the information.

48. The Commissioner notes that Highways England *did* reference the public interest test in its correspondence with the complainant and may have also considered the arguments for disclosing the information. He agrees, however, that it should have provided the complainant with more detailed public interest arguments, in favour as well as against disclosing the information he had requested. The Commissioner's guidance on the public interest test is available on his website:

https://ico.org.uk/media/for-organisations/documents/1629/eir_effect_of_exceptions_and_the_public_interest_test.pdf

49. Finally, the Commissioner agrees with Highways England that participating in the Transport Focus group would now present a good opportunity for the complainant to put his concerns about litter directly to Highways England representatives.

Right of appeal

50. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.
52. 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
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