

FER0458553 - Appeal to the Information Tribunal By Peter Silverman

The Commissioner's Decision

In his Decision Notice (DC) the Commissioner decided that the Highways Agency (the Agency) was entitled to rely on the regulation 12(4)(b) of the EIR to deny my four requests on the grounds that:

1. Against a backdrop of the number and the frequency of the previous requests complying with the requests would continue a pattern which has resulted in a significant diversion of the public authority's resources (DC 20).
2. The volume and frequency of my requests demonstrated I went beyond the reasonable pursuit of information and beyond persistence. This combined with the failure of my recent application for a litter abatement order in respect to J1 of the M40 and the steps the Agency was taking to address the litter problem meant that the requests could be fairly characterised as obsessive (DC 24).
3. There was a lack of proportionality between the information sought, the purpose of the requests and the time and resources needed to satisfy them (DC 25).
4. While the documents would contribute to discussions as to whether the Agency was meeting its obligations this was outweighed by the public interest in not diverting significant resources for compliance (DC 34).

Time estimates (DC 19 & 20).

In all four requests there were three component-requests which required information to be collected from all seven branches.

The Agency claimed that it would take each regional office 10 hours to collate the information for all 3 i.e. 3.3 hours per component-request.

One such component requests was part of my 30 April 2012 request. I had asked for "A copy of the last 4 monthly audits of environmental amenity referred to" by Lord Wallace in the House of Lords when he stated that "*Agency route managers perform monthly audits of the environmental amenity of stretches of randomly selected agency routes*".

These audit reports are produced as electronic documents. They are not paper documents that have to be scanned to record them electronically. One must assume they are stored in an "Environmental audit report folder". If so, it would take under 5 minutes for someone at a regional office to respond to an e-mail from the Agency's FOI Officer requesting copies of, say, the last two audits prior to 30th April.

The other two component-requests that may have required inputs from the seven regions were the one of 25th April ([recent] *communications with service providers reminding them of their contractual duties*) and part 2 of my request of 3rd May (*communications with any local authority directing the latter's attention to the littered state of, and/or the need to clean, any trunk road in your network*

[*within last 2 years*]). It is inconceivable that copies of these high level communications would have been stored, probably electronically, in such a way that they would take 3.3 hours to locate.

I have estimated that the resource required per region to comply with these requests at 10 man minutes in the first case (each region deals with one service provider) and up to 15 man minutes in the second (each region deals with a number of local authorities).

For the three component complaints involving the regions that's 5, 10 and 15 man minutes = 30 man minutes or 0.5 hours per region compared to the Agency's 3.3 hours an exaggeration factor of 6.6 times.

Let's now look at the less onerous component requests.

30 April 2012: 1. Forwarding a copy of a cost calculation – 5 minutes. 3. Last environmental amenity audit including J1 of M40 – 5 minutes because these audits, I have now learnt, are not applicable to the M40.

30 May 2012: 1. Last 4 communications etc with local authority re section of A31 in Dorset - 15 minutes.

16th May 2012: 1, 2. & 3. How many inspections of J1 of M40 in last 12 months, dates, copies - 5 minutes as the Agency, I have now learnt, does not carry out any routine inspections of the M40 to assess the degree of cleanliness or other wise of the verges.

In total that is 7 x 30mins + 5 + 5 + 15 + 5 = 240mins = 4 hours + 1 hour to collate and send off = 5 hours. This is well below the FOI limit of 12 hours.

Never the less I am conscious that this is not an insignificant amount of resource. But I would make the point that a no time did the Agency get back to me with any advice or assistance that would have enabled me to modify my requests so as to make them less burdensome.

I would also point out that none of my previous requests, as far as I can recall, involved the need to collect data from all 7 regions nor did they required the extraction and collation of information from multiple documents. Generally all I have asked for is existing documents or extracts from them.

Reasonable pursuit of information

In my request for an internal review of 4th July 2012 I put my dealings with the Agency in the context of the campaigning work I have been doing under the Clean Highways banner. I would ask the Tribunal to read this section of the e-mail. I would just add that I am the only watchdog organisation that takes a specific interest in the compliance or otherwise of the Agency with the requirement of the Section 89 (1) (a) of the Environmental Protection Act to ensure, so far as is practicable, that their highways (i.e. the motorway network in England) are kept clear of litter and refuse.

The Agency, I was pleased to note, seemed to have taken on board what I had said and had changed their position from that espoused in their refusal letter of 24th May 2012. In his response of 28th July 2012 the Agency's Mr Grunwell said in reference to the information I had provided that:

"I have therefore concluded that there is a legitimate interest underpinning your request for information on our approach to litter picking ..." and "I therefore accept that you may wish to make future requests for information." In his penultimate paragraph he proposed a contact point for future requests "so that we are able to better target your requests for information.."

Indeed the Agency have promptly fulfilled my subsequent information requests for which I am most grateful.

Steps taken by the Agency to address the litter problem

In DC 23 the Commissioner states "It is clear from the evidence the complainant himself has provided that the public authority responded to his campaign by taking steps to ensure that the road network remains free of litter".

In DC 24 the Commissioner states as one of the factors evidencing the obsessive nature of the requests "... and in light of the steps the public authority was taking to address the matter, steps which the complainant himself acknowledged".

The impression given is that I have made a complaint which has been dealt with so it would be pointless my continuing with my campaign and making further information requests.

However the evidence I provided was that as a result of my actions the level of cleaning activity on the main carriageway verges of the M40 had increased by a factor of 6 times but that this did not apply to the slip roads and, of course, to the rest of the network.

Anyone driving on a motorway will see that the problem is still very much on-going.

Magistrates' Court action

In DC 23 the Commissioner that the Magistrates' Court did not uphold my application for a litter abatement order. No doubt this information was provided by the Agency.

In DC 24 he uses this to further evidence my obsessive behaviour. (Surely requests cannot be obsessive, only people can?).

Had he asked me to comment before drawing his conclusions I would have been able to inform him that the court had only awarded the Secretary of State for Transport a quarter of their costs so as not to discourage further such actions. Also, I would have pointed out that there had been two previous cases using the same legislation (EPA S91) and regarding the M40. In both of these the

court awarded costs to me. The court does this only if they are satisfied that, at the time of the complaint, the highway was defaced by litter and that the complainant had reasonable grounds for making it.

The first of these resulted in the 6 fold increase in cleaning activities by the Agency's service provider. Please refer to the before and after photographs attached.

Public interest and Proportionality

I will just mention two requests that relate directly to the matters now at issue.

My requests to the M40 contractor asking for their cleaning statistics enabled me to show that the 6 fold increase referred to above started abruptly a few days after my legal warning notice under EPA S91 was sent to the Secretary of State. I was sent pre-existing electronic documents.

On 30th October 2012 I submitted a request regarding the M25 and M40. It can be seen here www.whatdotheyknow.com/request/regular_audit_and_performance_mo#incoming-335104

My penultimate paragraph read:

I am assuming that as I am asking for existing documents which I presume are stored in a readily accessible manner my request will not impose any great burden on your resources. If this is not the case I would be happy to consider any proposals you may have for modifying it.

I was sent a number of pre-existing electronic documents. I also asked for and received some additional information by e-mail. I gleaned from this that:

Monthly Environmental Amenity Audits are carried out on the M25 but not on the M40.

The service provider knows in advance which 5km sector is to be audited.

A far more lax definition of Grade B (the acceptable standard for verges) than the one defined in the Litter Code of Practice is used.

Grades were averaged over each kilometre stretch which I feel would disguise sub-standard non-compliant areas.

None of the 10 audits included slip roads which are acknowledged litter black spots.

The inspections take place from a vehicle moving with the traffic rather than slowly along the hard shoulder.

It would seem that no formal inspections of the degree of cleanliness of the M40 verges are carried out by the Agency.

My post on the subject has been viewed 116 times for an average of 2.47 minutes. The information has reinforced my concerns about the management of service provider contracts and will assist me in providing useful feed back to the Department of Transport and the Commons Select Committee on Transport.

I am confident that I could provide similar justifications for all of my requests to the Agency. They are not made gratuitously but always with a useful purpose in mind.

Commissioner's discretion

Even if the Commissioner felt that the multi region requests would involve an unacceptable burden why did he not instruct the Agency to release those that clearly involved only minimal resources e.g. the cost calculation requested on 30th April 2012.

Conclusion

The Agency's time resource estimates are gross exaggerations.

The total man hours required to comply with the 4 requests is well under the FOI limit.

My requests are normally for copies of pre-existing document held electronically or single extracts from them. Only very rarely would I require information from multiple branches.

The Agency failed to provide any advice to enable the terms of the 3 multi-region requests to be modified to reduce the resources required to fulfil them.

Looked at in the context of my campaigning work my requests are reasonable and there is a *legitimate interest in underpinning my requests for information on the Agency's approach to litter picking.*

In two out of the three cases I have brought against the Secretary of State for Transport he has been found negligent and been required to pay my costs in full. In the third one I was only required to pay a quarter of his.

The Agency has not, as implied by the Commissioner, taken steps to ensure their network remains free of litter.

The resources required to comply with my requests are proportionate to the purpose to which the information is put.

Therefore I do not feel that the 4 requests that are the subject of my complaint to the Commissioner can be regarded as manifestly unreasonable nor that my actions should be regarded as being beyond the reasonable pursuit of information or obsessive.

Peter Silverman
20th February 2013

Copies of all related documents can be viewed at

www.cleanhighways.co.uk/tribunal-documents-private-page