

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 June 2014

Public Authority: Highways Agency
Address: The Cube
199 Wharfside Street
Birmingham
B1 1RN

Complainant: Peter Silverman
Address: 20 Kingsend
Ruislip
Middlesex
HA4 7DA

N.B: The Information Commissioner notes that the Highways Agency is not a public authority in its own right but is an executive agency of the Department for Transport. Therefore, the public authority in this case is the Department for Transport. However, for the purposes of this decision notice the Highways Agency is referred to as if it were the public authority

Decision (including any steps ordered)

1. The complainant made a request for information to the Highways Agency for a number of reports referred to in its Roadside Litter Strategy Document. In its initial response, the Highways Agency disclosed most of the information but withheld one of the requested reports. At the internal review stage the Highways Agency disclosed all of the information. The complainant asked the Commissioner whether the Highways Agency has committed any procedural breaches of the EIR in its handling of the request.
2. The Commissioner's decision is that the Highways Agency breached regulation 5(2) by failing to disclose all of the requested information within 20 working days and regulation 14(5) by failing to inform the complainant of his right to an internal review. It also breached regulation 11(5) by failing to notify the complainant in its internal review of its failure to comply with the EIR by initially refusing to disclose some of the information. The Commissioner requires no steps to be taken.

Request and response

3. On 23 February 2013 the complainant made a request for information to the Highways Agency for a number of reports referred to in its Roadside Litter Strategy document. The request read as follows:

"Could you also now let me have copies of the 10 Delivery Plan Reports listed in Table 3.1. Please forward the original DOCs if possible."

4. The Highways Agency responded to the request on 28 February 2014 when it disclosed 6 of the 10 reports. It explained that 3 of the planned reports were never completed and so were not held. For the remaining report, it said that the information could not be disclosed as it was commercially sensitive.
5. On 18 March 2014 the complainant contacted the Highways Agency to challenge its decision to withhold one report on the basis that it contained commercially sensitive information.
6. On 7 April 2014 the Highways Agency contacted the complainant again. It explained that it had reviewed its initial response to the request and could now disclose the report which had previously been withheld.

Scope of the case

7. On 15 April 2014 the complainant contacted the Commissioner to complain about the delay in providing him with the requested information. He also complained that the request ought to have been dealt with under the Environmental Information Regulations and that the Highways Agency failed to properly explain its reasons for initially refusing to disclose some of the requested information. He also complained that it had failed to comply with its obligations with respect to carrying out an internal review.
8. The complainant also complained that in its handling of his request for information the Highways Agency had failed to act in accordance with the Defra code of practice on the Environmental Information Regulations. However this is outside the scope of the Commissioner's investigation as this is not a statutory requirement.

Reasons for decision

Environmental information

9. It is unclear under what legislation the Highways Agency considered the request, neither the EIR nor the Freedom of Information Act 2000 (FOIA) were mentioned. However, for the avoidance of doubt, the Commissioner considers that the correct access regime was the EIR as the requested information can be considered to be environmental information within the meaning of regulation 2 of the EIR.
10. Regulation 2(1) of the EIR defines environmental information as 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;
11. In this case the withheld information concerns the Highways Agencies' plans for managing litter on its network.
12. In the Commissioner's view, the phrase 'any information.....on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. The Commissioner considers a broad interpretation of this phrase will usually include information concerning, about, or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

13. The Commissioner accepts the requested information is on measures, affecting or likely to affect the amount of waste (in this case, litter) on land (i.e. Highways Agency's road network) and therefore falls within the definition of environmental information in regulation 2(1)(c).

Regulation 5 – Duty to make environmental information available on request

14. Regulation 5(2) of the EIR provides that environmental information shall be made available promptly and in any event within 20 working days. In this case the complainant made his request on 23 February 2014 but the Highways Agency did not disclose all of the information until 7 April 2014. Therefore the Highways Agency has breached regulation 5(2) of the EIR by failing to disclose all of the requested information within 20 working days.

Regulation 14 - Refusal to disclose information

15. The complainant had also complained that the Highways Agency ought to have told him why some of the requested information was (initially at least) withheld. Whilst it said that the information was "commercially sensitive", no exception from the EIR was cited.
16. The Commissioner will record breaches relating to a public authority's refusal of a request at the time of the completion of the internal review. That the EIR requires a public authority to carry out an internal review means that they have the opportunity to review the refusal of a request and if it got it wrong to be able to correct that decision before a complaint is made. Given that the Highways Agency disclosed all of the information when it reconsidered the request there is no breach of the EIR for failing to initially inform the complainant of its reasons for refusing the request.
17. In its initial response to the request the Highways Agency failed to inform the complainant that he may make representations to ask it to reconsider its handling of the request, i.e. carry out an internal review. It also failed to inform the complainant of the enforcement and appeal provisions, i.e. the right to complain to the Commissioner. The failure to carry out these steps constitutes a breach of regulation 14(5)(a) and (b).

Regulation 11 – Representations and reconsideration

18. Regulation 11 concerns a public authority's obligations to carry out an internal review. In particular regulation 11(5) requires that if after

carrying out an internal review a public authority decides that it has failed to comply with the EIR it shall provide the applicant with a statement of –

- (a) the failure to comply;
 - (b) the action the authority has decided to take to comply with the requirement; and
 - (c) the period within which that action is to be taken.
19. Whilst the Commissioner has found that there was no breach of regulation 14 for failing to inform the complainant of its reasons for refusing the request in its initial response, the internal review ought to have explicitly informed the complainant of its failure to comply with the EIR.

Right of appeal

20. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

21. 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.
22. 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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SK9 5AF