

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

**Date:** 17 November 2016

**Public Authority:** National Infrastructure Commission  
**Address:** 1 Horse Guards Road  
London SW1A 2HQ

**Decision (including any steps ordered)**

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1. The complainant requested information about a consultation. The National Infrastructure Commission (NIC) considered the request to be manifestly unreasonable under regulation 12(4)(b) of the EIR and refused to comply with it. NIC subsequently published the requested information and advised the complainant where he can access it.
2. The Commissioner's decision is that NIC:
  - met its obligations under regulation 4(1) to disseminate environmental information;
  - breached regulation 5(2) of the EIR because it did not provide a response to the request within 20 working days;
  - met its obligations under regulation 11 with regard to the review of its response to the request; and
  - was correct to apply regulation 12(4)(b) to the request.
3. The Commissioner does not require NIC to take any steps.

## Request and response

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4. On 22 January 2016, the complainant wrote to NIC and requested information in the following terms:

*"But, otherwise, and for the avoidance of doubt, I would be grateful if you would now publish the information on your website or provide me with electronic copies of all the submissions that have been provided to the Commission. That request now additionally engages the provisions of Section 5 of the same regulations."*

5. When he did not receive a response, the complainant wrote to NIC. NIC replied to the complainant on 25 February 2016 and apologised for the delay. NIC told the complainant that it expected that the submissions he had requested would be published and that it would email him again once the date was confirmed.
6. As a result of the Commissioner's intervention, on 31 March 2016 NIC provided the complainant with a response to his request under the EIR. NIC said that it was not obliged to comply with the request under regulation 12(4)(b) because it considered the request to be 'manifestly unreasonable'. NIC invited the complainant to refine his request to a particular subset of the submissions to the consultation in question.
7. The complainant requested a review of the response on 5 April 2016. HM Treasury (HMT) provided the review on 19 May 2016. HMT decided that regulation 12(4)(b) had been correctly applied to the request. The review noted, however, that the information the complainant has requested had been published in the interim and it provided him with a web link to where the information is available online.

## Scope of the case

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8. The complainant contacted the Commissioner on 10 June 2016 to complain about the way his request for information had been handled. He is concerned about:
- NIC's obligations under regulation 4 (dissemination of environmental information);
  - whether NIC has made the requested information satisfactorily available;
  - the time it took for NIC to respond to his request;
  - the internal review that was undertaken; and
  - NIC's reliance on regulation 12(4)(b).

9. The Commissioner's investigation has focussed on whether NIC:
- complied with regulation 4(1);
  - complied with regulation 5(2);
  - complied with regulation 11 in its handling of the internal review; and
  - correctly applied regulation 12(4)(b) to the request.

## Reasons for decision

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### **Regulation 4 – dissemination of environmental information**

10. Regulation 4(1) of the EIR says:

*... a public authority shall in respect of environmental information that it holds –*

- (a) progressively make the information available to the public by electronic means which are easily accessible; and*
- (b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.*

11. Regulation 4(4) says that the information under paragraph 4(1) shall include:

- (b) Facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.*

12. The purpose of regulation 4 is to set out public authorities' duties to make environmental information available proactively, so as to increase public awareness of, and involvement in, environmental issues. The duties under regulation 4 are separate to the duty under regulation 5 to make information available in response to individual requests. This regulation is discussed elsewhere in this notice.

13. On 13 November 2015, NIC published a Call for Evidence for three separate reports: Smart Power, High Speed North, and Transport for a World City. The Call for Evidence noted that NIC had been asked to publish its report on the above three areas before the 2016 Budget on 16 March 2016.

14. The Call for Evidence ran from 13 November 2015 until 8 January 2016. The three main reports were published in March 2016. Following a period of time collating, analysing and considering the submissions to the Call for Evidence that it had received (ie organizing the information for dissemination), NIC published this information on its website on 10 May 2016. The information can be categorised as the type of information referred to at regulation 4(4)(b), above.
15. The Commissioner disagrees with the complainant that the length of time NIC took to publish this information was too long. The Call for Evidence ran until 8 January 2016, and the information was published approximately four months later, on 10 May 2016. Given NIC's circumstances and the main reports that were its priority, the Commissioner does not consider this to have been an unreasonably long time.
16. In his communications with the Commissioner, the complainant argued that, while he can access the information himself, NIC has not disseminated the requested information adequately as some people may not be able to access this information for various reasons, such as not having access to the internet. Under regulation 18 of the EIR the Commissioner can only consider complaints brought to her by individual applicants. As the Commissioner explained to the complainant in her correspondence with him, if, in the future, someone else requests this information from NIC, is signposted to its website but is unable to access the information, that individual can submit a complaint to the Commissioner, which she would then consider.
17. Consequently, in this case it is the Commissioner's view that NIC met its obligations under regulation 4(1). It made the environmental information in question available to the public by electronic means (ie published it on its website); organized the information and, by publishing it, actively disseminated the information to the public, which it also did in a timely manner.

**Regulation 5 - duty to make available environmental information on request**

18. Regulation 5(1) of the EIR says that a public authority that holds environmental information shall make it available on request
19. Regulation 5(2) says that a public authority must comply with regulation 5(1) as soon as possible and no later than 20 working days after the date it receives the request.

20. In this case, the complainant submitted his request on 22 January 2016 and did not receive a response under the EIR until 31 March 2016. This is a clear breach of regulation 5(2).

### **Regulation 11 – representation and reconsideration**

21. Under regulation 11(1) of the EIR, if an applicant believes that a public authority has not dealt with a request for environmental information properly, the applicant can complain to the public authority and ask it reconsider its response. Under regulation 11(3), an authority that receives such a representation must consider it and decide if it has dealt with the request appropriately. Regulation 11(4) requires the authority to communicate its decision to the applicant as soon as possible and no later than 40 working days after the day it received the request for a review.
22. In this case, the complainant requested a review on 5 April 2016. HMT provided a review of NIC's response on 19 May 2016, ie within 40 working days.
23. The complainant has told the Commissioner that the EIR require an 'internal' review by the public authority and that HMT's review of NIC's response could not therefore be categorised as an 'internal' review. The Commissioner assumes that the complainant considers that the review undertaken was therefore invalid.
24. The complainant has also argued that NIC is a non-departmental public body and, as such, is external to government. He has mentioned that communications between NIC and a government department do not fall under the EIR's internal communications exception [regulation 12(4)(e)]. Finally, the complainant considers that the EIR public interest test, government interest and the interests of NIC are likely to be conflicting in the future. He requested that the Commissioner require NIC to review its *modus operandum* [sic] with respect to how it handles reviews.
25. NIC has explained in its submission to the Commissioner that it was set up on an interim basis on 5 October 2015. It is currently part of HMT and NIC confirmed that HMT officials in its Information Rights Unit conducted the review. NIC argues that, as such, there was no conflict of interest. It has noted that the review followed the Commissioner's guidance in that it was undertaken by a more senior official unconnected with the original handling of the response.
26. The Commissioner notes that regulation 11 does not specify *how* a review should be conducted and, contrary to what the complainant has told the Commissioner, the adjective 'internal' does not appear in this

regulation. The Commissioner has also noted on the Gov.uk website that NIC is one of 12 agencies and public bodies that HMT formally works with. Its relationship with HMT is described as 'Other', ie it is not categorised as an executive agency, executive non-departmental public body or advisory non-departmental public body.

27. The Commissioner has considered the submissions of both parties and the circumstances of the review ie the relationship between NIC and HMT. She considers that the review that HMT undertook of NIC's response was entirely satisfactory; meeting the requirements of regulation 11 above, the Commissioner's guidance on regulation 11 and the EIR Code of Practice, section XII '*Review and Complaints Procedures*'. Furthermore, the Commissioner is satisfied that NIC's modus operandi for its review in this case would be suitable for reviews that it conducts in the future.

### **Regulation 12(4)(b) – manifestly unreasonable request**

28. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. Regulation 12(4)(b) is subject to the public interest test at regulation 12(1)(b).
29. The Commissioner considers that the inclusion of 'manifestly' in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under the exception, the information request must meet a more stringent test than simply being 'unreasonable'. 'Manifestly' means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.
30. A request may be manifestly unreasonable for two reasons: either where it is vexatious or where complying with a request means a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources.
31. NIC's position in its response to the complainant of 31 March 2016 was not that his request was vexatious but that complying with the request would be an unreasonable diversion of its resources.
32. By way of an explanation, NIC had told the complainant that it was a new organisation, having been established in October 2015. It said it was still putting systems in place and while recruitment was ongoing, it was running at around a one third vacancy rate.
33. NIC told the complainant that it had received approximately 400 responses to the Call for Evidence and that the large number of responses it had received made publishing this information impractical

at the time of the request. NIC said that each piece of evidence would need to be analysed to clarify whether any of the information would be exempt from publication under the FOIA, such as for reasons of 'commercial sensitivity' or the Data Protection Act, or for any other factor.

34. NIC said it recognised the public interest in information being released but that given the size of the task and its limited resources, complying with the request would be too large a piece of work to deliver at that time.
35. Finally, NIC said that it hoped to be in a position to publish the evidence, or at least a summary of the evidence it had received, but that this was a work in progress. NIC provided the complainant with a list of companies that responded to the Call for Evidence and said that if the complainant refined his request to a subset of these responses, it would reconsider its response.
36. In its review of 19 May 2016, HMT confirmed that, after considering the request, it found that regulation 12(4)(b) had been correctly applied. HMT noted, however, that in the interim NIC had undertaken the necessary work to prepare the responses for publication and this information had now been published on the Gov.uk website.
37. In his initial complaint to the Commissioner, the complainant was concerned with NIC's categorisation of the information in question as 'work in progress' and referred to the exception under regulation 12(4)(d). This exception concerns material in the course of completion. The complainant argued that the information he had requested was completed documents prepared by third party individuals and organisations, it was not draft or internal material generated by NIC as part of its consideration of the responses it had received. The complainant considered that while NIC might have intended to publish the responses at the same time as the related reports, the responses did not form part of the reports themselves.
38. The exception NIC applied to the request was 12(4)(b) and not 12(4)(d) and this is the exception on which the Commissioner has focussed. In its submission to the Commissioner, NIC has confirmed that it considers that to have provided the complainant with a copy of the responses to the Call for Evidence at the time of his request would have been disproportionately burdensome.
39. NIC has explained that the Call for Evidence for the three separate reports closed on 8 January 2016. Each of these reports (which had only been commissioned in October 2015) had to be published prior to the Budget on 16 March 2016. The relevant teams had a very limited



time in which to read, analyse and follow up on all the information provided by a wide range of stakeholders, in order to draft and deliver the reports to the agreed deadline. NIC argues that due to the volume of work that needed to be undertaken to publish the reports, dealing with the complainant's request at that time would have been a distraction to that work.

40. NIC has told the Commissioner that once the reports had been published, it immediately turned its attention to publishing the responses to the Call for Evidence. NIC has noted that in the Call for Evidence document it stated that it 'may publish any responses made' and asked respondents to indicate where they considered information provided to be confidential. NIC says that this did not, however, absolve NIC of the responsibility of considering the suitability of each response for publication. It says that its intention had always been to publish information on the Call for Evidence responses once its reports had been published (by which time the information would have been fully reviewed and considered) - either the responses themselves or information on their content. NIC considers that this is normal practice for consultative exercises of this kind.
41. NIC has explained to the Commissioner that before NIC published each response, it needed to analyse each response to consider whether any of the information would be exempt from publication due to commercial sensitivity, data protection issues or any other factor. This involved consulting with respondents where necessary.
42. Due the number of responses it received and the volume of work required to prepare the information for release, NIC says that six of its officials were involved in analysing responses and redacting information that was not suitable for disclosure. Three more officials were then involved in preparing the files for publication. The size of the files and quantity of responses meant that this work needed to be prepared and sent in stages.
43. NIC considers it is relevant that it was established in October 2015, and was a new and comparatively small organisation with fewer than 25 members of staff, and still putting systems in place in early 2016. It argues that the purpose of regulation 12(4)(b) is to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation, in handling information requests. NIC believes that complying with the request at the time it received it would have disrupted it from the task of delivering the three main reports to the required deadline. It therefore considers there was an obvious and clear quality to the unreasonableness of the request.



44. NIC has noted that the complainant submitted his request for the responses just two weeks after the closing date of the Call for Evidence. NIC says that this was at a time when the relevant teams were focussing their resources into drafting the three reports. Dealing with the request at that time would have delayed the publication of these reports. NIC considers that this would not have been in the public interest.
45. In his communications with the Commissioner, the complainant has described his request as wholly moderate. He says that if NIC had insufficient human or other resources to comply with the request then that is a failing of that organisation and does not make his request even marginally unreasonable.
46. The complainant has also argued that at no time were there reasonable grounds of either cost or diversion of resources to withhold the information he had requested. He has acknowledged that NIC had informed consultees that their material would be published, but says there is no evidence that NIC had made any effort to publish prior to his request. He has noted that when "*they eventually applied themselves*" in response to his further submissions, NIC published the material in question in a short timescale.
47. The Commissioner considers the application of regulation 12(4)(b) on a case by case basis. In this case, she has taken account of a number of factors. These are: the timing of the request, NIC's capacity at that time; the separate piece of work NIC was required to undertake to a deadline; the volume of requested information that would need to be prepared for release and NIC's stated intention to publish this information in due course.
48. Taking all these factors into consideration, the Commissioner is satisfied that, at the time it was submitted, the request could be categorised as manifestly unreasonable under regulation 12(4)(b). The Commissioner considers that to review and prepare the requested information in order to release it would have distracted officers from preparing the three main reports for publication, the deadline for which was 12 weeks after the close of the Call for Evidence. Such a distraction would have been unreasonable as NIC already intended to publish the responses following publication of the main reports. That NIC's resources may have been stretched at the time of the request does not equate with a failing of that organisation. It seems to the Commissioner simply to be the reality of a newly created and small authority being required to undertake a complex piece of work to a challenging deadline.

**Regulation 12(1)(b) – public interest test**

49. Under regulation 12(1)(b), a public authority can only withhold information if the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner has gone on to consider the related public interest arguments in this case.
50. NIC has acknowledged that there is a clear public interest in the responses to the Call for Evidence being made publicly available. Publishing the responses would help bring transparency and accountability to NIC's work. NIC has noted that in its consultation document, it had flagged that it may publish any submissions made to the Call for Evidence, and its intention was to make public either the responses or detailed information on their content once its reports were published.
51. With regard to the public interest in maintaining the exception, NIC has referred again to the time when the complainant submitted the request - two weeks after the Call for Evidence closed. NIC says that at this time it was focussing its resources into delivering three reports to a very challenging deadline. It argues that there is clear public interest in ensuring this work was prioritised over and above the early publication of the responses. NIC considers that the public interest in complying with the request was outweighed by the public interest in NIC being able to focus its resources on delivering the main reports, rather than rushing to publish the responses.
52. The Commissioner considers that, in this case, there was greater public interest in NIC focussing its resources on preparing the three main reports, so that it could publish them to the required deadline. Its stated intention was then to prepare and publish the submissions that informed the reports (or to publish detailed information on their content) and NIC was able to do this approximately two months later. This satisfied the public interest in transparency.
53. Having considered the public interest arguments, the Commissioner remains satisfied that when NIC originally relied on the regulation under 12(4)(b) to not comply with the request, it was correct to have done this.

## Right of appeal

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54. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

55. 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.
56. 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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