

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 January 2024

Public Authority: Network Rail
Address: The Quadrant
Elder Gate
Milton Keynes
MK9 1EN

Decision (including any steps ordered)

1. The complainant has requested information from Network Rail, in relation to a fencing contract and the upgrade of a culvert. Network Rail refused the request under regulation 12(4)(b) of the EIR (manifestly unreasonable) on the grounds that providing all of the information requested would impose a significant and disproportionate burden on its resources, in terms of time and cost.
2. The Commissioner's decision is that Network Rail is entitled to refuse the request under regulation 12(4)(b). The Commissioner also finds that Network Rail complied with its obligations under regulation 9 of the EIR to offer advice and assistance. However, the Commissioner finds that Network Rail has breached regulation 5(2) of the EIR, as it failed to provide a response within 20 working days of receiving the request.
3. The Commissioner does not require any steps as a result of this decision notice.

Request and response

4. On 7 May 2023, the complainant wrote to Network Rail and requested information in the following terms:

“Spean Bridge, Roy Bridge and Achnacarry Community Council would like to see all correspondence including instructions to Contractors, and attempts to inform local landowners in relation to a fencing contract and upgrade of a culvert on the West Highland Line to the east of the Corriechoille Railway Bridge, Spean Bridge in 2021/22. In addition we would like to see any correspondence about the removal of a right of way or access on the same stretch of line.”
5. Network Rail responded on 4 July 2023. It provided some information within the scope of the request but explained that some had been withheld, citing regulation 13(1) of the EIR – personal data and regulation 12(5)(e) of the EIR – confidentiality of commercial information.
6. Following an internal review, Network Rail wrote to the complainant on 4 September 2023. It revised its position and stated that it was refusing the request under regulation 12(4)(b) of the EIR – manifestly unreasonable.

Scope of the case

7. The complainant contacted the Commissioner on 17 September 2023, to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether Network Rail is entitled to rely on regulation 12(4)(b) to withhold the remainder of the information.

Background

9. Network Rail has explained that when it originally responded to the complainant's request it disclosed a range of information to the first part of the request and explained that it had withheld personal information under regulation 13(1) of the EIR, from those documents. It also added that it had withheld information relating to contracts under regulation 12(5)(e) on the grounds that it would prejudice its contractors.
10. Network Rail also advised that it does not hold any correspondence with residents in the area and that it also does not hold correspondence

about the closure of a right of way, as its Property team had found that there was no right of way at the location.

11. Upon receiving the complainant's response, it carried out an internal review and found that it had not provided them with all the information that it holds. It was at this time that Network Rail established that it should have initially refused the request on the grounds that it is manifestly unreasonable.

Reasons for decision

Regulation 12(4)(b) - manifestly unreasonable requests

12. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information to the extent that the request for information is manifestly unreasonable.
13. There is no definition of 'manifestly unreasonable' under the EIR, but the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable for a public authority to respond to in any other way than applying this exception.
14. In the Commissioner's view, the key question for public authorities to consider when determining if a request is manifestly unreasonable is whether the value and purpose of the request justifies the burden that would be placed upon the authority in complying with it.
15. The Freedom of Information and Data Protection (Appropriate Limit and Fees) sets out an appropriate limit for responding to requests for information under FOIA. The limit for local authorities, such as the Council, is £450, calculated at £25 per hour. This applies a time limit of 18 hours. Where the authority estimates that responding to a request would exceed this limit, it is not under a duty to respond to the request.
16. Although there is no equivalent limit within the EIR, in considering the application of regulation 12(4)(b), the Commissioner considers that public authorities may use the section 12 limits as an indication of what Parliament considers to be a reasonable burden to respond to EIR requests. However, the public authority must then balance the cost calculated to respond to the request against the public value of the information which would be disclosed before concluding whether the exception is applicable.
17. Network Rail has explained that in order to make sure it had captured all correspondence within the scope of the request, it had to approach its audit team, who could then make key word searches of its systems.

18. Network Rail went on to advise that the audit team's searches had produced an extremely large volume of information that potentially fell within the scope of the request. It also added that the team was able to provide a small sample of correspondence for review, which confirmed that it had not located everything when handling the initial request. However, it explained that to reasonably determine that no information had been left uncaptured, it would need to review a vast number of emails.
19. Network Rail added that the audit team used keywords to try to find all correspondence relating to the request, which produced 661,964 items.
20. Network Rail also explained that when the complainant came back to them advising that there were 'clear gaps' within the information, it determined that a much more extensive search would be needed. It explained that its audit team has the capacity to search all company emails, including the correspondence for individuals who have left the organisation. As such, the only means of carrying out a comprehensive search was via the audit team.
21. Network Rail also advised that the complainant noted that the response did not include information on the "attempts...made to contact the Landowner", and that there was a paucity of information about the stile, the fencing and the water-gate. It explained that it went on to search for any emails sent between January 2021 and 31 December 2022, which contained the terms "Spean", "Corriechoile", "Stile", "landowner" and the name of their contractor, and this returned 661,964 items.
22. Network Rail explained that they removed the name of the contractor from the searches, as they work with them on numerous contracts. They amended the searches to include "fencing" and "gate", which went on to return 900,818 items which could be relevant to the complainant's request.
23. Network Rail explained that its global search function is not designed for searching for such large volumes of information and it has potentially included duplicate emails. However, it is unable to readily determine that this is the case without manually checking the documents.
24. Network Rail has advised that even working on the narrowest set of results (314,351 items), it would be impossible to process the request without placing a grossly oppressive burden on its resources. It explained it is unable to determine which emails fall within the scope of the request without opening and reading them.
25. Network Rail explained that whilst it thinks it is likely that the majority of the emails would not be captured by the request, the process of

reviewing and filing the relevant ones would take, at a conservative estimate of 45 seconds per item, approximately 3,929 hours.

26. Network Rail says it believes, on the balance of probabilities, the information captured by the audit team will contain information relevant to the request. However, to even determine the volume of information held, would absorb a disproportionate amount of resources.

Public interest test

27. Network Rail acknowledged that there is a substantial public interest in disclosure. It explained that its actions have had a direct impact on a local community's ability to enjoy its surroundings. It added that access to information about the matter has the potential to contribute to that community's capacity to participate in decisions which affect the environment.
28. Network Rail explained that even when taking the above into account, the burden on its limited resources would still be intolerably large. It advised it would take thousands of hours to meet a single request, which would prevent it dealing with other requests, or require more staff to be hired.
29. Network Rail also explained that meeting the request would place a disproportionate burden on its resources and added that the public interest in disclosure is also partially met by the previous disclosure.

Commissioner's position

30. When dealing with a complaint to him under the EIR, it is not the Commissioner's role to make a ruling on what information a public authority should hold, or how it should hold it. He is not concerned with how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requestor within the appropriate cost limit.
31. The Commissioner's job here is to determine whether Network Rail has demonstrated that the work involved in providing the requested information would be likely to exceed 18 hours, and thus the £450 cost limit established under the Fees Regulations.
32. The Commissioner acknowledges the complainant's concerns regarding the requested information and that they consider that it would be simple to locate the information using references or searches. Whilst the Commissioner understands this, from the information provided, Network

Rail's system, when doing specific searches has still returned in excess of 300,000 emails.

33. From the information provided by Network Rail, the Commissioner considers that the estimated 3929 hours is credible, due to the large amount of information that has been returned when carrying out searches. The Commissioner is satisfied that Network Rail has estimated reasonably and cogently that the costs involved in complying with the request would significantly exceed the £450 limit established by the Fees Regulation. The request is broad in nature and, even were the Commissioner to halve Network Rail's cost estimate, it would still far exceed any reasonable cost in terms of time and money under the EIR.
34. The Commissioner's decision is therefore that Network Rail was entitled to rely on regulation 12(4)(b) to refuse to comply with the request for information.

Regulation 9 – the duty to provide advice and assistance

35. Regulation 9 of the EIR requires public authorities to provide advice and assistance to requestors, so far as it would be reasonable to expect the authority to do so.
36. As stated in the Commissioner's guidance¹, in cases where a public authority refuses a request under regulation 12(4)(b) as manifestly unreasonable because of burden or cost, the Commissioner normally expects it to provide the applicant with reasonable advice and assistance to help them submit a less burdensome request.
37. In this case, Network Rail provided advice and assistance within the internal review (once it had changed its position and was relying on regulation 12(4)(b)), advising the complainant that if they were to narrow the time period within their request, it would allow for a more limited search.
38. Network Rail has advised that it has been in contact with the complainant to propose an alternative means forward, as it is confident that progressing on this basis would uncover all of the information

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-9-advice-and-assistance/#regulation9>

significant to the complainant's concerns. However, the complainant was not satisfied with this proposal.

39. The Commissioner is therefore satisfied that Network Rail complied with its obligations under regulation 9 of the EIR to offer advice and assistance.

Regulation 5

40. Regulation 5(1) of the EIR states that: "a public authority that holds environmental information shall make it available on request."
41. Regulation 5(2) of the EIR states that: "Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."
42. The complainant made their request for information on 7 May 2023 and a response was not provided until 4 July 2023. Therefore, the limit of 20 working days was exceeded and, as such, regulation 5(2) of the EIR has been breached.

Right of appeal

43. 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

44. 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.
45. 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

Michael Lea
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