

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

Decision notice

Date: 29 June 2017

Public Authority: Highways England
Address: Bridge House
1 Walnut Tree Close
Guildford
Surrey GU1 4LZ

Decision (including any steps ordered)

1. In six requests, the complainant has requested information about a proposed improvement scheme for the A27 Chichester. The proposal was subsequently withdrawn. Highways England (HE) released information but the complainant considers that the released information does not address five of his requests.
2. The Commissioner's decision is that HE:
 - does not hold the information requested in request 1[c] and has complied with regulation 5(1) (duty to make environmental information available on request) with regard to this request;
 - has complied with regulation 5(1) with regard to request 2[a];
 - has not complied with regulation 5(1) with regard to requests 1[a], 3 and 6;
 - did not breach regulation 5(2) (time for compliance) with regard to request 2[a];
 - breached regulation 5(2) with regards 1[a] and 1[c], and requests 3 and 6;
 - breached regulation 9(2)(a) and 9(2)(b) (advice and assistance) with regards to requests 1[b], 2[b], 4 and 5; and

- cannot rely on the exception under regulation 12(4)(b) (manifestly unreasonable request) with regard to request 1[a].
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Issue the complainant with responses to requests 1[a], 3 and 6 that comply with regulation 5(1) of the EIR.
 - Ask the complainant to provide more particulars in relation to requests 1(b); 2(b); 4 and 5 and provide reasonable advice and assistance to assist the complainant in providing those particulars.
 4. The public authority must take these steps 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

5. With regards to the public consultation on the proposed A27 bypass scheme, on 11 September 2016 the complainant wrote to HE and requested information in the following terms:

"I can not see any of the information available at that website. Except a one page business case stating that the total project costs for the "hybrid" proposals are 470 million.

As a result I am unable, currently, to comment fully on your flawed consultation. Can I therefore have:

[1] [a] Copies of all of the bypass options including the northern option with associated [b] assumptions and [c] one page business cases.

[2] [a] Costings comparisons and [b] assumptions for all considered options whether rejected or not

[3] The minutes of the public or other meeting when the clearly most viable northern option was rejected on cost grounds and whether any consultation was conducted

[4] The data for the environmental and traffic flow data

[5] *The consequential loss calculations for the build phase of all options which I assume has been done (as I was assured yesterday it had been)*

[6] *Any reserve matters or other non public consultation leading to the decision not to proceed with the northern option. By this I mean any records of meetings about this option. Or agendas where these topics were discussed.*

If you are not prepared to supply this data then please note that I further request this information under a freedom of information request"

6. On 14 September 2016, HE sent the complainant a web link to the dedicated consultation website. The complainant did not consider this website addressed his questions.
7. In correspondence to the complainant dated 22 September 2016, HE told the complainant that it does not hold any one document that explains the decision to withdraw the Northern Bypass route option (the Commissioner assumes this relates to requests 3 and 6). HE gave some background information about the Northern Bypass option and an earlier consultation, as well as a cost assumption for the A27 Chichester scheme and cost estimates for Options 4, 5 and 6 (request 2[a]). Finally, HE provided links to a traffic forecasting report and an economic assessment report which it said addressed the complainant's request for environmental and traffic flow data (request 4).
8. In further correspondence dated 28 September 2016, HE said that it had handled the complainant's requests as normal course of business and went on to provide the following information.
9. HE provided web links to two feasibility studies and to where information on the amount spent on the bypass scheme is published with regards to requests 1, 2 and 5. It provided relevant web links to an environmental report, a traffic forecasting report, and to particular exhibition display boards, with regard to request 4. HE suggested that to comply with requests 3 and 6 would be 'manifestly unreasonable' but did not refer to the EIR.
10. The complainant remained dissatisfied and told HE that he had not received information on Option 4 and 5 (the Northern Bypass options) and the decision ruling this out, allegedly on cost grounds.
11. On 3 October 2016 HE wrote to the complainant. It again said it was handling his requests as normal course of business because all the information he had requested is made available to the public on a regular basis. HE told the complainant that Options 4 and 5 – the Northern Bypass options - were excluded because they both exceeded

the budget range and they were outside the scope as stated in the *2014 Roads Investment Strategy*.

12. The complainant submitted a complaint to HE on 6 October 2016. This communication can be categorised as a request for an internal review.
13. The complainant contacted the Commissioner on 14 November 2016 as he had not received a response to his complaint. The Commissioner wrote to HE on 2 December 2016 and asked it to provide the complainant with an internal review.
14. HE wrote the complainant on 18 December 2016. It apologised that its initial correspondence had been unclear and confirmed that it was now dealing with his requests under the EIR. It said that when the A27 Chichester team had realised that responding to the complainant's requests would involve sifting through a large amount of material which would take a considerable time to retrieve and collate, that team should have responded citing the exception 12(4)(b) of the EIR and explained that it considered the complainant's request was 'manifestly unreasonable' under this legislation. It is not clear if HE was referring to one request in particular or all six of the requests combined.
15. HE went on to say that, although it had taken the above team some considerable time, it had managed to collate information which it considered answered the complainant's questions and that this was due to be published before the end of December 2016.
16. HE subsequently told the Commissioner that it published the information on 22 December 2016. The information included a report on the Spending Review 2010 which it considered would address request 2.
17. The complainant contacted HE on 22 December 2016. He told HE that he considered that HE was in breach of the FOI (EIR) as none of the links it had provided to him provided the information he had requested.
18. HE wrote to the complainant on 22 December 2016 and provided narrative information on the proposed A27 Chichester bypass improvements, the Road Investment Strategy and the Northern bypass options.
19. On 23 December 2017, HE asked the complainant to confirm which questions he considered had not been answered, so that it could review his requests.
20. On 24 December 2016, the complainant told HE that the published information had not answered the questions he submitted on 11 September 2016 and stressed that he wanted the details regarding the costings for Option 4 and 5 and the various considerations that led to

Option 4 and 5 being left out of the consultation. The complainant submitted a second request for information at this point. In other correspondence HE informed the complainant that he should expect a response to this separate request by 26 January 2017 and the Commissioner understands that HE did subsequently provide a response to this request.

21. On 20 January 2017, HE released further information to the complainant with regard to the current requests; namely the costings of all the route options considered for the A27 Chichester bypass proposal, including Option 4 and 5. The Commissioner notes that the Option 4 and 5 figures had originally been given to the complainant on 22 September 2016.
22. On 21 January 2017, the complainant again confirmed to HE that he did not consider that its previous responses had provided the information he has requested, in full. In correspondence during 23 January 2017, HE again suggested to the complainant that if he was still seeking information, he should let it know. It asked the complainant to clarify what information he was seeking and that it would be unable to proceed with his request without this clarification. The complainant told HE that he considered that HE had not addressed any of the six requests he had submitted.

Scope of the case

23. In correspondence to the Commissioner dated 12 April 2017, the complainant confirmed he has received the information requested in request 4. He has also received a total sum figure regarding the information requested in request 2[a], but not the information he says he requested. At this point therefore, it appears to the Commissioner that the complaint remains of the view that HE has not provided responses to requests 1, 2, 3, 5 and 6, which he submitted to HE on 11 September 2016.
24. As a result of further correspondence with HE, the Commissioner's investigation has focussed on HE's handling of these requests, whether HE has complied with its duties under regulation 5(1), 5(2) and 9 and whether one of the requests can be categorised as 'manifestly unreasonable' under regulation 12(4)(b).

Reasons for decision

25. HE provided an initial submission to the Commissioner on 9 March 2017. It told the Commissioner that the full study material, which is the basis for the public consultation the A27 Chichester improvement scheme, is available on 'the website' and is contained in the two detailed reports - 'Traffic Forecasting'¹ and 'Economic Assessment'², published on this site. Which website HE is referring to is not clear; the Commissioner has found the first report on HE's dedicated consultation site, and the second on the government's consultation site.
26. HE said that these two reports cover not only the five options made public, but also the two dropped Northern options (Options 4 and 5), including environmental impact information. Additional detail is also contained in an earlier 2005 consultation report³ and the Chichester Transport Study of Strategic Development Options and Sustainable Transport Measures⁴. HE has again told the Commissioner that these two reports are also available on 'the website'. The Commissioner has found the first of these reports on HE's consultation website and the second on Chichester Council's website.
27. HE also told the Commissioner that a search for relevant documents was carried out on all the records held by its Records Management team, so that it could respond to the complainant's requests. HE has not responded to the Commissioner's subsequent requests for clarification on what the outcome of this search was.
28. In its submission, HE noted that the complainant had told it that he had not been given costings information on Option 4 and 5, and that HE had provided this information to him on 20 January 2017.
29. Finally, HE acknowledged that the complainant's requests had been mishandled originally, because they had not been handled under the EIR. HE noted that it had provided the complainant with a sincere apology; had, in its view, made sure the information he was seeking was made available to him and, once it had received clarification, had provided further information within 20 working days.

¹ <http://roads.highways.gov.uk/projects/a27-chichester/>

² <https://www.gov.uk/government/consultations/a27-chichester-bypass-improvement-scheme>

³ <http://roads.highways.gov.uk/projects/a27-chichester/>

⁴ <http://www.chichester.gov.uk/CHttpHandler.ashx?id=18647>

30. Questions still remained for the Commissioner after she had considered HE's submission, and she had further discussion with HE on 8 June 2017 about its response to requests 1, 2, 3, 5 and 6. HE then provided a further submission on 13 June 2017.

31. HE's position in its final submission is as follows:

- **Request 1** – to provide all the information regarding the bypass options would involve identifying all emails and any related documents discussing the scheme. HE considers this would be 'manifestly unreasonable' under regulation 12(4)(b).
- It is not clear to HE what the complainant means by 'assumptions'.
- There are not business cases for each of the bypass options and HE acknowledges that it should have informed the complainant that it does not hold this information.
- HE says it has provided broad, narrative information about the options considered during the bypass scheme.
- **Request 2** – HE confirmed it provided the complainant with costings comparisons on 20 January 2017. It says it needs clarification on what the complainant means by 'assumptions'.
- **Request 3** – HE has confirmed that it has not provided this information. It has told the Commissioner that it would need to review the information it holds and consider if any exceptions apply.
- **Request 4** – HE confirmed that it has directed the complainant to two published reports but has told the Commissioner that these are large reports and the complainant needs to clarify what information he wants.
- **Request 5** – HE confirmed that it has directed the complainant to a published report (the Economic Assessment Report June 2016) but again, has said this is a long report and the complainant needs to clarify the specific information he wants. It says estimating costs are detailed in section 3, page 13.
- **Request 6** – HE has confirmed that it has not provided this information. It has again told the Commissioner that it would need to review the information it holds and consider if any exceptions apply.

32. As above, it appears to the Commissioner that the complainant is satisfied with HE's response to request 4. She has therefore considered HE's final responses to requests 1, 2, 3, 5 and 6.

Regulation 5(1) – access to environmental information

33. Regulation 5(1) of the EIR says that a body that holds environmental information shall make it available on request.
34. With regards to requests 3 and 6, some nine months after receiving them, HE has now confirmed that it has not responded to these requests. It has quite clearly breached regulation 5(1) with regard to these two requests.
35. With regards to request 1, HE has confirmed it does not hold some of the requested information (1[c] - one page business cases for all the bypass options), considers an element of this request ([1a]) to be 'manifestly unreasonable' under regulation 12(4)(b) and is not clear what another element of the request (1[b] - 'assumptions') is referring to.
36. With regard to not holding one page business cases ([1c]), HE has indicated to the Commissioner that it is able to confirm these are not held because it has liaised with the relevant Area team (ie the team that dealt with the A27 Bypass Scheme) and that team has confirmed that such information is not held. The Commissioner is prepared to accept that the Area team in question is familiar with what information it holds concerning this particular bypass proposal, and that HE does not hold the information requested at 1[c].
37. HE's response to requests 1[a] and 1[b] are discussed elsewhere in this notice.
38. Turning to request 2[a], the complainant requested: '*Costings comparisons ... for all considered options whether rejected or not*'. He says that HE has provided him with total sum figures and not the requested information.
39. On 10 May 2017 HE referred the Commissioner to the link it had originally provided to the complainant on 28 September 2016, to information on the amount spent on the bypass scheme. It considered this was a response to the request and noted that the complainant had not requested a breakdown of costs.
40. It appears to the Commissioner however, that the information HE released on 22 September 2016 (and 20 January 2017), addresses this request – namely the costings comparisons – as the request is phrased. That is, for costings comparisons and not a breakdown of costs. She is

satisfied that HE has provided a satisfactory response to request 2[a] and has complied with regulation 5(1) and regulation 5(2) with regard to this particular request.

41. Request 2[b], which concerns '*assumptions*' has not been addressed. HE's response to request 2[b] is considered elsewhere in this notice.

Regulation 12(4)(b) – cost of compliance

42. Regulation 12(4)(b) of the EIR says that a public authority may refuse to disclose information if the request is 'manifestly unreasonable'. This exception can be used when the request is vexatious or when the cost of complying with the request would be too great.
43. In the course of its early correspondence with the complainant, HE had indicated that requests 3 and 6 were 'manifestly unreasonable' under regulation 12(4)(b) but it is now suggesting that request 1[a] ('copies of all of the bypass options including the northern option') is 'manifestly unreasonable'. It has suggested that this is because of the excessive cost of complying with this part of the request (the equivalent of section 12(1) of the FOIA).
44. In its 13 June 2016 submission to the Commissioner, HE has referred to the cost of providing "all the information regarding the bypass options" which would involve identifying all emails and any related documents discussing the scheme.
45. The Commissioner notes that the request is not for "*all the information regarding the bypass options*". The request is for "*Copies of all of the bypass options including the northern option...*" This would appear to be quite specific and would not appear to encompass broad email correspondence or a wide range of documents. HE either holds copies of each of the bypass options in discreet documents or it does not. If it does hold such information, it could have released this to the complainant or directed him to where it is already published. And if HE does not hold this specific information, it could have clearly told the complainant so.
46. HE has not given a full explanation of the cost it expects to incur if it were to comply with this part of the request (as HE has interpreted it), why those costs would be incurred and why they are excessive. Because, as above, the Commissioner does not consider that HE has interpreted the request correctly, she has noted this omission but has not considered it further. In the Commissioner's view, request 1[a] cannot be considered to be manifestly unreasonable and does not engage regulation 12(4)(b).

Regulation 12(4)(c) – unclear requests / Regulation 9 – advice and assistance

47. HE has indicated in its 13 June 2017 submission that it considers that requests 1[b], 2[b], 4 and 5 are not clear. It has not referred to any regulation with regard to these requests.
48. Regulation 12(4)(c) says that a public authority may refuse to disclose information if the request is formulated in too general a manner and the public authority has complied with regulation 9.
49. Regulation 9(1) says that a public authority shall provide advice and assistance, so far as it would be reasonable to do so. Regulation 9(2) says that where an authority decides that an applicant has formulated a request in too general a manner it shall (a) ask the applicant as soon as possible and no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and (b) assist the applicant in providing those particulars.
50. Regulation 12(4)(c) cannot be engaged if the authority has not first complied with regulation 9(2).
51. The Commissioner has noted that HE did ask the complainant what additional information he was seeking that had not been released to him, on 23 December 2016 and 23 January 2017. On both occasions the complainant had indicated that none of his requests had been addressed.
52. The Commissioner is inclined to the view that HE has breached regulation 9(2) with regard to requests 1[b], 2[b], 4 and 5. Following the internal review, the complainant indicated to HE on 22 December 2016 that none of the links it had provided to him provided the information he had requested. The Commissioner considers that in its subsequent correspondence to the complainant HE could have done more to help the complainant provide more detail on exactly what it was that he was requesting by, for example, asking him what he meant by 'assumptions' and/or explaining broadly what information it was able to provide, what information it held that might not be quite what was requested but which the complainant might find useful, and what information it did not hold.
53. In her guidance on regulation 12(4)(c), the Commissioner recommends that public authorities:
 - read a request objectively and impartially
 - don't read anything into it any meaning which is not in the plain wording

- don't assume that they know what is in the mind of the requester; and
 - seek clarification when a request is unclear or ambiguous, rather than attempting to guess what the requester wants.
54. HE has, at this point, acknowledged that requests 1[b], 2[b], 4 and 5 are not clear. It appears to the Commissioner that HE did not review the five requests carefully when they were received on 11 September 2016. It appears to have made assumptions as to what the complainant wanted, leading it to direct him to particular information that the complainant did not consider was relevant. Ultimately it has led to the complaint to the Commissioner.
55. The point at which the complainant first expressed dissatisfaction with HE's response to his requests, on 6 October 2016, presented another opportunity for HE to review its understanding of the requests, which again was not taken.
56. If a public authority genuinely considers that a request is still not clear, even after it has offered the applicant advice and assistance, it may refuse to comply with the request. If the situation remains following an internal review, the applicant has the option of submitting a complaint to the Commissioner at that point.
57. The Commissioner has noted the shortcomings in HE's response to the complainant's request in this case. These were apparent from the start, when it initially handled the requests outside of the EIR. This led to more correspondence than was necessary, more delays than were necessary and, as above, a complaint to the Commissioner.

Regulation 5(2) – time for compliance

58. Regulation 5(2) says that an authority should comply with regulation 5(1) as soon as possible and no later than 20 working days after the date it receives the request.
59. The complainant submitted his request on 11 September 2016. The Commissioner has decided that HE has breached regulation 5(2) with regard to request 1[c], because it did not confirm within 20 working days that it does not hold this information, and with regard to requests 1[a], 3 and 6 because, again, it has not complied with regulation 5(1) by the required timescale.

Right of appeal

60. 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

61. 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.

62. 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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