Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 24 July 2020

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested information relating to the Queensbury Tunnel from the Department for Transport ("DfT"). The DfT refused to provide this information citing section 14(1) – vexatious request. The public authority later suggested to the Commissioner that the request could also be considered an EIR request and cited Regulation 12(4)(b) – manifestly unreasonable request.

2. The Commissioner's decision is that the request falls under the EIR and that Regulation 12(4)(b) is not engaged.

3. The Commissioner requires the DfT to take the following steps to ensure compliance with the legislation.

   - Issue a fresh response regarding this request that does not rely on Regulation 12(4)(b) of the EIR.

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.

Background

5. The Commissioner understands that the Queensbury Tunnel is owned by the DfT and that Highways England's Historical Railways Estate team maintains it on the DfT's behalf.

6. The website of the Queensbury Tunnel Society explains that the tunnel,

> *"…extends for 1.4 miles beneath a ridge in the Pennine foothills of West Yorkshire. Halifax lies at its south end (2.5 miles), whilst Keighley is located to the north (7 miles) and Bradford to the east (4 miles)".*

The website also states that,

> *"Stakeholders have an alternative vision of the tunnel fulfilling a positive role in the District's future through its conversion to host Bradford-Halifax Greenway, delivering social, economic and tourism benefits for generations to come."*

7. There has been controversy over the future of the tunnel for some time because there are groups that wish to create a greenway linking Bradford and Halifax. Highways England is planning to abandon the structure over concerns about its condition which, apparently, would mean that some sections would be infilled.

Request and response

8. On 13 August 2019 the complainant made the following request for information under the FOIA to the Department for Transport ("DfT"):

> *"copies of all emails (inc attachments), letters, reports and other documentation etc sent to/from/within the DfT since 11th February 2019 relating to Queensbury Tunnel."*
>
> *To help reduce the workload involved in dealing with this request, where relevant material is identified which the Department reasonably believes might fall under exemptions 35 (formulation of Government policy), 42 (legal professional privilege)or 43 (commercial interests) of the FoI Act, I am content for that material to be redacted without a public interest test being undertaken as long as the redacted material is still included within the final response."*

9. The DfT responded on 10 September 2019 and refused the request as vexatious under section 14(1) of the FOIA, having warned that it might do so in response to a previous request by the complainant.

10. The complainant requested a review on the same date.

11. The DfT provided an internal review sent on 6 December 2019 (dated 5 December 2019) in which it maintained its original position.

Scope of the case

12. The complainant contacted the Commissioner on 6 December 2019 to complain about the way his request for information had been handled. He did not consider that the information should have been withheld and explained that he had a serious interest in requesting this information.

13. The Commissioner considers that the scope of this case is firstly, to establish whether the request should have been considered under the FOIA or the EIR. Secondly, The Commissioner intends to consider whether the request has been appropriately refused as manifestly unreasonable.

Reasons for decision

Is the information environmental?

14. Regulation 2(1) of the EIR provides the following definition of environmental information:

> *"…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;*
> *(d) reports on the implementation of environmental legislation;*
> *(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);*
> *and*

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"

15. Requests for information need to be handled under the correct scheme. The reasons why information can be withheld under the FOIA are different from the reasons why information can be withheld under the EIR.

Why is this information environmental?

16. The Commissioner is satisfied that the information requested is environmental within the definition at regulation 2(1)(c), since it is information on measures which would affect or be likely to affect the elements and factors referred to in regulation 2(1)(a) and/or 2(1)(f) which relates to the state of human health and safety regarding built structures as they may be affected by the state of the elements of the environment referred to in (c).

17. When the DfT wrote to the Commissioner on 1 July 2020 it explained that it had taken the opportunity to consider whether the request fell under the FOIA or the EIR legislation. The DfT accepted that the request could have been considered under the EIR and accordingly provided a response under both access schemes, leaving it up to the Commissioner to decide. As the Commissioner has concluded that the request falls under the EIR, she has gone on to consider the complaint under that legislation.

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

18. The EIR states –

"Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(b) the request for information is manifestly unreasonable"

19. Regulation 12(4)(b) of the EIR provides an exception from disclosure to the extent that the request is manifestly unreasonable. The term *"manifestly unreasonable"* is not defined in the EIR. However, the Commissioner follows the lead of the Upper Tribunal in *Craven v The*

Information Commissioner and the Department of Energy and Climate Change [2012] UKUT442 (AAC) in her guidance[1]. This judgment concluded that there was no material difference between testing for a request that is considered to be manifestly unreasonable and one for a vexatious request under section 14(1).

20. There is some confusion in the DfT's response because of the failure to decide what was the correct access scheme – the FOIA or the EIR. In effect, the Commissioner has been asked to look at both the cost of compliance being manifestly unreasonable and that the request is vexatious (either manifestly unreasonable under Regulation 12(4)(b) EIR or that the request is vexatious under section 14(1) FOIA).

21. The Commissioner intends to look firstly at the cost of compliance in order to decide if the request is manifestly unreasonable on the grounds of costs. The legislation stipulates that a request is either manifestly unreasonable because the request is vexatious or when the cost of compliance with the request would be too great. The DfT has said that it is both.

Cost of compliance

22. As outlined above, in considering the volume of emails that fall within the scope of the request, the DfT regarded this request as manifestly unreasonable. It acknowledges that there is no clear 'cost limit' within the EIR regime as there is under the FOIA (limit of £600). However, the DfT understands from the guidance that the *Fees Regulations (Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* can be used as a useful starting point in assessing the level of costs that might be incurred in determining what may considered *"manifestly unreasonable"*.

23. The DfT therefore applied an hourly rate of £25 for the time staff members would take in actioning an EIR request. The DfT set out calculations that specify how long it estimates it would take to retrieve, download, read for the first time and seek clarification on the 335 emails that fall within the scope of the request. Some emails contain technical data (such as engineering and surveying advice) that the individuals responsible for reviewing the information are not qualified

[1] https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf

to assess. These would have to be assessed by the Head of Estates at the DfT who is a qualified RICS surveyor, other professionally qualified policy leads within the DfT and colleagues at Highways England, such as fully qualified and experienced engineers. The DfT suggests that, depending on the complexity of the information, the time spent on reviewing technical emails could be between 10 and 20 minutes.

24. In calculating its costs estimate, the DfT has worked on the basis that to find, extract and consider each email, a flat rate of 15 minutes should be applied. It arrives at this estimate by stating that this will mainly be done by two individuals in the Property Team reading the emails for the first time. It acknowledges that some emails will take longer than others due to the size of the email chain and whether there is a need to obtain professional clarification. Therefore, supposing it would take 15 minutes per email, and there are 335 emails, this equates to 83.75 hours. The figure of 83.75 hours at £25 an hour would cost £2,093.75.

The Commissioner's view

25. No sampling exercise appears to have taken place. The Commissioner notes that the figure is well in excess of the fees limit as it applies under the FOIA. Even if it took five minutes, it would still be in excess of the time allowed for government departments – nearly 27.9 hours when the maximum is 24 hours.

26. However, if the Commissioner accepts that the DfT is using the appropriate limit under the FOIA, then only those activities allowed under that legislation can be factored in -

- determining whether it holds the information;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it; and
- extracting the information from a document containing it.

27. The DfT can use the Fees Regulations as a guide in considering whether the burden of compliance would be manifestly unreasonable from a cost point of view. The DfT clearly knows it holds the requested information, it appears to have located it as it knows how many emails are involved. It remains unclear how the DfT has arrived at this figure. It considers that the technical emails would require a technical expert reviewing the technical details, though it isn't clear whether this is to decide whether an email falls within scope or for the purposes of considering what might need to be redacted which isn't a permissible activity. Given the phrasing of the request which is for everything sent

to/from/within the DfT relating to the Queensbury Tunnel over a period of six months, it is hard to see what would not fall within scope from the 335 emails already identified.

28. The Commissioner follows the approach set out by the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2006/0004, 30 October 2007)* which stated that a reasonable estimate is one that is *"…sensible, realistic and supported by cogent evidence"*.

29. The DfT is a large government department. Under EIR there is no appropriate cost limit unless it is *"too great"*[2]. In this case, the Commissioner does not consider that the cogent evidence has been provided. Public authorities may be required to accept a greater burden in providing environmental information as there is a presumption in favour of disclosure. Therefore, she cannot accept the fact that because there are over three hundred emails means that the burden is manifestly unreasonable, without more detailed evidence having been provided.

30. However, as the DfT has also argued that the request is manifestly unreasonable because it is vexatious, the Commissioner has gone on to consider whether this is the case.

31. The FOIA does not define the term *"vexatious"*. The Upper Tribunal (UT) considered the issue of vexatious requests in *Information Commissioner vs Devon County Council & Dransfield [2012] UKUT 440 (AAC), (28 January 2013)*. The UT decided that the dictionary definition had limited use and that it depended on the circumstances surrounding the request. The UT defined it as a *"…manifestly unjustified, inappropriate or improper use of a formal procedure."* (paragraph 27). The approach in this case was subsequently upheld in the Court of Appeal.

32. The Dransfield judgment also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: *"…adopting a holistic and broad approach*

[2] *Craven v The Information Commissioner and the Department of Energy and Climate Change [2012] UKUT442 (AAC)*, paragraph 25.

to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).

33. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the UT when it defined the purpose of section 14 as being –

> *"…concerned with the nature of the request and ha[ving] the effect of disapplying the citizen's right under Section 1(1)…The purpose of Section 14…must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA…"* (paragraph 10).

34. The Commissioner's guidance explains that the UT's decision established that the concepts of 'proportionality' and *'justification'* are central to any consideration of whether a request is vexatious.

35. The Commissioner has also identified a number of indicators which may be useful in identifying vexatious requests. They include (amongst others):

- The burden on the authority.
- Unreasonable persistence.
- Unfounded accusations.
- Intransigence.
- Frequent or overlapping requests.
- Deliberate intention to cause annoyance.

36. The fact that a request contains one or more of these indicators will not necessarily mean that it is vexatious. All the circumstances of a case need to be considered in reaching a judgement. Where relevant, public authorities may also need to take into account wider factors such as the context and history of the request.

37. The Commissioner's guidance suggests that if a request is not clearly vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should aim to objectively judge the impact on itself and weigh this against any evidence about the purpose and value of the request.

The Department for Transport's view

38. The DfT's view is that the request is vexatious and that the cost of compliance combined make it manifestly unreasonable. Since March 2018 it says that there have been ongoing FOI requests and persistent correspondence between the DfT and the complainant. The requests have continued every few months covering different time periods. The DfT clearly states that the individual requests are not vexatious in isolation but that this request when viewed in context, is vexatious. It represents a pattern of behaviour likely to lead to further requests. Given the wider history and context, the DfT views the request as harassing.

39. The DfT explained that it had received a number of requests from the complainant on various aspects of the Queensbury Tunnel. The Commissioner notes that the DfT has provided a list of five requests received between March 2018 and August 2019. It suggests that each request is followed a few months later with a new request for similar information for the time period immediately following the period covered by the earlier request. The DfT states that it has spent a significant period in processing these requests as they involve identifying and assessing a large amount of information. This also represents a cost burden.

40. The DfT highlights the fact that it received an earlier request from the complainant and responded on 3 July 2019 and that its response stated that, should a similar request be received on the subject, it would consider whether to refuse it as vexatious. The response contained this caveat -

> *"The Department considers that it may rely on section 14(1) and it is not obliged to respond to your latest request because it considers the request is vexatious. The Department has noted that your past behaviour in submitting requests and correspondence on the matter of the Queensbury Tunnel suggests that a detailed response would only serve to encourage follow up requests. The Department would draw your attention to section 17(6) of the FOI Act and would advise you that it will not issue a further refusal notice in relation to any future request on the same issue if it believes it would be unreasonable to do so."*

41. It is unclear why the DfT took nearly five months to respond to this earlier request.

42. Subsequently, the DfT considered that the request made in August 2019 was vexatious as it followed the same format as previous requests and asked for information up to the current date. It then

determined that providing a detailed response would only serve to encourage further requests.

43. The DfT then went on to indicate under several headings why it deemed this request to be vexatious and it did so by reiterating what was contained in the internal review conducted on 6 December 2019.

The DfT's view

Burden on the authority

44. The Commissioner's guidance suggests that the effort required to meet the request is a burden that is grossly oppressive in terms of the strain on time and resources and, as a result, the public authority cannot be expected to comply, however legitimate the subject matter or valid the intentions of the requester. The DfT explained that in order to comply with the request it would need to identify, sift and assess a huge volume of material in order to assess what could and could not be released. The DfT had already advised the complainant that it would not release material subject to various exemptions but, in order to reach that stage it had to be determined whether exemptions apply and this imposes a significant burden in terms of distraction of staff from their usual work. The complainant had suggested that he was willing for the DfT to redact information if it was covered by a certain exemption/s without the need for a public interest test in order to reduce the burden.

45. The DfT explained to the complainant that his previous requests had gone to review at Senior Civil Service level and been rejected, placing further administrative burden on the DfT and diverting staff from their usual work. It suggested that submitting requests for different time periods did not obviate the burden.

46. The Commissioner agrees that, however well-intentioned on the part pf the complainant, the DfT cannot release information under the FOIA or the EIR which has been redacted without citing an exemption or exception which requires careful consideration and a compliant refusal notice.

47. The DfT's view is that dealing with manifestly unreasonable requests involves significant cost and the diversion of resources from the teams concerned and the DfT's other work.

48. Whilst stating that the matter is not trivial, these enquiries still require the DfT to expend a disproportionate amount of resources in order to meet the requests. In this case, it estimates that the cost would be more than £2000 or 83.75 hours of working time (based on £25 per hour). The disproportionate amount of time DfT officials have had to

spend dealing with these requests, it contends, has also had the effect of harassing the public authority.

49. Disclosure would provide a modest contribution in light of the information that was already in the public domain. It would not therefore provide a good use of scarce public resources.

Unreasonable persistence

50. The indicator for unreasonable persistence is a situation where a requester is attempting to reopen an issue that has already been comprehensively addressed by the public authority.

51. The DfT suggests that the complainant's requests are an attempt to reopen an issue which has already been comprehensively addressed by the DfT and which has been the subject of independent scrutiny. The case for the abandonment of the Queensbury Tunnel has been made since 2014, and this matter has been covered in ministerial correspondence, including questions in both the House of Commons and the House of Lords and in a Westminster Hall Debate. The correspondence that has been provided to the complainant relates to the practical implementation of the ministerial decision.

Frequent or overlapping requests

52. The DfT argued that the complainant had submitted frequent correspondence about the same issue or sent in new requests before the DfT had had chance to address earlier requests. The public authority points out that it had previously advised the complainant that it would not be appropriate for it to comment, given that a planning application had been submitted, yet correspondence was still received asking the DfT to do just that. It added that these frequent or overlapping requests placed a burden on the authority.

Disproportionate effort

53. The DfT concedes that the matter of the Queensbury Tunnel is not trivial but that these enquiries require the public authority to expend a disproportionate amount of time dealing with these requests which has the effect of harassing staff.

Scattergun approach

54. Again, the DfT quotes from the Commissioner's indicator - the request appears to be part of a completely random approach, lacks any clear focus, or seems to have been solely designed for the purpose of 'fishing' for information without any idea of what might be revealed. The request is for copies of all emails, letters, reports and other

documentation to and from the DfT over a period of time. The public authority provided its evidence in an appendix in the form of a table containing the requests and the relevant dates.

No obvious intent to obtain information

55. The DfT reiterates that the case for the abandonment of the Queensbury Tunnel has been made since 2014 and has been covered in ministerial correspondence, questions in the House of Lords and Commons and in a Westminster Hall Debate. Correspondence has been supplied relating to the practical implementation of the decision.

Details of the detrimental impact of complying with the request

56. The DfT would suffer a detrimental impact by complying with the request due to the significant diversion of staff required to identify and assess a huge volume of material to determine the application of appropriate exemptions, what can be disclosed or withheld from the requested information. It further argues that overlapping requests place additional pressure on staff that are required to deal with them, it means that staff are diverted away from their normal work and there is a cost burden that flows from that.

Why this impact would be unjustified or disproportionate in relation to the request itself and its inherent purpose or value

57. The DfT takes the view that there is little inherent purpose or value in the requests being made due to the available information that is in the public domain. It therefore means that the public authority has to expend a disproportionate amount of its departmental resources on what it considers to be of little benefit to the public interest.

The complainant's view

58. Conversely, the complainant's view is that circumstances have materially changed. He has a legitimate interest in the reopening of the tunnel as a sustainable transport route connecting Bradford District and Calderdale. He considers the structure to be a valuable public asset with the potential to deliver social and economic benefits for generations to come. He believes that the decision to abandon the tunnel was based on a flawed report and should be reviewed when robust evidence has been gathered. He contends that preparatory work is ongoing and the costs have risen from £550,000 to more than £4,000,000 due to what he describes as *"significant failings on behalf of Highways England who manage the tunnel"*. He suggests that the cost of abandonment is likely to exceed £7,000,000 which he states is more than consultants for Bradford Council have costed for the repairs.

He contends that the local authorities at both ends of the tunnel have endorsed the reopening proposal.

The Commissioner's view

59. In terms of the burden on the authority, the DfT relies on cost and the diversion of resources. The Commissioner has given her opinion regarding costs earlier in this decision notice.

60. She does not accept that staff distraction from their main work or senior staff needing to carry out reviews is persuasive enough. Firstly, the response regarding the burden is generic and the review process is in place to provide requesters with a further level of recourse. Had the complainant made a large number of requests from the DfT this would be a significant burden but the DfT has provided a list of five requests, two of which appear to be of very limited scope. Two of the five requests were refused. Whether a review was requested on each one has not been stated, though implied. The annex attached to the correspondence with the Commissioner provides the DfT's response dates but not whether information was provided or withheld. However the Commissioner has concluded that the DfT provided information or partial information on three of the five requests.

61. The Commissioner has looked in more detail at the requests that have been made by the complainant. The DfT has listed five (including the request that is the subject of this decision). Two of them are of limited scope. The other three are similar in scope and cover different periods of time, each of approximately six months. She notes that the argument that another request arrives before the DfT has had the chance to respond to a previous request is undermined by the fact that the DfT took five months to respond to the request immediately prior to this one.

62. Leading on from the DfT's comments on disproportionate effort, the public authority accepts that the matter is not trivial but that staff must expend a disproportionate amount of time dealing with these requests and this has the effect of harassing them. The Commissioner is not convinced that either the requests or the manner of requesting information amounts to anything approaching harassment.

63. The DfT has said that the requests lack any clear focus and are part of a completely random approach. This is clearly not the case as it is evident that the complainant has a serious purpose and they are all connected with the Queensbury Tunnel. However, she accepts that the blanket approach to correspondence could be construed as "fishing".

64. She does not agree that there is no obvious intention to obtain information because the DfT considers the matter of the tunnel's abandonment to have been thoroughly debated and a decision taken. The correspondence from the complainant does not appear to her to demonstrate a means of venting anger or harassing or annoying DfT staff. There is also no example given of the complainant requesting information which he already possesses.

65. The detrimental impact of complying with the request has not been demonstrated sufficiently and the unreasonableness is not of an obvious or clear quality. As this request is for environmental information, the Commissioner is not persuaded that the DfT has reached the threshold for Regulation 12(4)(b) to be engaged. She has therefore not gone on to consider the public interest in this matter.

66. Finally, the Commissioner has not considered whether advice and assistance was offered as the request was originally refused under section 14(1) as vexatious. The review maintained that position. When a request is refused as vexatious, the Commissioner does not expect the public authority to provide advice and assistance for obvious reasons.

Right of appeal

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

68. 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.

69. 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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