



**Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004 (Regulation 18)**

Decision Notice

Dated 26 July 2006

Public Authority: Network Rail Limited (“Network Rail”)

**Address: 40 Melton Street
London
NW1 2EE**

Summary Decision and Action Required

The Commissioner’s decision in this matter is that:

- 1. Network Rail is a public authority within the meaning of regulation 2.2 of the EIR .**
 - 2. As a public authority it did not deal with the complainant’s request in accordance with Parts 2 and 3 of the EIR in that it failed to comply with its obligations under regulations 5(1) and 6(2). Network Rail must now respond to the complainant’s request for information dated 26th March 2005 within the terms of the EIR.**
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- 1. Freedom of Information Act 2000 (the “Act”) and Environmental Information Regulations 2004 (the “EIR”) – Application for a Decision and the Duty of the Commissioner**
 - 1.1 The Information Commissioner (the “Commissioner”) has received an application for a decision whether, in any specified respect, the complainant’s request for information made to Network Rail has been dealt with in accordance with the requirements of Parts 2 and 3 of the EIR.
 - 1.2 The enforcement and appeals provisions of the Act apply for the purposes of the EIR.



1.3 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

2.1 The complainant has advised that on 26 March 2005 the following information was requested in a letter to Network Rail in accordance with regulation 5:

“In early January my house, which is alongside the Carlisle-Newcastle railway line was flooded, and all attempts to get Network Rail to investigate the root cause of the flood have been met with a mixture of incompetence, disinterest and obfuscation.

Our property was flooded in January when a large area of Carlisle was under water. However, it quickly became clear that our case was somewhat different, and I traced the problem to a blocked culvert which runs under the railway..... Please also accept this letter as an Order under the terms of Section 7 of the Data Protection Act requiring Network Rail to deliver to me all documents in connection with this incident, in whichever form they are stored. In particular, I am interested in emails sent from and received by Tim Bates, including those to and from Barry Hindle.”

2.2 The complainant received no reply from Network Rail and therefore sent a reminder letter dated 5 May 2005.

2.3 The complainant still received no reply and made a complaint to the Information Commissioner's Office on 5 June 2005.

2.4 The complainant had framed his initial request for information and his complaint to the Information Commissioner under the Data Protection Act 1998. However the Information Commissioner's Office considered that the request for information should be treated as a request under freedom of information legislation, and in particular under the EIR. The Information Commissioner's Office accordingly wrote to the complainant on 26 July 2005 to inform him of that, and also wrote to Network Rail on the same date to investigate its failure to respond to the complainant.



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- 2.5 Network Rail responded to the Information Commissioner's Office on 2 August 2005, enclosing a letter dated 21 April 2005 which it stated it had sent to the complainant, but which does not appear to have reached him. That letter had refused the complainant's request under the Data Protection Act 1998 and had not treated it as a request for information under freedom of information legislation.
- 2.6 Neither the Act nor the EIR require a person requesting information to state that the request is made under those pieces of legislation, nor to make any reference to freedom of information.
- 2.6 Network Rail's letter of 2 August 2005 to the Information Commissioner's Office asserted that it was not required to respond to the complainant under the Act since it is: "a private company, not a public authority." Network Rail did not refer to the EIR.

3. Relevant Statutory Obligations under the EIR

Regulation 5(1) provides that –

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."

Regulation 6(2) provides that –

"If the information is not made available in the form or format requested, the public authority shall –

- (a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;
- (b) provide the explanation in writing if the applicant so requests; and
- (c) inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18."

Regulation 2(2) provides that –

"Subject to paragraph (3), "public authority" means –

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
 - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –



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- (i) has public responsibilities relating to the environment;
- (ii) exercises functions of a public nature relating to the environment; or
- (iii) provides public services relating to the environment.”

4. Review of the case

4.1 In this case, although Network Rail had replied to the complainant's second letter, its response does not appear to have reached the complainant. In any event that response failed to treat the complainant's request correctly under either the Act or EIR.

4.2 Network Rail has clearly stated in its letter to the Information Commissioner's Office that it does not consider itself a public authority under the Act but it has not stated its position under EIR.

4.3 In assessing the case, it was necessary as a principle to clarify the status of Network Rail under EIR, since if Network Rail is not a public authority under EIR, Network Rail is not obliged to reply to the complainant's request for information. The opportunity was also taken to consider the status of Network Rail under the Act. These issues have also been considered by the Information Commissioner in Decision Notice reference number FER0071801.

5. Analysis of the case

5.1 The status of Network Rail

5.1.1 In this case, Network Rail has not replied to the complainant's request under the Act or the EIR. In its response to the Information Commissioner's Office it has not advanced any arguments as to its status as a public authority under the EIR.

5.1.2 The Information Commissioner has analysed the position of Network Rail under the EIR.

(i) Network Rail is a private company limited by guarantee, with members drawn from the rail industry and general public as well as the Department for Transport.

(ii) Referring to the definition of “public authority” in regulation 2(2) of the EIR, it is clear that Network Rail falls under neither regulation 2(2)(a) “government departments”, nor under regulation 2(2)(b) “any other public authority as defined in section 3(1) of the Act....” .

(iii) However it does fall within regulation 2(2)(c) , i.e. “any other body or other person, that carries out functions of public administration”.



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- 5.1.4 Network Rail took over the railway network in 2002 from Railtrack. It is described by the Office of Rail Regulation (“ORR”) as “a private sector monopoly owner and operator of a national asset of considerable public importance”.
- 5.1.5 Network Rail’s own Mission Statement makes clear its public administration role: “Our Mission is to provide a safe, reliable and efficient railway fit for the 21st century”. Its overall intention is to ensure that the public and commerce benefit from an effective and efficient railway system. Network Rail’s responsibility for ensuring public safety on the railway network clearly demonstrates its crucial public administration role.
- 5.1.6 Network Rail owns and operates a national railway system and its own literature emphasizes this key national strategic role: “Network Rail represents a new beginning, a new vision and a new way of delivering Britain’s railway” and “We are ambitious for the future of the railway and wish to grow the railway, meeting the demands and aspirations of rail users. Our task now is to build on the progress we have made so that we can transform Britain’s railway into a world-class infrastructure”.
- 5.1.7 Network Rail is subject to regulation by public bodies, primarily by ORR. ORR has stated expressly that this regime exists to ensure the accountability of Network Rail to the public interest.

5.2 Is the information requested caught by the EIR?

- 5.2.1 Regulation 2(1) of the EIR defines “environmental information” as follows:
“ “environmental information” has the same meaning as in Article 2(1) of the Directive, namely 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



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

5.2.2 The information requested by the complainant was documents relating to a flooding incident on his property which lies adjacent to a railway line. It appears that the complainant wished to identify whether or not the cause of the flooding stemmed from a culvert under the railway, and also to examine documents relating to Network Rail's handling of his concerns about the flooding.

5.2.3 The Information Commissioner considers that the requested information falls clearly within the definition of "environmental information" contained in Regulation 2(1).

5.3 Is Network Rail a public authority under the Act?

5.3.1 As the information requested is environmental information within the terms of the EIR, the question of whether or not Network Rail is a public authority under the Act does not arise. However for the sake of establishing the principle and ensuring clarity for the future, the Commissioner has considered this issue in Decision Notice reference number FER0071801.

5.3.2 Network Rail is not a public authority under the Act.

6. **The Commissioner's Decision**

The Commissioner's decision in this matter is that:

6.1 Network Rail falls within the definition of a public authority under the EIR.

6.2 The information requested constitutes "environmental information" within the meaning of the EIR.

6.3 Network Rail failed to comply with regulation 5(1) in that it failed to make available to the complainant environmental information which it held and also failed to comply with regulation 6(2) in that it did not explain to the complainant the reason for its decision not to supply the information requested.



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7. Action Required

The Commissioner requires Network Rail to respond to the complainant's request and either to provide, in the form requested, the information requested or to provide a formal refusal notice to the complainant within 30 days of the date of service of this notice.

8. Right of Appeal

8.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

8.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 26th day of July 2006

Signed

Phil Boyd
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF