

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

Decision notice

Date: 31 January 2020

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

Decision (including any steps ordered)

1. The complainant has requested business cases relating to 20 different projects. Network Rail refused to comply with the request on the basis it would be manifestly unreasonable to do so.
2. The Commissioner's decision is that Network Rail has correctly refused the request under regulation 12(4)(b) and has provided appropriate advice and assistance under regulation 9 of the EIR.

Request and response

3. On 8 February 2019 the complainant made a request to Network Rail in the following terms:

"I request that a copy of the following documents or documents containing the following information of the listed projects (See the attached) be provided to me:

- 1) *Full Business Case (If it was revisited and updated after the investment decision, the Full Business Case at the time of the initial approval)*
- 2) *One Year After Report or any documents containing the information on completed (If it has not reached substantial completion, the most recently updated) (1) construction cost, (2)*

land related cost, (3) finance cost, and (4) other significant costs and (5) date in service."

4. The attached list referred to in the request was a list of projects as follows: Birmingham New Street; Border Railway; Derby Station Area Remodelling; Dr Days Junction to Filton Abbey Wood Capacity Improvements; Electric Spine: Basingstoke to Southampton DC to AC Conversion; Gospel Oak to Barking Electrification; Midland Mainline Capacity; Midland Mainline Electrification; North Trans Pennine Electrification; North West Electrification (Northern Hub); Northern Urban Centres: Manchester; Northern Urban Centres: Yorkshire; Oxford Station Area Capacity and Station Enlargement; Paisley Corridor Improvements; Rail Electrification: Hull to East Coast Main Line; South East Power Supply Upgrade; Southern Train Lengthening; Stafford Area Improvement Scheme; and Upgrade to Reading Station.
5. The complainant followed up on this on 13 February 2019 clarifying that Post-Construction Evaluations could be more likely to provide the requested information than One Year After Reports. He also stated that Full Business Case could be replaced with Best and Final Funding Bid documents.
6. The complainant confirmed his amended request was for:

"1. Best and Final Funding Bid documents or Full Business Case (If it was revisited and updated after the Best and Final Funding Bid, the Full Business Case at the time of the Approval to Construct)

2. Post-Construction Evaluations, One Year After Report, or any documents containing the following information:

(1) completed (If it has not reached substantial completion, most recently updated) construction cost (contractor's total of the prices)
(2) completed (If it has not reached substantial completion, most recently updated) land related cost (land and compensation)
(3) completed (If it has not reached substantial completion, most recently updated) finance cost (interest and other costs that the project incurred in connection with the borrowing of funds, if any)
(4) completed (If it has not reached substantial completion, most recently updated) other significant costs, and
(5) date in service."
7. Network Rail responded on 26 February 2019. It stated that complying with the request would be manifestly unreasonable under regulation 12(4)(b) of the EIR. Network Rail explained that the request was very broad in scope as it asked for information on 20 different enhancement projects all at different stages.

8. The complainant requested an internal review on 27 February 2019. The complainant did not agree that the costs limit under the FOIA should be directly read across to the EIR. In terms of the burden; the complainant pointed out he had asked for either the Best and Final Funding Bid documents *or* the Full Business Case but not both, similarly he had asked for either Post-Construction Evaluation reports *or* One Year After Reports.
9. Network Rail conducted an internal review and responded on 29 April 2019. Network Rail confirmed that it does not create best and final funding bids and full business cases are generally created by the DfT and sometimes shared with Network Rail so are not held in every case. It further explained it does not create post-construction evaluations or one year after reports but cost breakdowns for each project will be held to some extent depending on the stage and outcome of the project.
10. Network Rail stated it had conducted sampling exercises to understand how much time it would take to locate and provide information in relation to one of the listed projects and concluded complying with the request in full would exceed the appropriate cost limit which Network Rail considers can be applied to requests for environmental information.

Scope of the case

11. The complainant contacted the Commissioner following the internal review on 7 May 2019 to complain about the way his request for information had been handled.
12. The Commissioner considers the scope of her investigation to be to determine if Network Rail has correctly refused the request on the basis that it is manifestly unreasonable under regulation 12(4)(b).

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

13. Network Rail's position is that the request is manifestly unreasonable on the grounds that to comply with it would impose a significant burden on Network Rail's resources, in terms of time and cost.
14. 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. A request can be refused as manifestly unreasonable either as it is considered vexatious, or on the

basis of the burden that it would cause to the public authority. In this case Network Rail is citing regulation 12(4)(b) due to the burden the request would place on it.

15. The EIR differ from the Freedom of Information Act 2000 (FOIA) in that there is no specific cost limit set for the amount of work required by an authority to respond to a request, as that provided by section 12 of the FOIA.
16. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) which apply in relation to section 12 of the FOIA are not directly relevant to the EIR. However, the Commissioner accepts that the Fees Regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request, but they are not a determining factor in assessing whether the exception applies.
17. Another clear difference is that under the EIR a public authority can take into account the time and cost involved in redacting exempt information. Whereas under FOIA this is not a permissible task when considering section 12 and the Fees Regulations.
18. Regulation 12(4)(b) sets a robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is "manifestly" unreasonable, rather than simply being "unreasonable". The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness.
19. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information. This was confirmed by the First-tier Tribunal in the hearing of the Department of Business Enterprise and Regulatory Reform v The Information Commissioner and Platform (EA/2008/0097). The tribunal considered the relevance of regulation 7(1) and commented as follows (paragraph 39):

"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be 'to the widest extent possible'. Whatever the reasons may be, the effect is that public

authorities may be required to accept a greater burden in providing environmental information than other information.”

20. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:
- Proportionality of the burden on the public authority’s workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services.
 - The nature of the request and any wider value in the requested information being made publicly available.
 - The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
 - The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
 - The presumption in favour of disclosure under Regulation 12(2).
 - The requirement to interpret the exception restrictively.
21. Network Rail’s internal review response set out the time taken to undertake some preliminary activities in relation to the request as follows:
- Sending emails to conduct sampling exercise – 16 hours
 - Locating relevant information – 60 to 70 hours
 - Time already spent assisting with gathering information – 25 hours
22. Network Rail argues that the scope for activities that may be considered under regulation 12(4)(b) is broader than those set out in the Fees Regulations; a fact supported by the Commissioner’s guidance on regulation 12(4)(b)¹. Network Rail therefore argued that it was

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

appropriate to include the additional activities of reviewing the located information to determine if it may be disclosed or if exceptions apply could be factored in when considering the burden to Network Rail in complying.

23. Network Rail provided the Commissioner with detailed submissions in regard to the detrimental impact complying with the request would have. It focused on the diversion of resources from normal business activities that would occur and the impact this would have on three particular groups within the business.
24. Firstly, Project Managers (PMs) at Network Rail would be required to gather information they hold and this would take a minimum of three to four hours per project as there are 20 projects containing numerous sub-projects. This on its own would bring Network Rail to an estimate of 60-80 hours of work. Network Rail confirmed this estimate was based on retrieval work already undertaken by its PMs so was considered to be reasonable and accurate.
25. This is also only a portion of the work that would need to be done. Network Rail also considers the time taken to review the information once located should be factored in as it will contain commercial information and exceptions may need to be considered. Network Rail has conducted a sampling exercise using one of its subject matter experts (SMEs) to review a business case of one of the projects. The sampling exercise found that it would take approximately 51 hours based on one SME taking 75 minutes to review and assess the information contained in 17 pages of a 700 page document.
26. This 17 page sample of a 700 page document contained only 4 pages with drawing or maps. It took a SME 15 minutes to read the 17 page sample initially and to further review whether the information could or should be disclosed required a further 75 minutes. Network Rail therefore concluded it would take 75 minutes to read and review each batch of 17 pages so for 700 pages it would take 3,075 minutes (51 hours).
27. Network Rail accepts that this may represent the upper end of the scale as the project used for the sample was one of the larger scale projects but it considered it was still clear that collating and reviewing the information for all 20 projects requested would take each PM away from their work for tens of hours with a large impact on Network Rail as these staff are responsible for delivering major high value projects.
28. The second example given by Network Rail relating to the burden on staff is regarding its own Freedom of Information team. Network Rail has explained the size of its team and the volume of requests it handles

and argues that the size and scope of this request is equivalent to one member of staff's entire workload – therefore complying with the request would diminish the capacity of Network Rail to meet its commitments under the FOIA and EIR.

29. Lastly, Network Rail has pointed to the burden on third party stakeholders. Network Rail states it works with government departments, councils, contractors and suppliers and in each case it would contact these stakeholders to seek their views on disclosure of any information relevant to them. In the sampling exercise a Council was contacted and they estimated that reviewing the documents relevant to them would take an officer a minimum of 60 hours (one hour for each ten pages of the 700). Of the projects specified by the complainant there are a number that would involve additional hours of third party time to complete the necessary reviews.
30. The Commissioner acknowledges that Network Rail has provided thorough and detailed explanations regarding the potential burden various parties would be put under if they complied with the request. Certainly, there are strong arguments for the amount of time it would take PMs to review project documents and even if the average project was considerably smaller than the sample project there would still be a significant burden and diversion of resources.
31. Similarly, there is a clear burden on third party's who may need to be consulted and the Freedom of Information team. That being said, the FOI team at Network Rail would not be diverted from their day to day activities as this is expected of them but there is a case for saying they would be under extra pressure and this may divert them from dealing with other requests within the statutory timeframes.
32. Network Rail has demonstrated that compliance would take over 51 hours for larger projects. The Commissioner considers this is sufficient to demonstrate that the complainant's request is manifestly unreasonable and that regulation 12(4)(b) of the EIR applies. The Commissioner wishes to make the point that even if the estimate is excessive and the time is halved or even quartered for smaller projects, it would still equate to over 12 hours per project with 20 projects which would still be considered manifestly unreasonable.
33. Therefore the Commissioner accepts there is a burden that will occur if the request is complied with but she must consider if this burden is unjustified or disproportionate.

Public interest test

34. Network Rail acknowledges the public interest in disclosure to increase accountability. Putting the business cases into the public domain would provide information to allow the public to take a view on whether Network Rail is pursuing projects which represent value for money to the tax payer. The information would inform the public by providing accurate information and giving the opportunity to challenge the decisions made.
35. The complainant stated he wanted the information to assist with his research around saving public capital investment – this would appear to be the same public interest recognised above by Network Rail.
36. However, the fact a request relates to a subject matter that is likely to have significant environmental implications is not reason in and of itself to put public authorities to a large effort in compliance where to do so would require significant public resources to be applied in order to fully comply with the request and where there is no immediate evidence available to the Commissioner that suggests the actions taken by Network Rail have been incorrect, improper, or subject to a lack of transparency.
37. In this case, the Commissioner is not aware of any suggestion of improper or incorrect actions and work around the money spent on projects is subject to regulatory scrutiny and oversight from the Office for Road and Rail, the Department for Transport, the National Audit Office and the Hendy Review into public spending on rail enhancement projects.
38. For this reason Network Rail argues that complying with the request cannot add enough in terms of scrutinising its spending on enhancements compared to the hundreds of hours of work that would be required.
39. The Commissioner considers there is a public interest in transparency and accountability and providing access to information which enables members of the public to understand more clearly how projects are managed and the cost to the public purse and allow them to assess for themselves whether projects are beneficial, sustainable and offer value for money.
40. However, in this case the Commissioner agrees with Network Rail that the public interest rests in maintaining this exception. She considers the overwhelming and unreasonable burden compliance would cause Network Rail outweighs any public interest factors in favour of disclosure. Disclosure would place a significant burden on Network Rail and divert it away from its other functions and this is not in the wider interests of the public.

41. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).

42. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Regulation 9 – advice and assistance

43. The application of regulation 12(4)(b) of the EIR triggers the duty to provide advice and assistance in accordance with regulation 9. This means that a public authority should assist the applicant in making a fresh, refined request which could be considered without being a burden in terms of cost so far as it is reasonable to do so. For example, a public authority could suggest narrowing the scope of the request to a particular topic or by timeframe. In some cases it will not be possible for a public authority to provide any advice and assistance of this nature. In these cases public authorities are still expected to inform the applicant of this and why.
44. The Commissioner acknowledges that Network Rail did receive a clarification from the complainant towards the end of the period for completing the internal review which suggested he would be satisfied with limiting his request to only completed projects. At this stage Network Rail states they had already undertaken substantial investigation to inform the internal review, had drafted a response and had consulted with SMEs to get estimates for the time needed to retrieve relevant information.
45. Network Rail accepts that it did not address this attempted narrowing of the request in its internal review response as it was at such an advanced stage of its investigation. However, Network Rail argues that throughout the request handling process the complainant changed the remit of the

request on several occasions – a fact supported by correspondence the Commissioner has seen.

46. That being said, Network Rail did make enquiries with SMEs to seek details about the substantial completion of construction date for the projects listed. For the listed projects it identified 17 projects which had reached substantive completion, or part completion due to the project being delivered in phases. Network Rail therefore confirmed that the suggested narrowing of the request would not have significantly reduced the scope of the information required and would not have negated the difficulties in locating information for those projects completed several years ago.
47. The Commissioner notes that Network Rail did suggest narrowing the request to focus on only one project or to focus on more recent or current schemes as the information would be more readily available. At the internal review stage Network Rail suggested the complainant narrow the request to those projects where the sampling exercise had identified the relevant information was held.
48. The Commissioner therefore considers that Network Rail has complied with regulation 9 and provided appropriate advice and assistance to assist the complainant.

Right of appeal

49. 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

50. 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.
51. 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

Jill Hulley
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