

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 January 2024

Public Authority: London Borough of Bexley
Address: 2 Watling Street
Bexleyheath
DA6 7AT

Decision (including any steps ordered)

1. The complainant requested, from the London Borough of Bexley (the Council), a copy of a traffic management order. The Council said it was handling the request under the Freedom of Information Act 2000 (FOIA). It confirmed holding the requested information, and said there would be a charge of £16.50 for providing it, in line with the Council's fees and charges for providing traffic management order booklets of the size in question.
2. The Commissioner considers the request falls under the EIR rather than FOIA, so the Council handled the request under the wrong access regime. He finds that under the EIR, the Council wasn't entitled to seek to levy any charge for disclosing the requested information, because it hasn't published or made available a schedule of charges under the EIR.

3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Issue a fresh response to the complainant under the EIR, that does not seek to levy a charge under regulation 8.
4. The Council must take this step 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 FOIA, and may be dealt with as a contempt of court.

Request and response

5. On 29 August 2023, the complainant wrote to the Council and requested information in the following terms:

“The Bexley (Waiting and Loading Restriction) Traffic Order 2019 is held by [the Council] in the form of a 239 page PDF document. I hereby request a copy of this document in full”.
6. The Council responded on 7 September 2023. It said it was handling the request under FOIA. It confirmed holding the requested information and said it can be provided, but that there is a charge of £16.50 based on the Council’s ‘fees and charges schedules’ regarding traffic management order booklets.
7. The Council’s response of 7 September 2023 didn’t cite any provisions of FOIA.
8. The complainant’s internal review request disputed the charge, and referred to FOIA and the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations).
9. Following an internal review the Council wrote to the complainant on 27 September 2023. It didn’t uphold the complainant’s concerns. Like its original response, the internal review didn’t cite any provisions of FOIA. It said the stated charge (£16.50) “is as approved under the Council’s adopted fees and charges scheme, it does not relate to the [FOIA] cost system”, and that “[r]equesting information within the [FOIA] framework should not be used as means to bypass authorities [sic] other charges ...”. It also said “officers have already spent some time

over multiple emails to provide you with extracts from the traffic management order that relate to your specific matter at hand". The Council concluded the complainant had "already been provided with the specific information for your concern".

10. The Commissioner's understanding is that the previous correspondence the Council was referring to in the above quotes included an earlier and slightly different request from the complainant under information access legislation.

Scope of the case

11. The complainant contacted the Commissioner on 27 September 2023 to complain about the way their request for information had been handled.
12. They emphasised that their request of 29 August 2023 was for a copy of the specified document in full.
13. The complainant also commented on the Council's lack of reference to any FOIA exemption and said the response doesn't comply with the Fees Regulations.
14. The Commissioner wrote to the Council on 1 December 2023 with some initial comments and a request for submissions. He noted that previous published decision notices involving traffic management orders have held that such information falls under the EIR, and he asked the Council to comment on why it handled this request under FOIA. Disappointingly, the Council didn't respond at all.
15. In December 2023, the Commissioner received further correspondence from the complainant, attaching an email from the Council dating to October 2023 in which the Council states it doesn't have a schedule of charges under the EIR. (Based on the documents the complainant sent the Commissioner in December 2023, the Commissioner can see that in October 2023 the complainant had made an information request to the Council for a copy of its schedule of charges published under regulation 8(8) of the EIR.)
16. The Commissioner wrote to the Council again on 2 January 2024, highlighting that he hadn't received any response to his correspondence

of 1 December 2023 and asking the Council to contact him by the end of that week.

17. In his email of 2 January 2024, the Commissioner referenced the further evidence the complainant had sent (that the Council doesn't have a schedule of charges under the EIR). He quoted his website guidance which explains that whilst in some circumstances a public authority can charge a fee for making environmental information available, any charge should be 'reasonable'; and that the guidance also states it would **not** be reasonable to charge for information that wouldn't cost anything to send. The guidance gives the example of an email attachment, and the Commissioner expressed his understanding that the Council holds the requested document in PDF form, which presumably could be sent as an email attachment. Furthermore, the Commissioner explained, his guidance makes clear that public authorities can charge for environmental information only if they publish a schedule of charges and details of when they may or may not charge.
18. In this instance, he emphasised, the complainant has provided evidence that the Council doesn't have a schedule of charges under the EIR.
19. The Commissioner expressed his preference for resolving cases informally where possible, and he told the Council that if it were to disclose the requested information without the £16.50 charge, he would look to resolve the matter informally.
20. However, again the Council failed to respond by the deadline he had set.
21. To date, the Council hasn't responded at all to the Commissioner.
22. Given the Council's failure to provide submissions, or respond at all to his correspondence, by the deadlines he set, the Commissioner takes the Council's 7 and 27 September 2023 responses as its final position.
23. His letter of 1 December 2023 did emphasise to the Council that if he received no response by the deadline he gave, he would likely proceed straight to decision notice. It also explained that if the Council failed to explain its position adequately he'd be more likely to uphold a complaint against the Council.
24. The Commissioner considers that the scope of this case is to decide whether the request falls under FOIA or the EIR, and whether the Council was entitled to seek to charge £16.50 for disclosing the

requested information, according to the applicable information access legislation.

25. He hasn't seen the requested full traffic management order, because the Council hasn't sent him a copy of it.

Reasons for decision

Is the requested information environmental?

26. Regulation 2(1) of the EIR defines environmental information as being:

"... any information ... 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 ...".
27. Although he hasn't seen the requested information, in this case the complainant has requested a full copy of a particular traffic management order. The Commissioner considers that traffic management orders are measures affecting the elements of the environment and fall under regulation 2(1)(c) of the EIR. To explain this, he directs readers to his relatively recent decision notice in IC-228374-W5Z4¹, a case involving

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025244/ic-228374-w5z4.pdf>

traffic management orders, especially paragraphs 12-14 of that decision notice.

Regulation 8 – charging

28. Regulation 8(1) provides that a public authority may charge a requester for making environmental information available.
29. However, this is subject to regulation 8(8). This regulation provides that the public authority shall publish and make available to requesters a schedule of its charges and information on the circumstances in which a charge may be made or waived.
30. As noted earlier (paragraph 17), the Commissioner's guidance² on charging for making environmental information available explains:

"You can charge for environmental information only if you publish a schedule of charges and details of when you may or may not charge".
31. In this case, the complainant has sent the Commissioner documentary evidence that the Council has said it doesn't have a schedule of charges under the EIR (see paragraph 15).
32. Consequently, the Commissioner finds that the Council wasn't entitled to seek to levy any charge for making the requested information available.

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/guide-to-the-environmental-information-regulations/receiving-a-request/#what-should-we-do-when-we-receive-a-request-for-environmental-information-15>

Right of appeal

33. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

34. 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.
35. 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

Daniel Kennedy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF