

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

**Date:** 15 February 2024

**Council:** London Borough of Bexley  
**Address:** Bexley Civic Offices  
2 Watling Street  
Bexley Heath  
Kent  
DA6 7AT

**Decision (including any steps ordered)**

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1. In a four part request, the complainant requested information about a Task and Finish Group. The London Borough of Bexley (“the Council”) initially stated that it did not hold the information.
2. The Commissioner’s decision is that the Council wrongly handled the request under FOIA and that the request fell to be considered under the EIR. The Commissioner’s decision is that, on the balance of probabilities, the Council holds no recorded information relevant to the complainant’s request in question one in accordance with regulation 12(4)(a) of the EIR (information not held). The Commissioner considers that the Council does hold information in relation to questions two, three and four.
3. However, in the particular circumstances of this case, the Commissioner has exercised his discretion and does not require the Council to take any steps. Even if he had ordered the Council to respond to questions two, three and four again, without relying upon regulation 12(4)(a) of the EIR, the Commissioner’s decision is that the Council has already provided the complainant with responses to those questions in its

subsequent responses to four further information requests submitted by the complainant.

4. The Commissioner does not require further steps.

## Request and response

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5. On 28 August 2023, the complainant wrote to the Council and requested information in the following terms:

“1. Terms of reference for the ULEZ Task and Finish Group. (I.e. a document describing the group's objectives. E.g., how long was the group supposed to run? What was its expected output?)

2. Date the group was created.

3. List of the group's meetings to date. (With duration, and attendance if possible).

4. Proposals developed by the group.”

6. The Council responded on 8 September 2023. It dealt with the request under FOIA and denied holding the requested information. It said: “I can confirm that no such group or similar group exists.”
7. The complainant requested an internal review on 8 September 2023. He said that a ULEZ Task and Finish group did exist, and pointed out that it was referenced in Council documents.
8. Following an internal review the Council wrote to the complainant on 14 September 2023. It answered each question in turn but maintained its position that the information was not held by the Council as follows:

- 1. Terms of reference for the ULEZ Task and Finish Group**

Council response - the information is not available. The Task and Finish group was an informal group, as such a formal terms of reference were not prepared.

- 2. Date the group was created**

Council response - this information is not recorded.

- 3. List of the group's meetings to date. (With duration, and attendance if possible)**

Council response - this information is not available. Formal meetings were not held but the group met informally twice though those dates are not recorded. The ULEZ Task and Finish Group was a newly formed

Members only group ie there is no support from council officers. The group was composed of Cllr Smith, Brooks, Adams and Ogundayo.

#### **4. Proposals developed by the group**

Council response - the intended purpose of the group is as stated by Cllr Smith at the Place Overview and Scrutiny Committee meeting of 21 March 2023. As the group was in its infancy and remained informal before being made obsolete since the scrappage scheme was revised by the Mayor/TfL, there are no papers or minutes save for the minutes of Place Overview and Scrutiny Committee of 21 March 2023 (which were attached).

### **Scope of the case**

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9. The complainant contacted the Commissioner on 16 October 2023 to complain about the way their request for information had been handled.
10. This reasoning covers whether the Council are correct when it says that it does not hold the information the complainant requested in all four parts of the request.

### **Reasons for decision**

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#### **Is the requested information environmental?**

11. Regulation 2(1) of the EIR defines environmental information as being 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)...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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
12. In this instance, the information in question, which the Commissioner has seen, relates to an informal Council group set up to consider the impact of the Ultra Low Emission Zone ('ULEZ') expansion on Bexley residents and businesses. ULEZ is intended to lower harmful emissions into the environment<sup>1</sup>.
13. Therefore the Commissioner believes that the information in question is information on a measure, likely to affect the elements and factors referred to in (a) and (b) above – air, atmosphere and emissions. Therefore he is satisfied that the information falls under the definition of environmental information for the purposes of the EIR.
14. Whilst it would not affect his conclusion as to whether the Council does or does not hold the information, he considers that the Council should have dealt with the request under the EIR.
15. If the Council disagreed with the Commissioner's view, it was asked to provide its reasons for disputing that the EIR was applicable, however, the Council did not do so.

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<sup>1</sup> The Ultra Low Emission Zone (ULEZ) is an area in London where an emissions standard based charge is applied to non-compliant road vehicles. On 29 August 2023 it was extended to cover all of Greater London: <https://tfl.gov.uk/modes/driving/ultra-low-emission-zone>

### **Regulation 12(4)(a) – information not held**

16. Under regulation 5(1) of the EIR and subject to a number of EIR provisions, a Council that holds environmental information shall make it available on request.
17. Regulation 12(4)(a) of the EIR states that a Council may refuse to disclose information “to the extent that it does not hold that information when an applicant’s request is received.”
18. In cases where a dispute arises over the extent of the recorded information that was held by a Council at the time of a request, the Commissioner will consider the complainant’s evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and he will consider any other reasons offered by the Council to explain why the information is not held. The Commissioner will also consider any reason why it is inherently likely or unlikely that information is not held.
19. If a Council does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.
20. The complainant, in his complaint to the Commissioner, considered that the Council should hold information within the scope of the request arguing that:

“The council says it holds no terms of reference (or dates of meetings) for its ULEZ Task and Finish Group. I question the response, as I see published terms of reference for other task-and-finish groups at the council. The concept of an "informal" council group - exempt from disclosure - seems odd”.
21. The Council’s initial position, at the time it responded to the request on 8 September 2023 and the internal review on 14 September 2023, was that it did not hold information within the scope of the request – as set out in para 8 above.
22. During the course of the Commissioner’s investigation, on 25 January 2024, the Council reiterated this view to the Commissioner saying:

“we initially believed that we held no information about it. This was because [the complainant’s] request did not ask for correspondence and Councillor Smith later advised officers that the Group was only in its infancy and an informal arrangement.”
23. However, the Council went on to state in its submissions to the Commissioner that:

"...attached is the information we sent to [the complainant] back in [10] November 2023 which I believe covers the information he is seeking in this query. As you can see this was sent to him in response to multiple different requests for information [made on 13 October 2023 under reference numbers: 14678098, 14678097, 14678496 and 14678297].

24. The Commissioner notes the Council's explanation of how it had originally concluded at the time of its response and internal review why it should not be expected to hold the requested information. He is not persuaded by the Council's argument that it did not hold the information because the complainant "did not ask for correspondence" and that a Councillor advised that the Group was only in its infancy and an informal arrangement.
25. Further, the documents seen by the Commissioner during his investigation and provided to the complainant on 10 November 2023 - two months after he received the internal review response of 14 September 2023 in this case - suggests that the searches and checks carried out by the Council in order to respond to the request initially and the internal review response may not have been sufficiently thorough.
26. While the Commissioner is mindful of the Council's comments that "we received multiple FOI/EIR requests from [the complainant] during this period concerning ULEZ. It was difficult at times to keep track of these requests because of their overlapping nature, and it created a significant administrative burden", he is unable to accept the Council's conclusion that it does not hold any information falling within the scope of the four part request. The disclosure provided to the complainant on 10 November 2023 (in response to four further information requests all submitted on 13 October 2023) clearly shows that, at the time the complainant made his request in August 2023, the Council did hold information in relation to questions two, three and four.
27. The Commissioner is not convinced that just because the ULEZ Task and Finish Group was a new informal group, information relating to it did not need to be identified and retrieved in response to this information request. The Commissioner notes that all the Councillors involved in the group used their Council email addresses to communicate. From the information the Commissioner has seen, the Councillors appear to be working in their roles as local councillors, rather than in their private capacity, and all had a direct, formal connection with the public functions of the Council. Further, the later disclosures to the complainant of this information also indicate that the Council accepted that it held this information. Therefore, at the time of the request at issue in this case, it appears to the Commissioner that the Council did not carry out appropriate searches to confirm whether it held any information falling within the scope of the request.

28. The Commissioner therefore draws the Council's attention to the importance of ensuring that its record management conforms with the section 46 Code of Practice and to ICO guidance<sup>2</sup>. In particular, the Council should take care with the quality and rigour of its searches to determine whether it holds the information on the balance of probabilities. The Commissioner expects the Council to take steps to improve its searches when receiving requests for information.
29. The Commissioner does accept, however, that as regards question one there was no official terms of reference prepared for this Task and Finish group and that this information is therefore not held by the Council. The Commissioner considers that the Council has set out a plausible explanation as to why it does not hold this information. No evidence is available to the Commissioner which would indicate that the Council holds recorded information falling within the scope of question one of the request or that it is held by third parties on behalf of the Council.
30. In such cases, the Commissioner's usual procedure is to require a public authority to take steps to ensure compliance with the legislation and to respond to questions two, three and four of the request again, without relying upon regulation 12(4)(a) of the EIR.
31. However, in this particular case, the Commissioner recognises that there has been a significant change in circumstances since the time the Council originally responded to the request in September 2023– namely, the disclosures in November 2023 provided to the complainant's four requests for information made on 13 October 2023 under reference numbers: 14678098, 14678097, 14678496 and 14678297. The Commissioner can see that the Council has provided the complainant with copies of emails by the four Councillors concerned which in essence answer his question two (date group created: on or about 30 January 2023), question three (Group meeting dates: on or about 16 February and 13 March 2023) and question four (group proposals: set out in various emails and a draft document).
32. In such circumstances, therefore, the Commissioner has exercised his discretion, in accordance with the approach confirmed in the Upper Tribunal decision in *Information Commissioner v HMRC & Gaskell* ([2011] UKUT 296 (AAC)), to not require any steps to be taken by the

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>; <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/information-you-hold-for-the-purposes-of-the-eir-regulation-3-2/#who>

Council in relation to the request<sup>3</sup>. Any steps would confer no practical advantage on the complainant as the Council could only be required to disclose information that the complainant already possesses and has done since November 2023.

33. The Commissioner requires no further action to be taken by the Council in relation to the request.

### **Procedural matters**

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34. Regulation 14(1) of the EIR states that if a request for environmental information is refused by a Council the refusal shall specify the reasons not to disclose the information requested, and regulation 14(3)(a) requires the relevant EIR exception to be cited in the refusal notice. Where a Council receives a request for environmental information that it does not hold, it should refuse the request and cite Regulation 12(4)(a) of the EIR.
35. While the Council's response and internal review did state explicitly that the requested information was not held by the Council, it did not cite the EIR exception it was relying on.
36. For these reasons, the Commissioner finds that the Council did not issue an adequate refusal notice and has hence failed to comply with regulation 14(3)(a) of the EIR.

### **Other matters**

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37. The Commissioner notes that ICO guidance states that where events after the time of an authority's decision have changed the balance of the public interest test in such a way that disclosure would be inappropriate or undesirable, the ICO has discretion to decide what we order a public authority to do. Therefore the decision in this case, which while not considering the public interest test did consider the public interest in the broader sense, has been reached on the very particular facts of this case and the fact that the Commissioner has not ordered any steps should not be considered binding on or persuasive for future decision notices or Information Commissioner procedure when deciding subsequent cases.

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<sup>3</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/>



## Right of appeal

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38. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. 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.

40. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**