

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

Date: 29 February 2024

Public Authority: London Borough of Hammersmith & Fulham
("the Council")

Address: King Street
Hammersmith
London
W6 9JU

Decision (including any steps ordered)

1. The complainant has requested information on penalty charge notices ("PCNs") fining out of borough drivers using particular roads during the "Clean Air Neighbourhood" scheme. The Council refused the request in reliance on FOIA section 22 – information intended for future publication.
2. The Commissioner's decision is that the request should have been considered under the EIR not FOIA. As the Council maintained its position under FOIA during the Commissioner's investigation and the EIR does not contain a similar or equivalent exemption to the section 22 exemption, the Commissioner requires the Council to respond to the complainant under the EIR.
3. 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.

Request and response

4. On 22 May 2023, the complainant wrote to Council and requested information in the following terms:

"Please reveal how many PCNs have been issued in the first three months of the 'Clean Air Neighbourhood' that fines out-of-borough drivers using the roads between Wandsworth Bridge Road and New Kings Road since the scheme began charging on 1 February 2023 - and how much revenue has been collected by Hammersmith and Fulham Council in relation to this scheme."

5. The Council responded on 15 June 2023. It confirmed holding information in the scope of the request, stating that there was "a clear intention" to publish the information at a later date in accordance with FOIA section 22(1)(c).
6. Following an internal review the public authority wrote to the complainant on 14 July 2023 upholding its initial response.

Scope of the case

7. The complainant contacted the Commissioner on 10 September 2023 to complain about the way their request for information had been handled. The complainant explained that the Council:

"...did not offer any reasons the public interest was served by keeping the information secret. It admitted releasing the information would serve "transparency and public interest in the South Fulham (west) Clean Air Neighbourhood project"."
8. The Commissioner advised the Council to re-consider its reliance on FOIA and look to respond under the EIR as he considered that the information related to a measure or activity affecting air quality.
9. The Council disagreed with the Commissioner and wished to maintain its position. It considered that the PCN data requested was too far removed from an effect on the environment.
10. The Commissioner will therefore formally determine the correct access regime to be used.

Reasons for decision

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 maintaining its position to consider the request under FOIA the Council referenced other decision notices issued by the Commissioner concerning PCNs and clear air zones in which he had not decided that the requests should be considered under the EIR. The Commissioner has considered this argument and accepts that the Council could have been misdirected by those decisions.

13. The Commissioner has reviewed his policy and notes his guidance¹ in particular:

"Information on measures and activities affecting or likely to affect the state of the elements of the environment, or factors such as those listed in regulation 2(1)(b), is environmental information due to regulation 2(1)(c).

...the regulation gives "such as" examples of measures or administrative measures: policies, legislation, plans, programmes and environmental agreements. This covers a broad range, and includes the steps you take to ensure something happens and the methods, processes or instruments you use to implement the measure.

...Also included are regulatory measures such as Acts of Parliament and local by-laws, taxes, prosecutions, charges and voluntary agreements. "Policies" are not restricted to environmental policies, but cover those on development, economic, transport or health, if they are likely to affect the elements of the environment."

14. The Commissioner considers that schemes which are specifically created to affect the state of the elements of the environment, for example in relation to volumes of traffic and emissions, as in this case where the "Clean Air Neighbourhood" is clearly designed to affect the air in the neighbourhood. Part of such schemes are the regulatory measures in place to enforce the system.
15. The Commissioner has adopted this approach in earlier decisions² with regard to traffic management schemes. He considers that the broad aim of the majority of such schemes or initiatives in managing traffic is to create less pollution, be that by aiming to discourage or restrict the use of particular roads or by implementing charges for using particular types of vehicle. The failure to comply can result in PCNs in order to enforce the regulation. The PCN information itself cannot be separated from the overall purpose which resulted in its creation, in the context of EIR and FOIA, because it concerns the implementation and enforcement of the scheme in operation. Consequently the Commissioner has decided that

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-2-1-what-is-environmental-information/>

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025244/ic-228374-w5z4.pdf>
<https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025133/ic-222668-z6m1.pdf>

the request in this case falls within the definition of environmental information.

16. Having determined that the requested information is environmental information the Commissioner cannot go on to consider FOIA section 22.
17. FOIA and the EIR have several similar, though not identical, provisions which a public authority can rely on to refuse a request for information. These are called "exceptions" under the EIR. There is, however, no EIR exception which is equivalent to FOIA section 22.
18. The Commissioner is therefore ordering the Council to provide a fresh response to the complainant having considered the request under the EIR. In providing that fresh response, it is of course open to the Council to determine whether an exception applies.

Other matters

19. The Commissioner understands that the complainant may be dissatisfied with this notice as their case has not substantively been resolved in terms of whether they are entitled to be provided with the requested information. Unfortunately the Commissioner cannot make any formal other finding at the current time. However, he would wish to point out that from his assessment of the case, including the representations given by the Council to date and the content of the withheld information, it is unlikely that he would uphold the application of any exception in the EIR.
20. As set out in regulation 12(2) public authorities must apply a presumption in favour of disclosure when considering any exception to disclose environmental information.
21. The Commissioner has to date not been persuaded by the Council's arguments for withholding the information. One of the Council's primary concerns with disclosure of the requested information is misinterpretation of that information. The Council advised the Commissioner:

"The possible negative effect would be the way the public will interpret/perceive the project in the trial stage and start to pose negative arguments or put things out there in the media that are incorrect about the project, leading to them drawing the wrong conclusions from any data that is supplied. The ticket data is also very muddled as we issue to every single vehicle that goes through the access control points which will lead to the wrong narrative. This wrong narrative could undermine public confidence in the current Clean Air Neighbourhood project process as the public misunderstand it to only be about enforcement if 3-month PCN data is the only available information about the trial."

Any concerns the Council may have regarding the public's misunderstanding of the information resulting in an inaccurate view of the scheme may always be aided by the provision of an explanatory narrative setting out any issues with the interpretation of the information.
22. If the Council wishes to apply an exception to disclosure the Commissioner would expect to see a much stronger case to be made in relation to that exception.

Right of appeal

23. 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

24. 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.
25. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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