

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

**Date:** 15 February 2024

**Public Authority:** London Borough of Hillingdon  
**Address:** Civic Centre  
High Street  
Uxbridge  
Middlesex  
UB8 1UW

**Decision (including any steps ordered)**

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1. The complainant requested information about the London Borough of Hillingdon's (the 'Council's') legal case against the Ultra Low Emission Zone ('ULEZ') expansion<sup>1</sup>.
2. The Council dealt with the request under the Freedom of Information Act 2000 ('FOIA'). It disclosed some information but withheld other information under section 22 of FOIA (Information intended for future publication). During the Commissioner's investigation, the Council

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<sup>1</sup> London operates an Ultra Low Emission Zone ('ULEZ') on its roads. Vehicles entering the ULEZ must comply with certain environmental standards relating to the emissions they produce. In 2023, Bexley, Bromley, Harrow, Hillingdon and Surrey Councils challenged the Mayor of London's decision to expand the ULEZ to outer London boroughs with a Judicial Review but it was unsuccessful: <https://www.bbc.co.uk/news/uk-england-london-64798395>

disclosed further information but the complainant did not accept that the Council had disclosed all of the information to which he was entitled.

3. The Commissioner's decision is that the Council should have dealt with the request under the Environmental Information Regulations 2004 ('EIR'). The Council breached regulations 5(2) and 14 of the EIR, but it correctly confirmed that no further information in relation to question 1 was held, in accordance with regulation 12(4)(a) of the EIR (Information not held).
4. The Commissioner does not require the Council to take any steps.

### **Request and response**

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

"Can you please answer a few questions regarding the council's ongoing legal case against ULEZ expansion:

1. How much funding has been reserved for the case?
  2. How much has been spent? (Approximately).
  3. Whose decision was it to participate in the case? (A Cabinet decision? A committee decision? A full-council vote? A Cabinet member's decision? Etc.)
  4. Has the council undertaken any polling regarding residents' support for (or opposition to) the ULEZ expansion, or the council's legal case? If yes, can you please provide brief details."
6. The Council responded on 3 July 2023. It answered questions 1 and 3 but refused question 2, citing the exemption at section 22 of FOIA (Information intended for future publication). In relation to question 4, the Council did not directly address this.
  7. On 3 July 2023 the complainant asked the Council to carry out an internal review, directing it to respond to question 4 of their request. As regards question 1, the complainant considered that the Council's response saying that the costs of the legal case were being met from earmarked reserves was insufficient and that more information should be held by the Council about the amount of funding reserved for the case.

8. The Council provided the outcome of the internal review on 30 August 2023. It maintained its reliance on section 22 for question 2, answered question 4, but did not directly address the query about question 1.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 7 September 2023 to complain about the way their request for information had been handled.
10. The complainant's initial complaint was that the Council had not answered questions 1 and 2 of the original request.
11. In the period since the complainant raised their complaint with the Commissioner, the Council informed the Commissioner that it has published the answer to question 2 on its website<sup>2</sup>. The Council has also confirmed that it holds no further information in relation to question 1.
12. Where possible, the Commissioner prefers complaints to be resolved by informal means. However, the complainant remained dissatisfied and wrote to him expressing his dissatisfaction with the Council's performance.
13. The complainant has said that:

"The information is indeed available now [for question 2], many months after the request, and after the issue's political prominence subsided. It's highly plausible that the initial refusal to disclose the information was politically motivated. I would be disappointed if ICO condoned this behaviour. It feels like a decision notice would provide as much of a slap on the wrist as possible under the circumstances. The question about a reserved amount is not academic. The reserved amounts what was being (grudgingly) released by the Tory councils to the electorate. (In Bromley and Bexley, for example). The eventual numbers turned out to be well above. There is a question of (a) financial planning and (b) communication."
14. The Commissioner highlights to the complainant that he will not issue a decision regarding the Council's previous application of section 22 FOIA (or regulation 12(4)(d) of the EIR (Material still in the course of

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<sup>2</sup> <https://www.hillingdon.gov.uk/ulez-expansion-legal-challenge>

completion) ) to the information in question 2 that has now been disclosed to him and made public on the Council's website. This would not be an appropriate use of the Commissioner's limited resources.

15. The Commissioner therefore considers that the scope of this case is to decide whether the Council holds further information falling in scope of question 1 of the request. He will also consider the correct information access regime and any procedural matters he needs to address.

## Reasons for decision

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### Is the requested information environmental?

16. At the outset of his investigation, the Commissioner wrote to the Council and explained that, in his view, the information (if it were held) was likely to be environmental. During the Commissioner's investigation, the Council maintained that its approach under FOIA was correct. The Council argued:

"I believe it is important to note that the Council merely decided to seek Judicial Review of the Mayor of London's decision to expand ULEZ. Whilst I will accept that ULEZ affects the environment, it does not follow that the Council's decision to commence legal action actually impacted on the environment."

17. The Commissioner's opinion is that the EIR applies in this case.
18. 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)...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);
19. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
20. Further, the Commissioner considers in his guidance<sup>3</sup> that interpretation of the phrase '*any information on*' in regulation 2 of the EIR will usually include information concerning, about, or relating to the measure, activity, factor etc., in question. It is not necessary for the information itself to have a direct effect 'on' the elements of the environment, or to record or discuss such an effect. Information that would inform the public about matters affecting the environment and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information, even if the information does not directly mention the environment.
21. The ULEZ is a measure designed to have an environmental impact (i.e. on the air and atmosphere). The information in question relates to the legal cost incurred by the Council to challenge the measure (the expansion of ULEZ). It is therefore financial information on that measure, designed to reduce an environmental impact. In this instance, the legal costs incurred are, therefore, not too far removed from that measure and can be considered information on the environment.
22. Looking at the bigger picture, therefore, the Commissioner considers the requested information is information on an environmental measure and

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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/regulation-2-1-what-is-environmental-information/>

is therefore environmental information. The Commissioner has therefore assessed this case under the EIR. He notes that this is in line with other ICO decision notices.<sup>4</sup>

### **Is further information held?**

23. The complainant raised a number of points during the Commissioner's investigation as he believed that the Council should hold further information with regard to question 1 (How much funding has been reserved for the case?).
24. Regulation 5(1) of the EIR provides that a public authority that holds environmental information shall make it available on request. This is subject to any exceptions that may apply.
25. Regulation 12(4)(a) of the EIR provides an exception to the duty to provide information where an authority does not hold that information when an applicant's request is received.
26. The Commissioner is not required to prove beyond doubt that a public authority does or does not hold further information. When determining a complaint, the Commissioner makes a decision based on the civil standard of the 'balance of probabilities' – that is, more likely than not.
27. The Commissioner recognises that requests for information can sometimes take the form of questions seeking justification for an authority's course of action. He acknowledges that authorities may, in an attempt to be helpful, address such enquiries as part of the normal

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<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024224/ic-194410-m5g1.pdf>; [https://ico.org.uk/media/action-weve-taken/decision-notices/2009/456120/FER\\_0178169.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2009/456120/FER_0178169.pdf); <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025133/ic-222668-z6m1.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027135/ic-250573-b2z4.pdf>;

course of business and provide responses in line with normal customer service standards.

28. In this case the Council initially responded to question 1 of the request on 3 July 2023 as follows:

“We can confirm that the costs of the ULEZ legal challenge are being met from earmarked reserves.”

29. In his internal review request, the complainant was dissatisfied with the Council’s initial response to question 1 and he argued that the specific reserved amount should be known by the Council. The Council provided the outcome of the internal review on 30 August 2023 but did not directly address the complainant’s query about question 1.
30. When it becomes clear that a complainant is dissatisfied with an answer, public authorities should ensure that their responses, in accordance with the EIR, explicitly confirm or deny whether any related recorded information is held.
31. During the Commissioner’s investigation he therefore raised with the Council a number of questions about question 1 and, in essence, asked the Council to explicitly confirm or deny if any recorded information was held by the Council relevant to the scope of the complainant’s request in question 1.
32. The Council confirmed on 4 December 2023 to the Commissioner that the Council did not hold any recorded information about the specific figure/amount of funds reserved for the legal challenge as “no specified amount was allocated to the legal challenge.”
33. It further explained that this was because:
- “Whenever any decision is taken to commence legal action, the claimant will always be unaware of the full liability for costs that it is likely to incur. This is particularly the case when an application for judicial review is made on behalf of 5 authorities and involves a new point of law and an issue that has a high national profile. Further, as litigation develops, expenditure on certain aspects of the case may increase whereas expenditure other matters may decrease and the costs incurred by the Mayor/TfL were also unpredictable. Any litigation solicitor would have acted in the same way as the Council.”
34. There is no requirement for the Council to create information in order to answer the complainant’s question 1, their obligation is to supply information they held at the time of the request.

35. From the information provided by the Council to the Commissioner, the Commissioner is satisfied that, on the balance of probabilities, the Council holds no further information in scope of question 1 of the request. Therefore, regulation 12(4)(a) of the EIR can be correctly applied in this instance.

### **Procedural matters**

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36. Regulation 5(2) of the EIR states:

“Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.”

37. As noted above, the complainant submitted their request on 4 June 2023. During the Commissioner’s investigation, the Council disclosed information falling within question 2 of the request on 22 November 2023 and in relation to question 1, confirmed that no relevant information was held on 4 December 2023.
38. However, in failing to address these parts of the request within the statutory time limit, the Council breached regulation 5(2).
39. In addition, as set out above, in the circumstances of this case the Commissioner has found that although the Council originally considered this request under FOIA, it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the Council will have failed to comply with the provisions of the EIR.
40. In these circumstances the Commissioner believes that it is also appropriate to find that the Council breached regulation 14(1) of EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the Council failed to issue a refusal notice within the time limit set which confirmed that - as provided by regulation 12(4)(a) information was not held, and - as provided by regulation 12(4)(d) material was still in the course of completion.

## Right of appeal

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41. 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)

42. 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.
43. 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**  
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**SK9 5AF**