

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

Decision notice

Date: 17 October 2018

Public Authority: Lake District National Park Authority

Address: Murley Moss
Oxenholme Road,
Kendal
Cumbria
LA9 7RL

Decision (including any steps ordered)

1. The complainant requested information relating to traffic monitoring data near Little Langdale. The Lake District National Park Authority (LDNPA) cited section 22 (intended for future publication) of FOIA to refuse the request. The Commissioner's decision is that the request should have been handled under the EIR. LDNPA reconsidered the request under the EIR and confirmed it considered the withheld information to be exempt under regulation 12(4)(d) - material still in the course of completion.
2. The Commissioner's decision is that regulation 12(4)(d) is engaged but, in the specific circumstances of this case, the public interest in disclosure of the requested information outweighs the public interest in maintaining the exception. The Commissioner requires the public authority to provide the complainant with the requested information.
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.

Background

4. There have been complaints about, and media interest in, the number of vehicles using the 'green lanes' in the Lake District. LDNPA explained that motorised activity on unsealed routes such as Tilberthwaite is not illegal. All unsealed routes with public vehicular access are subject to the same laws as surfaced roads. Some commercial operators now offer the paying public organised 4x4 tours based on the use of such routes. The general public use these routes to access the fells and local farmers using agricultural machinery use these routes to access and manage their land.
5. Electronic data loggers have been used on 20 routes in the Lake District National Park (LDNP) to obtain accurate and long term data on levels and trends of vehicle use. The logs recorded motorcycles and unspecified motor vehicles. The 2002 - 2008 data for the Tilberthwaite route seemed to show trends of increasing motor vehicle traffic and decreasing then increasing motor cycle traffic.
6. The Cumbria and Lakes Local Access Forum (LAF) meetings in July and October 2017 (<http://www.cumbrialaf.org.uk/meetings-minutes/minutes.asp>) discussed the concern that there was increasing motor vehicle traffic on the Tilberthwaite route and that the management and maintenance of the route would require a multi-agency response. In October an overview of the consultation process and timescale involved was provided to LAF and to the local MP. Monitoring of the route began in the summer of 2017.

Request and response

7. On 8 January 2018 the complainant requested the following information:

'I have just spoken to [name redacted] at Tilberthwaite, who told me that the family are leaving the farm. She said that one of the main reasons was the pressure of 4x4 traffic coming through their yard, now also at night, and the damage to the track.

Do you have any data yet from your monitoring? It would be good to know how many vehicles are coming through.'

8. On 7 February 2018 LDNPA responded to the request for traffic monitoring data (Tilberthwaite Unclassified Road, route numbers U5001 and U5004) citing section 22 of the FOIA to withhold the information as it was intended for publication at a future date.

9. The complainant requested an internal review on 9 February 2018. He asked for clarification:

'1. *Could you tell me when the authority intends to publish the traffic monitoring data?*

2. *Item 13 in the minutes of the Cumbria and Lakes Local Access Forum (LAF) meeting held on 5 October 2017 indicates that the LAF was told that there had been an increase in traffic "since the last survey in 2009 [sic - 2008]", and one LAF member commented that the increase was not as great as people thought, indicating that data allowing a comparison between current and previous monitoring was provided to the LAF meeting. If this minute is correct, it shows that some data from the current monitoring has already been published to the LAF. Please could you provide this data, and data from the 2009 [sic - 2008] survey?*

3. *Could you explain why the authority thinks "it is reasonable in all the circumstances", under subsection 22(1)(c) of the Freedom of Information Act 2000 (the Act), that the traffic monitoring data should be withheld from disclosure until the date when it intends to publish it, especially given the circumstance that it appears already to have published some of the data to the LAF?*

4. *Could you explain why the authority thinks that "in all the circumstances, the public interest in [withholding this data until it is published] outweighs the public interest in disclosing the information" (subsection 2(2)(b) of the Act)? Again, when this information was published to the LAF meeting in October 2017, the authority must have considered that the public interest favoured disclosure at that time.*

5. *The authority has not stated its reasons for claiming that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information." The authority is required to do this by subsection 17(3) of the Act.*

6. *Could you explain why the authority has not yet included its intention to publish this dataset in its publication scheme, as required by subsection 19(2A)(a) of the Act?'*

10. LDNPA sent the outcome of its internal review on 27 February 2018 upholding the decision and answering the 6 points:

'1 *The Lake District National Park Authority will be carrying out electronic traffic counts, on-site surveys and face-to-face interviews with users of the routes until the end of August 2019. This is to provide a representative and robust set of data to analyse and from which to draw conclusions. Publication of these conclusions, and the resulting*

recommendations along with the raw data is expected to be published by 30 November 2019. Any variations to these timings will be publicised as and when they are known.

2 *We do not propose to release this data until the full data set is completed. Raw electronic data does not differentiate between increases in agricultural, commercial and recreational traffic for example. This will be validated and differentiated by on-site surveys to allow better informed conclusions and decisions to be made.*

3 *I refer you to my comments at point 2 above. The Authority was asked by the LAF to provide its information to date as working data. It has always been the intention to publish the data once the work and information gathering is completed.*

4 *The Authority considers that public interest in withholding the data until it is published outweighs the public interest in disclosing the information. The information that the Authority has obtained to date is not complete and therefore not accurate. The raw data may show an increase since base level surveys were completed, but the Authority cannot not [sic] know whether or not this is an increase in one type of user or is equal across all types of vehicle user without completing the project. To publish the data at this stage may provide a distorted view of use of the routes and lead to conclusions being drawn and action being suggested that may not be appropriate.*

5 *As referred to above, we believe that to provide better quality data other than an indication of a raw increase in numbers will provide all interested parties with more accurate and better quality information to inform their views, aid discussion and inform future recommendations of a sensitive subject.*

6 *The Authority only publishes data when it is complete. As explained in this email, it is not anticipated that the data set would be completed until the end of August 2019. It has always been our intention to publish the results and our conclusions/recommendations once the work had been completed. It is our usual practice to add the information to our publication scheme once we are aware of a date at which it will be published which is usually upon completion of the piece of work to which the data relates.'*

Scope of the case

11. The complainant contacted the Commissioner on 15 April 2018 to complain about the way his request for information had been handled.

12. During the course of the Commissioner's investigation, LDNPA agreed that the correct access regime for the request was the EIR as opposed to the FOIA. LDNPA reconsidered the request under the EIR and confirmed it considered the withheld information to be exempt under regulation 12(4)(d) - material still in the course of completion.
13. LDNPA provided the Commissioner with 2 bundles of withheld information. Bundle 1 contains the electronic vehicle survey data from June to December 2017 (for motorcycles and unspecified motor vehicles) held at the time of the request. Bundle 2 contains further electronic vehicle survey data and other survey information such as face-to-face interviews obtained since the date of the request and is therefore out of the scope of this request. LDNPA applied regulation 12(4)(d) to both bundles of information.
14. In light of the above, the Commissioner informed the complainant that she has focussed her investigation on determining if LDNPA correctly applied regulation 12(4)(d) of EIR in its response to the request for the 6 months of vehicle survey data in Bundle 1.

Reasons for decision

Is the information environmental?

15. The Commissioner first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"any information in written, visual, aural, electronic or any other material form 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...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

16. In coming to her view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information...on" in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
17. The withheld information, data collected on the number and type of vehicles using the unsealed routes in the Tilberthwaite and Little Langdale area, clearly relates to a measure which it is likely to affect the use of that land and thus have a direct effect on it. The Commissioner therefore considers that the information requested in this case falls under the definition of Environmental Information set out in the EIR.

Regulation 12(4)(d) – Material still in the course of completion

18. Under Regulation 12(4)(d) a public authority may refuse to disclose recorded information if it relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.
19. If the information in question falls into one of those categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception, but any adverse effects of disclosure may be relevant to the public interest test.
20. The fact that the exception refers to both material in the course of completion and unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy.
21. The information which LDNPA has withheld under this exception is the 6 months of electronic traffic counts for motorcycles and unspecified motor vehicles from late June to December 2017 from the loggers on the High Tilberthwaite and Little Langdale route.
22. LDNPA stated that it *'was made aware of the alleged increase in traffic on unsealed routes in the Lake District National Park and in September*

2017 agreed a project to plan to undertake electronic traffic counts, on-site surveys and face-to-face interviews with users of the routes to obtain a complete and accurate picture as to usage'.

23. LDNPA stated that a rough outline of the plan was disseminated and a letter was sent to the local MP on 11 October 2017. The letter summarised the work to date, the planned monitoring and collection period of two years to May 2019 and then the use of the evidence to *'inform a decision as to what the most appropriate management of the routes concerned should be, who should carry out this management, and whether a TRO [Traffic Management Order] is required. And if so, what prohibitions should be imposed. We would hope to complete this by November 2019.'*
24. The letter explained the approach by LDNPA was to work with a number of partners including Cumbria County Council and landowners to manage and contain the use of these routes. Where voluntary restraints are not adhered to *'TROs prohibiting certain types of traffic can be imposed through a legal process which can involve a public inquiry. This can take considerable time to reach a conclusion and has to be evidence based.'*
25. Both the complainant and the Commissioner have seen a copy of this letter.
26. LDNPA confirmed to the Commissioner that *'publication of the conclusions of the traffic counts, surveys, interviews and consultations will be collected and published by 30 November 2019. The work is currently running to time and until the work is concluded, the data is incomplete...'*
27. The Commissioner refers to her guidance on regulation 12(4)(d)¹ which states that:

"Material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete".
28. The Commissioner notes that the electronic traffic counts for motor cycles and motor vehicles started in late June 2017, 3 months before the project plan was agreed in September and disseminated in October.

¹ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

The Commissioner also notes that the complainant has only asked for the numbers of *'vehicles coming through'*. He has not asked for the information that distinguishes the types of vehicles or the decisions that may be made in the future on the overall data.

29. Having viewed both bundles of the withheld information, the Commissioner notes although the raw data withheld in bundle 1 could be considered as complete in itself, it is part of an ongoing collection of data. The raw data withheld in Bundle 2 (which is out of scope as after the date of the FOIA request) shows that the data continued to be collected from January to June 2018. It is clear that the process of collecting the data from the electronic traffic counts continued.
30. The Commissioner has also taken into account the fact that LDNPA has explained that the traffic count information was only one part of the survey. Again the Commissioner has viewed results from the other parts of the survey (For example, the results of user face-to-face interviews) in the withheld information in Bundle 2.
31. The Commissioner accepts that LDNPA has stated that it is collecting information (electronic traffic counts, user face-to-face interviews and consultations with local residents and businesses) over a 2 year period and will require further evidence in order to conclude its investigation and make a decision for the future use of the unsealed roads in Tilberthwaite. Until this process has been concluded the Commissioner is satisfied that the information withheld under regulation 12(4)(d) relates to material which is still in the course of completion and as such the exception has been applied correctly.

Public interest test

32. Under regulation 12(1)(b), public authorities can only withhold information under regulation 12(4)(d) if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2), a presumption in favour of disclosure must be applied to the consideration of the public interest.

Public interest arguments in favour of disclosing the information

33. The complainant has argued that there is an intrusion of recreational off-road vehicles in the area that is damaging the tracks and spoiling the natural beauty and amenity of the area: *'the public interest... is the conservation of natural beauty in the National Park.'*
34. He stated that *'LDNPA's primary statutory purpose is environmental, namely to 'conserve and enhance the natural beauty, wildlife and cultural heritage'.* *The number of recreational motor vehicles on*

unsealed roads is a key indicator of the state of the environment of which the LDNPA is the custodian; withholding it seems wholly incompatible with the National Park's remit.'

35. The complainant referred to many local and national articles from the media and the 229,000 signatories on the petition to demonstrate the public interest. He argued: *'the public has a right to know how the body entrusted with the protection of the area is discharging its remit, and what data it uses for this purpose.'*
36. From the article in the Guardian: *'World Heritage Watch asked Unesco to make the Lake District's continued inscription as a world heritage site dependent on the Lake District National Park Authority (LDNPA) acting to prevent further damage caused by the vehicles...the move came after almost 7,000 people signed a petition organized by the campaign group Save the Lake District calling for the national park authority to impose a traffic regulation order closing green lanes to motor vehicles.'*
37. The complainant stated that to withhold the 6 months of data *'prolongs the many years in which the public - local residents and visitors - were left in the dark. It also reinforces the impression of an Authority trying to conceal the neglect of its statutory purpose of conservation.'*
38. He referred to the EIR presumption in favour of disclosure and argued that there is no *'risk of harm'* caused by the disclosure of this information: *'the only negative effect of publication of the data could be public criticism of the National Park's stewardship.'*
39. The complainant argued that the information from the 6 months of data could be released and compared with data from previous years: *'The refusal to publish the 2017 data raises the suspicion that these will show a further increase in off-road vehicles and thus create doubts about the LDNPA's stewardship of the area.'*
40. He argued that LDNPA should **'progressively'** make the information available'. He argued that it is the *'duty of the LDNPA to inform the public of any changes in potentially damaging environmental factors such as the traffic of off-road vehicles, particularly as there has been no new information since 2008.'*
41. In 2008 LDNPA released the following table which the complainant argued was not complete and therefore it would be difficult to argue that any newly released data should also be complete. In the table, there is no distinction made between recreational and agricultural vehicles. The complainant commented that there is only one farm and so the agricultural vehicles constitute a negligible part of the overall traffic in the area.

	Jan- April 2008	April- July 2008
Tilberthwaite - 4x4	373	260
Tilberthwaite Motorcycles	332	233

42. LDNPA explained that whilst the Authority *'is of the view that that it would be preferable if people did not take vehicles on these routes'* the motorised activity on unsealed routes such as Tilberthwaite is not illegal. LDNPA is aware of the media interest in the issues of 4x4 vehicles using these routes and will *'publish the usage data when the full data set is complete'*.
43. LDNPA stated that the public interest arguments in favour of disclosing the incomplete information are:
- It would provide raw information to all interested individuals for them to draw their own conclusions upon the use of off-road vehicles on unsealed routes
 - It would provide information to enable members of the public, businesses or organisations whose members use the routes to raise any concerns that they may have about the use of the routes
44. The Commissioner considers that the complainant has shown that there is considerable interest in this issue. There is a legitimate public interest in public authorities being transparent in the way they discharge their duties. Disclosure in this case would promote accountability of the public authority and allows individuals to have access to information that helps them understand the reasons why decisions that affect them are taken by public authorities, and in them having the ability to challenge those decisions and to participate in the debate around them.

Public interest arguments in favour of maintaining the exception

45. LDNPA provided the following arguments in favour of maintaining the exception.
- The raw electronic data does not differentiate between increases in agricultural, commercial and recreational traffic. This will be validated and differentiated by onsite surveys and will allow better

informed conclusions and decisions to be made about the future of these unsealed routes.

- The raw data may show an increase since base level surveys were completed, but the Authority cannot know whether or not this is an increase in one type of user or is equal across all types of vehicle user without completing the project. To publish the data at this stage may provide a distorted view of the use of routes and lead to conclusions being drawn and action suggested that may not be appropriate. To a limited extent this has already occurred and articles published in the Westmorland Gazette (the local newspaper) are already making assumptions about the use of 4x4s within the Lake District and are calling for a ban. Those lobbying for 4x4s to be banned, are also seeking the intervention of UNESCO and as a last resort deleting the Lake District National Park (LDNP) from the World Heritage List. Such lobbying on the basis of incomplete information is detrimental to the Authority's World Heritage Site Status.
 - Those using the information to request removal of 4x4s from the LDNP are one voice among many. There are many users of 4x4s within the LDNP and some local businesses who depend upon such access. Access by 4x4 also allows access to the fells for some members of the public who may not otherwise have such access.
46. LDNPA argued that it is for the purpose of ensuring a balanced and informed decision is made that it considers it inappropriate to publish incomplete data. To ensure all members of the public and interested parties have a meaningful contribution to any future decision made by the LDNPA it is necessary that full and complete data is available.
47. The Commissioner considers that there is a legitimate public interest in public authorities being able to withhold incomplete information until it has collected all the information that it requires to make a fully informed decision about the way forward.

Balance of the public interest arguments

48. In considering such matters, the Commissioner is mindful that disclosure under the EIR is a disclosure to the world at large and that there is a presumption in favour of disclosure that must be applied to the consideration of the public interest.
49. In reaching a view on the balance of the public interest in this case the Commissioner has considered both the complainant's and the authority's points of view and the content of the withheld information.

50. It is clear that these issues are very emotive in the community with strongly opposing views on all sides of the argument. There is considerable public interest about this issue of motorised vehicles using unsealed roads in the National Park. As well as concerns for the potential disruption to other users of the Park and the ability of all users to enjoy the routes, there are implications for the maintenance of the roads themselves.
51. However, the issue that the Commissioner must determine is whether the disclosure of the requested raw data would affect the debate on this issue and the ability of LDNPA to make a fully informed decision about the way forward, which may or may not include a decision to seek a TRO to restrict some of the motorised vehicles on the routes.
52. In reviewing the balance of the public interest arguments the Commissioner has considered the following questions:
 - Would the disclosure of the 6 months electronic data affect the ability of LDNPA to continue to collect a full 2 years' worth of raw data alongside the other surveys to detail the types of vehicles using the routes and then consider all the evidence to make an informed decision on the future of the routes in November 2019?
 - Would such a disclosure affect the ability of LDNPA to seek an evidence based TRO should it decide that this was the best way forward?
53. As LDNPA has continued in 2018 to collect the electronic data and has started to collect the other surveys, the Commissioner does not consider that disclosure would affect the ability of LDNPA to collect the planned 2 years of data.
54. The Commissioner recognises the strong public interest arguments in favour of maintaining this exception. The Commissioner believes that there are occasions when a 'safe space' is needed by public authorities to allow them to formulate policy, debate live issues and reach decisions without being hindered by external comment and/or media involvement.
55. LDNPA has made it clear that it intends to collect evidence over 2 years until June 2019 and then consider the evidence and make a decision which will be published in November 2019.
56. The Commissioner considers the 'safe space' to be about protecting the integrity of the decision making process. In this case, the timing of the request in January 2018 is important as LDNPA was still at a very early stage of the data collection and was not at the decision making stage. At that time (January 2018) LDNPA was already aware of the increasing media interest and the call, by some, for the ban of 4x4 motorised

vehicles for this route. Disclosing the requested information would not affect the views already published in the media.

57. Therefore, the Commissioner considers that as LDNPA has not yet started to consider the evidence for its decision it is not at the stage where a 'safe space' is required. The Commissioner finds that the disclosure of the initial 6 months of data would not affect the ability of LDNPA to consider the full evidence to make an informed decision on the future of the routes in the period June to November 2019. Further, if LDNPA decided that the best way forward was to seek an evidence based TRO, then the Commissioner does not consider that disclosure of this initial data under EIR would affect that ability.
58. The complainant's view is that the 6 months of data can be released 'progressively' and considered on its own. It could then be usefully compared with the available data from previous years (2008) to establish an initial view on any potential changes in the overall usage of the routes by motorised vehicles.
59. The Commissioner notes that this data has already been provided to the LAF in October 2017: '*The Authority was asked by the LAF to provide its information to date as working data*' (see paragraph 10 above). There was a discussion in the meeting on the increased numbers. (see paragraph 9 above). The media are also aware of the increased numbers. (see paragraphs 35, 36 and 45 above)
60. The Commissioner notes that the numbers of vehicles has been counted in previous years (2002-2008) but from the information provided, it appears that there has not been a regular and annual census of the vehicles and motor cycles using this route. There has been a gap of nearly 10 years since the last survey and there is an expectation that there has been a huge increase in the amount of traffic. The Commissioner considers that it may be that providing the actual figures may show that any increase is not as great as the rumoured figures. (see paragraph 9 above)
61. LDNPA have argued that disclosure would give an incorrect impression and possibly an incorrect assumption about the outcome of the investigation. However, the Commissioner considers that there would not be any adverse effects in disclosure of the requested information to allow the interested parties to compare the data from 2017 with the baseline data from the previous years, especially as the information has already been disclosed to a public forum, the LAF.
62. The Commissioner considers that the requested data could be disclosed with some additional explanation from LDNPA. For example LDNPA could explain that the data does not identify the types of motorised vehicles or

the types of users (recreational, agricultural, commercial, residential or visitor).

63. In conclusion, the Commissioner accepts that there is always a general public interest favouring the disclosure of environmental information. In this case, although the surveys continue and the decision making process will commence in 2019, the Commissioner does not accept that disclosure would present a real risk of prejudice to the 'safe space' to the decision making process associated with the future of these unsealed routes. There is a stronger public interest in disclosing the requested information to allow a realistic comparison with previous years and to inform the public debate.

Right of appeal

64. 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@hmcts.gsi.gov.uk

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

65. 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.
66. 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

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