

Environmental Information Regulations 2004

Decision Notice

Date: 20 December 2010

Public Authority: Transport for London
Address: Windsor House
42-50 Victoria Street
London
SW1H 0TL

Summary

The complainant asked Transport for London ('TfL') to provide him with documents and emails relating to the presumption in the Mayor's transport strategy that modal share for cycling in London is unlikely to exceed 5% after 2025. TfL initially explained that it did not hold information regarding the 5% target after 2025. However, when it was clarified that the complainant considered his request had made it clear that he required the origin of the 5% figure, TfL provided him with a survey analysis document and identified another document which it held but considered to be outside the scope of the request. The Commissioner finds that the request should have been considered under the Environmental Information Regulations 2004. He also considers that the request could objectively be read either according to the interpretation of TfL or according to the interpretation of the complainant. There were therefore two objective readings of the request. To the extent that TfL did not provide the information in relation to the complainant's objective reading of the request, TfL is found to be in breach of regulation 5(1). In failing to provide this information within twenty working days, the Commissioner finds TfL to be in breach of regulation 5(2). The Commissioner also finds TfL in breach of its regulation 9(1) duty to provide reasonable advice and assistance.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. On 15 January 2010 the complainant sent the following request to Transport for London ('TfL'):

'I would like to request the following information with a preference for it being emailed to me.

- Any documents and emails relating to the presumption in the Mayor's Transport Strategy that modal share for cycling in London is unlikely to exceed 5% after 2025.

I realise that this request may cover a wide range of information so would appreciate advice and assistance at your earliest convenience to narrow this request down.'

3. On 15 February 2010 the complainant informed TfL that he had not received a response within the statutory time limit. He also complained that he had not been provided with any advice and assistance.
4. TfL informed the complainant that it had not yet replied because the information was being collated. On 17 February 2010 the complainant informed TfL that his last email was a request for a review. He again reminded TfL that it had a duty under section 16 of the Freedom of Information Act 2000 (the 'Act') to provide him with advice and assistance regarding his request.
5. On 17 February 2010 TfL confirmed that an internal review would be undertaken to establish why it had failed to respond to his request within 20 working days.

6. On 2 March 2010 TfL provided an internal review. It explained that it had failed to respond to the request within the statutory time limit of 20 working days as the request had been sent to the wrong business area. It apologised for the delay. TfL explained that the business area now dealing with the request had not considered that it was necessary to contact him to ask him to clarify or narrow his request.
7. On 2 March 2010 TfL also provided the complainant with a formal response to his request. It informed him that it did not hold any documents or emails which relate to the issue of whether the 5% target is likely to be exceeded after 2025.
8. However, TfL explained that the Mayor of London has set out in his draft Mayor's Transport Strategy (the 'MTS') his aspiration to achieve a 5% mode share for cycling by 2026. It explained that there had been no detailed consideration of whether this target will be exceeded after 2026.
9. TfL explained that the MTS shows that the 5% mode share target for cycling will be achieved by 2026 and maintained thereafter. Cycling trips will continue to increase (as will other trips) in line with population growth, however, no further increase in mode share is assumed. The complainant was informed that the public and stakeholder consultation on the MTS had recently come to a close. He was told that a final version would be published in the Spring.
10. On 2 March 2010 the complainant confirmed that he understood TfL's response meant TfL had no emails or documents giving reasons why 5% should be the maximum modal share possible for cycling in London. He confirmed that the response suggested that there was no evidence base for this assumption.
11. The complainant asked TfL to clarify where the 5% figure came from and asked for how long it had been used as a basis of policy. He explained that the maximum predicted modal share has significant consequences for land use and transport planning and he argued that if this figure had "simply been plucked out of the sky, as your response seems to suggest, no reliance ought to be placed on it."
12. On 22 March 2010 the complainant reminded TfL that he was still waiting for clarification of the origin of the 5% figure.
13. On 26 March 2010 TfL promised a response the following week.
14. On 8 April 2010 the complainant again asked for a response.

15. On 14 April 2010 TfL responded to these points. It explained that its response had stated that there has been no detailed consideration whether the 5% mode share target for cycling will be exceeded after 2026. It was not intended to imply that 5% is the maximum possible modal share. The MTS assumes that the 5% mode share target for cycling will be achieved by 2026 and maintained thereafter.
16. TfL explained that it first began identifying a cycling mode share target under the previous administration. Analysis of the London Area Travel Survey ('LATS') undertaken at that time formed the basis of the 5% cycling mode share target. TfL then explained how it had arrived at the figure of 5%.
17. TfL also explained that since the above analysis had been undertaken, a more detailed analysis of projected trips and mode share has been carried out to inform the development of the new draft Mayor's Transport Strategy. This should be considered the most authoritative assessment at present.
18. On 14 April 2010 the complainant reminded TfL that he was still seeking documents and emails in TfL's possession which relate to the assumption that cycling's modal share cannot be increased beyond 5%. He asked TfL to let him know when it would forward him the analysis of LATS referred to in its earlier response. He also asked for a copy of the more detailed analysis undertaken to inform the development of the LTS.

The Investigation

Scope of the case

19. On 16 April 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - He had received information but not within 20 working days.
 - The information was not what he requested.
 - TfL had not provided him with advice and assistance.
 - TfL had breached statutory time limits.
 - He believed TfL had misinterpreted his request so as not to find any relevant documents.

- He believed TfL were deliberately delaying and interfering with Freedom of Information requests from some campaigning organisations as it was trying to avoid public criticism of its policies and practice.

Chronology

20. Following his complaint to the Commissioner, the complainant remained in correspondence with TfL. As a result, the complainant was provided with further information and advice and assistance to enable him to make another request. For completeness, the Commissioner has set out below the detail of those discussions.
21. On 19 April 2010 TfL provided the complainant with a copy of the briefing on cycling targets given to the previous mayor. When the complainant questioned this response the following day, TfL then provided a copy of the original (LATS) analysis underpinning the briefing. This had informed the initial discussions with the previous mayor and helped to inform the current mayor's decision to set a target for a 5% mode share for cycling by 2026.
22. On 24 May 2010 the complainant informed TfL that he required additional information, in particular the more detailed analysis for the MTS which he believed should have been provided in response to his initial request in January.
23. On 25 May 2010 TfL wrote to the complainant and summarised its position. It explained that it had no further information to disclose in response to the initial request. TfL explained that the request had been for information relating to the presumption in the MTS that modal share for cycling in London was unlikely to exceed 5% after 2025. The more recent analysis had not been used to inform the development of this target and has not been used to inform any discussion of possible growth beyond 2026. It was therefore outside the scope of the request which refers to the way in which the target in the current MTS was developed.
24. TfL invited the complainant to submit a new request for the more recent analysis.
25. On 25 May 2010 the complainant informed TfL that due to its failure to provide advice and assistance, he had not known what it held until 14 April 2010. At that point he had requested the more detailed research and did not understand why he now had to make a new request for it.

26. The complainant also pointed out that he believed TfL had interpreted the original request as referring to the MTS that was in force at the time of the request (MTS1) rather than the draft that was published shortly before the request. The final version had been published earlier that month (MTS2). The complainant suggested that if there had been any confusion about the request on the part of TfL, then it had a duty to ask for clarification.
27. The complainant asked TfL to either explain why his request of 14 April 2010 was not treated as part of his original request, or if it was a fresh request for information, why he was not provided with a formal response to it.
28. The complainant explained that he looked forward to receiving this information and made it clear that he required the detailed analysis undertaken to arrive at the 5% modal share target in the MTS2 published this month.
29. On 26 May 2010 TfL wrote to the complainant to clarify its responses and to explain that the MTS2 had not involved further analysis of the target but accepted the target as presented to it. TfL apologised for the confusion it had caused. It explained that in its correspondence it had been referring to the 5% target as presented in MTS2 and at no point had it been referring to MTS1. The analysis already provided to the complainant was the basis for this target and was adopted by the current mayor upon assuming office. As the target was in place and approved, TfL did not perform a further analysis of this for the MTS.
30. The further analysis has been undertaken to help TfL to understand how it might deliver this target. This was (and is) for the purpose of developing policy to deliver the target, not to review the target itself. As the request was for information relating to the development of the target TfL did not consider this analysis for disclosure.
31. However, TfL did accept that it should have considered the email of 14 April 2010 as a request for this information and it should have explained that this analysis had not been used to inform the development of the 5% target.
32. TfL explained that it was happy to consider the release of further information pertaining to the development of cycling policy, which would include the more recent analysis though it would like to make sure that the complainant understood that the analysis has not been used to arrive at the 5% modal share target in the MTS2 published this month.

33. On 26 May 2010 the complainant informed TfL that he would like to see the more detailed analysis even though he understood that this analysis was not done to review the target.
34. When considering the complaint before him on 11 June 2010 the Commissioner wrote to the complainant and informed him that he did not consider that serving a Decision Notice would serve any strong public interest. The issues as regards the information the complainant had requested had been resolved, in that the complainant had been provided with some information and had made a new request for additional information. TfL had been informed of the breaches of the Act which had been recorded and the Commissioner was satisfied that TfL recognised this. It had been reminded of its responsibilities under the Act.
35. On 9 July 2010 the complainant informed the Commissioner that he required a formal resolution to his complaint. He did not consider that an informal resolution was adequate. He pointed out that TfL had failed to improve its handling of information requests, despite assurances which had been given the previous year with respect to another complaint. A key part of his complaint was that TfL had failed to provide advice and assistance.
36. On 28 September 2010 the Commissioner wrote to the complainant and to TfL and informed them that he would progress to preparing this Decision Notice.

Analysis

37. The full text of regulation 5 and 9(1) is available in the Legal Annex at the end of this Decision Notice.

Substantive Procedural Matters

Regulation 2

38. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.

39. The Commissioner considers that the information requested falls within regulation 2(1)(c) of the EIR: "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 these elements".
40. Information about a policy, plan or an activity that affects or is likely to affect the elements of the environment (such as air and land) is environmental information.
41. The complainant has requested information about the Mayor's Transport Strategy with regard to the target share assumed for cycling. This target has implications for land use in the capital and also quality of air in the future. The Commissioner therefore considers the requested information to be environmental, as it relates to information on a plan (the Mayor's Transport Strategy) which is likely to affect the land or air.

Regulation 5 – Duty to make environmental information available

42. Regulation 5(1) provides that a public authority that holds environmental information shall make it available on request.
43. The request asked TfL to provide the complainant with any documents and emails relating to the presumption in the MTS that modal share for cycling in London is unlikely to exceed 5% after 2025. In its response, TfL confirmed that it did not hold any documents or emails which relate to the issue of whether the 5% target is likely to be exceeded after 2025.
44. However when the complainant clarified that his request required an explanation of where the figure of 5% had come from, on 14 April 2010 TfL explained that it held an analysis of the London Area Travel Survey (LATS). This had been completed under the previous administration and had formed the basis of the 5% target.
45. It is apparent that TfL and the complainant have interpreted the request differently. It would appear that TfL interpreted the request as meaning documents and emails relating to the strategy after 2025 and the question of whether the 5% share would be exceeded after 2025. TfL also explained that it had considered the request with respect to the MTS2 for which no analysis of the target had been completed. The MTS2 had simply accepted the target figures adopted and approved by the MTS1.

46. It became apparent that the complainant considered that his request covered documents and emails which explained where the figure of a 5% share had come from. The Commissioner accepts that the complainant's interpretation of the request is an objective one.
47. However, the Commissioner's view is that TfL's interpretation of the request was also an objective reading. In the case of *Berend v the ICO & the London Borough of Richmond upon Thames (EA/2006/0049 & 50; 12 July 2007)*, the Information Tribunal found that "the request should be read objectively. The request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request". There is therefore no requirement for a public authority to seek a second meaning or ask for clarification of a request.
48. Likewise, in the case of *Boddy v the ICO and North Norfolk District Council (EA/2007/0074; 23 June 2008)*, the Information Tribunal stated that the request "ought to be taken at face value" and that there was no legal obligation upon a public authority to "second guess what was a clear request".
49. The Tribunal went on to explain that if the public authority suspected from prior knowledge that the applicant required different or additional information, then it is permitted (but not required) to seek clarification of the request. However, there is no indication in this case that TfL was aware that the complainant had another interpretation of the request in mind.
50. TfL therefore did not consider that the request required clarification and responded accordingly. When the complainant clarified what he required, TfL's interpretation proved to be incorrect in so far as it did not accord with the complainant's interpretation. Once it had received this clarification, TfL attempted to remedy this situation. On 14 April 2010 it informed the complainant that it held a survey which had formed the basis of the 5% target.
51. This survey analysis (LATS) was provided after the complainant requested it on 14 April 2010 and again on 20 April 2010. However this information was not provided until after the complaint to the Commissioner was made on 16 April 2010.
52. It is therefore apparent that in this case the meaning of the request is in dispute. The Commissioner has carefully considered the interpretations of both parties and is satisfied that there are two objective readings of this request.

53. For this reason, the Commissioner considers that there is no evidence of deliberate misinterpretation of the request to avoid providing information.
54. However, it is also the Commissioner's view, that when it became evident to TfL that its own interpretation of the request did not match with the complainant's, TfL should have accepted the complainant's objective reading of the request and provided him with the survey (the LATS) that fell within this reading. The Commissioner considers that it should not have been necessary for the complainant to ask again to be provided with this information. Therefore to the extent that TfL did not initially provide the information that it held (the LATS analysis) in relation to the complainant's objective reading of the request TfL is found to be in breach of regulation 5(1).
55. The Commissioner considers that the further detailed analysis which concerned developing policy to deliver the target did not fall under the scope of this request. However he considers TfL should have interpreted the complainant's request for this further analysis made on 14 April 2010 as a new request. TfL has acknowledged its failure to do so.

Regulation 9 – Advice and Assistance

56. The full text of regulation 9(1) can be found in the Legal Annex at the end of this Decision Notice.
57. On 2 March 2010 the complainant asked TfL to clarify where the 5% figure originated. He also indicated that he considered that TfL's response to his request suggested that there was no evidence base for the 5% figure. As stated above, the Commissioner considers that at this point it should have been evident to TfL that the complainant's interpretation of the request was wider than its own, and it should therefore have provided information falling within this wider objective reading of the request.
58. On 14 April 2010 TfL explained that an analysis of the London Area Travel Survey (LATS) had been completed under the previous administration and this had formed the basis of the 5% target. It explained where the 5% figure had come from.
59. At this point TfL explained to the complainant that a more detailed analysis of projected trips and mode share had also been carried out to inform the development of the new draft MTS.

60. The complainant has argued that it would be reasonable to expect that TfL should have informed the complainant about the LATS analysis and the more detailed analysis in its initial response. He has argued that this would have been in accordance the duty of a public authority to provide advice and assistance to a complainant (regulation 9(1) of the EIR).
61. Given that the Commissioner is satisfied that TfL's reading of the request was an objective interpretation, he does not consider that TfL should have been expected, upon receipt of the original request, to inform the complainant about the LATS analysis and the more detailed analysis. TfL considered the request to be clear and therefore had no reason to think that advice and assistance was necessary.
62. However, the Commissioner also considers that at the point at which it became clear that the complainant's interpretation did not match its own, and that the complainant's interests were wider than just the post 2025 presumption (2 March 2010), it would have been reasonable to expect TfL to contact the complainant about the scope of his request and to inform him of the existence of both the LATS analysis and the further detailed analysis. The Commissioner accepts that TfL did do this, although not until 14 April 2010. He also notes that the complainant had to chase up a response to his concerns of 2 March 2010 twice before the advice and assistance was provided on 14 April 2010.
63. In light of the unreasonable delay in the provision of appropriate advice and assistance as noted above, the Commissioner finds that TfL did not provide the advice and assistance which would be reasonably expected of it. He therefore finds TfL in breach of Regulation 9(1).

Regulation 5(2)

64. Regulation 5(2) of the EIR states that:

"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."

65. The request was dated 15 January 2010. TfL informed the complainant that it held the relevant LATS analysis on 14 April 2010 and provided it to him after he specifically requested it on 20 April 2010.

66. The Commissioner therefore finds to the extent that TfL did not provide the information (the LATS analysis) in relation to the complainant's objective reading of the request within twenty working days, TfL is in breach of regulation 5(2).

The Decision

67. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR:

- In failing to provide the requested information in relation to the complainant's objective reading of the request TfL is found to be in breach of regulation 5(1).
- In failing to provide the complainant with the requested information in relation to the complainant's objective reading of the request within twenty working days, the Commissioner finds TfL to be in breach of regulation 5(2).
- In failing to provide reasonable advice and assistance the Commissioner finds TfL to be in breach of regulation 9(1).

Steps Required

68. The Commissioner requires no steps to be taken.

Right of Appeal

69. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 20th day of December 2010

Signed

**Lisa Adshead
Group Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) 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.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 9 - Advice and assistance

Regulation 9(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.