

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 August 2014

Public Authority: Devon County Council
Address: County Hall
Exeter
EX2 4QD

Decision (including any steps ordered)

1. The complainant has requested information on traffic flow data in a specific area of Exeter. Devon County Council (the council) initially refused to provide the information relying on regulation 12(5)(e) of the EIR to withhold it. Following an internal review, the council then considered it to be exempt under section 43(2) of the Freedom of Information Act 2000 (FOIA).
2. During the Commissioner's investigations, the council amended its decision to instead rely on regulation 8 of the EIR, in that a payment would firstly be required from the complainant before the information would be released. On further considerations, the council determined that it would supply the information to the complainant free of charge if he firstly confirmed that he was not going to use the information for commercial purposes, otherwise it would maintain regulation 8 is engaged.
3. The Commissioner's decision is that the council has incorrectly relied on regulation 8 of the EIR in this case.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the requested information it holds without requiring the complainant to make a payment for it.
5. 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

6. On 4 November 2013 the complainant made the following request for information:

"Could you please provide me with the latest data you hold regarding traffic flow through the Marsh Barton/Matford industrial estate area of Exeter, with particular regards to:

- (1) times of usage (by road if possible)*
- (2) any heat maps or usage plots of traffic in the estate*
- (3) usage by type of vehicle (by road if possible)"*

7. The council responded on the 27 November 2013. It advised the complainant that it does hold some traffic flow data in relation to the areas requested and asked that he contact its Highways Team to progress the request, noting that the council does sometimes charge for the release of this information.
8. On the 1 December 2013 the complainant questioned having to contact a different department.
9. On 6 January 2014 the council provided a second response. It advised the complainant that it only holds the information relating to 'heat maps'. The council also advised that it was withholding the information under regulation 12(5)(e) of the EIR as it considered disclosing the information free of charge would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
10. The council provided the complainant with a link to the details of its charges¹.

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http://www.devon.gov.uk/index/transportroads/traffic/traffic_transport/data-team-network.htm

11. On the 10 January 2014 the complainant advised the council that he was not satisfied with its response and that he did not consider the information to be environmental information. He told the council that if he did not receive the information immediately then he would refer the matter to the Commissioner. Which he did that day.
12. On the 14 January 2014 the council advised the complainant of the Commissioner's contact details.
13. On 27 January 2014, the complainant wrote to the council to advise that he had contacted the Commissioner who had asked that he firstly go back to the council and request a review of its initial decision.
14. The council provided its internal review response on the 29 January 2014. Instead of relying on regulation 12(5)(e) to withhold the information, the council amended its position to withhold the information under section 43(2) of the Freedom of Information Act 2000 (FOIA) – Commercial interests.
15. The council explained that to release the information would prejudice the interests of Devon County Council explaining that it has a charging mechanism for making this type of information available and so to provide the information free of charge would be prejudicial to the commercial interests of the council resulting in a loss of revenue for the Highways Service.
16. The complainant contacted the Commissioner as he did not agree with the council withholding the requested information that it held.
17. During the Commissioner's initial investigations the council reconsidered the request. It advised the Commissioner that it now considers the information to fall within the EIR, and that it was no longer relying on section 43(2) of the FOIA or regulation 12(5)(e) of the EIR to withhold the information.
18. However the council considered that the information would only be released to the complainant following receipt of payment for it, in accordance with regulation 8 of the EIR. The council contacted the complainant on the 11 June 2013 to advise of its amended position.
19. The council then advised the complainant, on the 30 June 2014, that it would provide the information free of charge subject to him confirming that he will not use the information for commercial purposes.
20. On 4 July 2014 the complainant stated that he is not obliged to give a reason for wanting the information as a request for information is purpose and applicant blind.

Scope of the case

21. The complainant has told the Commissioner that he is not satisfied that the council has withheld the information.
22. The Commissioner considers that the scope of the request is to determine whether the council is able to rely on regulation 8 of the EIR to request a payment before releasing the information it holds for this request.

Reasons for decision

Is the information Environmental Information

23. Regulation 2(1) of the EIR define environmental information as, among others, information on:
 - (a) *"The states 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;"* and
 - (c) *"Measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors preferred to in (a) and (b) as well as measures or activities designed to protect those elements;"*
24. The requested information that the council has stated it holds, that being heat maps on traffic flow, in the Commissioner's view would fall within the definition of regulation 2(1)(c) as 'measures or activities', likely to affect the elements of the landscape defined in regulation 2(1)(a).

Regulation 8 of the EIR - charging

25. Regulation 8(1) of the EIR states that a public authority may charge for making environmental information available, albeit that there are two important qualifications to this
 - Regulation 8(2) specifies that no charge can be made for accessing public registers or lists of environmental information or for examining the information requested at the place which the authority makes available for that purpose.

- Regulation 8(3) states that a charge may not exceed an amount that a public authority is satisfied is a reasonable amount.
26. Although regulation 8(3) does not offer any assistance as to what is meant by the word reasonable, the Directive, upon which the EIR are based, provides some guidance namely that "as a general rule, charges may not exceed the actual costs of producing the material in question."
 27. The Commissioner viewed the council's list of charges via the link supplied to the complainant following his request. He asked the council to clarify exactly which of the charges was applicable to the information it held to the request and the amount it was to charge.
 28. The council advised that without confirmation from the complainant as to the nature of his request, it would rely on paragraph 1(1)(b) of its charging policy and therefore require a payment of £135 plus VAT from the complainant before making the information available.
 29. The council has advised the Commissioner that paragraph 24 of its charging policy states:

"A market-based charge is considered to be reasonable where the information is made available on a commercial basis and the charge is necessary to ensure such information continues to be collected and published."
 30. The council does maintain that it is willing to release the information free of charge if the complainant confirms that the information will not be used for commercial purposes.
 31. The complainant maintains that requests are applicant and purpose blind, so does not need to confirm what he requires the information for.
 32. The Commissioner on considering this stand-off between the council and the complainant considers that the complainant is correct in that requests under either the FOIA or EIR are applicant and purpose blind.
 33. The Commissioner understands the council's reluctance to provide the information without these assurances, but the fact of the matter is that the complainant is not required to specify why he requires the information under the EIR.
 34. In charging for the information in this case, it appears to the Commissioner that the council has chosen to presume that the complainant requires the information for commercial purposes and therefore requires a payment to be made before releasing the information.

35. The Commissioner considers that if the presumption was that the complainant did not require the information for commercial purposes, then the information would be provided to him free of charge.
36. The Commissioner also notes that on the council's list of charges provided to the complainant under point 1.1(a)(i), for members of the public, it states:

"The first request normally supplied free of charge but minimum charge for additional requests £88 + VAT"
37. The council has confirmed to the Commissioner that this request is his first request to the council for this type of information.
38. On consideration of the above, and without any evidence being presented to the Commissioner that the complainant is requiring the information for commercial purposes, it does not seem 'reasonable', in this case, to charge for the information requested.
39. Therefore the Commissioner's decision is that the council are unable to rely on regulation 8 of the EIR to charge the complainant for the information it holds with regards to this request and should provide the information to him.

Other Matters

40. The code of practice issued under regulation 16 of the EIR (the "EIR code") provides guidance to public authorities as to the practice that would be desirable for them to follow in connection with discharging their functions under the EIR.
41. Paragraph 1 "Training" of the EIR code states:

"All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code in addition to the FOIA and the other Codes of Practice issued under its provisions,

and takes account of any relevant guidance on good practice issued by the Commissioner.”²

42. Having considered the manner in which this request for information, which is the subject of this decision notice, has been handled, the Commissioner has concerns about the way the council has dealt with this request.
43. Requesting to know reasons as to why a complainant requires the information before deciding whether it would be released without charge is clearly outside the spirit of the EIR.
44. The Commissioner expects that, in its future handling of requests, the council will ensure that it follows the recommendations of the EIR code and complies with its obligations under the EIR.

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http://ico.org.uk/~media/documents/library/Environmental_info_reg/Detail_ed_specialist_guides/ENVIRONMENTAL_INFORMATION_REGULATIONS_CODE_OF_PRACTICE.ashx

Right of appeal

45. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

46. 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.
47. 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

Andrew White
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