

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

**Decision notice**

**Date:** 18 December 2017

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

**Decision (including any steps ordered)**

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1. The complainant has requested information on the cost of implementing the Ultra Low Emission Zone (ULEZ). TfL refused to disclose the requested information under regulation 12(4)(d) and 12(5)(e) EIR.
2. The Commissioner's decision is that TfL has incorrectly applied regulation 12(4)(d) and 12(5)(e) EIR in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information to which regulation 12(4)(d) and 12(5)(e) EIR have been applied.
4. 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**

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5. On 9 April 2017 the complainant requested information of the following description:

I requested information on the latest ULEZ proposals from TfL some days ago. As there has been no response, not even an acknowledgement, please consider this a request under the Freedom of Information Act:

I have read the announcement by the Mayor about the latest proposals to extend the ULEZ to all vehicles by 2019 and the associated public consultation, but I cannot find any information on how much these proposals will actually reduce air pollution within the existing Congestion Charge area, or outside it. Neither is there any cost/benefit analysis to be found. In addition there is no information provided on the other proposals mentioned in the latest announcement and their impact on air pollution. Please provide that information.

Could you please also provide the costs of implementing the ULEZ (i.e. the capital cost) and the other proposals and the revenue and profits, i.e. surplus over operating costs in future years, forecast to be obtained by TfL as a result.

Please provide this information or point me to where it can be found as soon as possible.

6. On 10 May 2017 TfL responded. It refused to provide some of the requested information under regulation 12(5)(e) EIR.
7. The complainant requested an internal review on 22 May 2017 as he considers that the information he requested relates to information on emissions and therefore under regulation 12(9) TfL was unable to rely on the exception at regulation 12(5)(e). TfL sent the outcome of its internal review on 11 July 2017. It said that it does not consider that the information requested relates to information on emissions and it upheld its application of regulation 12(5)(e) EIR.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 7 July 2017 to complain about the way her request for information had been handled.
9. During the course of the Commissioner's investigation, TfL additionally applied regulation 12(4)(d) EIR.
10. The Commissioner has considered whether TfL was correct to apply regulation 12(5)(e) or 12(4)(d) EIR.

## Reasons for decision

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### Regulation 12(9)

11. Regulation 12(9) EIR states that, "To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g)."
12. The complainant considers that the requested information in this case, the budget available for the implementation of the ULEZ as well as its projected revenue is information on emissions and therefore TfL is unable to rely upon regulation 12(5)(e) EIR in this case.
13. Regulation 2(1)(b) refers to "any information on ...emissions" and regulation 12(9) will apply to information falling within this definition.
14. Regulation 12(9) will only be relevant where information falls within the definition of environmental information directly under regulation 2(1)(b). In other words it will only apply where information is directly linked to emissions.
15. This interpretation is in line with European Directive 2003/4/EC, Article 4(2) which states that "...Member States may not by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment."
16. This interpretation is also supported by the Advocate General's Opinion in a case concerning Article 4(2) of the Directive, *Ville de Lyon C-524/09*. Advocate General Kokott found that information on the sale of emission allowances was environmental information because licence holders are permitted to release substances and transaction details would allow the public to ascertain who has the right to produce emissions.
17. However he also found that it was doubtful that, "restriction of the exceptions to the right of access under the fourth sentence of Article 4(2) of the Environmental Information Directive is intended to encompass indirect information on emission in exactly the same way as the definition of environmental information. The two provisions have different functions which preclude a uniform interpretation". He went on to say that if the exception regarding confidentiality of commercial or industrial information could not apply to information indirectly linked with emissions then the scope of that exception would be severely restricted as most environmental information can be linked indirectly with emissions.

18. The Commissioner considers that the budget information and projected revenue of implementing the ULEZ is not information directly linked to emissions. This is because it relates to the financial information of implementing an environmental measure designed to reduce emissions but is not information directly on emissions. The Commissioner does not therefore consider that regulation 12(9) EIR prevents TfL from relying upon regulation 12(5)(e) EIR in this case.

### **Regulation 12(5)(e) – commercial confidentiality**

19. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.
20. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
- Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality provided to protect a legitimate economic interest
  - Would the confidentiality be adversely affected by disclosure?

#### *Is the information commercial or industrial in nature?*

21. TfL considers that the withheld information is commercial in nature as it states the budget available for the implementation of the ULEZ as well as its projected revenue. This budget will be indicative of the funds available for the cost of the implementation of the ULEZ and it is currently in discussion with an existing supplier about this work and they are working on their cost estimate.
22. The Commissioner notes that the withheld budgeting information for the implementation of the ULEZ relates to the available funds to pay suppliers for works and she is satisfied that this information relates to a commercial activity (the provision of services).

#### *Is the information subject to confidentiality provided by law?*

23. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the

information was shared in circumstances creating an obligation of confidence.

24. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
25. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
26. TfL said that confidentiality of this information is provided by law. The information is not trivial or in the public domain, and disclosure would cause detriment to TfL's commercial interests, therefore it considers that the common law of confidence applies. It went on that the disclosure of confidential information by employees is covered by TfL policies, including the Business Ethics policy, Discipline at Work policy and TfL Code of Conduct.
27. The Commissioner accepts that, at the very least there is a clear implied obligation of confidence in the withheld information. Furthermore, she notes that there is an explicit understanding between TfL and its staff that the information should be considered to be confidential. In contrast to the section 41 exemption under FOIA, there is no need for public authorities to have obtained the information from another.
28. It is also clear to the Commissioner that the information is not trivial in nature. The Commissioner also understands that the information has not been placed in the public domain.
29. The Commissioner considers that it is reasonable to assume that the information has been shared within TfL in circumstances creating an obligation of confidence. The Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, she is satisfied that the information is subject to confidentiality by law.

*Is the confidentiality provided to protect a legitimate economic interest?*

30. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a

legitimate economic interest of the person the confidentiality is designed to protect.

31. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
32. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probable than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based.

This gives the following guidance on legitimate economic interests:

*"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".*

33. TfL has argued that disclosure of the information would adversely affect its own legitimate economic interests. In relation to the adverse affects, it argued that disclosure would be likely to result in prices which are closer to its own cost estimates (and by inference its likely budgets), rather than a supplier's best price. Therefore disclosure would be likely see the costs to TfL of introducing the ULEZ increase because it's negotiating position would be greatly weakened if and when it tries to appoint a contractor to run the scheme.

### *Conclusion*

34. The Commissioner considers that threshold for the engagement of regulation 12(5)(e) is a high one and, in order for it to be applied, it must be shown that the disclosure of specific information will result in specific harm to the legitimate economic interests of one or more parties. In demonstrating harm, an explicit link needs to be made between specific elements of withheld information and specific harm which disclosure of these elements would cause.
35. In this case TfL has said that disclosure would weaken its negotiating position when and if it tries to appoint a contractor. It has not said that it has definitive plans to appoint a contractor and therefore it appears that the exception has been applied on a hypothetical basis. Furthermore, having viewed the withheld information, the projected budgeting and revenue information appears to be very high level without any breakdown which would be of any significant value to a potential contractor. Furthermore TfL has said that work is ongoing to

refine the estimates for revenue alongside the negotiations on costs and the estimates have changed in the time since the time of the request, it has not provided an explanation as to how a potential contractor could use these high level and outdated figures to their advantage in submitting a presumably much more detailed bid.

36. Having considered the available evidence the Commissioner does not find that she is able to support the council's application of the exception based on such limited rationale. The arguments provided do not warrant the conclusion reached that adverse affects to TfL's economic interests would be more probable than not.

### **Regulation 12(4)(d)**

Regulation 12(4) states that, "For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—  
(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

37. 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 affect in order to engage the exception, but any adverse effects of disclosure may be relevant to the public interest test.
38. 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.
39. In this case TfL has argued that the information is held as part of its policy development around the implementation of the ULEZ. It said that if and when the ULEZ goes live it will be subject to reporting, as it does with the Congestion Charge. It went on that work is ongoing to refine the estimates for revenue alongside the negotiations on costs and the estimates have changed in the time since the original request was submitted. The proposals for the expansion of the ULEZ are still under development and subject to consultation. The operational costs will depend on the detail of the final scheme, which will be decided following a further statutory consultation.
40. The Commissioner would first note that the fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception.

41. Furthermore, data that is incomplete because a public authority is still collecting it will be covered by this, but where an authority is using or relying on data at the time of the request, then it cannot be considered incomplete simply on the basis that it may be modified or amended in the future.
42. In Decision Notice FER0321779, this concerned a request to Basildon Council for information about the eviction of travellers from unauthorised sites. The Council applied regulation 12(4)(d) to a small part of the information – an estimate of the number of mobile homes on the sites. They argued that this was incomplete data because it was an estimate that may be changed in the future. The Commissioner found that the exception was not engaged:

“The Commissioner was not persuaded that an estimate could be said to be “incomplete” information simply by virtue of being an estimate that may turn out to be incorrect in the future or which is subject to change. As far as the Commissioner can see, the information represented the estimation of the contractor based on the information available at that time and in view of this, the Commissioner would regard that estimation as being “complete” information.” (paragraph 51)

43. In this case TfL has confirmed that work is ongoing to refine the estimates for revenue alongside the negotiations on costs and the estimates have changed in the time since the original request was submitted. The withheld information was therefore an estimate which has now been amended. The Commissioner does not therefore consider that it can be classed as incomplete. Furthermore whilst policy development continues in terms of the planned implementation of the ULEZ for April 2019, the withheld figures have now been amended and TfL has not explained the relevance these will have going forwards in terms of the wider policy development.
44. Therefore on the basis of TfL’s submissions the Commissioner does not consider that it has sufficiently demonstrated the exception is engaged.



## Right of appeal

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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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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** .....

**Gemma Garvey**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**