

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

Decision notice

Date: 27 September 2023

Public Authority: Bristol City Council

Address: City Hall
PO Box 3399
Bristol BS1 9NE

Decision (including any steps ordered)

1. The complainant requested information about a proposed Traffic Regulation Order. Bristol City Council (the "council") disclosed some information and withheld other information under the exception for internal communications (regulation 12(4)(e)).
2. The Commissioner's decision is that the council initially wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14; that it failed to respond to the request in time and breached regulation 5(2) and regulation 11(4) but that it correctly withheld some information under regulation 12(4)(e) and correctly confirmed that additional information was not held in accordance with regulation 12(4)(a).
3. The Commissioner does not require the council to take any steps.

Background

4. The council has confirmed that, in 2021, a Traffic Regulation Order (TRO) was put in place to close the southern end of University Road in the centre of Bristol. In 2023, the Bristol Mayor's Office instructed the City Transport team to put forward a proposal to reopen the southern end of University Road, which would require a further TRO to be issued.
5. In April 2023 the council published "statement of reasons" relating to the grounds for the proposed TRO which stated "Whilst it is acknowledged that prioritising motor traffic is not in line/in accordance with current local and national policy/traffic hierarchy; the Administration considers it is justifiable at this location".
6. The council has confirmed that, at the time of the request and at the time of the issuing of this decision notice, no decision regarding this matter and no corresponding TRO had been issued and that the issue, therefore, remained live.

Request and response

7. On 20 April 2023 the complainant submitted the following request to Bristol City Council (the "council") :

"I am aware that the Council has proposed removing the modal filter from University Road and reopening the southern end of University Road to all traffic at the junction with Queen's Road.

According to the Statement of Reasons for the proposed change, which can be found at <https://www.bristol.gov.uk/files/documen...>, the Administration acknowledges that prioritising motor traffic conflicts with current local and national policy on traffic hierarchy. However, you apparently still believe that it is justifiable at this location.

In light of the proposed changes, I request the following information:

1. Could you please explain why you consider it justifiable to act outside of the current local and national policy on traffic hierarchy in this particular case?
2. What has changed since the Council's decision last year to close the southern end of University Road to motor vehicles based on the benefits of uninterrupted pedestrian priority at this location?

3. What requests have the Council received to reopen University Road to all traffic? Please provide copies of any relevant correspondence, with personal information redacted.
4. What (internal and external) consultation has the Council conducted prior to formally publishing this proposal? Please provide copies of any relevant correspondence, with personal information redacted."
8. The council responded on 26 May 2023 but did not provide all the requested information.
9. On 26 May 2023 the complainant asked the council to carry out an internal review, directing it to properly respond to each part of their request.
10. On 26 July 2023 the council provide its internal review response. This stated that it considered that parts 1 and 2 of the request sought an opinion rather than recorded information and were not, therefore, valid. In relation to part 3, the council did not directly address this. The council confirmed that it was withholding the information in part 4 of the request under the exception for internal communications (regulation 12(4)(e)).

Scope of the case

11. On 18 July 2023 the complainant contacted the Commissioner to complain about the council's handling of their request.
12. The Commissioner has considered whether, in relation to parts 1-3 of the request, the council complied with the duty to provide information under regulation 5. He has also considered whether the council correctly applied the exception in regulation 12(4)(e) to the information in part 4 of the request.

Reasons for decision

Access regime

13. The council initially handled the request under the FOIA but revised its position at the internal review stage, issuing a new response under the EIR.
14. In this case the requested information relates to a measure regarding a road. In keeping with regulation 2(1)(c), the Commissioner considers, therefore, that the information can be considered to be a measure

affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").

15. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard.

Regulation 5 – Duty to provide environmental information

16. Regulation 5(1) states:

"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.

17. Regulation 5(2) 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."

18. Regulation 12(4)(a) provides an exception to the duty to provide information where an authority does not hold that information when an applicant's request is received.
19. The Commissioner recognises that requests for information can sometimes take the form of questions seeking an opinion about or 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 course of business and provide responses in line with normal customer service standards.
20. However, when it becomes clear that a complainant is dissatisfied with such an approach, authorities should ensure that their responses explicitly confirm or deny whether any related recorded information is held.

Request part 1 and 2

21. In relation to parts 1 and 2 of the request, the council has acknowledged to the Commissioner that its responses failed to comply with these obligations and that it failed to carry out searches for relevant information.

22. The council has stated that it recognises that in question 1 the requester is seeking justification for the decision to put forward a proposal to reopen University Road. With regard to question 2, the council considers it is reasonable to interpret question 2 as a reframing of question 1 (i.e. the requester is seeking justification for the proposal) with the added element of specifying that the justification should identify the change in circumstances between the proposal to reopen the road and the previous TRO which closed the road. The council has acknowledged that, whilst is under no obligation to generate new information to justify the proposal, it should have considered if any information was already held which could have answered these questions.
23. The council confirmed to the Commissioner that its City Transport team is the part of the council responsible for issuing TRO proposals and any associated work related to them, including running the statutory consultation which takes place following publication of a proposal. It confirmed that no other part of the council is involved in the TRO process.
24. The council confirmed that, therefore, the only two parts of the council where relevant information would be held are the Mayor's Office and the City Transport service. In light of this, the council carried out searches of the inboxes and drives of relevant officers from the Mayor's Office and the City Transport service using the search terms (not case-sensitive): "university road" AND ("re-open" OR "re-opening" OR "reopen" OR "reopening").
25. The council has stated that its searches identified 2 emails which contain comments that present a rationale for the proposal and/or address the question of 'what has changed' since the previous TRO which closed the road. The council disclosed this information to the complainant during the Commissioner's investigation.

Request part 3

26. The council confirmed to the Commissioner that any requests to re-open University Road would have been made or directed to either the Mayor's Office or the City Transport service, and would be a factor in the consideration of the TRO proposal. As such, the council explained, if the information had existed it would have already been known to the City Transport service and readily available as part of the TRO process. The council explicitly confirmed to the Commissioner that senior staff from both the Mayor's Office and the City Transport service have confirmed that no such requests were received. The council's position, therefore, is that the requested information is not held.

Conclusions

27. As noted above, the council disclosed information falling within parts 1 and 2 of the request during the Commissioner's investigation and confirmed that no further information was held. In relation to part 3 of the request the council confirmed during the Commissioner's investigation that it did not hold any relevant information.
28. Having considered the above the Commissioner has concluded that, in relation to any outstanding information falling within the scope of request parts 1-3, the council has correctly confirmed that the information is not held and that regulation 12(4)(a), therefore, applies.
29. However, in failing to address these parts of the request within the statutory time limit, the council breached regulation 5(2).

Regulation 14 – refusal to disclose information

30. 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.
31. 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 which confirmed that (as provided by regulation 12(4)(a)) information was not held within the time limit set.

Regulation 12(4)(e) – internal communications

32. Regulation 12(4)(e) provides that information is exempt from disclosure if it involves the disclosure of internal communications.
33. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
34. The Commissioner has viewed the withheld information, which consists of emails between council officers, and he is satisfied that it constitutes internal communications and that it, therefore, falls within the scope of the exception. He has gone on to consider the public interest test required by Regulation 12(1)(b).

Public interest in disclosure

35. The council has acknowledged that there is a recognised public interest in transparency and accountability to aid understanding in the council's policy and decision-making process.
36. The council has further recognised that there is a legitimate public interest in understanding how it handles TRO proposals.
37. As stated in the wording of their request, and acknowledged in the council's own "statement of reasons" (see paragraph 5 above) the complainant notes that the proposed TRO conflicts with current local and national policy on traffic hierarchy. If it is the case that the council's proposal is not consistent with wider policy, there is, therefore, an enhanced public interest in understanding the reasons for the council's approach in this matter.

Public interest in maintaining the exception

38. The council has confirmed that no decision has been yet made regarding the TRO proposal. The council has explained that a notice of making an order, if such a decision is made, will be made in the usual manner and published once the process is complete.
39. The council confirmed that in April 2023 it made public a notice of the proposed TRO and a statement of reasons and invited those objecting to submit objections which would be considered ahead of any decision. The council confirmed that this period of public consultation ran until 17 May 2023. The council considers that these measures satisfy the public interest in facilitating engagement with the decision making process.
40. The council has argued that it requires a safe space in which to reach decisions on TROs and other proposals of this nature. The council has suggested that this can be considered as a general principle whereby it is entitled to a space away from external commentary to develop proposals, formulate policy, or reach decisions.
41. The council has suggested that disclosure of the requested information ahead of the TRO decision notice will certainly attract premature scrutiny and that this will have the effect of interfering with and interrupting live, ongoing work and would constitute an unreasonable diversion of resources.
42. The council has also cited the "chilling effect" as a rationale for withholding the information and argued that free and frank internal debate is an essential element of the success of traffic regulation orders. It has argued that disclosing the withheld information would cause hesitation and reservation by contributors in future freely contributing.

The same contributors who will likely be again called upon to assist in addressing any unexpected issues arising in actually delivering the TRO on behalf of the council, So the quality of the advice and information in the drafts, and hence the quality of decision making, would suffer.

43. The council has additionally argued that publishing incomplete, non contextualised or unfinished information would be misleading, create an inaccurate representation of issues relating to the delivery of any TRO and distract public debate.

Balance of the public interest

44. The Commissioner considers that there is no automatic public interest in withholding information just because it falls within this class-based exception. Neither should there be a blanket policy of non-disclosure for a particular type of internal document. Arguments should always relate to the content and sensitivity of the particular information in question and the circumstances of the request.
45. In balancing the public interest arguments in this case the Commissioner has given due weight to the position public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. However, it is open to the Commissioner to consider the severity and extensiveness of any harm that disclosure might cause to such a safe space, or, in relation to the extent of any 'chilling effect' which the possibility of future disclosure might have on council staff's willingness to contribute uninhibited and robust advice.
46. The Commissioner considers that the need for a safe space will be strongest when an issue is still "live". Once a public authority has made a decision, a safe space for deliberation will no longer be required and the public interest is more likely to favour disclosure.
47. The Commissioner accepts that there is a general public interest in public engagement in planning processes, particularly where they relate to policies which impact on the local environment. However, except in cases where there are specific concerns that sufficient information is not being made available or where there is evidence of malpractice, the Commissioner does not consider that this general interest justifies bypassing information disclosures made outside the statutory planning regime.
48. In relation to the council's own admission that the proposed TRO does not align with current policy, the Commissioner recognises that this provides legitimate grounds for public concern. However, the Commissioner is mindful that the consultation process provides a forum for such concerns to be raised. In addition, a decision about whether the

TRO will be issued has not been made and the Commissioner considers that disclosure at this time would be likely to inhibit the process of deliberation by requiring the council to redirect resources to the fielding of enquiries about a position that has not yet been finalised.

49. Whilst the Commissioner accepts that disclosure of the information might well aid transparency he considers that this would be to the detriment of the ongoing deliberation process which the withheld information records. In short, there is a stronger public interest in the council being able consider the available options in this matter in order to inform a stronger decision making process. He also considers that the disclosures already made by the council in relation to this matter and the consultation process provide opportunities for public engagement. This is in keeping with previous decisions made by the Commissioner in comparable cases¹.
50. For the reasons set out above the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure and he therefore accepts that information should be withheld.

Regulation 11 – internal review

51. Regulation 11 sets out the responsibilities of public authorities in relation to complaints about the handling of requests (“internal reviews”)
52. Regulation 11(4) states:

“A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.”
53. In this case the complainant requested an internal review on 26 May 2023 and the council sent its internal review response on 26 July 2023.
54. The Commissioner has, therefore, concluded that the council breached regulation 11(4).

¹ See, for example: <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023180/ic-145733-n1s0.pdf>

Other matters

55. Although they do not form part of this notice the Commissioner would like to note the following matters of concern.

Request handling

56. The Commissioner considers that the council's handling of this request falls short of its statutory obligations under the EIR and does not confirm to recommended practice.

57. In the Commissioner's view, if the council had handled the request properly, it is likely that the complainant would not have needed to submit a complaint to the Commissioner and all parties would have been spared the additional time and effort needed to resolve the matter.

58. In future the Commissioner expects that the council will ensure it complies with the EIR and follows the good practice recommendations set out in the code issued under regulation 16².

² https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

Right of appeal

59. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

60. 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.

61. 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

Christopher Williams
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