

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

Decision notice

Date: 19 October 2020

Public Authority: Essex County Council
Address: PO Box 11
County Hall
Chelmsford
Essex
CM1 1QH

Decision (including any steps ordered)

1. The complainant requested information regarding the costs of repainting road markings in a particular location. Essex County Council (the Council) stated that it did not hold the requested information. However, in an attempt to assist the complainant it provided him with information which it created in response to the request.
2. The Commissioner's decision is that, on the balance of probabilities, the Council did not hold the requested information.
3. The Commissioner does not require the Council to take any steps as a result of this notice.

Request and response

4. On 19 July 2019, the complainant wrote to the Council and requested information in the following terms:

"Please could you tell me under the freedom of information act the cost or estimated cost of relining Skitts Hill area of braintree after

the lining done at the end of June is obliterated by the resurfacing to be carried out soon by Essex county council and Ringway Jacob's."

5. The Council responded on 31 July 2019. It stated that it did not hold the requested information.
6. The complainant requested an internal review on 27 November 2019.
7. On 8 January 2020 the Council provided the outcome of its internal review. It maintained its original position and stated:

"While we don't have a document giving separately the cost of re-lining the Skitts Hill area of Braintree, I am told by the surfacing manager that the approximate cost of that part of the lining operation on the scheme would be £4,000 (four thousand pounds). He makes that calculation from the whole cost of the lining work divided approximately into sections based on the lengths of each road. I trust that is helpful to you."

Scope of the case

8. The complainant contacted the Commissioner on 14 January 2020 to complain about the way his request for information had been handled. He argued that the information was not complete or accurate.
9. The Commissioner wrote to the complainant on 12 and 19 May 2020 to clarify the scope of the complaint. The Commissioner explained that her role was limited to assessing whether or not the Council had complied with the FOIA or EIR. The Commissioner confirmed that she would be able to investigate whether the Council held further information that fell within the scope of his request. However, she explained that it was not within her remit to address his concerns about the accuracy of any information provided by the Council.
10. The complainant continued to raise concerns about the accuracy of the information, despite the Commissioner's clarification that she was not able to address such concerns.
11. The Commissioner wrote to the complainant on 27 May 2020 to inform him that the focus of her investigation would be to determine whether the Council handled his request in accordance with the FOIA/EIR and, specifically, whether the Council had provided all of the relevant information it held.

12. The scope of this case and the following analysis is to consider whether, on the balance of probabilities, the Council held any information within the scope of the request.

Reasons for decision

Regulation 2 – Is the requested information environmental?

13. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA.
14. Regulation 2(1)(c) of the EIR defines environmental information as any information on "*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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements.*"
15. The request in this case is for the costs of repainting lines on the road. The Commissioner is satisfied that the requested information is on a measure that would or would be likely to affect the elements listed in regulations 2(1)(a) and is, therefore, environmental under regulation 2(1)(c).

Regulation 5(1)/Regulation 12(4)(a) – Information held/not held

16. Regulation 5(1) of the EIR states that "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.
17. Regulation 12(4)(a) of the EIR provides that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
18. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information was not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that the requested information was not held.
19. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of

the balance of probabilities. This is in line with the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities.

20. It is also important to note that the Commissioner's remit is not to determine whether information should be held, but only whether, on the balance of probabilities, the requested information was held by the Council at the date of the request.

The Council's view

21. In her correspondence to the Council the Commissioner explained her approach to investigating cases where there was a dispute about the amount of information held by a public authority. She asked the Council to provide detailed representations in support of its position. In line with her standard approach the Commissioner asked the Council various questions, including questions regarding the searches it undertook to locate the information.

22. The Council stated:

"We found the traffic order which occasioned the original painting of lines on Skitts Hill, which is 'Skitts Hill, Braintree/Temporary Waiting Restriction Order 2019'. However, there is nothing else we can search as we know there was no separate cost calculated anywhere for the cost of re-painting the lines on Skitts Hill which is why we gave an estimate of £4,000 based on a proportionate cost of all the lining carried out at that time on the surfacing work on several roads as one scheme of machine surfacing work. Costs are not apportioned or held at road level. Our original response that the data was not held is correct as we do not hold the information requested at road level, simply at the higher scheme level."

23. The Council confirmed that there was no business requirement for the Council to hold the data at the level requested. It explained that work was not dealt with "per road" but "per scheme" which, in this case, included the other nearby roads which were resurfaced at the same time.
24. The Council stated that it accepted that it was "*far from ideal that the road was painted twice in a short space of time. The cost of that re-painting of lines was at most £4,000 and the inquirer is of course free to draw any conclusions he wishes from this information*". It went on to say

that with hindsight perhaps it would have been better not to have provided the complainant with a probable cost, but that it was trying to be helpful.

The Commissioner's decision

25. The Commissioner's role is to make a decision based on whether recorded information was held by the Council.
26. It is important to highlight that both the FOIA and EIR provide access to information which is held in recorded form by a public authority. A public authority is not required to create information in order to satisfy a request for information.
27. In his correspondence to the Commissioner, the complainant raised several concerns regarding local road traffic safety and the Council's spending of public money. It is the complainant's belief that road markings were painted in the knowledge that the roads were due to be resurfaced and would therefore have to be painted again. He alleged that this was a waste of public money. However, it is outside the Commissioner's remit to make any judgement on those issues.
28. While the Commissioner recognises that the requested information is of interest to the complainant in order to support his wider concerns, there is no evidence to suggest that the specific information he requested was held by the Council.
29. The Commissioner has considered the representations made to her by the Council regarding this complaint. She finds the Council's explanations as to why it did not hold the information to be credible. The Commissioner accepts that Council did not hold this type of information at the level requested by the complainant.
30. The Commissioner is satisfied that, on the balance of probabilities, the Council did not hold the requested information. The Commissioner considers that the Council complied with the requirements of regulation 5(1) of the EIR and that regulation 12(4)(a) was engaged.

Right of appeal

31. 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@justice.gov.uk

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

32. 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.
33. 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

Ben Tomes
Team Manager
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Wycliffe House
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