

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

**Decision notice**

**Date:** 19 October 2020

**Public Authority:** Braintree District Council  
**Address:** Causeway House  
Bocking End  
Braintree  
CM7 9HB

**Decision (including any steps ordered)**

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1. The complainant requested information regarding the costs of repainting road markings in a particular location. Braintree District Council (the Council) initially stated that it did not hold the requested information. It revised its position after an internal review and disclosed some information.
2. During the course of the Commissioner's investigation, the Council confirmed that the requested information was not held and that the information which it disclosed had been created in order to respond to the request and to assist the complainant.
3. The Commissioner's decision is that, on the balance of probabilities, the Council did not hold the requested information.
4. The Commissioner does not require the Council to take any steps as a result of this notice.

## Request and response

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5. On 13 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."*

6. The Council responded on 6 August 2019 and confirmed that it did not hold the requested information. It explained that the work was commissioned by the North Essex Parking Partnership (NEPP) and advised the complainant to submit his request to Colchester Borough Council, the administrators of the NEPP.

7. The complainant requested an internal review on 27 November 2019.

8. On 23 December 2019 the Council provided the outcome of its internal review, in which it revised its position. It disclosed the following information:

*"The cost of marking the yellow lines that were required by the Temporary Traffic Regulation Order requested by Braintree District Council was a total of £518.70. The cost of lining was £0.70 per linear metre."*

## Scope of the case

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9. The complainant contacted the Commissioner on 28 December 2019 to complain about the way his request for information had been handled. He raised various concerns regarding the Council and argued that the information provided was not complete or accurate.
10. The Commissioner wrote to the complainant on 12 and 19 May 2020 to clarify the scope of his 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.

11. 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.
12. 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.
13. During the course of the Commissioner's investigation it became clear that the Council had created information in order to assist the complainant.
14. 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**

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### **Regulation 2 – Is the requested information environmental?**

15. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA.
16. 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.*"
17. 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**

18. 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.

19. 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.
20. 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.
21. 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.
22. 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**

23. 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.
24. In its initial submission, the Council explained that it contacted Colchester Borough Council, the lead authority for the NEPP, to obtain the information. It stated:

*"The Council does not have access to Colchester Borough Council's systems or manual records and relied upon the information provided in response to the Council's enquiries to be accurate and*

*that their records have been searched appropriately to reveal the information held which was relevant to the request."*

25. The Council also told the Commissioner that it did not hold the requested information.
26. Based on the Council's initial submissions, the Commissioner was unable to reach a decision and she contacted the Council again for further information. The Commissioner asked the Council to clarify whether its position was that the requested information was held on its behalf by Colchester Borough Council. She also asked the Council whether its position was that the information it had provided to the complainant was already held in recorded form or whether it was created for the purpose of responding to the request.
27. In order to respond, the Council provided some background information regarding its involvement in the relining work, which was the subject of the request. It explained:

*"Braintree District Council applied to the NEPP (North Essex Parking Partnership) for a Temporary Traffic Regulation Order (TTRO) to introduce waiting restrictions to alleviate parking issues which were occurring in the Skitts Hill Area of Braintree.*

*Although the application was made by Braintree District Council (a partner of NEPP), the decision to make the TTRO was by the NEPP. The TTRO was made by and the works were carried out by Colchester Borough Council as the Lead Authority for the NEPP.*

28. The Council stated that the lining works were part of a larger contract and that there was not an individual invoice that related specifically to repainting the lines.
29. The Council confirmed that the figure of £518.70 was not held in a recorded form by the NEPP and was created by a member of staff in order to respond to the request and to assist the complainant. It stated:

*"In the absence of an invoice, to establish the costs of the TTRO lining, measurements were taken from the design plan for the TTRO (attached for information) and the costs were calculated based on £0.70 per metre, the cost that NEPP were charged. £0.70 per metre was the cost for the standard yellow lines that were used.*

*Although the applicant for the TTRO, Braintree District Council, did not hold the information about the costs associated with the TTRO including the highway markings (lining) and Colchester Borough Council (as the Lead Authority for NEPP) would not have held this information on behalf of Braintree District Council."*

### **The Commissioner's decision**

30. The Commissioner's role is to make a decision based on whether recorded information was held by the Council.
31. 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 at the time a request is submitted. A public authority is not required to create information in order to satisfy a request for information.
32. 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.
33. 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.
34. The Commissioner has considered the representations made to her by the Council regarding this complaint. She finds the Council's explanations as to why the information is not held to be credible.
35. 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

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36. 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](mailto:grc@justice.gov.uk)

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

37. 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.
38. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**