

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

**Decision notice**

**Date:** 19 October 2020

**Public Authority:** Colchester Borough Council

**Address:** Rowan House  
33 Sheepen Road  
Colchester  
CO3 3WG

**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. Colchester Borough Council (the Council) initially stated that it did not hold the requested information. However, it disclosed information to the complainant in its internal review response.
2. During the course of the Commissioner's investigation, the Council confirmed that the requested information was not held and that it had created information 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 18 July 2019 and confirmed that it did not hold the requested information. It advised the complainant that the information was available from Essex County Council.
7. The complainant requested an internal review on 27 November 2019.
8. On 6 January 2020 the Council provided the outcome of its internal review. The Council did not uphold its original response of 18 July 2019. Instead, it referred to an email sent to the complainant on 25 July 2019 by the North Essex Parking Partnership (NEPP), in which information was disclosed to the complainant. The Commissioner understands that the Council is the lead authority for the NEPP, which is a service responsible for the provision of parking operations throughout the six districts across North Essex. Specifically, the Council stated:

*"I have reviewed the answer provided to you in the email dated 25 July 2019 from NEPP to yourself when it was confirmed that the lining of Skitts Hill cost a total of £518.70 (at 70 pence per metre). This figure is related to both of your questions.*

*Accordingly the council has answered your questions."*

## Scope of the case

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9. 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 accurate.
10. 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.

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 regulation 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. The Commissioner also asked the Council to clarify the relationship between the Council and the NEPP and, in particular, how this impacted the handling of requests for information.
25. The Council stated:

*"NEPP is a service provided by Agreement with Essex County Council. The lead authority for the entire partnership is Colchester Borough Council, based at Colchester. The partnership is governed*

*by a joint committee between Essex County Council and 6 district councils in North Essex. One of the partner authorities is Braintree District Council*

*NEPP is responsible for provision of Parking Operations – parking patrols, permits, machines, the maintenance of lines, signs and parking restrictions, and the implementation of certain types of restrictions on the highway, throughout the six districts across the North Essex.*

*The responsibility for all other maintenance of the highway – such as resurfacing and reinstatement – remains with Essex County Council and provided under a separate Agreement with their contractor, Ringway Jacobs.*

*For cases where a new parking restriction is implemented Councils have a duty (under paragraph 4 of the Road Traffic Regulation Act 1984) to inform the motorist of its presence – in the case of a 'no waiting' restriction, this would normally be a system of double yellow lines in the carriageway along the kerbside.*

*All NEPP FOI/EIR requests are dealt with in accordance with the Council's central FOI/EIR case management system."*

26. With regard to the searches it undertook, the Council stated that the Commissioner's questions were of little relevance as the details of resurfacing and relining of the area in question had never been held by the Council. However, it went on to say that "*the only relevant information in this case was the cost of re-lining following resurfacing which the Council answered with the information it held.*"
27. Based on the Council's initial submissions, the Commissioner was unable to reach a decision. She contacted the Council again to ask it for further information regarding its position.
28. The Council clarified that it did not hold the information. It explained that the NEPP implemented a new parking restriction on several parts of the road in question and adjacent roads and, therefore, painted lines on these roads. Essex County Council subsequently carried out resurfacing works which affected part of this scheme and repainted some of the lines as a result.
29. The Council told the Commissioner that it created an estimate of the cost of the work completed by Essex County Council, based on what it would have costed the NEPP to paint the lines, multiplied by the amount of kerbside to cover. It confirmed that this was calculated especially to respond to the request.

30. Ultimately, it was the Council's position that it did not hold the information and had created it in order to assist the complainant.

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

31. The Commissioner's role is to make a decision based on whether recorded information was held by the Council.
32. 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.
33. 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 is a waste of public money. However, it is outside the Commissioner's remit to make any judgement on those issues.
34. 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.
35. The Commissioner has considered the Council's representations in this case. She finds that the Council's explanations as to why it did not hold the information to be credible.
36. The Commissioner notes that the Council was trying to assist the complainant by creating information to respond to his request. However, the Council was not obliged to create information in order to respond to the request and, in doing so, it has confused matters.
37. 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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38. 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)

39. 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.
40. 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**  
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