

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 19 February 2024

Public Authority: London Borough of Barking and Dagenham

Address: Civic Centre
Dagenham
Essex
RM10 7BN

Decision (including any steps ordered)

1. The complainant has requested information about road works. The London Borough of Barking and Dagenham ("the Council") provided a narrative response but stated that it did not hold recorded information within scope of the request.
2. The Commissioner's decision is that the Council does not hold recorded information within scope of the request.
3. The Commissioner does not require further steps.

Request and response

4. On 25 July 2023, the complainant wrote to the Council and requested information in the following terms:

"We are aware that BeFirst carried out works to change the road layout at the junction of Choats Road and Northgate Road (map and drawing below) sometime in 2017. The works included widening Choats Road and adding a new bell-mouth junction where Northgate Road meets Choats Road.

As part of those works the utility companies' apparatus that was buried

in the footway to the south of Choats Road had to be moved to accommodate the new road layout. In connection with these works, please can you:

1. Confirm when BeFirst¹ laid cable ducts for BT Openreach to the south of Choats Road;
 2. Confirm when BT Openreach was on site at this location as part of this project;
 3. Confirm when BT Openreach moved their cables at this location; and
 4. Provide any available as built drawings of BT Openreach apparatus installed as part of this project.”
5. The Council responded on 7 August 2023. It stated that it did not hold information within scope of the request.
6. Following an internal review the Council wrote to the complainant on 11 October 2023. It stated that:

“I have reassessed your case and after careful consideration and further enquiries made, I have concluded that the original response provided to you was partially compliant under the requirements of the FOIA.

We can confirm that there was no s278 agreement for work in this location as the Council carried out the work on the highway. The traffic signal junction was built by LBB/Jacob Ringways on behalf of BRL [Barking Riverside Limited]. Therefore you should contact them directly for the information you require.”

7. On 16 October 2023 the complainant contacted the Council to request clarification of their internal review response:

“You have now confirmed that the council/Ringway Jacobs carried out these works, albeit on behalf of BRL. My request is for the council's/BeFirst's information, not BRL's. I understand from our FOI team that it is inappropriate and non-compliant with the Act to simply refer me on to BRL in these circumstances.

Following your confirmation that these were the council's works, please can you confirm whether the council holds the information requested? If not, please can you provide an explanation as to why the council does not hold these records for the works it carried out. Where works are

¹ BeFirst is a limited company wholly owned by the London Borough of Barking and Dagenham, and works in partnership with the Council to deliver development and regeneration projects: <https://befirst.london/wp-content/uploads/2023/04/Social-Value-Report-final-final-digital.pdf>

carried out on TfL's road network, there is a central register recording who has access to a particular work site, including the dates of the works. I would expect the council to hold similar records as well as the as built drawings.”

8. The Council responded the same day, explaining that it had consulted BeFirst and concluded that neither the Council nor BeFirst held information within scope of the request as they didn't commission the works. The Council stated that BRL owned the land where the works were taking place and had commissioned the works while developing the site.
9. The complainant contacted the Council on 25 October 2023 to further clarify its response. The complainant argued that, as the Council had stated that it had built the traffic signal junction on behalf of BRL it follows that it must hold information relating to the works.
10. On 15 November 2023 the Council responded in the following terms:

“The original FOI request was asking if we hold this information (regarding BT apparatus) and what apparatus exists. As Barking Riverside constructed the junction as part of their development and any associated information relating to British Telecom apparatus is down to BT, we simply do not hold this information. This has been explained in our last reply. In addition, any BT apparatus that existed at the time of construction is now probably not accurate, as companies like BT constantly update their plant and what we advise existed several years ago, will not necessarily reflect what exists now. In addition, even if by chance we had been issued this information by Barking Riverside, it would have been stored on the councils historic S:Drive, which was wiped some years ago, when this drive was taken out of action.”
11. On 29 November 2023 the complainant wrote to the Council to remind it that their request had been for information about when BT Openreach had been at the site. The complainant explained that they expected the Council to hold this information on account of its internal review response of 11 October 2023 and because of expectations of its record keeping as a highway authority. The complainant asked the Council to clarify whether all information it held within the scope of all parts of the request had been destroyed when its S:Drive had been wiped.
12. As of the date of this notice the Council has not responded to the complainant's correspondence.

Scope of the case

13. The complainant contacted the Commissioner on 16 October 2023 to complain about the way their request for information had been handled.
14. The Commissioner understands the complainant's position to be that they believe the Council must hold information within scope of the request as it had carried out works at the junction of Choats Road and Northgate Road on behalf of the company Barking Riverside Ltd, per the narrative provided by the Council in its internal review of 11 October 2023.
15. The Commissioner considers that the scope of his investigation is to determine whether the Council holds information within scope of the complainant's request.

Reasons for decision

Is the requested information environmental?

16. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) 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 (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
17. Although he has not seen the requested information, as it is information relating to road works, the Commissioner believes that the requested information is likely to be information on the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 12(4)(a) – information not held

18. Regulation 12(4)(a) of the EIR states 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.”
19. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.

The Council’s position

20. The Commissioner wrote to the Council to query the searches it had undertaken when responding to the request.
21. The Council explained that the works referred to by the complainant in their request² were not carried out by BeFirst:
- “I understand that this statement was incorrect. Be First did not undertake this work, as confirmed by the manager in charge of Be First’s capital team, who would have been aware if their team was undertaking these works, especially as they would have been charging a fee for their involvement.”

² “We are aware that BeFirst carried out works to change the road layout at the junction of Choats Road and Northgate Road (map and drawing below) sometime in 2017). The works included widening Choats Road and adding a new bell-mouth junction where Northgate Road meets Choats Road.”

22. The Council continued to explain that, in the time since receiving the complainant's request, BeFirst had met with colleagues from its Highways team and Capital team, including a civil engineer who would have had oversight of the type of works described in the request, and had concluded that it had never had any involvement in the project. Consequently, the Council was maintaining that information within scope of the request was not held.
23. In terms of internal searches it had undertaken, the Council stated its Highways team had checked their system and had not identified BT Openreach for street works in the location specified in the request between 2014 and 2019. BeFirst had also checked its systems, monthly team reports and hard copy material. The searches did not produce information within scope of the request.
24. The Council also provided the following context:

"At the time there were two elements of work taking place to the Barking Riverside site that the Council were involved in. The first was the new Barking Riverside School that was being constructed and this was on the other side of the site. The Second was the new Drovers Road project that was passing through the middle of the site, but the works were being managed by the Council's Capital Works Team, who were involved in constructing the roadway up to a point short of the Choats Road junction. The construction of the junction then fell to Barking Riverside to undertake as part of a later phase of works. Any searches were in relation to this "Drovers Road" project and no other title because nothing else existed on the site (which was constructed at the time on new ground). In addition, emails have been searched between 2016-2018 and no information has been located."
25. The Commissioner asked the Council whether any recorded information was ever held relevant to the scope of the complainant's request but deleted or destroyed, as the request dates to events taking place over six years ago.
26. The Council explained that, had information been held but subsequently deleted, then it would most likely have been due to individual staff deleting emails. The Council stated that it was unlikely that all staff likely to have held information within scope would have deleted recorded information.
27. With regard to whether there is a business or statutory requirement to retain information relevant to the scope of the request, the Council explained the following:

"All utility information is valid for a period of up to 6-months and is purely an indication, so if the information was held, there wouldn't have

been a need to retain it after this period...

Be First have confirmed that following meetings with the team, that there is no statutory requirement to keep it, especially due to the fact it relates to historic utilities layouts that could have been updated every six months.

I understand that it is possible that the works could have been carried out on a junction which was designated private land and that still remains a private road, and as such falls outside the statutory responsibilities of the Public Highway Authority and Permitting requirements, which would not have been necessary, with a private arrangement between contractors BT and BRL developments undertaken."

The Commissioner's position

28. The Commissioner considers that the basis of the complaint is grounded in confusion arising from the Council's internal review, in which it states that "LBBD/Ringway Jacobs" built a traffic signal junction "on behalf of BRL" but does not explain which team or department within the Council was involved in the works. This therefore invites speculation as to whether BeFirst, as a company wholly owned by the Council ("LBBD") were, in fact, involved in the project. According to its website, BeFirst have previously been involved in transport and infrastructure improvement projects³ around the area specified by the complainant.
29. However, per the explanations provided at paragraphs 23 and 25 above, the Commissioner understands that the Council's Capital Works Team were involved in construction up to a point prior to the Choats road junction, and that the new junction referred to by the complainant in their request was built by a third party (BRL) on land owned by that third party. Put simply, BeFirst were not involved in the project at all, and therefore neither the Council nor BeFirst holds information within scope of the request.
30. The Commissioner also recognises that there is some ambiguity surrounding whether the Council was ever in possession of information within scope of the request that may have been provided by BRL, which arises from the response given to the complainant at paragraph 12 above. However, per the explanation given at paragraph 29, the Commissioner understands that even if information within scope had been provided by BRL, the Council was not under a statutory obligation to retain it and probably would not have retained it for a period longer

³ <https://befirst.london/project/>

than six months. Furthermore, the Council has already explained to the complainant that the drive location where information would have been likely to be held was decommissioned. On this basis the Commissioner considers it unlikely that the Council holds information provided by BRL.

31. The Commissioner cannot disregard the possibility of that information within scope of the request had, at one point, been held by the Council and subsequently lost or destroyed, however he has not been presented with any evidence by the complainant or the Council to suggest that this is, in fact, the case.
32. In respect of the searches undertaken by the Council, as outlined at paragraphs 25 to 29 above, the Commissioner considers that they were reasonable, proportionate and would have been likely to uncover any information within scope of the request, further to the narrative response which has already been provided.
33. Based on the above, the Commissioner is satisfied that the Council does not hold information within scope of the request. Per paragraph 3 above he does not require any further steps.

Right of appeal

34. 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

35. 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.

36. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF