

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

Date: 16 August 2021

Public Authority: Luton Borough Council
Address: Town Hall
George Street
Luton
Bedfordshire
LU1 2BQ

Decision (including any steps ordered)

1. The complainant has requested information regarding Luton Borough Council's (the council) leasing of some land for a telecommunications mast.
2. The council provided some information in scope of the request, and denied holding the remainder.
3. The Commissioner's decision is that, on the balance of probabilities, the council does not hold any further information within the scope of the request. However the Commissioner finds that the council breached regulations 5(2) and 14(2) in its handling of the request.
4. The Commissioner does not require any steps.

Request and response

5. On 5 July 2020 the complainant wrote to Luton Borough Council ('the council') and requested information in the following terms:

"Information regarding Arqiva Telecommunications Mast, [Redacted Address], Luton of which Luton Borough Council is Landlord.

- 1) A copy of the current lease granted to Arqiva by Luton Borough Council.*
- 2) A copy of the latest structural survey of the almost 50 year old mast.*
- 3) A copy of the latest RF emissions survey carried out for the site and surrounding area.*
- 4) A copy of the latest inventory of apparatus installed at the site"*

6. The council responded on 15 July 2020, in relation to each question:

[1] the council advised that the information is available from the Land Registry, but did not advise whether it held the information nor cite an exemption;

[2], [3] and [4] the council denied holding the requested information.

7. The complainant requested an internal review on 15 July 2020.
8. Following an internal review, the council wrote to the complainant on 1 September 2020. It advised that it was responding in terms of the FOIA, however it upheld its position.
9. During the course of the investigation, on 27 July 2021, the council wrote to the complainant with an updated response. It advised that the previous response should have been made in respect of the EIR. The council provided a copy of the lease, as requested in question [1], with the rent value redacted on the basis of regulation 12(5)(e) (confidentiality of commercial information). The council maintained its position that it holds no information in scope of the remainder of the request. It also provided advice that Ofcom are the regulatory body for telecommunications and therefore may hold the information, or be able to inform who would hold such information.

Scope of the case

10. The complainant contacted the Commissioner on 01 September 2020 to complain about the way the request for information had been handled.

Specifically that the council holds information in scope of the request which it should provide.

11. Following the council's revised response of 27 July 2021 and the provision of the lease document, the complainant confirmed that they were satisfied with the response to question [1], including the redactions made on the basis of regulation 12(5)(e).
12. The Commissioner therefore considers the scope of the case is to establish whether the council holds any information in scope of questions [2], [3] and [4].

Reasons for decision

Regulation 5(1) – Duty to make environmental information available on request

13. 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.
14. 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 is 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 information is not held.
15. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was 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. This is therefore the test the Commissioner applies in this case.
16. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the*

discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed." The Commissioner has therefore taken the above factors into account in determining whether or not further information is held, on the balance of probabilities.

The complainants' view

17. The council is the landlord of the site and therefore should hold and be able to provide the structural survey, the inventory of the site, and the Radio Frequency ("RF") emission survey.
18. All installations at the site are subject to planning applications to the council therefore the information should be held as part of this process.
19. The lease specifies "*site sharers*". The Commissioner notes that this is where telecommunications operators have rights to share with other operators. The complainant considers that information relating to the use of the site by site sharers would be checked by the council and logged.
20. The complainant states that they have historically contacted Ofcom, who advise that they lay the responsibility for the site with site operators and sharers.
21. The complainant states that if none of this information is available from the council as landlords, then it has failed in its responsibilities.

The council's response

22. The council advised the Commissioner that it is not the regulatory body for telephone equipment and therefore would not have a purpose for holding the requested information.
23. The Commissioner advised the council that it would still need to check its records, even if there is no obvious business or regulatory purpose for holding the information. She advised that information may have been received and retained, which would therefore be in scope of the request.
24. The council confirmed it had searched emails and documents, including the older paper management file. It advised that emails are held in a vault and include all emails for the last 7 years. The council found no information relating to this request was found.

25. The council stated that the email searches were thorough. It considered that, as there are no emails relating to the search terms, neither will there be any documents held separately, as email is the main form of communication for the council.
26. The council confirmed that it stores all data centrally in network drives, and that officers are not able to store data locally. Search terms used to find any information in scope of the request included Wolston, Arqiva telecommunications mast, structural survey, emissions survey, inventory of apparatus.
27. The council advised that it has no evidence of records in scope of the request questions being destroyed.
28. The council confirmed that it holds emails for seven years and that the files relating to the lease would be retained for the period of the lease. However, there was nothing in the retention policy specifically relating to the requested information as the council has neither powers nor responsibilities for enforcement in this area.
29. The council confirmed that there are no statutory requirements on it to collect or retain the requested information as it is not the regulator for telecommunications. In the normal course of a commercial lease the council would not have the powers to access this type of information.
30. The council confirmed that whilst it holds information in regard to the planning process for the site, nothing is held within the scope of the questions [2], [3] and [4]. It advised that the searches carried out included the historical planning information for the site. Furthermore it stated *"The specific information in the questions is unlikely to be required for planning applications, which focus on planning law."*
31. The council stated that the provisions within the Electronic Communications Code (set out in Schedule 3A of the Communications Act 2003¹), override the lease commitments thereby allowing tenants to site share without reference to the council as the landlord. This means that the council has no requirement to hold any information on site sharing.
32. The council confirmed that there was no further advice and assistance that it could give the complainant as it has no powers or responsibilities in relation to the information requested.

¹ [Communications Act 2003 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

Conclusion

33. In coming to a conclusion, the Commissioner has considered the information requested in respect of the complainants' views and the council's responses.
34. The complainant argues that, as the landlord for the site, the council should hold the requested information.
35. However, the Commissioner finds that the council has provided a reasonable explanation regarding why it has no business purpose nor regulatory requirement to hold the information requested in [2], [3] and [4].
36. Furthermore, it is not appropriate for the Commissioner to make a judgement regarding whether or not the council "should hold" the requested information. In terms of the EIR she is required to determine whether suitable analysis and searches have been carried out to satisfy her, on the balance of probabilities, that no further recorded information "is held."
37. Having considered the response from the council, the Commissioner is satisfied that the searches undertaken were sufficient to locate any information held that is in scope of the request.
38. The Commissioner is also satisfied that the council confirmed that no records were known to have been deleted. Furthermore, that the retention policy holds no reference to the type of information requested because the council has no regulatory powers in regard to telecommunications.
39. Having appraised the council's position that it has no purpose for the requested information, the Commissioner finds that she is also satisfied that the council undertook reasonable searches to discover information that it may not necessarily believe should be held.
40. The Commissioner is satisfied that, on the balance of probabilities, the council does not hold any information in scope of questions [2], [3] and [4].
41. The Commissioner therefore considers that the council complied with its obligations under regulation 5(1) of the EIR.
42. No steps are required.

Procedural matters

43. Regulation 5(1) of the EIR states that, subject to any exceptions, environmental information must be made available on request. regulation 5(2) requires that the information be made available promptly, and in any event no later than 20 working days after the date of receipt of the request. Where no information is held, regulation 14(2) requires a refusal notice to be issued within that time.
44. The request was made on the 5 July 2020 and council's initial response was provided on 15 July 2020 which is within the time limit. However the council changed its response in the review dated 27 July 2021. In this response it provided some information in scope of the request, and an updated refusal notice for the remainder.
45. The Commissioner concludes that the council breached regulation 5(2) in providing information 12 months after it was requested, outside of the statutory time limit. It also failed to issue an adequate refusal notice within 20 days and thus breached regulation 14(2) of the EIR.

Right of appeal

46. 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

47. 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.
48. 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

Janet Wyles
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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