



**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Appeal Reference: EA/2019/0445 P**

**Decided without a hearing  
On 30 November 2020**

**Before**

**JUDGE HAZEL OLIVER  
MARION SAUNDERS  
ROGER CREEDON**

**Between**

**JAMES CORNISH**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

## **DECISION**

The appeal is dismissed.

## **REASONS**

### **Background to Appeal**

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 15 October 2019 (FS50831447, the “Decision Notice”). It concerns information about the adoption of the road where the appellant’s house is located (the “Road”) as a public highway, as held by the City of York Council (the “Council”). The appellant maintains that the Road is private and has not been adopted as a public highway. The Council maintains that it is a public highway, and the appellant is seeking evidence from the Council on this issue.

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 29 January 2019, the appellant wrote to the Council and requested information in the following terms: *“Any and all information concerning [redacted] Road (“the Road”), including, but not limited to: (numbering added for ease of reference)*

*[1] certificate of highway adoption, or any other proof of adoption that supports the council’s electronic GIS map, the method of adoption, and detailed specifics of what parts of the road are exactly under the adoption, including the land under title number [redacted]*

*[2] any highway maintenance on the road supported by public funds*

*[3] proof the land was acquired by the highway authority for road building purposes, OR*

*[4] proof the road was built via a legal agreement between the owners and the highway authority for which maintenance was transferred to the council, OR*

*[5] proof that street works lead to the declaration of the road’s adoption through the highway authority, OR*

*[6] proof that the road was a dedication by the owner(s) and this was then accepted by the public by using the way for passage and repassage, OR*

*[7] proof the public has been using the road in excess of 20 years, OR,*

*[8] proof the highway existed before 1835.*

*[9] documents showing the road was constructed by the council using their house building powers under Part II of the Housing Act 1985.*

*[10] documentation of the houses built on the road, including but not limited to, planning applications, planning permission, and conditions set on the cul-de-sac.*

*[11] any other records or documentation held by the Council relating to the highway status of [the Road].”*

4. The Council responded on 27 March 2019, as follows in response to each request item (using the same numbering):

*[1] Denied holding the requested information, adding “However, the existing record is supported by the previous sets of physical maps, and extract that the council believe you already have, as per email dated the 11th December 2018.”*

*[2] Requested clarification. It then provided the complainant with a response on 15 April 2019. It provided some information in-scope of the request, being the electronically held records. It stated “The council only holds maintenance records going back 18 years for legal purposes. Therefore, prior to 18 years this information is not held.”*

*[3] Denied holding the requested information “This information is not held, as the original street and homes were built by the Ministry of Defence (MOD).”*

*[4] Denied holding the requested information, adding “There is no legal requirement for the construction of adoptable Highway, acceptance by the Highway Authority of the responsibility for maintenance of the highway is sufficient.”*

*[5] Denied holding the requested information, adding as above “there is no legal requirement for the construction of adoptable Highway, acceptance by the Highway Authority of the responsibility for maintenance of the highway is sufficient.”*

*[6] Denied holding the requested information, adding “highways status is not dependant on its use by the public, and public acceptance is not a requirement.”*

*[7] Denied holding the requested information, adding “highways status is not dependant on its use by the public, and public acceptance is not a requirement.”*

[8] Denied holding the requested information.

[9] Denied holding the requested information, because "*The dwellings on [the Road] predate 1985, and would not have been built under the Housing Act 1985.*"

[10] Denied holding the requested information, because "*The council does not have the original approvals etc. for the houses on [the Road], as the original street and homes were built by the Ministry of Defence (MOD).*" It also referred the complainant to records of alterations / extensions / minor works in the street which are publicly available. It stated this information is exempt as it is available by other means.

[11] The council provided information in scope of the request, which it stated was "*an extract showing [the Road] as an adopted road.*"

5. The appellant requested an internal review on 29 March 2019, which reiterated that the request was for evidence that the Road was adopted. The Council provided a response on 15 April and a further response as part of a second internal review on 30 April 2019. It maintained that no further information is held. The Council provided a photo taken from the physical maps on 19 April 2019, which shows the Road is an adopted highway. In response to a question from the appellant about the information relied on to ascertain that the Road had been adopted, as had been said to him in an email on 11 December 2018, the Council stated, "*The councils map records indicate the Highway as adopted is over twenty years old. Please see attached the original email chain showing correspondence to your original query. Service has cited this as evidence for the record of Adopted Highway. The Highway Authority is required to keep a record of Adopted Highway; therefore, the Highway Authority is responsible for maintaining those records, and hence we prepare and update the record. However, the council can provide you with a photo taken from the physical maps on the 9th April 2019 which is provided above.*"

6. The appellant initially contacted the Commissioner on 21 March 2019. After receiving the outcome of the Council's second internal review, he complained further on 30 April as he was dissatisfied with the outcome of the review. His position is that the Council has failed to provide evidence that the Road has been adopted and further information must be held. His specific complaints were:

- "*I require more information about the map. This proves nothing without context as to where it is from, the date and what the colours indicate.*"
- "*They state above "The Highway Authority is required to keep a record of Adopted Highway; therefore, the Highway Authority is responsible for maintaining those records, and hence we prepare and update the record". Then they must have this information available to share? Failure to have this information can only mean it's not adopted.*"
- "*They claim above "The council's map records indicate the Highway as adopted is over twenty years old". What evidence is this based on as it's not been shared with me? "*"

7. The Commissioner conducted an investigation into the complaint. During the course of this investigation, the Council provided the following further information to the appellant:

- a. Context for the photograph of the physical maps. These are based on 1976 dated Ordnance Survey sheets, as updated beyond digitisation which stated in 1996. A green layer shows any adopted highway. The Road is shown as green in the map provided to the appellant.
- b. Provided a list of streets that the council is responsible for, which is held by the maintenance department, and confirmed that "*The list is not as detailed as either the colour washed or the digital map information but is updated at the same time... The*"

*information held by Maintenance department reveals that the database record for [the Road] was first inputted in 2002 into the maintenance system.”*

8. During her investigation, the Commissioner asked the Council to provide details of the searches undertaken to locate further information in scope of the request. The Commissioner also asked the Council for details of recorded information relating to its statement that the Highway as adopted was over twenty years old. The Council stated this was their “best estimate”, and explained there was no requirement to retain some of the records once a highway is adopted. In relation to the photo taken from the physical maps, the Council stated that the Road was private before 2002, the MoD sold off the properties within the Road in 2002, and the map would have been amended with green colourwash “*in 2002 to record the road as a public highway, when its status changed*”.

9. The Commissioner decided that the Council had now explained the context of the map, including amendment in 2002 with green colourwash, and this superseded the estimate of adoption being over twenty years old. In relation to the core issue, being recorded information that proves the Council had gone through the necessary processes to change the status of the Road to an adopted highway, the Commissioner decided that no further information was held:

- a. The Council had undertaken appropriate searches to identify all information held within the scope of the request.
- b. The Commissioner appreciated the appellant’s frustration about there not being a definitive record, and the lack of information about the meaning of the map and the twenty-year time estimate.
- c. The EIR is not concerned with what information a public authority “should” hold, but what records are held.
- d. There was no evidence which undermines the Council’s position that it has provided all of the information it holds.
- e. On the balance of probabilities, no further information in scope of the request is held by the Council.

### **The Appeal and Responses**

10. The appellant appealed on 26 November 2019. His grounds of appeal are:

- a. The Commissioner failed to obtain all of the information he was entitled to, based on the fact the Council has shared new information without evidence.
- b. After receiving the Decision Notice, he complained to the Council that the Road should be removed from the list of streets, as there was no evidence to support its adoption.
- c. The Council’s response stated, “*This information was added to the records when the land was transferred from the Ministry of Defence in 2002*”. The transfer of land is an action of road adoption, and the information he is seeking.
- d. The response also stated, “*The Council can evidence private land is adopted highway in lots of ways*”, but provided no evidence.

11. The Commissioner’s response maintains that the Decision Notice was correct:

- a. She is satisfied that the searches conducted by the Council are likely to have identified all the information it holds, using search terms such as “s38 highway adoption certificate”, “[the Road]” and “adopted”.

- b. In relation to the new information raised by the appellant, the Council have maintained throughout that the properties were sold by the MoD and the status of the Road changed in 2002, and the appellant was provided with a link to the MoD's contact information.

12. The appellant submitted further representations which provide detail about how the Council have failed to provide evidence to support their position that the Road was adopted as a public highway. He says that, if the Council maintain that their records are correct, they must have more evidence to support this. He questions how the correspondence from the Council of 20 November 2019 can refer to a "transfer" and "evidence" if they do not hold further information. Either the Council is failing in its duty to keep the list of streets corrected up to date, or the Commissioner has failed to obtain all information.

### **Applicable law**

13. The relevant provisions of the Environmental Information Regulations 2004 ("EIR") are as follows.

2(1) ... "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements;

.....

5(1) ...a public authority that holds environmental information shall make it available on request.

.....

5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of a public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

14. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 ("FOIA") in section 39 and must be dealt with under EIR, and it is well established that "environmental information" is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. We are satisfied that this request falls within EIR.

15. In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a request is not held somewhere in a large public authority's records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority's record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority.

16. A relevant and helpful decision is that of the First-Tier Tribunal in ***Bromley v the Information Commissioner and the Environment Agency*** (EA/2006/0072). Although this case related to FOIA, the same approach applies to whether information is held under EIR. 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.*"

## **Issues and evidence**

17. The issue in the case is whether, on the balance of probabilities, the Council held further information within the scope of the appellant's request. It is not the Tribunal's role to determine what information the Council ought to hold.

18. In evidence we had an agreed bundle of open documents, which included the appeal, Commissioner's response, and appellant's reply. We also had some final submissions from the appellant, which are addressed below.

19. The appellant submitted a further 43-page bundle of information on 25 November 2020. Although this was submitted very late, we have considered this additional information as it is relevant to the issues in the case.

## **Discussion and Conclusions**

20. In accordance with section 58 FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision.

21. The Council provided information to the Commissioner about the scope of its searches for the requested information, which can be summarised as follows:

- a. The initial search was of electronically held mapping on the Council's intranet.
- b. Paper files held by the Highway Regulation team were searched for a highway adoption certificate (S38 adoption), but nothing was located relating to the Road.
- c. A request was sent to multiple service areas for additional information, and the outcomes provided to the appellant.

- d. Further searches of digital records were conducted by the Commercial Property Management Team and Legal Service team, using “[the Road]” and/or “Adopted”.
- e. City Archives have checked all their catalogues and do not hold any adoption of road agreements or certificates.
- f. Searches were for electronic and paper data on the Council’s systems and networks, and included all files, folders, records and emails in the service area.
- g. The parameters used for the search was “[the Road]”.

22. We are satisfied that the steps set out above show that the Council undertook a search which was appropriate in scope, and used relevant and appropriate search terms in order to find the information sought by the appellant. The appellant was seeking information about a section 38 highway adoption of the Road, and these search terms were used, including the specific name of the Road. This included a search of archive records as well as records currently held by the Council.

23. The appellant says that the Council’s correspondence of 20 November 2019 refers to the “transfer” and other “evidence”, and this suggests they must hold other information. This was in a letter from the Council to the appellant responding to his request for the Road to be removed from the list of streets. We do not agree that this letter indicates that further information is held, particularly when considered in light of the additional information provided by the Council later (as discussed below). The reference to, “*when the land was transferred from the Ministry of Defence in 2002*” is consistent with the explanation that the map would have been amended in 2002 when its status changed following the transfer from the MOD. It does not mean there is further information held about the transfer and any related road adoption. The sentence, “*The Council can evidence private land is adopted highway in lots of ways*” does not indicate that further information within the scope of the request is actually held – and in fact the Council has not provided any further evidence (apart from the additional information discussed below)

24. The appellant sent some additional submissions on 29 September 2020. He has been involved in a dispute with the Council about the placing of two skips and fencing on what he says is his driveway during renovation works. A letter from the Council of 25 September 2020 includes the following paragraph: “*Whilst the adoption certificate currently seems to be missing, our electronic records of adopted highways refer to [the Road] as being adopted in 2002. Two of our officer’s recall processing the adoption certificate in about 2002 and updating the mapping system accordingly, and, as noted above, it is shown as being adopted highway on the plan dating back to 2008 that records the Council’s list of maintainable highways. The Council’s processes are such that the road would not have been entered onto its list of maintainable roads had it not been adopted.*”

25. The appellant makes two points about this paragraph. Firstly, no electronic records of adopted highways have been disclosed. He concludes that the Road has been added to this list since making his request, and if so this exclusion from the records should have been shared with the Commissioner. We do not agree – the appellant had asked for information about the Road, so records which did not mention the road would not fall within the scope of his request. Secondly, it is unclear what 2008 map is being referred to, if the paper record was updated in 2002 and the maps only became available online in 2013. We agree it is not clear what is being referred to here, but we do not find that this means there is a further relevant map which has not been disclosed – taking into account the further information that has been disclosed, as discussed below.

26. This issue has been superseded by the latest correspondence contained in the additional bundle submitted by the appellant on 25 November. This provides copies of further correspondence between the Council and the appellant relating to the dispute about the renovation works at the appellant's property. On 2 November 2020, the Council provided a copy of an adoption certificate and plan for the Road, dated 29 June 1967. The Council says that the Council did not have access to these documents at the time of the appellant's request, and the information available at the time had pointed to an adoption around 2002. In further correspondence the Council has explained that it obtained this information by making enquiries of the solicitors who were involved in the development and adoption process. In his covering letter to the Tribunal of 25 November 2020, the appellant disputes the accuracy of this new information and says he has no trust in the Council. He says that this correspondence from the Council undermines the Commissioner's case.

27. We have considered the most recent correspondence. Our role is limited to considering whether further information was held by the Council at the time of the original request that should have been disclosed. We do not agree with the appellant that this undermines the Commissioner's case. Our view is that the latest disclosure of information by the Council supports the position that they did not hold further information at the time of the request.

28. There is a live dispute between the appellant and the Council about the status of the Road, and the Council are warning the appellant about possible enforcement action for obstructing the highway. In support of their position, they have obtained evidence about adoption of the Road from a third party. This was clearly not held by the Council at the time of the appellant's request – they have had to obtain it from external solicitors. The Council's obligations under EIR are limited to information that it "holds", not information that it may be able to obtain from a third party. We also note that, if the Council did hold further information itself about the adoption status of the Road, it is very likely that they would have sent this to the appellant in support of their arguments that he is obstructing the highway, rather than needing to obtain information from a third party.

29. We acknowledge the appellant's frustration. He has been given contradictory information at different times about when the Council says the road was adopted as a public highway. However, our role is limited. We are not able to intervene in the dispute between the appellant and the Council about the status of the Road, or make a finding on what information the Council ought to hold.

30. We have considered the extent of the searches conducted by the Council, and the later material disclosed by the Council which helps to shed light on what they held at the time of the request. For the reasons explained above, we find on the balance of probabilities that the Council did not hold further information within the scope of the appellant's request, at the time when that request was made.

31. We dismiss the appeal and uphold the decision of the Commissioner.

Signed: Hazel Oliver  
Judge of the First-tier Tribunal

Date: 4 December 2020