

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 June 2024

Public Authority: Herefordshire Council
Address: Plough Lane
Hereford
HR4 0LE

Decision (including any steps ordered)

1. The complainant submitted a request for information held by Herefordshire Council (the council) about the legal status of a particular area of land.
2. The council aggregated the request with a number of other requests submitted by the complainant and issued a refusal notice, citing section 12 (cost limits) of the Freedom of Information Act 2000 (FOIA).
3. During the Commissioner's investigation, the council revised its position, and provided the complainant with information in response to all seven parts of their request.
4. The Commissioner's decision is that the council should have initially considered the request under the EIR. However, he considers that the council has, on the balance of probabilities, now provided the complainant with the information that is held that falls within the scope of the request.
5. The Commissioner does not require the council to take further steps as a result of this decision notice.

Request and response

6. The request relates to a particular area of land; there appears to be some dispute over its legal status, and whether the parking of a vehicle on the land is considered to be an obstruction.
7. On 10 October 2023, the complainant wrote to the council and requested information in the following terms:

"On 6/9/23 the 'enforcement' officer, Richard Pearce wrote "By use of the definitive map it appears that the vehicle you refer to is NOT parked on the legal line and therefore is NOT an obstruction. It is either private or common land I will continue these enquiries today."

This clearly appears INCORRECT, but has not, as yet, been corrected.

The Hedge to Hedge legal presumption obviously applies, there is a low but clearly ancient stone wall extant on the northern side. However, this can be rebutted. With such an extant 'legal presumption', it is now incumbent on the HA to show why it is NOT highway.

What information does Herefordshire Council hold:-

A) to rebut the presumption that this is all highway 'between the hedges'?

B) that it is or may be private land?

C) that it is common land?

D) that it belongs to, is under control of or allocated parking for Stone Cottage?

E) whether the 'highways extents' have been mapped for this part of CP32? (If so can you please supply a copy)

F) what are the results of his enquiries of 6/9/23?

G) when was the 'legal' Definitive Map (that must be available by law at all reasonable times) first unavailable and when it Will be available to view? (This is/ was due to it's move from Rotherwas to Plough Lane)."

8. On 26 October 2023, the council provided its response to the complainant. It said that, when dealing with the request, it had considered it appropriate to aggregate a number of requests submitted by the complainant between August and October 2023.
9. The council went on to confirm that it considered that to deal with the aggregated request would exceed the cost limits, and it was therefore refusing the request under section 12 of FOIA.
10. During the Commissioner's investigation, the council confirmed that upon further review, it had decided to release the information that it held that was within scope of the complainant's request of 10 October 2023. The council then provided the complainant with a response to each of the seven parts of their request. It also included two extracts from documents that contained maps, and a copy of a letter about the parking of a vehicle on the land in dispute.

Scope of the case

11. The complainant has said that the council has not provided the information that they asked for in part a) of their request.
12. The Commissioner will therefore make a decision on the following:
 - whether the request is for environmental information, and should have been considered under the EIR.
 - whether the council has, on the balance of probabilities, provided the complainant with all of the information held that is relevant to part a) of their request.

Reasons for decision

Is the requested information environmental?

13. Regulation 2(1) of the EIR defines environmental information as being:

“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)...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).
14. The Commissioner considers that the phrase “any information...on” should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner’s opinion, a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
15. In the circumstances of this case, the information is on a measure likely to affect the state of the elements of the environment described above. In the Commissioner’s opinion, decisions regarding rights of way, highways and rights of access for pedestrians and vehicles will have an impact on the land and how it is used. The Commissioner has therefore decided that the withheld information is environmental information and subject to the EIR.

Regulation 5 – duty to make environmental information available on request

16. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available upon request.
17. In cases where a dispute arises over whether recorded information is held by a public authority at the time of the request, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies

the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.

The complainant's position

18. The complainant states that an officer at the council has advised that the relevant area of land is not a highway. The complainant has referred to case law dating back to 1862, saying that there is a legal presumption that the relevant land is a highway, unless the council holds information "to rebut the fact."
19. The complainant has said in order for the council to have established the position that the area is not a highway, it must hold evidence which supports this, or its position is not legally sound. The complainant has said that this is the information that they still require in response to part a) of the request.

The council's position

20. The council has said that the request relates to the ownership of, and, or, the extent of the highway at, the relevant area of land.
21. The council has advised the Commissioner that it has provided all of the information that it holds, including explanations regarding its position in respect of the land, and its use, to the complainant. It says that it has also explained why it made the decision that the vehicle parked on the land was not considered to be causing an obstruction.
22. The council has said that the officer's statements referred to by the complainant were their professional view, based on their knowledge of the area of land.
23. The council goes on to say that it does not hold any further information on the ownership of the land apart from that it is unregistered. It has said that there is a possibility that the land is owned and that, given this, it considers that there is not an automatic assumption that the land is all highway "hedge to hedge", as indicated by the complainant.
24. The council has referred to the Definitive Map and Statement which it has explained is the conclusive legal record of public rights of way in the county. It says that the Map Statement gives the start and finish with the map providing the defined legal line of the route.
25. The council goes on to say that a Definitive Map Modification Order (DMMO) is required in order to confirm or rebut the presumption regarding the legal status of land, and that the process that is required in order to apply for a DMMO is available on its website (details of which

were provided to the complainant). The council has confirmed that anyone can apply for a DMMO, provided that they are able to submit sufficient evidence to support their application. The council then has a legal duty to investigate and decide whether to make a Modification Order, which would record the legal status of the land.

26. With regard to this case, the council has said that historical maps may have further information, but an investigation or further research has not been undertaken because a DMMO application has not been received to date. The council states that the DMMO process would need to be followed with the applicant providing as much information as possible which should align to the research guidance.
27. The council has said that if an application is received from the complainant and sufficient evidence is provided to support the application, further research could then be carried out.

The Commissioner's analysis

28. The Commissioner has considered the council's response to part a) of the request, which was as follows:

"Byway CP32 is recorded on the Definitive Map and Statement for Herefordshire which is a legal document and conclusive evidence of public rights of way. The path was not claimed in the legal process which created the First Definitive Map 1952, it was added under the 1972 Review and the route is now shown on the current 1989 Definitive Map.

The legal line of Byway CP32 is clear and usable with a suitable width for a Byway. The nature of the land in the area under discussion i.e. with a steep slope on the northern side would indicate that the width is correct with the track lying at the foot of the slope.

Herefordshire does not have legally recorded widths for public rights of way. The paths that have a recorded width are those sections of paths that have been the subject of a Public Path Diversion Order, or paths that have been put on the map by a Definitive Map Modification Order where the route has been researched and a width stated. There is no general width for a public rights of way, just that it is passable for the purpose for which it is intended to be used. Changes to the Definitive Map and Statement can only be made by legal order and following the process set out by legislation.

It is not for the Authority to prove that a greater width exists, there is a legal process in place for anyone to make an application for a width to be recorded by way of a Definitive Map Modification Order.

This would need to be in the prescribed form and with supporting evidence.

Further details are available via the following link:

<https://www.herefordshire.gov.uk/public-rights-way/definitive-map-statement-dms/3> "

29. It is not for the Commissioner to determine what statements made by the council, or the complainant, are accurate with regard to the legal status and rights of use of the land. His role is only to consider whether a public authority has complied with its obligations when considering and responding to a request for information under the EIR.
30. In the Commissioner's view the EIR is not the route by which the complainant will obtain the answers that they are looking for. If the complainant believes that they have evidence that the land in dispute is a highway, then the most appropriate course of action is to submit a DMMO application with their supporting evidence, as suggested by the council.
31. The Commissioner considers that the council has provided an answer part a) of the request, based on the information that it currently holds. Furthermore, he has found no evidence to indicate that further information is held that would fall within scope of part a) of the request. The fact that the council could conduct further research and may hold information that could be used to make a determination regarding the legal status of the land, should a DMMO application be received, is not information that the Commissioner considers would fall within the scope of the complainant's request.
32. Given the above, the Commissioner concludes that, having considered the information currently available, on the balance of probabilities, the council does not hold any further information that would fall within the scope of part a) of the complainant's request.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Suzanne McKay
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