

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

**Decision notice**

**Date:** 28 May 2012

**Public Authority:** Dorset County Council  
**Address:** County Hall  
Collition Park  
Dorchester  
DT1 1XJ

**Decision (including any steps ordered)**

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1. In an issue which relates to an area of land which is subject to flooding, the complainant requested details about land close to his property which the council considers to form part of the highway. He requested details about how the land is defined as highway, what obligations the council has to maintain the highway and details about the councils responses to any objections which it had received about his plan to buy and 'stop up' the highway. In response the council provided some information to the complainant and stated that it had disclosed everything to him.
2. The Commissioner's decision is that Dorset County Council has breached the Environmental Information Regulations 2004. It responded to the complainant under the Freedom of Information Act whereas the information should correctly have been considered under the Regulations. It also did not supply all of the information which it held to the complainant in response to his request. The council has however subsequently agreed to provide copies of this information (with personal data redacted) to the complainant.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To provide copies of the letters it sent to objectors which it initially withheld with the names and addresses of the objectors redacted.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. After a long history of correspondence between the parties, including other requests for information, the complainant wrote to the council requesting information.
6. On 28 November 2011 the complainant wrote to the council in response to its response to a previous request. The request was for:

*"1. Please supply evidence as to the status of the land adjacent to [address redacted].*

*2. Please supply answers to the questions which have been treated as objections from local residents, sent to DCC during the consultation period regarding the land already mentioned.*

*3. Please show evidence that the land can be only partly maintained when I have been advised by T-Sol that Council cannot pick and choose to only partially maintain land **if** there are highway rights over any land.*

7. On 19 January 2012 the complainant wrote to the council slightly amending his first request. He requested:

*"Please supply evidence as to the status of the land adjacent to [address redacted]. If there are Highway rights, supply a copy of the order."*

8. On 20 December 2011 the complainant wrote to the council asking for it to review its response to his request. He stated:

*As I have asked for formal documentation of the highways rights over this piece of land AGAIN, which you have not supplied yet again, and since a visit is just not acceptable to us. As asked for, a copy of the magistrates order for highways rights is all that will be acceptable along with the responses to the public questions as requested, I have no option but to copy this to more senior persons as well. The time for a reply is almost over (30 Dec 2011), if you cannot fulfil this please supply further and better particulars as to exactly why. You say that all questions have been answered, I would disagree as an opinion is just not acceptable to me or any Solicitor or Magistrate*

9. The Dorset County Council made numerous responses to the requests. In a response to the request for internal review dated 30 December 2011 the council stated that all information it held had now been provided to the complainant.

### **Scope of the case**

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10. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. The Commissioner considers that the complainant wishes the council to provide him with a copy of all of the information which he has asked for, essentially justifying its position in relation to the land. His complaint relates to requests 1 – 3 given in paragraph 7 above.

### **Reasons for decision**

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12. The council's initial responses did not specify under what legislation it was responding to the complainant; it did not clarify whether the responses were made under the Act or the Regulations. However in its internal review the council specified that it was responding to the complainant under the Act rather than the Regulations.
13. The Commissioner initially wrote to the council asking it to consider whether its response should have been provided under the Regulations. The council responded stating that it agreed that it should probably have considered the request under the Regulations, but as the information which was asked for was provided it did not believe that this was material to outcome of the review.

### Is the information environmental information?

14. Regulation 2 of the EIR defines information which should be considered environmental information for the purposes of the legislation.
15. It defines environmental information as "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;*
- (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 elements of the environment referred to in (b) and (c);*
16. The Commissioner considers that the requested information is information on the state of the elements of the environment (land), and factors such as measure or activities designed to protect those elements. It is information on the ownership of the land, and on details of whose obligation it is to maintain the land in order to prevent flooding to other nearby properties. It is also details of objections received to the complainant's plans to obtain ownership of the land and to carry out maintenance on it to prevent further flooding occurring to his property.
17. The Commissioner is therefore satisfied that the information is environmental information for the purposes of the Regulations. The council was not therefore correct to consider the information under the Act.
18. The Commissioner agrees with the council however that due to the circumstances of this case this made little difference to the complainant in fact.

#### The council's response

19. The council's initial response to the requests was to provide the information it holds to the complainant, and to seek to discuss the matter with him. It says that it tried to explain the legal situation and sought to treat him in a sympathetic and non beaurocratic way. As an example it agreed that the complainant could dig an open ditch across the land to protect his property from flooding without having to buy the land and stop up the highway rights. The Commissioner understands that 'stopping up' the highway is a legal term meaning that highway rights over the land would be legally extinguished.

20. The complainant has stated to the Commissioner that a question which remains unanswered relates to the councils initial responses to his questions about the status of the land. He states that he was initially advised that the land in question was "public open space", and a copy of a map supplied along with a letter stating this. However he says that the council subsequently said that this was an "error", and that the land is "highways adopted land" and supplied him with an identical map except that this was marked differently as regards the relevant areas of land.
21. The complainant says that he has asked for evidence to support the councils claim but that its response is that there is no evidence to support what it says and it cannot therefore prove that the supposed rights exist, despite persisting with the assertion.
22. The Commissioner is only able to consider whether the council's response complies with its obligation under the Regulations. He must consider whether the authority disclosed all of the information which the complainant is legally entitled to under the Act or the Regulations. If the council does not hold relevant information he cannot legally require the council to create information or seek legal advice to justify its position to the complainant.
23. The Commissioner cannot become involved in legal disputes over the status, obligations over, or ownership of land. The complainant disagrees with the council's decisions, however the council states that it does not hold specific documents detailing why it reached the decisions it did.
24. This issue may therefore be based on legal opinion and an interpretation of the law rather than legal certainty. If that is so then specific legal proof or evidence may not exist and it would be for the complainant to argue against the council interpretation of the law through the courts. This is not an issue which the Commissioner can become involved in.

#### Request 1

25. The council said that it had provided the complainant with the information it holds in response to request 1 (above). It said that a copy of a 'dedication agreement' was provided to him by letter on 19 January 2012. It said that it had also previously provided other information such as Acts of Parliament under which highway rights are defined to him. The Commissioner understands therefore that during the long history of correspondence between the parties some information had been provided previously and some was provided as a result of the requests. The council's opinion is that it holds no more information that can respond to the complainant's request.

26. The Commissioner asked the council to explain how highway rights over land are defined, and whether it holds any legal documents stipulating which areas of the land in question are specified as highway which have not already been provided to the complainant.
27. The council explained that it is obliged to maintain a register of highway maintainable at the public expense. This does not specify the entire area, but rather lengths of road. It stated that it is obliged to maintain a definitive map and statement of public rights of way (footpaths, bridleways, restricted byways and byways open to all traffic), but the highway near [the complainant] is not within this definition. Otherwise the Council has no obligation to hold records about the extent of the highway.
28. The Commissioner therefore understands that there are no documents specifically defining the section of land in question as part of the highway. Ultimately, whether the land is defined as part of the highway or not may therefore be a question for a court to decide.
29. As stated above, the Commissioner cannot require the council to prove that its legal position is correct. He can only consider whether any information is held which falls within the scope of the request and whether that information should be disclosed. In this case the council specifically states that no information is held.
30. The Commissioner asked the council if there was any written legal advice over the issue as it is possible that this may fall within the scope of the request if it was able to be considered as 'evidence'. The council stated that there was no specific written legal advice other than an email which had already been disclosed to the complainant. The council lawyer concerned stated that she had provided advice over this issue over the telephone in the past, but that no written legal advice exists which would fall within the scope of the request other than the email.
31. Where an authority states that it does not hold information in response to a request under the Act or the Regulations the Commissioner must satisfy himself that 'on a balance of probabilities' no further information is held which falls within the scope of the request.
32. The Commissioner is satisfied that in providing the information it has to the complainant the council met with its obligation to provide the information it holds on the status of the land. He considers in this case that on a balance of probabilities no further information is held.

Request 2

33. In response to the second part of the request the council explained that objections which it received were disclosed to the complainant on 5 July 2011 and so he had already received copies of them.
34. The Commissioner asked the council if the council's responses to those objections had been disclosed. The request was in fact for the 'answers to the questions asked by objectors' rather than for the objection letters themselves. The council confirmed that it had not disclosed these to the complainant. It added however that these were, in effect, acknowledgements which it had sent and so it was prepared to disclose these to the complainant with any personal data identifying the recipients such as their names and addresses redacted.
35. The Commissioner is satisfied that this response is the correct approach, however the council should have done this initially in response to the request. The council therefore breached Regulation 5(2) by not disclosing this information in response to the initial request within the specified time period of 20 working days.
36. The Commissioner has not made a decision as regards the redaction of the personal data. The complainant may raise a separate complaint with the Commissioner if he considers that the redactions of personal data are not correct.

Request 3

37. The complainant requested information on whose obligation it was to maintain the land. The council said that its response was based on case law and legal principle. It explained that its obligation is to maintain highway land to the standard necessary for its use.
38. Presumably therefore the council's argument is that it is not legally required to maintain the land where the highway remains usable, even where flooding may be occurring to adjacent properties partially or wholly as a result of the state of the land upon which the highway is situated. It explained further that it does not hold any further information which could respond to the request.
39. Again, the Commissioner has no powers to require the authority to seek legal advice or to force it to ensure that that decision is correct. The Regulations simply provide the right for individuals to access information that is already held.
40. As the council's stance is that it considers it is not legally required to maintain the land the Commissioner understands that this may again be

a question which needs to be decided in the courts if the complainant disagrees with that view.

41. The Commissioner therefore accepts that on a balance of probabilities no further information is held, and that the council has met its obligations under the Regulations in this respect



## Right of appeal

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42. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

43. 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.
44. 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** .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**