

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

Decision notice

Date: 27 November 2013

Public Authority: Hertfordshire County Council

Address: County Hall
Pegs Lane
Hertford
Hertfordshire
SG13 8DQ

Decision (including any steps ordered)

1. The complainant has requested information relating to the status and access rights to Warwick Road, Bishop's Stortford.
2. The Commissioner's decision is that the Hertfordshire County Council has contravened regulation 5(1) and 5(2) of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Council is required to disclose to the complainant the documents numbered 1, 2, 3 and 5, which are listed at paragraph 17 below.
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

5. On 1 October 2012, the complainant wrote to Hertfordshire County Council ("the Council") and requested information in the following terms:
 1. "When did the council invent the category "highway but not maintainable at public expense"?"
 2. What is the legal basis for this category? Please cite exact references in statute or case law so that we may review them.
 3. What does the council believe the legal effect of this category to be which distinguishes it from 'highways' and 'private streets' (which are covered extensively in the Highways Act 1980). How many roads in the county has the council included in this category? We are aware of one other example in Bishop's Stortford.
 4. What was the date (or dates) on which those roads (including Warwick Road) were so classified?"
6. The Council responded on to the complainant's request on 26 October 2012. The Council provided explanations for each of the four parts of the request rather than providing copies of recorded information. The Council stated:
 1. "It is believed that the Council started using the term "Highway but not maintainable at public expense" in about 2003 to help clarify the status of the road. Before that the misleading term of "Private Street" was used for highways that were not adopted by the highway authority.
 2. The term 'highway but not maintainable at public expense' is used where the road is shown 'uncoloured' on our Finance Act map, giving evidence of the existence of highway rights, but it is recorded on our highways management system (Confirm) as not being maintainable at public expense. We would also check with highways engineers for the area to ascertain whether highway works have ever been undertaken at that location.

If the road is shown coloured on the Finance Act map (or not shown at all), then we would refer to the road as being 'NOT highway maintainable at public expense' unless there is documentary evidence to the contrary. Highway rights could have come into existence but the standard wording would be "The County Council has no record of any claim for highway rights in this area. The onus is on any person claiming highway rights to produce evidence to support that claim.

3. The first part of this question regarding the Council's belief is not held by the County Council.

Following a review of our database there are approximately 55 roads in the County which are referred to as being "highway but not maintainable at public expense".

4. The documentary evidence clearly shows that Warwick Road is uncoloured on the Finance Act map which is regarded by the County Council as being strong evidence that highway rights were considered to exist, it is however, no indication of the nature of those rights. The nature of any rights would depend on the evidence as to use."
7. Following an internal review the Council wrote to the complainant on 30 November 2012 and confirmed the following:
 - The category 'highway but maintainable at public expense' was introduced by the Council in 2003.
 - Warwick Road would only have been categorised as such in 2004 when a query as to its classification first arose.
 - The legal basis for the designation of Warwick Road as a 'highway but not maintainable at public expense' stems from the decision in *Robinson Webster (Holdings Ltd v Agombar & Ors* [2001] EWCH 501 (Ch) (9 April 2001)/ Etherton J, in that case. stated that a plan prepared pursuant to the Finance (1909 -1910) Act 'is very powerful evidence' as to the status of land.

The Council provided the complainant with details of where and when the Finance Act map may be inspected.

Scope of the case

8. The complainant contacted the Commissioner 30 March 2013 to complain about the way her request for information had been handled. In her complaint she specified the following:
 - The complainant questioned whether the Council was correct in treating this matter under the requirements of the EIR rather than under the FOIA.
 - The complainant drew the Commissioner's attention to an apparent inconsistency concerning the date the Council introduced the category 'highway but not maintainable at public expense'. She points out that the date provided by the Council is 2003. This

date preceded the advice provided by an officer of the Council in August 2004, that Warwick Road was 'not a highway maintainable at public expense'. This information is contrary to the advice provided by another officer of the Council in 2012, who had informed the complainant that the category had been introduced after 2004.

Reasons for decision

Is the requested information environmental information?

9. Regulation 2 of the EIR states that environmental information is 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;
10. The Commissioner has considered the information held by the Council which falls within the scope of the complainant's request. The information relates to the designation by the Council of Warwick Road, Bishop's Stortford, as being a 'highway but not maintainable at public expense'. As such the Council's designation of Warwick Road has relevance to the Council's, or others', current and future administration of this road. The Commissioner considers that the Council's designation of Warwick Road may have direct impact on any future plans affecting this aspect of the landscape. He therefore considers that the information held by the Council is environment information and falls to be considered under the EIR.

Regulation 5 – Duty to make environmental information available on request

11. Regulation 5(1) of the EIR requires a public authority holding environmental information to make it available on request.
12. Regulation 5(2) requires the public authority to make the requested information available as soon as possible and no later than twenty working days after the date of receipt of the request.
13. The correspondence passing between the complainant and the Council illustrates that the designation of Warwick Road is a long-standing issue for the complainant and the association she represents. It is clear that the Council, over time, has attempted to address the complainant's queries and concerns by making 'normal business' responses rather than through the provision of recorded information under the FOIA or the EIR. This history has had an effect on the way the Council has answered the complainant's substantive information request.
14. The Commissioner has considered the four elements of the complainant's request. He notes that one of the enquiries made by the complainant – the first part of element 3, is not a request for recorded information under either the FOIA or the EIR. Rather, it is a request for the council to provide an opinion.
15. The Commissioner must stress that the FOIA and the EIR only provide a right to access recorded information held by a public authority. Neither the FOIA nor the EIR require a public authority to create information in order to satisfy an information request.

The recorded information held by the Council

16. During the Commissioner's investigation of this complaint the Council provided him with documents which it considers relevant to the complainant's request for information. These documents illustrate the rationale behind the Council's designation of Warwick Road.
17. The documents relevant to the complainant's request are:

Element 1

Document 1 – an internal memorandum referenced M7/306/45 dated 23 July 2004, which states that 'it is considered that this road [Warwick Road] is not highway maintainable at public expense.'

Document 2 – an internal memorandum referenced M7/306/45 dated 18 August 2004, which states, '...in the absence of any appropriate

evidence, it is considered that this road [Warwick Road] is not highway maintainable at public expense.'

Document 3 – an annotated email dated 16 July 2003 which identifies the rationale for changing the terminology to avoid confusion over the terms '*private road*' and '*private street*'.

Element 2

Document 4 – an extract copy of the Finance 1909-1910 Act map IR1/206, for Warwick Road, Bishop's Stortford. The Council's opinion of the highway status of Warwick Road rest on the 1909-1910 Act map. This map shows Warwick Road as being uncoloured and is therefore taken to indicate that highway rights were considered to exist when the map was created. The map does not indicate the nature of those rights as these would depend on evidence as to use of the road.

Element 3

Document 5 – a copy of a letter sent to the complainant by the Council's Legal Services Department on 22 December 2009. This letter sets out for the complainant the Council's opinion on the designation of Warwick Road as 'a highway though not maintainable at public expense'.

The Council advised the Commissioner that its estimate of there being 55 roads in the county which are referred to as being 'highway but not maintainable at public expense', is based on research of the Council's records of individual roads which was carried out at the time of the request.

Element 4

The Council advised the Commissioner that document 5 – above, is the information it holds relevant to element 4 of the complainant's request.

18. The Commissioner asked the Council whether it had sent the documents listed above to the complainant or whether she had been given access to them. In reply to this query, the Council stated that it believed at least some of the documents had been seen by the complainant because she had referred to the contents of these documents in her own correspondence.
19. The Council's inability to state definitively whether the complainant had been sent or had access to these documents, prompted to the Commissioner to ask whether the Council would object to their disclosure following this notice. The Council informed the Commissioner that it had no objections.

20. The Commissioner therefore requires the council to disclose to the complainant documents 1, 2, 3 and 5 under regulation 5(1) of the EIR. The Council should redact the complainants name and address from document 5.
21. The Council is not required to disclose document 4. The Commissioner accepts that the Finance (1909-1910) Act map is available for public inspection at the Hertfordshire Archives and Local Studies at County Hall.
22. In the circumstances of this complaint, the Commissioner must decide whether any further information is likely to be held by the Council which is relevant to the complainant's request. The Commissioner makes this decision based on the balance of probabilities.
23. The Council advised the Commissioner that it had searched its legal files and had sought information from its Highway Boundary and Land Charges Unit staff. The Council considered that these were the locations/staff where relevant information would most likely be held. It also advised the Commissioner that it had not destroyed or deleted any information thought to be relevant to the complainant's request.
24. In the absence of any evidence which suggests that the Council has withheld information relevant to the complainant's request, and having considered the Council's representations referred to in paragraph 24, the Commissioner has concluded that it is unlikely that the Council hold any further recorded information relevant to the complainant's request.

Right of appeal

25. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. 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.
27. 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
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Wycliffe House
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