

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

**Decision notice**

**Date:** 15 October 2019

**Public Authority:** City of York Council  
**Address:** West Offices  
Station Rise  
York  
YO1 6GA

**Decision (including any steps ordered)**

---

1. The complainant has requested information relating to the adoption of a private road into the public highway.
2. The Commissioner's decision is that on the balance of probabilities, City of York Council has located all the information held in scope of the request. However it breached Regulation 5(2) in failing to respond to the request within 20 working days.
3. The Commissioner does not require any steps.

## Request and response

---

4. On 29 January 2019, the complainant wrote to the City of York Council ('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 by ICO for 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 re-passage, 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]."*

5. The council responded on 27 March 2019. In response to each request item it:

- [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 publically available <https://planningaccess.york.gov.uk/online-applications/>. It stated this information is exempt under section 21 of the FOIA as the information 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.*"
6. The complainant requested an internal review on 28 March 2019, stating that the council must hold further information in scope of the request. Additionally, regarding [1], the complainant reiterated the request was

for evidence that the Road is adopted and asked for further details on the extract referred to by the council.

7. Following an internal review the council wrote to the complainant on 30 April 2019. It maintained its position that no further information is held, but also:

[1] Provided some further information which it stated was "*to be helpful*", advising it was "*a photo taken from the physical maps on the 9th April 2019, which shows [the Road] is an adopted highway.*"

In response to further questions, regarding [1] from the complainant 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."*

## Scope of the case

---

8. The complainant contacted the Commissioner on 30 April 2019 to complain about the way their request for information had been handled. Specifically that the council must hold further information in scope of the request and raising the following issues: [notation added by ICO for reference]
  - [a] More information is required regarding the photo taken from the physical maps. The complainant states that it proves nothing without context as to where it is from, the date and what the colours indicate.
  - [b] That the council states "*the Highway Authority is required to keep a record of Adopted Highways, therefore the Highway Authority is responsible for maintaining those records, and hence we prepare and update the record*". Therefore the complainant believes that the council must have information proving that the

road was legally adopted, otherwise failure to have this information can only mean it's not adopted.

[c] Asking on what basis or evidence the council claim "*The council's map records indicate the Highway as adopted is over twenty years old*".

9. During the course of the investigation, following questions from the Commissioner, the council provided further information to the complainant in response to the issues raised above:

[a] Provided context for the photograph of the physical maps, being the origin of the map, the date of the original map, and meaning of the colourwash coding.

[b] Provided a list of streets that the council is responsible for, which is held by the maintenance department. Confirmed that "*The list is not as detailed as either the colourwashed 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.*

10. The Commissioner therefore considers, in light of the investigation, that the scope of this case is to establish whether, on the balance of probabilities, the council holds any further information in scope of the request. She will also consider if the council has made any procedural breaches.

## Reasons for decision

---

11. 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.

12. 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 argument. 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.

13. 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.

14. 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*

15. The complainant made the request because part of the Road is within their boundary, and that the deeds *"for my property, which were created in 2003, make no mention of the road being adopted and clearly has it within my boundary."*
16. It is the complainant's position that *"The road does not meet the necessary conditions to be adopted and the council has provided no evidence that it has ever been through the legal process required for it to be adopted."*
17. The complainant states that they are considering pursuing the road status legally if the council maintains the requested information is not held. However they are concerned that the information may come to light at a later stage when legal costs will have been incurred unnecessarily.
18. The complainant states *"I didn't want to pursue further legal costs at this stage because it seemed that if the council can-not provide the evidence to support their position then it should really be a straight forward admittance that a mistake has been made."*

19. The complainant identifies that *"other councils have websites that are able to provide evidence of road adoption going back many years."*
20. Regarding the information provided during the investigation the complainant states that if *"the council believe the road was adopted in 2002 then there has to be evidence of this. Road adoption creates a paper trail, whether it was by agreement between the council and the developers or by the council taking on maintenance of the road which they are supposed to declare publicly."*
21. Furthermore the complainant argues that *"the road could not have been adopted via usage by the public at large as this takes 20 years"*

#### *The Council's response*

22. The Commissioner asked for details of recorded information relating to council's statement that *"map records indicate the Highway as adopted is over twenty years old"*. It responded: *"This statement given at the time of the request by the service area, was their best estimate."* It further explained that *"there is no requirement to retain some of the records once a highway is adopted."*
23. Regarding the photo taken from the physical maps, the council advised:
  - the Road was private before 2002;
  - the MoD sold off the properties within the Road in 2002;
  - the physical map would have been amended with the green colourwash *"in 2002 to record the road as public highway, when its status changed."*
24. The Commissioner asked for details of searches undertaken to locate further information in scope of the request. The council advised:
  - *"The initial search consisted of electronically held mapping on the Council's intranet, specifically the Adopted Highway layer on York Map – which is also publically available."*
  - *Please note that only the definitive record which City of York Council (CYC) are obliged to maintain is in the form of a List of Streets (Sect 36 para 6 of Highways Act 1980). The colourwashed maps are kept to give a putative detailed record and more detailed than a street name.*
  - *Paper files held by the Highway Regulation team were also searched for a highway adoption certificate (S38 adoption) but nothing was located relating to [the Road].*



- *The information governance team also sent a request to multiple service areas for any additional information pertaining to the EIR request. The service areas included Planning, Building Regulations, Public Rights of Way, Highway Maintenance, Transport, and Highway Regulations. The outcome of this request, with exception of the Highway Maintenance (Question 2), was provided in a response the council sent to the complainant on 27th March. The highway maintenance reports were provided to the complainant in a part 2 response dated the 15th April.*
  - *A further request for checks to ascertain if additional records are held was made more recently, to the councils Commercial Property Management Team and to our Legal Service team. Both service areas have searched digital records using '[the Road]' and/or 'Adopted', and have found no additional recorded information. We have also had a response from the City Archives that having checked all their catalogues, they do not hold any adoption of road agreements or certificates.*
  - *These requests for searches and retrievals set out above are the ones that were likely even if only remotely, to have retrieved any relevant information."*
25. *The council confirmed that the "searches were for both electronic and paper data held and will have included all files, folders, records in that service area as well as emails. These will have been done only on the council's systems and networks and not personal devices or laptops. The council has policies, procedures and measures in place that instructs all employees on how to access, use and store etc. council records, only through the council network either directly or through remote access. This is controlled by unique user ID, logins and passwords and two-factor authentication where accessing remotely."*
26. *The council confirmed that it has searched for a highway adoption certificate (S38 adoption) and that it does not hold a copy nor does it have any record of its destruction. It stated "The council's approach to the retention and deletion of records of this type is to consider before any destruction or deletion, whether it is a record or document type that should be passed onto the City Archives. However for the certificate for this road adoption in regard to this case, we approached the City Archivists to ask if it is in their catalogues and they confirmed they have checked and they do not have any adoption of road agreements or certificates."*



27. The Commissioner asked whether there is a statutory or business purpose to retain the requested information. The council responded that *"The definitive record which the council are obliged to maintain, is in the form of a List of Streets (Sect 36 para 6 of Highways Act 1980) which is kept up to date by our Highway Maintenance asset management team. The colourwashed maps were kept to give a putative detailed record and provide more details than a street name."*
28. At the request of the Commissioner the council provided the list of streets to the complainant however it qualified that the information *"does not disclose any further or additional details, than what has already been provided."*
29. The council summarised that *"in the council's correspondence with the complainant, advice and guidance was provided both before the request for recorded / held information was made and through our further responses from the complainant's enquiry. The council has not refused to provide any held recorded information in response to this request, as we do not hold it and so are unable to provide it."*

### Conclusions

30. In coming to her conclusion, the Commissioner has considered the three issues raised by the complainant, and their view regarding why further information should be held by the council. The Commissioner has also considered the responses provided by the council during the course of her investigation.
31. In response to issue [a], the council provided the complainant with some context for the photograph of the physical maps explaining that it is of a paper record based on the 1976 dated ordnance survey maps. It also explained that the green colourwash on the map represents an adopted road. The complainant responded stating that this still does not answer the core purpose of the request, as a key issue is when the green colourwash was overlaid. In response to further questions from the Commissioner the council has advised that the map was amended with the colourwash in 2002 to *"record the road as a public highway, when its status changed."*
32. In issue [c], the complainant asks on what basis or with what evidence, does the council claim that its map records, indicating that the Road is adopted, are over twenty years old. The question arises because council had stated to the complainant: *"The councils map records indicate the Highway as adopted is over twenty years old."* However in response to the Commissioner's investigation the council confirmed that its 20 year statement was an estimate of time, and was not based upon any recorded information that it holds. The Commissioner notes that this

estimate appears to be superseded by the council's response to issue [a].

33. The Commissioner considers that issue [b] is at the core of the complainant's request, being for any recorded information that proves that the council have been through any necessary process in order to change the status of the Road to an adopted highway. It is therefore necessary for the Commissioner to establish whether, on the balance of probabilities, the council holds any further information in-scope of the request.
34. The Commissioner is satisfied that the council have undertaken appropriate searches to identify all information held in scope of the request. This included searches for a record of an 's38 highway adoption certificate' which was identified as necessary by the complainant. The council also confirmed that the archive records were searched and that no information has been destroyed or deleted. The council explained it has no statutory requirement to hold further information and that the only definitive record which it is obliged to maintain is in the form of a 'List of Streets', which has been provided to the complainant.
35. The Commissioner appreciates the complainant's frustration that the council's disclosures have only provided records showing the Road's status as being 'adopted'. The complainant's view is that the council should be able to provide a conclusive record of the adoption of the Road into the public highway when it became maintainable at public expense (pursuant to the 1980 Highways Act).
36. The Commissioner also observes that complainant's misgivings about the absence of such a definitive record on the matter have been further exacerbated by the lack of information about the origin and meaning of the colourwash map [a] and the council's initial estimate of time since adoption [c].
37. However, the Commissioner is mindful of the purpose of the EIR, being that it gives the public the right of access to recorded information that is held by a public authority. It is not concerned with what information a public authority 'should' hold, only those records that 'are' held. The Commissioner must therefore conclude whether the council is likely to be holding further recorded relevant information beyond that which has already been disclosed.
38. The Commissioner understands the importance of the request to the complainant. She appreciates why the complainant considers that further information should be recorded. However, the Commissioner has not found there to be any evidence which undermines the council's

position that it has provided all of the information it holds that is relevant to this request.

39. Taking all of the above into account the Commissioner is satisfied that, on the balance of probabilities, no further information in-scope of the request is held by the council.

*Procedural matters*

**Regulation 5(2)**

40. Regulation 5(2) of the EIR provides that in response to information requests under the EIR, information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
41. The complainant made their request for information on 29 January 2019. The council responded on 27 March 2019 which is later than the statutory 20 working days.
42. The Commissioner therefore concludes that the council failed to comply with the requirements of Regulation 5(2) in the time it took to respond to the complainant's request for information. As the response has been provided no further action is required.

## Right of appeal

---

43. 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: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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**