

9 May 2019

Complaint reference:
18 010 841

Complaint against:
City of York Council

The Ombudsman's final decision

Summary: There was fault in the time it was taking the Council to make an order on Mr X's application to change the rights of way map. The Council agreed to apologise to Mr X and pay him £250 in recognition of the avoidable distress and uncertainty caused by its delay. The Council also agreed to review its rights of way of service with the aim of reducing its backlog of applications.

The complaint

1. Mr X complains about the Council's unreasonable delay in complying with the Secretary of State's direction to make a definitive map modification order (DMMO) on his application for a public right of way. Mr X says the Council's failure to act prevents him from using a path he believes to be a public right of way. Mr X wants the Council to make the order so legal steps will follow and a final decision made about the status of the path. Mr X also wants the Council to review how it handles DMMO applications and clear its order making backlog.

What I have investigated

2. Mr X applied to the Council for a DMMO several years before bringing his complaint to the Ombudsman. However, Mr X came to the Ombudsman within 12 months of finding his application was at the bottom of the Council's waiting list for public rights of way orders. Mr X's complaint is not therefore a 'late complaint' (see paragraph 4 of this statement). To properly consider Mr X's position on coming to the Ombudsman, I have used my discretion to take account of key events since he first applied to the Council for a DMMO.

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. I refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
4. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council has done. (*Local Government Act 1974, sections 26B and 34D, as amended*)

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5. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*)
 6. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

7. I have:
 - considered Mr X's written complaint and supporting papers;
 - talked to Mr X about the complaint;
 - asked for and considered the Council's comments on the complaint;
 - shared the Council's comments with Mr X; and
 - shared a draft of this statement with Mr X and the Council and considered their responses.

What I found

What should happen

8. Councils must prepare and keep up-to-date 'definitive maps and statements' to show public rights of way (PROW) in their area. Examples of PROWs are footpaths and bridleways.
9. The law sets out how people may apply to their council for a definitive map modification order (DMMO) to have a public right of way recorded on the definitive map. Once the council has a properly made DMMO application, it should "as soon as reasonably practicable" decide whether to make an order. A decision to make an order needs evidence a right of way exists or is reasonably alleged to exist.
10. If 12 months passes without a decision, the applicant may ask the Secretary of State to direct the council to decide the application. The Secretary of State's direction may include a deadline for the council to make its decision. The Government's current Rights of Way Circular 1/09 (Circular 1/09) says, at paragraph 4.9, when considering whether to make a direction with a deadline, the Secretary of State:

"...will take into account any statement by the [council] setting out its priorities for bringing and keeping the definitive map up to date, the reasonableness of such priorities, any actions already taken by the [council] or expressed intentions of further action on the application in question, the circumstances of the case and any views expressed by the applicant."
11. If a council decides not to make an order, the applicant has 28 days to appeal to the Secretary of State. On appeal, the Secretary of State will consider the evidence to decide if there is a case for making an order and, if so, direct the council to do so. The Secretary of State's direction may include a deadline for the council to make the order.
12. If a council makes an order, further legal steps follow, which may include the Secretary of State deciding whether to confirm the order if people have objected to it. A public inquiry may be necessary and people asked about their use of

claimed rights of way where there are inconsistencies in the evidence. (In practice, Planning Inspectors, independent of councils, usually act for the Secretary of State in dealing with DMMO applications, including issuing directions to councils.)

13. Circular 1/09, at paragraph 1.8 says, councils “should ensure that sufficient resources are devoted to meeting their statutory duties with regard to the protection and recording of public rights of way...”
14. The Council has a ‘Statement of Priorities’ dated 1999 for dealing with DMMO orders (‘the Statement’). The Statement says it will be reviewed each year and progress reported to the Council’s Transport Consultative Group. Mr X’s application is a ‘priority 4’ case under the Statement. The Council says its focus has been on priority 1 and 2 cases, which work is nearing completion. The Council has therefore recently started to consider priority 3 and two priority 4 cases. The Council says it is preparing a revised statement of priorities.

What happened

15. Mr X applied for a DMMO. Two years later, Mr X asked the Secretary of State to direct the Council to decide his application. An inspector, acting for the Secretary of State, took account of the Statement, which led the Council to suggest it would be at least 10 years before it could investigate the application. The inspector said it was appropriate for the Council to act in line with the Statement, however, the law said it should decide applications as soon as reasonably practicable. The inspector recognised the Council needed time to investigate Mr X’s application but considered 12 years unreasonable. The inspector directed the Council to decide Mr X’s application within 12 months.
16. Twenty-three months later, the Council wrote to Mr X refusing to make an order. Mr X appealed the decision within 28 days. An inspector, acting for the Secretary of State, found enough evidence to reasonably allege a right of existed along the route claimed by Mr X. The inspector directed the Council to make a DMMO on Mr X’s application but did not set a deadline making that order.
17. Hearing nothing further for nine months, Mr X contacted the Council. In the correspondence that followed, the Council referred to the Statement and that Mr X would need to wait while it dealt with higher DMMO priorities and applications received before his. Later, having completed the Council’s complaint procedure, Mr X came to the Ombudsman. Mr X said the Council was suggesting it would take 29 years before it could make an order on his application. Mr X said this was unacceptable and people supporting the application and able to give evidence, if necessary, at any public inquiry, might not be available in 29 years.
18. In responding to the Ombudsman, the Council’s position, in summary, is:
 - the law requires it to act as soon as reasonably practicable and it is not compelled to act by any timescale;
 - it is bound by the Statement, which provides transparency and equity for all;
 - it can’t disadvantage others and depart from the Statement just because Mr X had the time and tenacity to use his legal rights and seek directions from the Secretary of State;
 - “notwithstanding the direction from the Secretary of State to make the order, the Council does not believe that public rights exist...” over the route shown in Mr X’s application;

- it needs to make an order on Mr X's application to comply with the Secretary of State's direction and will do so once it has dealt with DMMO applications received before Mr X's;
- Mr X's comment about a 29 year wait "might be a little high but not excessively so";
- Mr X is correct about the adverse impact on people arising from its backlog of DMMO cases but, it works with its available staff and funds;
- it now publishes information on its website about DMMOs and will in future routinely tell applicants about the Statement;
- it recently recruited an officer to fill a vacancy in its rights of way team and will seek councillor approval to take urgent cases out of sequence; and
- it could recruit more officers but needs to weigh this against its finite resources and the other powers and duties it must fulfill.

Is there fault causing injustice

19. The Ombudsman has recently issued a Focus Report, 'Under Pressure'. The Report recognises councils face budget pressures and that delay caused by service request backlogs is a key theme in many of our investigations. The Report says the presence of delay does not necessarily mean there is fault by a council. Rather, we will consider whether the law requires councils to act in a set time; what steps a council has taken to explain what is happening and to anticipate and respond to increasing pressures. We will also consider the impact of delay on the complainant.
20. The key issue in Mr X's complaint is the time it is taking the Council to make an order on his DMMO application. The law does not set a time limit for councils to deal with DMMO applications but requires them to act 'as soon as reasonably practicable'. In this case, the only timescale for action referred to is 29 years, which the Council accepts is not an 'excessively high' estimate. The 29 years is additional to the years Mr X has already been waiting since making his application and following the Secretary of State's second direction to the Council.
21. The available evidence shows the Council's DMMO backlog is longstanding and not caused by budget pressures in recent years. However, budget pressures are likely to add to the Council's difficulties in reducing and addressing its DMMO backlog. I recognise the Council published its Statement. Circular 1/09 (and its predecessor, Circular 2/93) says the Secretary of State will consider such published statements, and the reasonableness of the published priorities, when deciding whether to issue a DMMO direction. And yet, such statements are but one consideration for the Secretary of State. I am concerned at the Council's seeming over reliance on its Statement especially when it has not been regularly reviewed and or DMMO progress considered by councillors. Such reliance does not show the Council is actively addressing its backlog.
22. In response to the Ombudsman, the Council says it has, within the last 12 months, published information about DMMO applications on its website. The Council also says it will send a copy of the Statement to future DMMO applicants. I welcome the steps the Council is now taking. And yet, I am concerned the Council has not acted much sooner to publicise information about DMMOs for its residents and potential applicants.
23. The Council also intends to keep under review, and be prepared to prioritise, urgent DMMO cases in exceptional circumstances. Again, I recognise the

Council's willingness to adopt this approach in future. However, I am concerned the Council appears to find it acceptable to work at a pace that means Mr X may wait 29 years before it makes an order on his application.

24. Applications for DMMOs often involve evidence given by local people about the use they have made of claimed rights of way. That evidence will be in written statements. Where an order is made and opposed, it is often necessary and helpful to ask people to clarify and or expand on what they have written. Similarly, if unresolved objections lead to a public inquiry, people may attend and describe their use of a claimed path to the inspector acting for the Secretary of State. As years pass, people move away, may die or become unable and or unwilling to take part in public inquiries. Here, Mr X says two local people that provided witness statements for his application have since died.
25. Overall, publishing the Statement and the Council's adherence to its priorities cannot justify a 29 year wait for dealing with Mr X's application. And, 29 years for the Council to make an order on that application cannot comply with the legal requirement to act 'as soon as reasonably practicable'. I find fault here.
26. The Secretary of State's report leading to the second direction on Mr X's application said there was enough evidence to support the claimed right of way. The report also said there was credible evidence from the landowner that conflicted with parts of the claimed right of way. The report found "a conflict of credible evidence" that required the Council to make an order. I cannot know but, on balance, once made, the order is likely to result in unresolved objections and further involvement by the Secretary of State. The ability to test the written evidence before an independent inspector is therefore likely to be of importance in deciding whether the order is confirmed. I therefore find the time the Council takes to make that order will have a direct and substantive impact on Mr X and his application. I find the fault identified at paragraph 25 causes Mr X significant injustice.
27. I further find that other DMMO applicants may be facing similar lengthy waits before the Council both investigates their claimed paths and, where appropriate, makes an order (see paragraph 5 of this statement).

Agreed action

28. To address the injustice caused to Mr X by the fault I have identified at paragraph 25, the Council agreed (within 28 days of this statement):
 - To write to Mr X to apologise for both its delay in making an order on his DMMO application and the frustration caused by its failure to provide a reasonable timescale for carrying out the Secretary of State's direction; and
 - to pay Mr X £250 in recognition of the avoidable distress caused by the delay and continuing uncertainty about the legal existence of the claimed right of way.
29. To address the wider injustice identified at paragraph 27, the Council agreed:
 - Within three calendar months of this statement, to start and finish a review of its DMMO service with the aim of reducing the DMMO backlog. (Such review could include consideration of current staffing levels, work practices, policies and procedures and how other local authorities have dealt with similar backlogs.)

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- Within one calendar month of completing the review, to report the findings to councillors and seek approval for any changes required.
 - Within two weeks of councillors deciding what action to take:
 - To write to Mr X about the outcome of the review and the steps it will take; and
 - in the light of those changes, when it expects to be able to make the order on his DMMO application.
 - To write to other DMMO applicants updating them on any changes to the DMMO service and giving a time frame for investigating and deciding their applications.
30. The Council also agreed to send the Ombudsman:
- A copy of its apology and update letters to Mr X; report to councillors on the service review; written records of councillors' discussions and decision on the review; and letters to other DMMO applicants. (The copies to be sent to the Ombudsman when the originals are sent/available to Mr X, councillors and other DMMO applicants.)
 - Updates every six months on its progress in reducing its DMMO backlog. The six-monthly updates to continue for two years after the date of this statement.

Final decision

31. I completed my investigation, finding fault causing injustice, when the Council agreed the recommendations set out at paragraphs 28 to 30.

Investigator's decision on behalf of the Ombudsman