



## Report to Service Director – Highways and Technical Services

**Date:** 11th November 2021

**Title:** Claimed Public Footpath from Asheridge Road to Fair Leas, Chesham.

**Relevant councillor(s):** Cllr Patricia Birchley, Cllr Mohammad Fayyaz, Cllr Jane MacBean

**Author and/or contact officer:** Helen Francis, Interim Definitive Map and Highway Searches Team Leader

**Ward(s) affected:** Chiltern Ridges

**Recommendations:** That the 20 year relevant period for the section A-B-C-D-E-F-G is 1996 to 2016.

That the route shown between A-B-C-D-E-F-G (Appendix 1) be **ACCEPTED** on the grounds that there is sufficient evidence to show on the balance of probabilities that the route subsists under Section 31 Highways Act 1980 and should be shown on the Definitive Map and Statement as a Public Footpath.

**Reason for decision:** There is sufficient evidence to show on the balance of probabilities that the route subsists under Section 31 Highways Act 1980.

### Executive summary

1.1 The purpose of this report is to determine an application for a Definitive Map Modification Order to show a path from Asheridge Road to Fair Leas, Chesham. The claimed route is shown between points A-B-C-D-E-F-G on the plan [Appendix 1].

1.2 On the 20 December 2016 an application was made to modify the Definitive Map and Statement by adding the route as described in paragraph 1.1. The application was made by Mr Allan Bacon and Mr Mohammed Fayyaz [Background Papers; pages 54-58].

1.3 The application was supported by 16 user evidence forms claiming use of the route from 1963 – 2016. The application was made on the basis that the route had been used by the public as a Public Footpath without let or hindrance for many years and residents would like to protect it by officially registering it on the Definitive Map and Statement.

## Legal Background

1.4 The Council as the Surveying Authority has a duty under section 53(2)(b) of the Wildlife and Countryside Act 1981 (WCA 81) to keep the Definitive Map and Statement under continuous review and to make such modifications to the Definitive Map and Statement that appear to be requisite in consequence of events described in section 53(3).

### Section 53(3) events

1.5 The relevant events referred to in section 53(3) which are applicable in the context of the present application are:

*“(3)(b) the expiration in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway.”*  
[Referred to below as test (a)]

and/or

*(3)(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows-*

*(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or subject to 54A, a byway open to all traffic.”* [Referred to below as test (b)]

1.6 In relation to section 53(3)(b) the decision maker must consider whether, on the balance of probabilities, enjoyment by the public of the way over a period raises a presumption that the way has been dedicated as a public footpath.

1.7 In relation to section 53(3)(c)(i) the decision maker must consider whether the evidence produced by the applicant, together with all the other evidence available, show that either (a) a right of way subsists or (b) that it is reasonable to allege that a right of way subsists. These tests were considered in *R v Secretary of State for the Environment ex p. Bagshaw and Norton* and *R v Secretary of State for Wales ex p. Emery* in the context of section 31 of the HA 1980.

1.8 On test (a), it is necessary to find on the balance of probabilities that the right subsists. This will be the case where there is clear evidence of 20 years' user uncontroverted by any credible evidence to the contrary and no credible evidence that there was on the part of the landowner no intention during the period to dedicate the way to the public.

1.9 On test (b), it is necessary to find on the balance of probabilities that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. The evidence necessary to establish that a right of way is reasonably alleged to subsist over land is less than that which is necessary to establish that a right does subsist. In relation to test (b), whether an allegation is reasonable or not will depend on a number of circumstances. If the evidence from witnesses as to user is conflicting, but reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it is reasonable to allege such a right. Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under section 31, then the allegation that the right of way subsists is reasonable, unless there is documentary evidence which inevitably defeats the claim (for example by showing that the landowner had no intention to dedicate).

1.10 Where there is no credible evidence of 20 years' user, or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, then the decision should be that the allegation that a right of way subsists is not reasonable and that no right of way as claimed subsists.

#### Presumption of dedication

1.11 Section 31 of the Highways Act 1980 (HA80) provides for the presumption of dedication of a public right of way following 20 years continuous use as of right, without interruption, unless there is sufficient evidence that there was no intention during that period to dedicate it. Sub-section (1) states:-

“where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

1.12 The period of twenty years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question: section 31(2) HA 1980. Section 69 of the Natural Environment and Rural Communities Act 2006 (NERC) clarified that the submission of an application to modify the Definitive Map was sufficient to call the use of the route into question by inserting subsections 7A and 7B into Section 31 HA80.

1.13 Bringing into question the public's right to use a particular route will require an act where the landowner challenges by some means sufficient to bring home to the public that he is challenging their right to use the way, so they may be apprised of the challenge and have a reasonable opportunity of meeting it, for example putting up a notice that makes it clear to the public that he is challenging their right of way. Such evidence may

consist of notices which call into question the rights of the public to use a particular way, the erection of physical barriers such as by locking of the way on one day in the year, and drawing this to the attention of the public, or by the deposit of a Statutory Declaration under HA80 section 31 (6) to the effect that no additional ways (other than any specifically indicated in the Declaration) have been dedicated as highways since the date of the deposit. The relevant question is when did the landowner make it clear to the public that he was challenging their right to use the way: *Fairey v Southampton County Council*.

- 1.14 Once the decision-maker has determined the date upon which the public's right to use a particular way is brought into question, the decision maker must consider the evidence of use in the twenty year period and then evidence that the landowner had no intention to dedicate.

#### User Evidence

- 1.15 There is no statutory minimum level of users required to show sufficient use to raise a presumption of dedication, however, use of a way must be use by the public or the community. Use of a way by different persons, each for periods of less than 20 years may be sufficient if taken together they total a continuous period of 20 years. The number of users must be such as might reasonably have been expected if the way had been a public highway: *Mann v Brodie*. Use "as of right" must be without force, secrecy or permission.

#### Lack of intention to dedicate

- 1.16 Once use is established as of right and without interruption, the presumption of dedication arises. Consideration must then be given to evidence that there was no intention to dedicate on the part of the landowner. "Intention to dedicate" was considered in *Godmanchester*, which is the authoritative case dealing with the proviso to HA80 s31. In his leading judgment, Lord Hoffmann approved the obiter dicta of Denning LJ in *Fairey v Southampton County Council* [1956] who held "*in order for there to be 'sufficient evidence there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path....that he had no intention to dedicate*".

- 1.17 It is clear from *Godmanchester* that actions satisfying the proviso will, usually, also bring the public's right to use the way into question. It nevertheless remains the case that not every act which brings the rights of the public into question will necessarily satisfy the proviso.

- 1.18 Lord Hoffmann held that "*upon the true construction of Section 31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the owner's intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to 'disabuse' [him] of the notion that the way was a public highway*".

1.19 For a landowner to benefit from the proviso to s31(1) there must be 'sufficient evidence' that there was no intention to dedicate. The evidence must be inconsistent with an intention to dedicate, it must be contemporaneous, and it must have been brought to the attention of those people concerned with using the way. Although s31 ss (3), (5) and (6) specify action which will be regarded as "sufficient evidence", they are not exhaustive; s31 (2) speaks of the right being brought into question by notice "or otherwise".

#### Common Law

1.20 A right of way can come into existence under common law. This occurs when the public use a way "for so long and in such a manner that the [landowner]...must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was." (Mann v Brodie 1885 10 App Case 378 Lord Blackburn). No minimum period of use is required. The greater the evidence of use (which is acceptance by the public at large of a public right of way) the greater the implication of dedication.

#### Role of decision maker in determining the application

1.21 In determining the rights of way application, the decision maker must act in accordance with the following overriding principles set out in R v Isle of Wight County Council, ex p O'Keefe [1989] JPL 934.

- a. The decision maker must make a careful and properly informed decision as to whether all the evidence shows that a right of way subsists or is reasonably alleged to subsist.
- b. The decision maker must determine the application with a proper appreciation and weighing of the available evidence and any legal principle which might have to be applied.
- c. The decision maker must arrive at their own conclusion on the evidence and whilst the decision maker may have regard to the recommendation of the relevant Officer they must determine the application for themselves and not simply adopt the view of the relevant Officer without analysing the evidence.
- d. The decision maker must actually make a decision on the application in light of the relevant evidence and legal principles and must not rely upon the possibility of an appeal or an inquiry at a later date.

1.22 All the relevant statutory provisions and competing rights and interests have been considered in making this report. The recommendation is in accordance with the law and proportionate, having regard to individuals' rights and the public interest.

## User Evidence

- 1.23 The application was accompanied by 16 user evidence forms claiming use of the route from 1963 – 2016. A graph identifying the periods of use is attached to this report at Appendix 2. In addition, officers carried out interviews with nine of the users [Background Papers; pages 21-53].
- 1.24 Fourteen of the users provided details of the period during which they used the route, with most using the route frequently. None of the users asked for permission or felt that they needed permission to use the route.
- 1.25 A few of the users who walked the route in the 60/70s recall a rope being put across the path at the Fair Leas end and a notice. The notice referred to the route being closed on Good Friday. Since the 1980s all of the users confirmed that there were no structures or any notices suggesting that the route is not open to the public.
- 1.26 One of the users mentioned that the original path was running directly between points C to E, as there was less undergrowth in the field. During interviews it became apparent that the original route had followed closer to the field boundary. However, from the 80s the route had become overgrown and users stated that they were using a route further into the field as shown on the plan. All the users who were interviewed resubmitted a map showing an alignment of the route which matches the route on the plan.
- 1.27 The users accessed the path on foot and some on bicycle. The path was mainly used for leisure, dog walking, access to the shop and the post box in Asheridge Road or a shortcut to the town and other estates.
- 1.28 The route between points C-D-E is maintained by Chesham Town Council and is part of the Public Open Space. The applicant with local volunteers and Chiltern Rangers were involved in cutting back vegetation between points A-B-C between 2014-2016. Mr and Mrs Roots recall local residents of Fair Leas clearing fallen tree between points E-F-G which was obstructing the route.

## Documentary Sources

- 1.29 Documentary sources have been checked, the findings of which can be found below:-

### Aerial Photos

- 1.30 Aerial photos taken in 1969 and 1988 (pages 2-3) show clearly the path leading through the woodland off Fair Leas to the Public Open Space field and towards Ashridge Road. The 1969 aerial photo also shows the path between points C-E running along the edge of the field.

1.31 Aerial photos taken in 2003, 2006 and 2020 (pages 4-5) show the route following the alignment on the plan. The surrounding area is more populated with trees and undergrowth.

#### Ordnance Survey

1.32 The Ordnance Survey maps of 1877 and 1897 (page 6) , 1972 – 1990 map (page 7) and the current Ordnance Survey maps show a route similar to what was originally claimed in the application and to the route shown on the plan in Appendix 1.

***Comment:*** *Ordnance Survey maps do not provide any indication of the status of a route but only show what was on the ground at the time of the survey.*

#### Comments

1.33 The claimed route was brought into question by the submission of an application in 2016 to modify the Definitive Map and Statement by adding the route to the Definitive Map as a public footpath. Therefore, the relevant period is from 1996 to 2016.

1.34 The claimed route was originally for A-B-C then straight across to E-F-G, this matches the alignment of the route which was used in the 1960s/70s. However, during the relevant period from 1996 to 2016 the evidence would suggest the route between points A-B-C-D-E-F-G should be considered.

#### Other options considered

1.35 The pros and cons should not be considered when determining the application based on the evidence.

#### Legal and financial implications

1.36 Financial implications should not to be considered when determining this application as the Council has a statutory duty to make an Order if it believes that there is sufficient evidence to support it. Officer time is involved in investigating the application and dealing with a public inquiry if an Order is made and there are objections to it.

#### Corporate implications

1.37 Corporate implications should not be considered when determining this application for the same reasons detailed in 1.5.

## Consultation and communication

- 1.38 Consultation was carried out with the Local Member for the Chiltern Ridges Division, Chesham Town Council and the list of prescribed organisations and statutory undertakers for the area.
- 1.39 In an email dated 14 October 2020 Cllr Patricia Birchley supported the application. Cllr Peter Jones responded by email dated 15 October 2020 and confirmed he has walked the claimed route in the past year.
- 1.40 In an email dated 11 November 2020 from the UK Power Network they stated the company has access and cable rights over/under the path to the substation and do not object to the proposal, providing their company's statutory rights of protection are incorporated.
- 1.41 Cllr Jane MacBean forwarded an email on 23 November 2020 forwarded from Roy Evans, Neighbourhood Sergeant for Chesham, who does not see a point in creating an additional path leading from the public open spaces field. He had a conversation with Cllr MacBean two years ago about difficulties to police this open space.

## Next steps and review

- 1.42 If the application is accepted an Order to modify the Definitive Map and Statement will be made and open to objections. If objections are received the Order and the objections will be sent to the Planning Inspectorate for determination. If the application is rejected the applicant can appeal the decision to the Planning Inspectorate.

## Background papers

### Pages

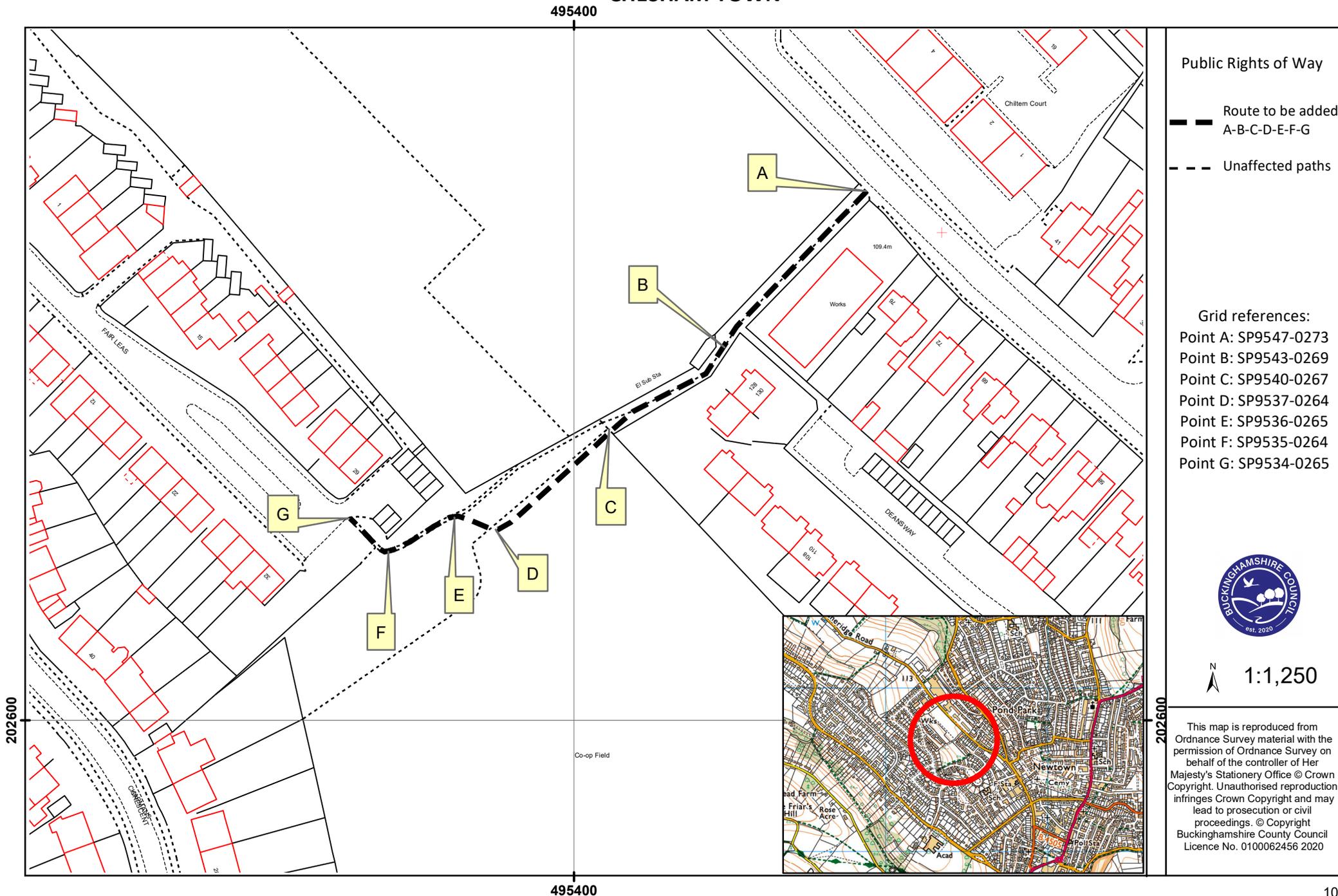
- 2 - 5 1969, 1988, 2003, 2010 & 2020 Aerial Photos
- 6 - 7 Ordnance Survey Maps 1877, 1897, 1972 – 1990
- 8 Extract from Town Council Meeting - dedication of Open Access Land – 23 December 1982
- 9 - 12 Responses from Cllr P. Birchley, Cllr P. Jones, UK Power Networks, Cllr J. MacBean forwarding email from Seargants Evans
- 13 - 20 Land Registry Details
- 21 - 53 Witness interviews
- 54 - 188 Application and Evidence

## Your questions and views

For further information please contact Ela Hackling – [ela.hackling@buckinghamshire.gov.uk](mailto:ela.hackling@buckinghamshire.gov.uk)

**WILDLIFE AND COUNTRYSIDE ACT 1981  
SECTION 53 CLAIMED PUBLIC FOOTPATH  
CHESHAM TOWN**

Appendix 1.



Appendix 2.

Claimed Footpath from Asheridge Road to Fair Leas, Chesham.																
Witness	Years	Frequency	1960	1965	1970	1975	1980	1985	1990	1995	2000	2005	2010	2015	2016	
Witness 1	2014 - 2016	Infrequent														
Witness 2	1963 - 2016	Frequent														
Witness 3	1967 - 2016	Frequent														
Witness 4	1999 - 2016	Frequent														
Witness 5	1987 - 2016	N/A														
Witness 6	1980 - 2012	N/A														
Witness 7	1991 - 2016	Frequent														
Witness 8	1991 - 2016	Frequent														
Witness 9	1986 - 2016	Frequent														
Witness 10	1986 - 2016	Frequent														
Witness 11	1968 - 2016	Frequent														
Witness 12	1976 - 2014	Frequent														
Witness 13	1982 - 2016	Frequent														
Witness 14	1997 - 2016	Frequent														
Witness 15	1997 - 2016	Frequent														
Witness 16	1998 - 2016	Frequent														
 Frequent Use 12 times a yr or more																
 Infrequent Use 12 times a yr or less																
 N/A																