



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2013/0022

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No:
FS50444929**

Dated: 21st. January, 2013

Appellant: Stephanie Harvey

First Respondent: The Information Commissioner ("the ICO")

Second Respondent: Walberswick Parish Council ("WPC")

**Before
David Farrer Q.C.**

Judge

and

Jacqueline Blake

and

Darryl Stephenson

Tribunal Members

Date of Decision: 7th August 2013

Representation:

This was a paper determination.

Subject matter:

FOIA s.14(1) – Vexatious Requests

Cases :

ICO v Devon County Council and Dransfield GIA/3037/2011

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 7th. day of August, 2013

David Farrer Q.C.

Judge

[Signed on original]

REASONS FOR DECISION

The Background

- 1 Parish Councils are the smallest unit in our system of elected government. In rural areas their jurisdiction typically extends to a single village or perhaps two or three, depending on size. Their powers are limited, extending to certain highway matters, litter, community facilities and other provision for immediate local needs. They have an important statutory consultative role on planning applications. The extent to which these powers are exercised varies according to the size of the council and the character of the community and those who serve as councillors.
- 2 Their budget generally runs to a few thousand pounds a year, again varying according to size. They generally employ one part – time clerk to perform secretarial and administrative tasks and often to liaise with the District and County Councils. Their income derives from their precept – usually a small fraction of the Council tax. Most Parish Councils probably have little experience of FOIA requests for information. Local people often just make a telephone call, or send an informal e mail, if they wish to know what is happening.
- 3 Walberswick is a village near Southwold in Suffolk. It is apparent that its residents have been seriously divided on certain planning issues in recent years, which have resulted in some bad feeling. The Parish Council has been at the centre of the storm.
- 4 Between 1st. January, 2011 and 1st. January, 2013, The ICO received no fewer than 42 complaints arising from information requests to WPC out of 58 cases

opened in which WPC was the public authority. That workload implies a still higher figure for FOIA requests made to WPC over that period. The great majority of complaints have been made by just four residents, of whom the Appellant is one. She has made seven. The other complaints to the ICO have related to WPC's handling of requests. According to the WPC clerk, Jane Gomm, in a letter dated 16th. December, 2011, about 234 requests were received from 1st. December, 2009 to 30th. November 2010 and about 263 from 1st. December, 2010 to 30th. November 2011.

- 5 WPC's precept rose from £7,742 in 2011/2 to £16,000. The clerk far exceeded her maximum authorised hours. WPC had to seek extra funding from the District Council. The clerk attributes the rise in expenditure to the flood of FOI requests. The Appellant and other critics of WPC blame it on the backlog of work caused by WPC's earlier failures to handle FOI and other issues efficiently.
- 6 It is evident that, at any rate before Mrs. Gomm became clerk (July, 2011), WPC did not tackle information issues in a satisfactory manner. The ICO identified failings in its responses dating from early 2010, leading to further complaints and FOI requests. To some extent, therefore, WPC, though not its present clerk, Mrs. Gomm, has contributed to the problems that it now faces.
- 7 A particular error was the issue in November and December, 2010, to the four requesters referred to above, including therefore the Appellant, of "exclusion notices", documents unknown to FOIA and plainly of no legal effect. Their intended purpose was to staunch a flow of what WPC, as then constituted, regarded as vexatious requests for information. The "notices" provoked a very hostile reaction from their recipients, which is reflected repeatedly in the Appellant's correspondence with WPC and the ICO. So far from stemming the FOI requests they appear to have triggered a long series of further FOI requests dealing with a particular planning application, the "notices", other affairs of WPC and WPC's handling of FOI requests, a form of derivative inquiry, which might threaten the prospect of requests about requests about requests.

- 9 The ensuing stress, tension and acrimony led to the resignation of all the parish councillors over a period in 2011 and 2012 and their temporary replacement by county council appointees.

The Request

- 10 On 10th. December, 2011, in the course of this series of requests, “M. Williams” requested various statistics from WPC, including the number of FOI requests over a two – year period and of failures or refusals to provide information. The reply indicated that in about 50 cases WPC had refused on grounds of cost.
- 11 On 17th. January, 2012, in the course of a letter robustly expressing concerns as to WPC’s performance, the Appellant requested “the information/ record/ list” of the 50 requests as well as numbers of requests for another two – year period. The clerk, by letter dated 27th. January, replied that the requests came from one person, were scattered within 82 pages of closely – typed letters and attachments in exclusively paper form, included extraneous “rhetorical” material and could not be edited and re – typed in less than 18 hours or so. The cost objection therefore applied.
- 12 This prompted two letters from the Appellant to the clerk and the chairman of WPC, both dated 5th. February. The first, headed, somewhat provocatively, “*Unsatisfactory and misleading response from (WPC)*” requested an internal review of the above refusal and made further complaints about a refusal to answer certain points and a failure either to provide information or serve “*a valid s.17 notice*”. In fact, the WPC response of 27th. January clearly specified the exemption relied on in accordance with FOIA s.17(5). The second letter made a fresh but related request for photocopies of the 83 pages containing the 50 requests. This is the request giving rise to this appeal.
- 13 This request was refused by one of two letters of 21st. February, 2012, from the

clerk. It clearly spelt out reliance on s.14 and referred to certain of the tests prescribed by the ICO for deciding whether a request is vexatious. The refusal was maintained on an internal review, which expressly took account of the erroneous refusal by the previous clerk to reply to earlier requests on the strength of the invalid “exclusion notices”. It acknowledged the unavoidable problem of self – review, which resulted in part from councillor resignations. It treated the request as part of a campaign against WPC involving the four principal requesters referred to in paragraph 4 above.

The Complaint to the ICO

- 14 Following a highly critical reply to WPC, the Appellant complained to the ICO on 18th. April, 2012. On 4th October, 2012, at the ICO`s request, the clerk set out again and in detail WPC`s arguments for treating the request as vexatious pursuant to s.14. By that time all the parish councillors had resigned; the appointees were then or shortly afterwards in place. At a parish council meeting in January, 2013, shortly before the issue of the ICO`s Decision Notice, the invalid “exclusion” notices were withdrawn.
- 15 By his Decision Notice dated 21st. January, 2013, the ICO, whilst acknowledging its earlier failings, upheld WPC`s refusal. He accepted that the request was part of an organised campaign involving several requesters. He applied familiar tests in reaching his decision.

Appeal to the Tribunal

- 16 The Appellant appealed to the Tribunal by notice of 14th. February, 2013, attaching her comments on the ICO`s Decision, her proposals for the determination of the appeal and a substantial range of relevant documents, including most, if not all, of the material correspondence. WPC was joined as Second Respondent.

Our Decision

- 17 We refer below to events occurring shortly before our determination of this appeal. They are not directly material to the character of this request at the date when it was made. In fact, as we shall indicate, we do not draw from them any conclusions influencing the outcome of this appeal.
- 18 The cases of the ICO and WPC on the one hand and of the Appellant on the other may be concisely summarised.
- 19 The request is said by both respondents to be vexatious because it placed intolerable administrative and financial burdens on WPC and harassed council members to the point of relinquishing office, as witness their letters of resignation. Both respondents assert that this request was designed as part of a concerted assault on WPC designed to create the state of affairs that in fact came to pass.
- 20 The Appellant rejects every one of these claims. She says that the material request is “*clear, entirely legitimate and very modest*”. Its purpose is serious. She denies that it is part of a campaign. She accuses WPC of acting in a covert and unaccountable manner. It must hold the requested information and can readily provide it. The “exclusion notices” and the consequent backlog of unanswered requests are the source of any burdens faced now by WPC, which is probably misleading the public and seeking to shield itself from legitimate criticism by its unwarranted refusal. The ICO, so says the Appellant, has misstated the facts and ignored the effects of the unlawful notices. He failed to take account of the withdrawal of those notices shortly before his decision and the apology from WPC. He is applying s.14 in an unprecedented fashion. In her Reply to the ICO she relies on a number of observations of Judge Wikeley in *ICO v Devon County Council and Dransfield GIA/3037/2011* (“*Dransfield*”) and reiterates many of the points made against the decision notice in her Grounds of Appeal. She further

criticises the WPC response in respect of various factual details, which have no obvious bearing on the outcome of this appeal.

21 We judge that the essential principles emerging from the *Dransfield* decision are clear and reflect earlier decisions of the FTT.

(i) “Vexatious” means more than simply irritating, annoying or disappointing.

It signifies “*a manifestly unjustified, inappropriate or improper use of FOIA*”(Para. 43).

(ii) Whilst the ICO guidelines are recommended, this is not a box – ticking exercise but an appraisal of the overall effect and intention of the request or requests.

We further have regard to the four core issues identified in *Dransfield* at paragraph 28, which may shortly be labelled as

(i) Burden

(ii) Motive

(iii) Value

(iv) Harassment or distress?

“Burden” is to be viewed in the light of the observation in paragraph 10, which is highly pertinent to this appeal –

“The purpose of section 14 must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA.”

22 In reaching our conclusions we fully accept that the misguided and ill – informed decision to issue “exclusion notices” provoked a great deal of heat and even more

correspondence. Before Mrs. Gomm became clerk, it seems that FOIA issues – and probably other council functions – were not efficiently handled, though who was responsible for that is no concern of this appeal. The ICO had an excellent overview of the position and we adopt his assessment.

23 Furthermore, we do not regard the evidence of express collusion of the Appellant with other requesters as compelling. She denies such collusion and we are not willing to reject her denial without hearing oral evidence on the point, tested by cross examination. The absence of such a finding is not, however, of great significance because she was plainly aware of the flood of requests targeted on WPC over a considerable period. The position was vividly publicised on the WPC website and the local media. Nobody making such a request as the one in this appeal could expect it to be viewed by WPC in isolation when deciding whether it was vexatious. Certainly, the Appellant could hardly assume such a response, given her personal contribution to the known stream of requests and complaints.

24 WPC is a parish council. Parish councils are not equipped to handle a torrent of FOIA requests and, we suppose, very rarely do so. If WPC was failing to handle such matters efficiently, to bombard it with an unending further stream of requests and demands seems an odd way of helping it to improve its service.

25 In the view of the Tribunal the grossly excessive burden placed upon the resources of WPC by the flood of requests, of which this was one, is the decisive consideration in any assessment as to whether it was vexatious. That WPC virtually ceased to function as an elected body in 2012 due to resignations induced by this written assault, that the clerk, Mrs. Gomm, left at one stage to her own devices and with no authorised source of income for her services, was obliged to devote a quite disproportionate amount of time to FOIA requests to the detriment of all other WPC business, that the precept should be massively inflated and external funding required to meet WPC expenditure, are factors which together demonstrate beyond any sensible doubt that further requests of the kind involved

here were unjustified and an abuse of FOIA, where the public authority was a parish council. The Appellant cannot have been unaware of this.

- 26 Furthermore, there is no reason to doubt that the councillors who resigned did so for the reasons stated, namely the stress and anxiety induced by the sequence of requests and demands. Any significant contributor to the correspondence must have foreseen that effect, hence that such harassment might drive councillors to give up their seats.
- 27 The particular request with which the Tribunal is concerned was, in effect, for evidence to justify the clerk's earlier statement, in response to the request of 17th January, 2012 (see paragraph 11 above), that there were 83 pages containing 50 requests. Why that statement should be viewed with suspicion is unclear. Requests about requests and examination of other requests in order to check on the authority's accuracy in counting the number of requests do not appear to fulfil the broad purpose of FOIA.
- 28 The tone of the Appellant's request and associated correspondence is relentlessly aggressive, albeit lucid and precise. We do not regard such a style as clearly offensive or distressing for the purposes of s.14 but neither is it conducive to a productive correspondence with a public authority. We commend Mrs. Gomm's admirably clear and courteous responses, which accurately addressed the issues of law involved.
- 29 We need go no further in our findings to uphold the Decision Notice .
- 30 Negotiations between the Appellant and the appointed councillors continued after the appeal to the Tribunal was lodged. It resulted ultimately in an agreement shortly before our determination that the 83 pages should be provided to the Appellant and we understand that she received them at about the time that the Tribunal convened.

31 The wisdom of the appointed council in entering such an agreement is not a matter for us, though we can understand the desire, particularly of councillors from outside Walberswick, to see an end to this unhappy and wasteful affair. This development is, however, irrelevant to our determination. We do not regard it as an acknowledgement by WPC, as currently constituted, that the clerk was wrong to apply s.14 to this request, rather as a pragmatic step designed to relieve WPC of the incubus of an unpleasant dispute. Even if it had been such an acknowledgement, that would not have ousted the Tribunal's jurisdiction nor modified our assessment in any way.

32 Any further requests of this kind are likely to be equally vexatious and are strongly to be discouraged, though any judgment as to a particular future request will be for the ICO and, if there is an appeal, this Tribunal, probably differently constituted, to determine. If WPC fails to fulfil its statutory duties under FOIA, account taken of its size and resources, that is a matter with which the ICO can deal, as he has in the past, using his powers under FOIA s. 47. Remorseless repetition of regressive requests is not a sensible way to improve performance.

33 Our decision is unanimous.

Conclusion

34 We therefore dismiss this appeal

David Farrer Q.C.

Tribunal Judge

7th. August, 2013