



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

Appeal No: EA/2013/0079

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No:
FS50459125**

Dated: 26th. March, 2013

Appellant: John MacCarthy

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

Second Respondent: Walberswick Parish Council ("WPC")

**Before
David Farrer Q.C.
Judge
and
Paul Taylor
and
Jean Nelson
Tribunal Members**

Date of Decision: 31st October, 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 31st day of October, 2013

David Farrer Q.C.

Judge

[Signed on original]

REASONS FOR DECISION

The Background

- 1 This is the third recent appeal to reach the Tribunal arising from persistent tensions between WPC and certain local residents. The background history has been related in the Tribunal Decisions in *Harvey EA/2013/0022* and *Walpole EA/2013/0080* and will be repeated here only in so far as it concerns directly this Appellant.
- 2 WPC was, until recently, run by elected councillors and a paid clerk, as is the normal position with parish councils. Serious disagreements arose some time ago from planning decisions affecting Walberswick. They resulted in a large number of complaints and requests for information pursuant to FOIA addressed to WPC. In late 2010 the then councillors purported to issue “exclusion notices” to four residents, including the Appellant, which were intended to prevent them from making further such requests or complaints to the ICO. Those notices were, of course, of no effect in law, since FOIA makes no provision for such notices, whatever their intended effect.
- 3 The recipients complained to the ICO about the notices and WPC withdrew them in July, 2011, following guidance from the ICO.
- 4 Neither the “notices” nor their withdrawal did anything to stem the incessant flow of requests to WPC or complaints to the ICO. They merely fuelled a sense of

grievance which continued to be cited by the recipients, certainly by the Appellant, as part of the justification for the continuing campaign, which each conducted.

5 The requests and complaints resulted in a vastly increased workload for the clerk to WPC with a consequent substantial inflation of WPC`s budget. How far, if at all, that increase stemmed from mishandling of FOI issues before January, 2011 and whether the clerk`s pay rise was approved in accordance with required procedures are questions irrelevant to our decision. The increase in workload and the reason for the increase are simple matters of fact. The ICO and the Tribunal can judge for themselves the demands on time, hence cost of the requests, complaints and reviews of which they have seen substantial evidence.

6 In October 2012, some months after the request with which this appeal is concerned, all the parish councillors resigned, citing as their reason an intolerable stream of FOI requests and complaints (our wording). We have read their letters on the WPC website. What happened at the council meeting at which these resignations were announced does not affect their reasons for resignation. Nominee councillors were appointed. In January, 2013 they apologised for the bad exclusion notices and evidently tried to make peace with the disaffected requesters. The traffic continued, nevertheless, involving, so far as the Appellant is concerned, an unceasing series of requests for financial information relating to the precept, an advance from Suffolk County Council and matters covered by the index request.

- 7 In July, 2013, the parish clerk, Mrs. Gomm, who had been recruited in July 2011, when her predecessor resigned because of the pressure of requests and complaints from the same residents, herself resigned for similar reasons. So did one of the appointed councillors. In or about July, 2013 the appointed council offered the Appellant and another resident, Mr. Gilby unrestricted but supervised access to its records. Apparently, these offers were unacceptable. These events occurred a considerable time after the index request but are material to our decision for the reasons set out below.

The Request

- 8 By e mail of 20th. February, 2012 the Appellant made the following request –

“Anonymous donations of £2600 paid into the Community Benefit Fund

- 1 *How many donations were there ?*
- 2 *When were they received ?*
- 3 *How much were they for ?*
- 4 *Who are they payable to ?*
- 5 *Were they sent by cash, cheque or banker`s draft and were they receipted by you ?*
- 6 *What is the status of the CBF and why did you pay these donations into it ?*
- 7 *How can the funds in the CBF be deployed and on whose decisions and authority ?*
- 8 *How is the CBF recorded in the parish council`s financial records ? Is it an identifiable separate element ?*
- 9 *Are there any other named “Funds” included in the Parish Council`s accounts”*

He further sought confirmation that the donors were indeed unknown, referred to

an earlier request for financial information and made a series of requests relating to a possible loan from the County Council.

- 9 Mrs. Gomm responded on behalf of WPC on 1st. March, 2012. She noted that the Appellant had made ten requests since 28th. December, 2011 and recited them, questioned whether some of the requested information was held and refused the request, relying on an assertion that the cost of providing the information would exceed the prescribed limit (FOIA s.12).
- 10 Having earlier expressed his dissatisfaction, the Appellant sought a review of this decision by e mail dated 24th. June, 2012. In response, WPC maintained its refusal, citing s.12 and referring to the impact on its work of the volume of requests from the Appellant and others. He complained to the ICO on 1st. August, 2012.

The complaint to the ICO

- 11 In the course of the investigation WPC sought to rely on s.14 of FOIA, namely that the request was vexatious, which provided an exemption from the duty to provide the requested information. That this exemption had not initially been invoked did not preclude reliance upon it at this stage. The s.14 exemption is the only one as to which the ICO made a finding in his Decision Notice and it is the only exemption with which we are concerned on this appeal. WPC had cited s.14 when refusing, on 15th. December, 2011, a request from the Appellant dated 8th. December, 2011. That refusal was upheld by the ICO in a Decision Notice dated 24th. January, 2013 which found the request to be vexatious. That decision was joined to the decision before us for determination but that appeal, EA/2012/0028, was abandoned with the Tribunal`s consent by order of the Registrar dated 13th. August, 2013. The Appellant explains that he took this course only in order to simplify our task and we accept that explanation. The fact of such a request on that date and meeting such a response is nevertheless a factor in the history of this appeal.

- 12 By his Decision Notice the ICO found the request vexatious and upheld WPC's reliance on s.14.

Appeal to the Tribunal

- 13 The Appellant appealed. His grounds were extensively argued and are forcefully repeated in his replies to both Respondents and his skeleton argument. He adduced in evidence a statement from Mr. Alan Walpole, the appellant from another decision of the ICO, one of the four residents referred to in paragraph 2. Mr. Walpole stated in an e mail to Mrs. Gomm that he did not use the expression "the four of us", which might give rise to the inference that the four residents were acting in concert. The Tribunal proceeds on the assumption that he did not use those or similar words.

- 14 In essence the Appellant's case is as follows –

(In the interests of clarity, we add in italics, as to each point, a brief summary of the Tribunal's approach to the issue.) –

- (i) The particular request is rational and raises an issue of local public interest.

Taken in isolation, that is accepted.

- (ii) It fulfils none of the tests formulated by the ICO and applied to this request.

The Tribunal assesses vexatiousness in the round as recommended by Judge Wikeley in ICO v Devon County Council and Dransfield GIA/3037/2011. Our overall assessment is set out below.

- (iii) It should not be regarded as part of a campaign, conducted with others, to paralyse or destabilise the work of WPC.

Whether it is or not, the Tribunal approaches this appeal by asking the question –

Was this request vexatious, given the history of recent requests, supplementary requests and complaints which this Appellant had made and their likely consequences for the functioning of WPC ?

- (v) It should not be judged in the context of previous or subsequent requests but by reference to its intrinsic character.

In every s.14 case, it is necessary to assess the request against the background of previous requests and events. It may be right to look at any subsequent history of requests, in so far as it illuminates the purpose of the request under examination.

- (vi) The ICO wrongly disregarded the earlier shortcomings in WPC`s handling of FOI requests (see *Dransfield* at para.30) in deciding whether this request was vexatious.

We doubt that he did but, in any event, the Tribunal is keenly aware of the history of this dispute. The question is : did such failings, as at the date of the request, provide a justification for the number and nature of the requests which form the immediate background to this one ?

- (vii) In particular, the exclusion notices were wrongly disregarded as a justification for the ensuing series of requests and complaints.

The exclusion notices were unlawful, a serious mistake which gave rise at the time to legitimate resentment. They were withdrawn, however, in July 2011. As with (vi), the question for the Tribunal is whether they continued to justify the subsequent barrage of requests and complaints.

- (vii) There is reason to doubt that the appointed council, which apologised for the exclusion notices in January, 2013, supports the refusal of 1st. March, 2012.

Recent correspondence exhibited by WPC strongly suggests that the present council now takes the same view as its elected predecessor and its clerk.. However, whether or not that is so is quite irrelevant. The ICO upheld WPC`s reliance on this exemption and the sole question for the Tribunal is whether he was right, that is to say whether we, not the appointed council, regard this request as vexatious ?

In his grounds and responses the Appellant also criticises the ICO's reasoning, findings or conclusions in general terms without identifying the errors which he is said to have made (see e.g., Grounds of Appeal section 6, paras. 2 and 11, Reply to ICO, paras. 3 and 4). We have studied his submissions carefully but have not attempted to deal with every point of detail nor to become embroiled in questions of fact, such as the need for a loan to WPC or the propriety of the procedures for dealing with the clerk's remuneration, which simply do not require to be resolved for the purposes of this appeal.

Our Decision

15 The Appellant evidently made to WPC a series of requests for information from at least early 2010, leading to the issue of the unlawful exclusion notice. It was perfectly reasonable for him then to make FOI requests designed to discover who had taken this step and on what basis in law. However, we consider that the need for such inquiries ended with the withdrawal of the notice in July, 2011, which implicitly acknowledged that they were invalid. The Appellant's requests continued, however, in September and October, 2011. In early December, 2011 the Appellant evidently told BBC Radio Suffolk that he had made twenty requests in the past year for general information about council procedures.

16 On 8th. December, 2011, he made the requests giving rise to the appeal now abandoned. The subject matter was now financial information. The requests reveal another request made two days earlier, evidently relating to legal advice on the exclusion notice. Perhaps significantly, when commenting on the asserted failures of the Chairman to observe the "Code of Conduct", he stated –

"The only thing I could think of to get some leverage was the FOI so I used it, and I don't regret that decision although I understand it gives you a problem".

That could be interpreted as an acknowledgement that he was using FOIA, not primarily to obtain information but rather to browbeat WPC, conscious that he was thereby placing an unreasonable burden on Mrs. Gomm.

17 As already indicated, the index request was, in itself, rational, related to a matter of legitimate public interest and was courteously and clearly worded. Taken in isolation, no public authority, great or small, could have taken it amiss.

18 However, adopting the dates set out in WPC`s response, it followed requests for information, most of them multiple requests, dated successively, 28th. December, 2011, 1st, 2nd, 3rd, 17th.18th, 19th, 24th, January, 2012 and 5th. February, 2012.

The topics varied, though financial issues predominated. The last covered much the same ground as the request of 20th. February.

19 Whilst not collaborating with other residents, the Appellant could not possibly have been unaware through the local media (to which he spoke), from village contacts and from council meetings that he attended, that WPC, specifically the clerk, was inundated with FOIA requests from a few other residents, over a period of many months.

20 That he apparently continued this flow of requests and complaints after the refusal of 1st. March, 2012, may offer some insight into his intentions in making the critical request. However, we think it safest to disregard the subsequent requests when assessing vexatiousness.

21 Looking at the question of vexatiousness in the round, we identify two plainly relevant features of this case which correspond to the “core issues” identified in *Dransfield* at paragraph 28, namely the burden imposed on the authority by this litany of requests and the associated stress and harassment experienced by clerk and councillors, every one of whom has now resigned, citing such stress as the cause.

22 As to the burden, WPC is a parish council, not a department of state. The limits on its resources were well – known to the Appellant and to everybody else involved in this unhappy saga. The words of paragraph 10 of *Dransfield*, fit this case exactly –

“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.”

It is plain that FOIA requests, both those made by the Appellant and the others of which he was concurrently aware, reduced WPC to paralysis so that anyone flooding it with such requests in January – February, 2012 knew and presumably intended that this should be the result – or was, at least, indifferent to such a consequence.

23 Furthermore, it was perfectly plain to any sensible individual – and without doubt to one of the Appellant`s sophistication and social awareness – that such pressure would drive elected and ultimately appointed councillors from office, as well as their clerk, who was at the centre of the battle. The fact that the resignations took place some time after the index request – indeed eighteen months later in the case of Mrs. Gomm, is immaterial if we find, as we do, that they resulted predictably from a long series of stressful and harassing requests, complaints and appeals in which this Appellant and this request, complaint and appeal have played a significant part.

24 Taking those two features together we have not the slightest doubt that this was a vexatious request and that this appeal must fail.

- 24 This seems to the Tribunal a case which demonstrates a gross abuse of FOIA, whatever the intentions of the Appellant or of others who have behaved in a similar fashion. Most unusually, we think it right to conclude with some brief general observations.
- 25 The Tribunal has no doubt that WPC will not function as a democratically elected body until this bombardment by FOIA requests ceases. That may well mean that, as here, intrinsically reasonable requests for information are treated as vexatious if part and parcel of a sustained assault motivated by a desire to disrupt. Crippling a parish council by subjecting it to ceaseless interrogation is not a sensible way to improve its service to local residents nor to fulfil its duties under FOIA. We cannot believe that those who have done so, including the Appellant, can really believe it is.
- 25 Any resident minded to sustain this kind of ordeal by FOIA or, on the other hand, contemplating standing for election to WPC or for employment as clerk, should by now appreciate that, whilst every request must be treated on its merits, subject to historical context, and that the Tribunal decides only the appeal before it, it is highly unlikely that any future appeal from this parish council will be decided on different principles or without regard to the outcome of this and earlier appeals relating to Walberswick. Unsuccessful appeals by campaigning requesters may well attract the unusual sanction of orders for costs.

26 Nobody can be excluded from making requests under FOIA. However, should current practices continue, WPC may wish to take advantage of s.17(6) of FOIA, which entitles it to dispense with a notice relying on s.14 where

(i) it has issued such a notice in respect of an earlier request and

(ii) to require a further notice in respect of the current request would be unreasonable.

It would almost certainly be unreasonable where a further request simply continues the campaign featured in this and the other two appeals to which we have referred.

27 As to more reasonable ways of keeping WPC up to the mark we advise reference to paragraph 32 of the decision in *Harvey EA/2013/0022*.

Conclusion

28 We dismiss this appeal.

29 Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

31st October, 2013