Neutral Citation Number:

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2014/0273**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0521079
Dated: 6 October 2014

Appellant: **Mark Perkins**

Respondent: **The Information Commissioner**

Second Respondent: **Wickhambreaux Parish Council**

Date of Hearing: **4 March 2015**

Before

Chris Hughes

Judge

Michael Hake and Pieter de Waal

Tribunal Members

Date of Decision: **25 March 2015**

Subject matter:

Environmental Information Regulations 2004

Cases:

Dransfield [2012] UKUT 440 (AAC),
Craven [2012] UKUT 442 (AAC)

REASONS FOR DECISION

Introduction

1. In 2009 the Church Commissioners sold some grazing meadows near the village of Wickhambreaux to a group of adjoining householders (including the Appellant in these proceedings, Mr Perkins). In early 2010, as part of the management of the grazing land, a fence was erected in the area known as Seaton Meadow. This caused concern in the village about recreational public use of the area. There was also vandalism to the fencing. A campaign was started and in Spring 2010 the Second Respondent in these proceedings (Wickhambreaux Parish Council, "WPC") resolved to seek recognition of Seaton Meadow as a village green. An application was made on 28 June 2010 and the registration authority, Kent County Council ("Kent"), considered that the matter should go to a full public inquiry. A committee was formed including councillors and non-councillors and advice was sought from Kent Law Clinic ("KLC"), a legal advice service associated with the University of Kent which brings together academic lawyers, legal practitioners and law students in the provision of free legal advice as a public service and as part of the legal education for the University's students.

2. The process of preparing for and moving towards the public inquiry to examine the evidence for village green status took a significant period of time. During that period attempts were made to resolve the dispute and Mr Perkins offered to hand over part of the land he had bought to the village. However efforts at resolving the matter without proceeding to an inquiry were unsuccessful. The inquiry was finally held between November 2012 and March 2013. The inspector's decision was published in December 2013 and in March 2014 Kent accepted the inspector's report and conclusion that the case for a village green had not been made out.

3. On 15 May 2012 Mrs Perkins wrote to WPC asking for copies of minutes of council meetings from February 2010 and copies of future minutes. She also requested, under the Freedom of Information Act ("FOIA"): *"any further information held by the Parish Council which includes external correspondences from parish councillors, paper records, letters, emails, information stored on computer, maps, photographs,*

handwritten notes or any other form of recorded information which covers the timeframe from August 2009 to date." On 25 May 2012 WPC provided the minutes from January 2012 and on 11 June 2012 sought clarification of what was requested, pointing out that Kent held a considerable amount of information generated by the inquiry process. The response pointed out that:-

"The Parish council has no office and no office equipment and employs a clerk for 4 hours a week. Therefore we regard it as reasonable to ask you to obtain any of this information from the County Council under the terms covered in FOIA section 21."

The letter continued:-

"any legal advice on the application we regard as exempt from disclosure under section 42 of the FOIA, which seeks to ensure protection for the confidential relationship between lawyer and client. In the Council's view, the public interest in maintaining the confidentiality of legally professionally privileged material is not outweighed in this case by the public interest in releasing that information. Similarly, we regard as exempt any material being collated for the enquiry, as it is intended for future publication, (see FOIA section 22), in this case at the latest by 22nd October, in accordance with the Inspector's directions."

4. On 27 June 2012 Mr Perkins responded in writing to WPC stating that his communication was a clarification and refinement of the information requested earlier and seeking an internal review of WPC's earlier decision to withhold certain information (bundle pages 324-327). The letter refined the request to:-

"information held by WPC or by others on its behalf which comprises all communications, including but not limited to e-mails sent and received between 1 August 2009 and to date that relate to the sale of the meadows by the Church Commissioners and/or the application to register the meadows as a village green and Seaton Meadow in general. For the avoidance of doubt this request includes any communications, including, but not limited to, e-mails of councillor Le Jeune, councillor Lodge, councillor Joice, councillor Twyman and councillor Wright that fall within this timeframe and relates to the category of information specified".

The letter stated that the request was made under FOIA and the Environmental Information Regulations ("EIR"); and stated that he and Mrs Perkins were aware of e-mail traffic involving the named councillors which fell within the scope of the request

and that the Council should remind those councillors of the duty to ensure that none of the information or e-mails within the request was deleted, erased or altered. It stated that they did not seek certain specific information including information that was already in the public domain and material that would be included in the public inquiry bundles and would be supplied to them in due course.

5. The letter then addressed in turn each of the statutory grounds WPC had put forward in its earlier response to justify a refusal to supply information. Mr Perkins argued that section 21 of FOIA did not apply since the material was held by WPC for its own purposes and not for the purposes of Kent and that in any event section 21 could not apply to information held which was disclosable under EIR.

6. With respect to section 42 it stated:_

"we ask that you review your application of section 42 so as to ensure that each and every part of the information you seek to withhold under section 42 is in fact covered by section 42."

It asked them to disclose the source of the legal advice and further stated:-

"where WPC has disclosed all or part of any legal advice falling within section 42 to individual parishioners or members of the Seaton community action group (SCA) we take the view that any privilege which could have been maintained in legal proceedings will have been lost by the WPC. Disclosure of such material to individual members of the community or to members of the specific pressure group or interest groups such as SCA cannot be regarded as a confidential disclosure of material. If on the other hand you accept that such a disclosure has taken place but that the confidentiality of the material remained protected please can you provide us with a copy of the relevant confidentiality agreement between the parties on the date of that agreement?"

7. Mr Perkins advanced details of arguments with respect to section 22:-

"… We wish to understand how section 22 is engaged in respect of the different types of information being withheld under this particular exemption. Please can you therefore confirm when the decision was made to publish each item of information and to make that decision? …. It is our view that in this case it is not reasonable to withhold all information requested from us as we are legal owners of the land to which the application relates and consequently it is inequitable to liken our interest in

the outcome of this matter to that of the general public in this specific case. We also take the view that the publication date that is over five months beyond the date of the information was requested is unreasonable in all the circumstances. Clearly you may have considered this point and have sound grounds for distinguishing your position from ours but as your refusal notice does not include those grounds it is simply impossible first to determine if section 22 has correctly been engaged in each case where information has been withheld under this provision."

8. WPC sent its internal review to Mr Perkins on 23 July 2012 (bundle pages 324 -332). In the light of the guidance published by the First Respondent (the Information Commissioner) *"FOIA/EIR Information Produced or Received by Councillors"* it gave details of how the various Councillors handled their correspondence and indicated that many routine e-mails were deleted. The schedule to the letter listed documents which were being sent to Mr Perkins. The letter reaffirmed the view of WPC that section 21 applied to material also held by Kent. With respect to section 42 WPC stated :-

   "WPC can confirm that it has received legal advice from the Open Spaces Society, the National Association of Local Councils through the Kent Association of local councils, Cain Ormondroyd of Francis Taylor Building and the Kent Law Clinic. Following its internal review, the WPC is satisfied that this information amounts to confidential client-lawyer communications for the purpose of seeking and receiving advice as to legal rights and obligations in a relevant legal context and is therefore properly covered by legal advice privilege."

9. The letter went on to refer to specific guidance published by the Information Commissioner in respect of the exemption for legal professional privilege under FOIA and EIR. The letter continued:-

   "the WPC does not consider that in the current circumstances this public interest is outweighed by the sufficient existence of any countervailing factors, in respect of which I refer you to pages 7-10 of the ICO's LPP guidance. The question whether WPC has waived the legal advice privilege it claims in respect of this information by disclosing legal advice to individual parishioners or members of the Seaton community action group ("SCA"). WPC can confirm that the only piece of legal advice which has been disclosed outside of WPC's Seaton Meadow Advisory

Subcommittee ("SMA subcommittee") was advice which was included in WPC's response to the oblectORS. *Therefore it is already in the public domain and there is no question of legal advice privilege being claimed in respect of it. To the extent which the information you request may amount to environmental information, I refer you to page 10 of the ICO's LPP guidance, in accordance with which regulation 12(5)(b) EIR operates in a similar way to section 42 FOIA."*

10. The letter concluded by confirming that information in respect of which section 22 was relied on:-

"is the information which will form the inquiry bundles and which has subsequently been confirmed does not form part of your request".

11. Mr Perkins complained to the Information Commissioner using a specialist legal practice who wrote a detailed letter to the Information Commissioner on 3 September 2012 (bundle pages 334-342).

12. On 27 April 2013 Mr Perkins addressed a separate information request to the University of Kent:-

"Could you please supply me with all information held by the University of Kent, through the services provided by the Kent Law Clinic, on communications with the Wickhambreaux Parish Council (WPC) or the Councillors of the WPC, who include [specified individuals], or with third parties about Seaton Meadow in Whickhambreaux, where the communication did not specifically provide legal advice to the WPC or the listed officers of the Council."

The Information Commissioner was ultimately also apprised of this matter and concluded that the records of KLC were to some extent held by the University for its own purposes and that the University was obliged to issue a response. This decision of the Information Commissioner was upheld by the tribunal in *Governing Body of the University of Kent v Information Commissioner and Perkins* [EA/2014/0102].

13. On 24 June 2013 the Information Commissioner issued his decision notice in respect of Mr Perkins' information request to WPC. He noted that:-

"the Council initially considered the whole request under the FOIA but later accepted that some information should have been considered under the EIR. It provided some information to the complainants but refused other information by virtue of section 21,

22 and 42 of the FOIA. It also relied on section 1(1)(a) for information it discounted on the basis that it was produced by or received by Councillors and not therefore held for the purposes of FOIA. The Commissioner's decision is that Wickhambreaux Parish Council (WPC) has not considered this request in compliance with the EIR. The Commissioner believes it is likely that all of it would be environmental information as defined by regulation 2(1)(a) to (f) of the EIR. The Commissioner also considers that the information withheld by virtue of section 42 of the FOIA, provided to him during the course of the investigation, fall within the definition of environmental information and should have been withheld under regulation 12(5)(b) of the EIR." The Information Commissioner therefore directed the Council to make a fresh decision under EIR (bundle pages 348-362 – DN FS50463579).

14. In the light of this decision notice the solicitors acting for Mr Perkins wrote to the Information Commissioner's Office raising questions as to whether certain advice provided to WPC by various organisations was indeed legal advice (and given by qualified legal practitioners). The Information Commissioner's Office confirmed they had not asked further questions about the status of advice given to WPC or the qualifications of those who gave it. They subsequently also confirmed that they would not be revisiting the issue of whether certain advice was protected by legal professional privilege and that Mr Perkins would have to appeal against any aspect of the Information Commissioner's decision notice if he wished to challenge it.

15. On 20 July 2013 WPC (now considering Mr Perkins' request under EIR as directed by the Information Commissioner) wrote to him asking for clarification with respect to that part of his request which was for information about "the application to register Seaton Meadow as a village green". The letter stated:-

"We are at a bit of a loss to know exactly what it is that you are seeking. Members of the advisory committee collected evidence and prepared for the application and the Inquiry. The work was substantial but you received a copy of the application and previously stated that you did not require information which would form part of the bundles to the enquiry, which became public last October. Can you pinpoint for us what further information you have in mind? Given the amount of work that goes into preparing for an Inquiry can you help us to know what we are seeking? Your request is very wide and any refinement would be helpful to us. We wish to assist you, and all Councillors, advisory committee members and our legal advisers at the Kent Law

Clinic have been asked to review any material they may hold in the light of the EIR. However, as we have entered the holiday season, and, as you know, none of these people are paid employees, but just volunteers, it is becoming apparent that regretfully we shall not be able to meet the 35 day deadline within which we should respond to the decision notice. We apologise for this, we are seeking to provide an appropriate response as soon as possible and ask you to agree to extend the dates for reply by two weeks, until Monday, 12 August 2013."

16. On 6 August 2013 Mr Perkins replied to the request for clarification:-

"We highlighted that we did not require the documents that were submitted to the enquiry, as we have a number of copies of those and they are in the public domain, but we do require all the information that the WPC holds associated with the construction of those documents, which as well as drafts saved, will include any handwritten notes, or letters received and sent, all e-mails sent and received, which were not included in the bundle submitted to the non-statutory public enquiry. Some examples of our request include, but are not limited to, copies of e-mails sent by parish councillors, and advisory committee members (including e-mails sent and received from private e-mail addresses and from home computers) asking people to fill in an evidence questionnaire and the replies received; e-mails sent by parish councillors to Kent county council, and replies. We require all e-mails sent and received between parish councillors and advisory committee members. We would also wish to have copies of all e-mail traffic that was sent by those persons representing WPC, where that information does not constitute legal advice, i.e. where the information is not presentational or strategic advice that specifically relates to WPC's legal rights and its obligations. Therefore as an example we would expect to receive all the statements of witnesses that WPC compiled, including those that were not called to the Inquiry, bearing in mind that the witnesses are not the client and are therefore not protected by LPP."

He advised that he could not assist WPC with the request for an extension of time because he had no authority to change a date for compliance set by the Information Commissioner in the decision notice.

17. The Information Commissioner also replied to the Council (bundle 372-3 9 August 2013) stating that:- *"the ICO considers that Mr Perkins' refined request of 27 June*

2012 is quite clear and I note that WPC did not request further refinement before it responded to his request on 23 July 2012. Please also be aware that an applicant is unlikely to know what information the public authority holds therefore when a public authority seeks refinement of the request it should provide some advice and assistance specifying some broad categories of information for the applicants to choose from. Please ensure that the Council has complied with the steps specified in the decision notice within 14 calendar days (23 August 2013) from the date of this letter, as failure to do so will result in this matter being escalated to our legal team who may take action against you for being in contempt of court."

18. On 13 August 2013 WPC sent a substantive response to the request for information made by Mr Perkins (on 27 June 2012) treating the request under EIR. It addressed the complexities of the request, the number of people who held information and the state of their records. It provided a schedule of information already provided (or being provided with its response), information not held, information withheld under Regulation 13(1) (personal data), Regulation 12(4)(e) (internal communications) and Regulation 12(5)(b) (disclosure that would adversely affect the course of justice). It also explained WPC's application of the public interest test under Regulation 12(1)(b). It also considered that some information was held by councillors in their private capacity and was therefore not subject to EIR because it was not held by WPC or on its behalf.

19. WPC's response also addressed the point that information held could include personal data relating to Mr Perkins which could be disclosed to him on receipt of a subject access request.

20. In respect of the Regulation 12(5)(b) exception the response considered the question of legal professional privilege and weighed the arguments in favour of disclosure of such material and acknowledged that:- *"there is a general public interest in providing access to the information by which the Council's decisions and actions can be scrutinised*". It weighed that interest against the fact that the application for village green status had yet to be determined, that the advice therefore related to a live matter, and that disclosure of the information would weaken the principle of legal professional privilege which is fundamental to the administration of justice. It concluded that there were no special factors which undermined the weight which should be placed on legal professional privilege, and that disclosure would undermine

the level playing field between the parties to the public inquiry and would be unfair to WPC. It concluded that information should not be disclosed.

21. Mr Perkins then made a subject access request. In a review of its response to that request WPC informed him that they had already spent more than 40 hours reviewing his documentation in order to identify the personal data relating to him and that:- *" section 9 (3) of the DPA provides that if the data are described by the data subject in his request, a public authority is not obliged to comply with subsection (1) of section 7 in relation to unstructured personal data if the authority estimates that the cost of complying with the request so far as relating to those data would exceed the appropriate limit."* The letter set out in detail the steps which WPC had taken to determine what data relating to Mr Perkins was held and the time various individuals had taken to examine various records. At that stage reviewing, retrieving and carrying out a trial sample of the material had taken in excess of 21 hours and an estimate to carry out a full review of all the material was approximately 370 hours.

22. In the meantime Mr Perkins' solicitors had submitted a complaint to the Information Commissioner on 11 November 2013 to challenge WPC's fresh handling (under EIR) of Mr Perkins' original request for information. The Information Commissioner's Office confirmed on 26 November 2013 that they would undertake a fresh investigation and would seek copies of the withheld information from WPC. The Information Commissioner's Office commenced the investigation with WPC on 20 December 2013 and received a response from WPC on 30 December 2013. They also received a response from KLC (on behalf of WPC) dated 29 January 2014 dealing with information held by KLC, and providing 4 large ring-binders of information. The Information Commissioner's Office queried this on 3 April 2014 stating:- *"For the avoidance of doubt, when the ICO investigates a complaint where the public authority has relied on an exception/exemption under the EIR/FOIA, we need to see a copy of all withheld information. Please therefore let me know which file I'll find this information in, or provide a copy of this information at your earliest convenience clearly indicating which exception WPC is relying on in respect of each document."* In a telephone call of 7 April 2014 (bundle page 493) between KLC's solicitor and the Information Commissioner's Office (as noted by the Information Commissioner's Office), KLC advised that they:- *"had provided the information the way it was because that is how it had been prepared to deal with multiple requests*

they were dealing with. She informed me that to separate it out would take a considerable amount of time and stated that they have already spent a considerable number of hours on this request and felt that having to go back to it again would involve an unreasonable amount of time and effort. [KLC solicitor name redacted] further added that following the decision notice they would have liked to have relied on costs to refuse the whole request but had not been able to. I informed [name redacted] that nowhere in the decision notice did it say that WPC couldn't rely on costs to which [name redacted] informed me that they had raised it before the decision notice was issued but we had not considered it. I informed [name redacted] that this was because there were so many issues with WPCs original RN and IR, and its response to the ICO that it was felt the most appropriate way forward was for it to revisit it completely, but that didn't mean WPC couldn't rely on costs."

23. Thus the Information Commissioner's Office steered the handling of the request in yet another direction by prompting WPC, or at least permitting it, to adopt a new approach to the request based on time and cost. We pause to point out that, at this stage, almost two years (and one decision notice from the Information Commissioner) had already passed since the information request was first made by Mr Perkins. At this point he could have been forgiven for feeling that, in terms of progress and process, the access to information regime was failing him.

24. Unsurprisingly, in the light of the telephone conversation between KLC on behalf of WPC and the Information Commissioner's Office, WPC wrote to the Information Commissioner's Office on 6 May 2014 (bundle 496-509) to claim fresh reliance on Regulation 12(4)(b) of EIR (manifestly unreasonable requests). It explained that rearranging the 4 ring binders provided to the Information Commissioner's Officer so as to group the information in accordance with the different exceptions previously relied on under regulations 12 and 13 of EIR would take approximately 20 further hours effort together with four hours copying 1600 pages at 10p per sheet. The letter stated that in dealing with the request of 27 June 2012 135.75 hours had been expended, 100 of which had been spent by staff of KLC. WPC submitted that the request should be seen as manifestly unreasonable. They commented:-

"We are a small Parish Council, who are dependent on the resources of one Parish Council elected member to deal with this and other requests acting in a voluntary capacity. We do not consider it reasonable that a volunteer should be required to

devote more than a few hours a week to responding to EIR/FOIA/DPA requests, and should not be expected to do this in more than a few weeks of each year."

With respect to the balance of public interest WPC submitted that it was disproportionate to commit further time to the request and noted that the Information Commissioner's guidance *"is against dealing with classes of documents on the basis of principle."*

The council continued:-

"in relation to the information held on behalf of the Council by our solicitor the request is substantially for all of the information held on our behalf on our solicitors' file, save for the information served in the application to register a village green. There is a particular emphasis on communications relating to the TVG or meadow. We do not consider that there is any wider value in the public having access to these communications which concerned detailed preparation of the case for a public Inquiry, nor that they would illuminate any underlying issue of public interest."

"We have had regard to the size and scale of this request, and of the other requests and the burden this places on the Council and its solicitor. Both bodies are public bodies, with resource constraints, whose other activities are being adversely affected by the size and scale of the request."

"We have had regard to the context in which the request is made, which includes the burden of responding to other requests on the same subject from the same requester. There had been two main requests to the Council and two requests to the University seeking substantially the same data, but for different periods. There have been two requests for personal data to the Council and now one to the University. There have been numerous other incidental requests which have been more focused and somewhat less time-consuming to reply to."

The response then cited the first recital to the European Directive setting out the rationale for the regulations:-

"increased public access to environmental information and the dissemination of such information contribute to greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."

The response went on to point out that those objectives had been served by the very public nature of the application and public inquiry and the widespread participation in the process:-

"on the other hand the making of very extensive information requests which relate to individual witnesses, volunteers and local people who contributed their time or gave evidence in the Inquiry and of pursuing excessive requests for documents is perceived as oppressive. The burden is likely to have the effect of suppressing the ability of the Council to achieve the high level of awareness, debate and participation in similar issues. It will impact on the ability of the Council to attract volunteers on whom we are dependent to discharge our function, and to operate as a deterrent to the Council taking up environmental or community issues in the public interest on behalf of local people."

25. The Information Commissioner's Office completed its investigation and the Information Commissioner issued his decision notice on 6 October 2014. He found that WPC was entitled to rely on regulation 12(4)(b). In doing so he noted that while FOIA contained an explicit provision with respect to the cost of compliance with a request, EIR did not. In considering whether a request under EIR was manifestly unreasonable a public authority could include the time taken for (or the cost of) considering whether information was exempt from disclosure and that the proportionality of the request (in terms of the burden that compliance would impose on the public authority) could take into account the size of the public authority. He carried out a review of the 135.75 hours claimed by WPC. In his analysis of the various elements of that claim he accepted 77.75 hours *"and even if some are over estimates, or taking an unreasonable length of time, the total time is considered a reasonable estimation of items described."* (DN para 32). He noted that public authorities had a duty to provide withheld information to him in a readily identifiable form and considered that on this occasion 20 hours was a reasonable estimate of the time it would take to prepare the material. In considering Mr Perkins' arguments he decided that time already spent was relevant to considering any additional burden in fully complying with the request. He held it was necessary to include time spent by KLC in considering and preparing the records. While WPC's records management fell far short of a desired standard it was a small Council and his decision had to be based on the actual arrangements prevailing in WPC. He found:- *"Having been*

provided with copies of the information WPC has identified as falling within the scope of the request and therefore seeing the additional work necessary for WPC to be in a position to present the information in such a way for him to consider the withheld information, the Commissioner is satisfied that the additional work necessary represents a disproportionate burden on WPC which is a small parish Council with very limited resources." He therefore found the regulation relating to manifestly unreasonable requests to be engaged.

26. He then considered the public interest test and noted Mr Perkins' views on public interest:-

    - There is a public interest in favour of disclosure of the information due to the potential environmental consequences of a successful application to register Seaton Meadow as a village green. Mr Perkins also considered that WPC neither properly understood, nor communicated to the public the consequences of its application.
    - There is an interest in providing transparency concerning the advice and actions of KLC.
    - Disclosure could have avoided the expense of the public inquiry.
    - The public inquiry had criticised WPC's case and witnesses.

27. The Information Commissioner weighed these points against the argument of WPC that there was no wider value in examining the detailed preparations for the public inquiry because it would not illuminate any underlying matter of public interest and that the work associated with the disclosure would place substantial demands on the Council and distract it from its proper responsibilities.

28. The Information Commissioner concluded that while there was public interest in disclosure of the information about the application to register the meadow as a village green, EIR was not the appropriate avenue to obtain this information and that the public inquiry, which at the time of the request was "on going" (a date had been set for submission of evidence), was the appropriate mechanism for exploring those consequences. He did not take into account subsequent comments of the Inspector since he could only consider the situation which prevailed at the time of request. He recognised the burden that complying with the request placed upon the time and

resources of WPC and its impact on WPC's ability to carry out its other functions, and concluded that the balance of public interest weighed significantly in favour of maintaining the exception to disclosure. He also addressed the provision of guidance to Mr Perkins as to the refinement of his request in order to make it of a manageable scale and considered that WPC had responded appropriately in attempting to achieve this.

29. In his appeal to this tribunal against the Information Commissioner's decision notice Mr Perkins argued that:-

    - the Information Commissioner had been wrong to take into account time already spent in handling the request in determining whether the exception in regulation 12 was engaged,
    - the Information Commissioner had erred in considering the burden on WPC as a factor going to the public interest test when the same factor had already been considered in determining whether the regulation 12 exception is engaged (a double-counting argument), and
    - WPC could not rely on the cost burden ground unless it indicated to the requester information that could be provided within a reasonable cost/time limit.

30. In his reply the Information Commissioner upheld his position in the decision notice relying on the Upper Tribunal decisions in *Craven* and *Dransfield*. He submitted that, applying the approach set out in those cases of looking at the question in "all the circumstances", the historic burden already incurred in dealing with the EIR request was relevant background. He noted that the estimates of the additional time required to comply with the request would, within the FOIA regime, take it over the appropriate cost limit. In any event, given the broader approach, it was necessary to take into account the time already expended on the request and the disproportionate impact on WPC. He further argued that part of the burden to be taken into account was the impact on KLC in complying with the request: "*indeed, the very fact that WPC has had to rely on the goodwill of a University law clinic is indicative of both its own limited resources, and the burden imposed on it by the appellant's requests."*

31. The Information Commissioner's reply also re-affirmed his position that burden could be considered at both stages of the process (in considering whether the exception was

engaged and where the balance of public interest lay) and that WPC had within its limited resources complied with its obligation to assist the requester.

32. WPC supported the Information Commissioner's stance and emphasised lack of resources, the time it would take to assess and categorise the disputed material according to exceptions relied upon, and the value and importance of volunteers' time, stating (paragraph 28(c))*"Where a small council relies on goodwill, it would be iniquitous to suggest that volunteer time does not count"* and pointing that KLC were no longer able to assist in the work and that WPC was now assisted pro bono by a barrister. In contrast to Mr. Perkins' focus on cost as a measure of burden and discounting those items for which a charge was not made, WPC argued that burdens can also arise from the use of other resources: people and time. A key argument of the Council was the time burden on them and their witness statement emphasised this and its impact.

33. Mr Perkins in oral argument submitted that the Information Commissioner's Office should have required WPC to comply with the Information Commissioner's requirements with respect to the provision of information in an acceptable form, and that there was no basis for the time spent by KLC on the request. He noted that the agreement between KLC and WPC (bundle page 70/1) was for work to be carried out by KLC without payment. He argued that WPC should have prioritised its statutory duty to comply with EIR rather than pursuing the village green application. In respect of burden he argued that the agreement between KLC and WPC waived confidentiality and therefore the work separating out legally privileged material did not need to be carried out. He argued that KLC was only formally instructed by a WPC resolution on 21 February 2012 and that there was no client relationship (and therefore no confidentiality) before that date.

34. Mr Perkins disputed that there was a personal data issue in the material.

35. In respect of public interest Mr Perkins submitted that there was a significant public interest in understanding how WPC had approached the village green application, the circumstances giving rise to that (failed) application and WPC's relations with the campaign group. On the question of vandalism of the fence, he posed the question: *"did the WPC have e-mails on the vandalism, if not why not."*

36. The question for the tribunal is whether the Information Commissioner's decision is correct in law. Mr Perkins' fundamental arguments may be conveniently considered in two parts. First with respect to "manifestly unreasonable" he put forward a series of arguments which he felt would diminish the significance of any burden on WPC – that legal privilege was not relevant to the material held by KLC and therefore the amount of time needed to prepare the material for consideration was actually much reduced; past burden was no burden and therefore only time and effort going forward needed to be taken into account; the time of KLC was voluntary and not a burden; and WPC's priority should have been to comply with its statutory duty rather than the village green application. Secondly with respect to public interest there should be greater accountability of WPC and KLC in wasting public money on the unsuccessful application and he wished to satisfy himself that there had been no impropriety on the part of WPC.

37. The tribunal was satisfied that, in attempting to discount some of WPC's burden in identifying and excluding potentially privileged information, Mr Perkins took an overly restrictive view of legal advice privilege. The evidence was clear that the KLC advice service was structured to provide legal advice by regulated lawyers bound by duties of confidentiality and in the process to enable law students to start to learn their profession. The date of the formal decision of WPC to instruct KLC in connection with the public inquiry was not material – the duty of confidentiality was established in equity when the committee (authorised by WPC) approached KLC for legal advice and was enforceable. Accordingly, any material held by KLC would potentially attract legal advice privilege which had been correctly identified as an issue by WPC in June 2012. The identification and sorting of this material for the Information Commissioner's consideration would therefore have taken a significant amount of time.

38. The decisions of the Upper Tribunal in *Dransfield* and *Craven* require the consideration of antecedent circumstances in determining whether a burden is manifestly unreasonable.

39. WPC relies on the voluntary activities of its members and on the goodwill and assistance of other volunteers, including KLC. Regulation 12(4)(b) is broadly drawn – a public authority may refuse to disclose information to the extent that "the request is manifestly unreasonable". If carrying out the work required to properly process a

request for information under EIR causes substantial resource difficulties to a parish council and those who assist it, then it is legitimate to include all the resource effects whether they fall on the council as a corporate entity in terms of its money and staff time, on its councillors, or on agencies making resources freely available to assist it in its work.

40. The argument forcibly advanced by Mr Perkins in oral argument that WPC should have devoted its resources to complying with his request rather than the village green application is unattractive in view of the broader requirements of the Aarhus Convention requiring public authorities to ensure that arrangements are made by them to enable public participation in environmental decision-making. Viewed in this context, and taking into account that the public inquiry process had already been launched when the request for information was made, the tribunal considered that it was entirely legitimate for WPC to consider the burden of the request on its overall activities.

41. The tribunal was also satisfied that WPC had advanced strong evidence of the burden that the request placed upon it. Furthermore, at an early stage it had identified issues going to the complexity of the work involved in dealing with the request and it was fully entitled to rely on the Regulation 12(4)(b) exception in resisting the request (albeit very late). While the circumstances giving rise to the late reliance on the exception (and the consequential delays) were unfortunate, it was permissible for WPC to engage it and it would have been equally permissible at the time when the request was first made. The Information Commissioner considered the evidence in respect of burden and reasonably discounted some of the time claimed but satisfied himself that the burden was substantial and would increase. He was right to find that the exception was engaged.

42. In addressing the arguments on public interest Mr Perkins told the tribunal that he was seeking to make WPC accountable. He was trying to demonstrate that there was no good governance in WPC and he was trying to get to the driving force behind WPC's failed attempt to obtain village green status for Seaton Meadow. He wanted to know whether it was a “personal issue-hammer Perkins" or was it "something real". He felt aggrieved; he felt bullied. He feels that WPC had been too closely involved with the Seaton Community Action Group. He made a very wide request because "I had a huge suspicion information would not be there." If he had received the information

when he requested it he would have been able to offer a settlement proposal to WPC without the need for a public inquiry. He felt that WPC must have known from the beginning that they did not have a good case.

43. The Information Commissioner correctly argued that burden is relevant to the consideration of public interest. In his response to the appeal (paragraph 46-50) he pointed to the importance of the public inquiry as being the key focus in which environmental information could be scrutinised and interrogated. The tribunal agrees with that analysis. At the time the request was made in mid-2012, the timetable for the public inquiry had been announced with publication of evidence occurring at the end of October that year. The inquiry was tasked with examining the issues and did so. A fundamental part of the process of an inquiry is the presentation of their cases by the various parties. To require one party to disclose all their records (including records attracting legal advice privilege) would unfairly shift the balance between the parties. Mr Perkins acknowledged that his request was very broad, and deliberately so, linked (it appears) to concerns about possible misconduct. However, no evidence of wrongdoing has emerged during our consideration of this matter. The comments of the inspector to which Mr Perkins has drawn attention are somewhat selective. It is clear that the inspector tested the information being presented and commented on the way some people had approached the matter. In all the circumstances the tribunal is satisfied that the Information Commissioner correctly struck the balance in determining the public interest.

44. In considering the whole of this matter the tribunal is struck by the inexorable operation of the law of unintended consequences. Mr Perkins is aggrieved at the time and expense which went into the enquiry process - it is clear that some £100,000 was expended by WPC, Kent and the objectors in the process. Legislation originally intended to enable the public right to a village green to be simply and easily determined has proved, in this case, not to be so. Similarly legislation designed to open up information about the environment to the general public in order to foster public understanding, participation and ultimately the right of access to courts has itself become a protracted, time-consuming, emotionally demanding and expensive process which has consumed resources on a considerable scale to no good purpose (given that the inquiry was capable of addressing the concerns and indeed commented

on some of them). The public interest has been served. It is, perhaps, also in the best public interest for all parties to move on.

45. While the tribunal has sympathy with the procedural frustration and disappointment that must have been felt by Mr Perkins as he laboured through a much delayed process as a user of the access to information regime, the tribunal is satisfied, for the grounds stated, that the decision of the Information Commissioner is correct in law and dismisses the appeal.

46. Our decision is unanimous

Judge Hughes
[Signed on original]

Date: 25 March 2015