



**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No:  
FS50548837**

**Dated: 24th. February, 2015**

**Appeal No. EA/2015/0079**

**Appellant: Graeme Russell**

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

**Before  
David Farrer Q.C.  
Judge**

**and**

**Jean Nelson  
and  
Michael Hake**

**Tribunal Members**



[Signed on original]

## REASONS FOR DECISION

### The Background

1. The Appellant (“GR”), lives within the civil parish of Leybourne, Kent. For some time he and his mother have disputed with Leybourne Parish Council (“LPC”) the use of a strip of land in the village leased by LPC from the District Council. LPC wishes to leave it as a nature reserve; GR and others want it to be maintained as mown grassland, the footpath which runs through it kept free of brambles, nettles and other natural obstructions. GR has cleared weeds and rubble from this land and caused Kent County Council (“KCC”) to cut back undergrowth and mow the edges of sections of the footpath. LPC has asserted that such maintenance was and remains too costly, given its financial resources.
  
2. Such disagreements led to a series of hostile exchanges between GR and LPC or its members. It appears, however, that most, if not all the events to which LPC specifically referred when justifying to the ICO its eventual decision to rely on FOIA s.14 post-dated the request of 1st. July, 2014 which gives rise to this appeal. They involved -
  - (i) allegedly disruptive conduct by GR at two Parish Council meetings;
  - (ii) intimidating contact with the Parish clerk;
  - (iii) harassment of a site manager and
  - (iv) the setting - up by GR of Facebook and Twitter accounts, masquerading as LPC accounts said by LPC to contain offensive, even defamatory comments about LPC.
  - (v) the unauthorised removal of roots and undergrowth from the strip of land by GR and his mother.

3. These activities led to police investigation of the Facebook and Twitter accounts (which did not result in any charge) and an order from KCC excluding GR from the LPC offices and a play area for 12 months. Other than a fairly innocuous transcript of exchanges at an LPC meeting, no evidence in support of these disputed complaints was before the Tribunal. Their relevance is assessed in paragraphs 26 - 29.

### The Request

3. At an LPC meeting on 3rd. June, 2014 GR asked why the footpaths were not kept clear of brambles, nettles etc. He was evidently told that LPC did not have the money to do this.
4. On 1st. July, 2014 he made the following request for information -  
*“Under the Freedom of Information Act, 2000, would you kindly supply me, within the next 20 working days, a copy of the Leybourne Parish Council’s FULL income and expenditure accounts for each month over the last five years, beginning April, 2009. and including June and July, 2014, by means of a stick, chip or email.”*

It was apparently delivered at the LPC meeting that day.

4. LPC replied within 20 days refusing the request on the ground of cost. A similar request dated 6th. August, 2014 elicited a more detailed response dated 17th. September, 2014, citing s.12 of FOIA and setting out the technical problems involved in satisfying the request and the statutory and accounting duties of LPC. GR had complained to the ICO following receipt of the first refusal.
5. On 9th. December, 2014 LPC informed the ICO that it now relied on s.14 rather than s.12. The DN proceeded on the basis that s.14 was the sole ground of refusal to be considered and so does this Decision.

6. As observed above, several incidents identified in paragraph 2 above and now relied upon as evidence of the vexatious nature of the request had occurred in the interval between the request and the issue of the DN on 24th. February, 2015, indeed before LPC's change of stance.

#### The DN

7. The ICO noted the switch to reliance on s.14. He observed that s.12 could not be successfully relied on because costs of formatting and redaction could not be included in the computation of the cost of satisfying the request. He accepted, nevertheless, that the overall cost could be considered in the assessment of the burden imposed by the request for the purposes of s.14. which, having regard to LPC's circumstances, was "great". He recited the incidents referred to in paragraph 2, which he evidently interpreted adversely to GR as indicating some kind of obsessive campaign. He accepted that GR had a serious purpose in making the request but concluded that the burden imposed on LPC and the matters summarised above rendered it vexatious. He therefore upheld LPC's refusal to respond. GR appealed.

#### GR's case on appeal

8. The core of his submissions was that his request had a serious purpose and sought information which ought to be available to any taxpayer in a democratic society. More specifically, he wanted LPC to maintain footpaths, trees and shrubbery to a proper standard; LPC said that it could not afford to do so. GR wished to check this claim by seeing how it spent its income, given that there was no accessible public record of its income and expenditure, whether in published minutes or elsewhere. Furthermore, he had observed apparent discrepancies in records of payments to LPC which justified an examination of the accounts requested.
9. He refuted LPC's interpretation of the events listed in paragraph 2, argued that most of its complaints were exaggerated and denied any campaign of disruption. He had made no

previous FOIA requests. He did not accept that the burden of compliance was disproportionate. He would be prepared to modify his request to some degree to facilitate compliance

#### The case for the ICO

10. In his Response the ICO reiterated the conclusions of the DN. He accepted some serious purpose in the request but considered that it was outweighed by the burden of satisfying it, taken in the context of surrounding events and the history of dealings between LPC and GR. As to LPC's argument as to the relevant history he stated more than once that he had "no reason to doubt" LPC's statement or comments on a disputed issue. He evidently accepted LPC's case as to these features of its dealings with GR and relied on it in support of his decision.

#### The reasons for the Tribunal's decision

11. We have regard to two important observations (underlined) of Arden L.J. giving the judgment of the Court of Appeal in **Dransfield v ICO and Devon County Council and other appeals [2015] EWCA Civ. 454 at paragraph 68 -**

*“ - - - I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right.”.*

We therefore start by asking ourselves whether there was a reasonable foundation for the claim that the information would have value for GR and by reminding ourselves that proof of vexatiousness requires cogent evidence.

12. We have no doubt that GR had a serious purpose in making the request. Whatever the correct view of subsequent events, he wanted to verify claims as to financial constraints which, rightly or wrongly, he viewed with scepticism. He also believed, that there was a discrepancy in figures relating to a Lottery Fund grant. His motive was not, in our judgement, simply to harass or disrupt the work of LPC. If he subsequently used the requested information to criticise or attempt to discredit councillors, then that is his right and their vulnerability in a democratic society. This is not a case of speculative “fishing” for damaging information.
  
13. Furthermore, his request was not one which he should have supposed to be exorbitant or burdensome when he made it. There is no evidence that he knew the complex history of LPC’s electronic records, hence that his request would make heavy demands on its resources, assuming that to be the case. A local resident may well expect that records of the kind requested would be held in accessible form even by a parish council of modest size. This was a request which had “a reasonable foundation” to quote Arden L.J..
  
14. LPC provided a full account of its financial functions and accounting procedures in its letter to GR of 17th. September, 2014. The description of procedures appears to convey the message that existing audit checks and publication of Annual Returns are a sufficient guarantee of the propriety and efficiency of LPC’s discharge of its financial responsibilities so that GR’s request, regardless of other objections, was superfluous. If that implication was intended, it was misconceived. A local taxpayer is entitled to see for himself, within reason, what income his parish council receives and how it is spent.
  
15. LPC identified two problems which increased the burden of responding to GR’s request, namely a succession of different persons maintaining its books and the use of a series of mutually incompatible software systems/ file formats. It stressed the burden of complying with the requirements of LPC’s own financial regulations as to scrutiny of payments and signatures on LPC cheques and the consequent safeguards against error or malpractice. Why the discharge of such duties should, of itself, aggravate the task of responding to GR’s request is not apparent. Indeed the procedures described, involving the presentation

to the Finance Committee of a monthly list of cheques for approval and payment seem to provide a source for a major part of the information which RG seeks.

16. The Tribunal bears in mind that this letter was written in support of a reliance on the cost exemption provided for by s.12 of FOIA, not s.14. However, it is notable that it contained no estimate of the expected volume of work entailed in answering the request but rather a detailed account of prescribed procedures and an emphatic assertion of excessive cost. It indicates that the records relating to the financial year ending in April, 2010 are inaccessible due to the use of unidentifiable software.
17. The DN contains later calculations, apparently made by the ICO, as to the time required to answer this request. They arrive at a full week's work for the Parish Clerk.
18. Clearly, this request demanded a substantial use of LPC's resources; hence compliance would impose on LPC a significant burden, though, as already observed, that would not have been obvious to the requester. LPC asserts that its routine work and work on particular projects has already been disrupted by dealing with the request and with GR's activities more generally. We address the latter aspect of this appeal at paragraph 28. As to work undertaken so far in direct response to the request, that amounts to five and a half hours, five for the "initial search" and thirty minutes to extract, redact and reformat two spreadsheets for one month according to the DN (see paragraphs 18, 19 and 20). Even allowing for some additions to that estimate of time spent (provided by LPC), it would be implausible to attribute to such a commitment the wrecking of LPC's work programme described at paragraph 21 of the DN. The lack of a permanent Parish Clerk is a far more probable source of such problems.
19. A striking feature of the LPC response of 17th. September, 2014 and of the DN is the absence of any reference to s.16 of FOIA or s.45 and the relevant Code of Practice. FOIA s.16 provides -

*“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who*



*propose to make or have made requests for information to it.*

- (2) *Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under s.45 is to be taken to comply with the duty imposed by subsection(1) in relation to that case.”*

Paragraphs 8 - 11 of the 2004 Code relate to “Clarifying the request”. This request, if those words are narrowly construed, required no clarification but it is evident that the term covers cases where the request might, with the authority’s assistance, be reduced to a manageable scope without seriously restricting the requester’s access to the information critical to the request. Paragraph 10 includes “*providing an outline of the different kinds of information which might meet the terms of the request*” and concludes with the words “*This list is not exhaustive and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant*”.

Quite apart from the Code, assistance in the refinement of a request to meet the limitations of the authority’s resources was plainly envisaged by Parliament when s.16(1) was enacted.

20. Making due allowance for the modest resources of LPC, this was a case in which it could reasonably be expected to offer such assistance to GR both in his and in LPC’s interests. In the letter of 17th. September, 2014, LPC set out its problems and systems but ended, not with a suggestion that discussion of the scope of the request might assist GR in obtaining what he wanted but with the uncompromising statements that the cost of response would be excessive, the request was declined and LPC had “*exhausted its procedures in this matter.*” It may be that LPC councillors were not in a mood to offer assistance by September, 2014, due to deteriorating relations with GR. That does not absolve LPC from compliance with s.16 however.

21. It is surprising that the ICO still made no reference to s. 16 in his Response to the Grounds of Appeal.

22. The purpose of GR's request, which, the Tribunal accepts, was a matter as to which LPC could not question him, suggests that compromise was possible, consistently with GR's targets. Whether such assistance would have resolved the problems of disclosure, the Tribunal cannot say, though GR's subsequent stance suggests a willingness to modify his requirements in the interests of obtaining relevant information. Be that as it may, such assistance was not offered, despite the very modest burden of work that it would have involved.
23. The Tribunal finds that LPC breached s.16 in its initial response, its subsequent letter of 17th. September, 2014 and further correspondence up to and including its letter of 9th. December, 2014 invoking s.14. In our view, that breach is relevant to the claim as to a disproportionate burden.
24. We turn now to what the DN refers to as "The background", that is to say events subsequent to the request and continuing up to the issue of the DN.
25. Their relevance is said to be that they provide context for the request and shed light on the nature of and motivation for that request. GR was conducting an obsessive campaign to discredit councillors.
26. An unusual feature of such context is that all or virtually all of the events cited postdate the request. Furthermore, only one of them involves any kind of communication with LPC on the general subject matter of expenditure and that was a brief intervention at a meeting, not a lengthy FOIA request.
27. Clearly, subsequent events may shed light on the bona fides of a requester but caution is needed in deciding how far, if at all, they assist in determining the reasonable foundation of the antecedent request. If, looking at all the surrounding evidence, a request was reasonable at the time it was made, subsequent misconduct, especially misconduct which does not involve communication with the authority, cannot transform it into a vexatious request.

28. In this appeal, assuming in favour of LPC and the ICO, that subsequent events reflect adversely on GR, it is far from clear how the removal of brambles, the following of a site manager, offensive conduct towards the Parish Clerk or posting offensive lampoons on social media demonstrate that the July request was valueless, motivated by spite, obsessive or unreasonably burdensome. The time involved in reacting to such occurrences has no bearing on the burden or disruption said to be caused by the request. The referring of the social media activities to the City of London fraud squad and the making of an exclusion order, apparently without giving its subject a chance to be heard, might suggest that LPC was itself engaging in disproportionate responses.
29. The nature and timing of these events, assuming that they occurred just as stated by LPC and accepted by the ICO would have very little significance in the Tribunal's assessment of the vexatiousness of the request. "Vexatiousness" imposes a high hurdle of proof on the public authority.
30. However, a further objection to attributing importance to such matters is the fact that, though the ICO and LPC were aware that LPC's account of what took place and its interpretation were strongly disputed by GR, as noted above at paragraph 9, there is no evidence before the Tribunal from the ICO or LPC as to any of these events. There is not even a statement from the ICO that he has heard from both sides and prefers the evidence of LPC. He merely observes at paragraphs 29 and 44 of his Response that he "*has no reason to doubt*" statements and comments made by LPC. He does not indicate what reasons he has to doubt the contradictory statements of GR in his Grounds of Appeal as to every one of the cited events.
31. Where a party, here the ICO, intends to rely in support of his case on appeal on matters which he knows to be disputed, then he must adduce evidence in the form of witness statements upon which the makers can be cross - examined, and require an oral hearing. Any excess of such evidence can be trimmed off by direction of the Registrar. It is unthinkable that, on a material issue, the Tribunal should act without more on a disputed

and significant statement of fact, especially where both sides advance reasonably plausible versions of what occurred.

32. We do not adjourn this appeal for such evidence to be tendered because, as indicated at paragraph 29, a resolution of the conflicting versions would not affect our decision.

33. We find that this request had a reasonable foundation and that the burden of compliance could well have been reduced by agreement, if LPC had had regard to s.16. It was not vexatious.

34. For these reasons we allow this appeal.

35 Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

24th. August, 2015