



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2018/0190**

**Before**  
Judge Stephen Cragg Q.C.

**Tribunal Members**

Dr Malcolm Clarke  
Ms Jean Nelson

**Heard at the Leeds Tribunal Centre on 13 March 2020**

**Between**

**Dr Peter Kelway**

Appellant

-and-

**The Information Commissioner**

Respondent

**Attendances:**

For the Appellant: In person

For the Respondent: Did not appear

**DECISION AND REASONS**

**INTRODUCTION**

1. On 13 June 2017 the Applicant requested information from the Wark Parish

Council (the Council) as follows:-

“In the absence of the publication of the draft minutes of the meeting of Wark Parish Council on 3 May 2017 I am requesting a copy under the

Freedom of Information Act.”

2. On 24 June 2017 the Appellant also requested the following information:

“In the absence of the publication of the draft minutes of the meeting of Wark Parish Council on 22 May 2017 I am requesting a copy under the Freedom of Information Act.”

3. On 8 July 2017 the Appellant also made the following request for information under the FOIA for:

“I repeat my request for a copy of the minutes of the council meeting of 22 May 2017 under the FOIA.

I note that the minutes of the meeting of 3 May 2017 have now been published but the supporting documents are missing from the web site, in contravention of statutory requirements. Please supply these under the FOIA.

The minutes of the meeting of 26 April 2017 have similarly been published without the supporting documents so please provide me with a copy of these. In particular the BDO report was not tabled nor was it properly included as an agenda item (see below), despite my request to you for a copy before the meeting took place.”

Contrary to statutory requirements, the BDO report for 2015/2016 was not included as an agenda item for discussion in public session. Please explain the reason for this omission so that I can decide whether to make a formal objection to the 2016/2017 accounts in relation to this failure.

I note that the minutes of 26 April 2017 have been published in approved form despite the fact that they were not approved at the meeting on 3 May 2017 or 22 May 2017. Please clarify the reason for this error.

4. On 25 October 2017 the Council responded to say that the requests were vexatious and applied section 14 FOIA. The Appellant was directed to the Commissioner, who investigated and produced a decision notice on 3 August 2018.

#### THE DECISION NOTICE

5. The Commissioner noted that the minutes of meetings mentioned in the requests had subsequently been published by the Council on its website. The Commissioner stated that other information has not been provided to the complainant such as the requested background papers to some meetings and therefore decided that the 'issue for the Commissioner in dealing with this complaint is ...the application of section 14 of the Act to the .... requests for information of 8 July 2018'.
6. In her decision notice the Commissioner made it clear at paragraph 22 that:-
  22. The council's argument is not that these particular requests are overly burdensome. Its argument is that the request follows a long history of similar behaviour by the complainant, and when seen in this context, the requests are vexatious.
7. The Commissioner records that the Council's clerk only works for four hours a week. The Commissioner states that the Council said that 'it has had a long history of issues with the complainant making a large number of requests and other correspondence with the council prior to these current requests being received'. These requests and correspondence have been burdensome. The correspondence has not all been in relation to requests for information, and the Council argues, says the Commissioner, that dealing with the Appellant's correspondence 'creates a

disproportionate burden compared to the value and purpose of the requests. It also considers that the request is part of a pattern of behaviour designed to harass and annoy members and officers of the council' (paragraph 26).

8. The Commissioner cites the statement of the Council Vice-Chair who says:-

“...between 6 August 2014 and 11 January 2016 (17 months) I received 373 emails on a wide range of subjects. However, this is not reflective of the actual number as I kept only the latest in any trail of question/response/chasing up emails, so the actual number would be very much higher: I could only guess that each retained email was the last of at least 3 others, possibly more. I received 32 between 17 December 2015 and 11 January 2016 alone; this was when I told him I would not respond to emails and I read none of them. Previously, between 7 September and 15 December 2015 I had received and read 40 (remember that there would have been more due to the trails of messages that I deleted).

9. The Commissioner concludes as follows:-

35... She does not accept that the individual requests in this case were overly burdensome, however she notes that this does follow a past history of a significant number of emails, queries and requests being received which have, overall, been disproportionately burdensome given the size and resources of the council.

10. The Commissioner goes on to say that the Appellant stated that his motive was to hold the Council to account as it is not transparent, and that does not follow correct procedures. The Commissioner sets out some of the complaints from the Appellant as to how the Council, since elections in May 2017 (some 15 months before the decision notice), has failed to publish information (including financial information) minutes and papers as required.

11. The Commissioner then details the Council's case as to how the continued correspondence from the Appellant has put clerks and some councillors under 'a great deal of stress'. At two places in the decision notice (paras 24 and 42), the Commissioner reports that the Council argues that the stress has led to the resignation of a number of clerks. We should record here (and see below) that the Council has subsequently stated in writing that this is not an allegation it has made.
12. The Council says that advice was sought from the police about the use of councillor's private email addressed by the Appellant, and also that advice had been sought from the Commissioner about the influx of correspondence.
13. The Commissioner sets out the text of two emails sent to a newly appointed clerk in May 2017, which set out in some detail procedural failings in the calling and publishing details of meetings, which the Commissioner says 'can be read to be of a passive aggressive nature' (paragraph 51). She says at paragraph 51 that:-

The Commissioner considers that the result of receiving such emails would have been an increase in the feelings of harassment, annoyance and distress by the clerk and by other council members.

14. The Commissioner also sets out other remedies and avenues of complaint explored by the Appellant.
15. In conclusion, the Commissioner says she is satisfied that the Council needs to do more to ensure that core information is published to the public. She notes that further requests have been sent by the Appellant, showing a determination to continue to question the Council, and that the Appellant has persistently pointed out the shortcomings of the Council, in a manner and tone which impacts on the ability of the Council to carry out its functions, and which 'would harass and annoy those receiving his

correspondence, when bearing in mind the nature and level of correspondence which he has had over an extended period of time.’ (paragraph 63). The Commissioner concludes that:-

66. Although the Commissioner acknowledges that these requests are not in themselves particularly burdensome, and she would generally expect that information of this sort would be disclosed as a norm, viewing this request in the context of the history of correspondence and antagonism between the parties, the Commissioner's decision is that the requests were vexatious in this instance. The council was therefore correct to apply section 14.

#### THE LAW

16. As set out above, in decision notice the Commissioner has set out a summary of her approach to section 14(1) FOIA. Thus, section 14(1) FOIA states that “(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”. Vexatiousness is not defined in section 14 FOIA, but it is immediately noticeable that it is the request that must be vexatious and not the person making the request.
17. Amongst other things, the Commissioner’s guidance on section 14 FOIA states that it is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.
18. The approach to vexatiousness is based mainly around the case of *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC). The emphasis on protecting public authorities’ resources from unreasonable requests was acknowledged by the Upper Tribunal in *Dransfield* when it defined the purpose of section 14 as follows:

'Section 14...is concerned with the nature of the request and has the effect of disapplying the citizen's right under Section 1(1)...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...' (paragraph10).

19. Also in *Dransfield*, the Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question as to whether a request is vexatious ultimately depends upon the circumstances surrounding that request. The Tribunal placed particular emphasis on the issue of whether the request has adequate or proper justification. As the Upper Tribunal observed:

'There is...no magic formula - all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA'.

20. *Dransfield* was also considered in the Court of Appeal (*Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454) where Arden LJ observed at paragraph 68 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... The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.'

21. The recent Upper Tribunal case of *Cabinet Office v Information Commissioner v Ashton* [2018] UKUT 208 (AAC) made clear that s14(1) FOIA can apply purely on the basis of the burden placed on the public authority, even

where there was a public interest in the request being addressed and where there was a 'reasonable foundation' for the request.

22. The case also confirmed the approach in *Dransfield* to the effect that the Tribunal should take a holistic approach, taking into account all the relevant factors, in order to reach a balanced conclusion as whether a particular request is vexatious: see especially paragraph 27 of the UT judgment in *Ashton*.
23. Further, the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance and, in short, they include:
- Abusive or aggressive language
  - Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden
  - Personal grudges
  - Unreasonable persistence
  - Unfounded accusations
  - Intransigence
  - Frequent or overlapping requests
  - Deliberate intention to cause annoyance

### THE APPEAL

24. The Appellant filed an appeal dated 30 August 2018 which argued that his request was not vexatious and had a serious purpose. He argues that much of the correspondence with the Council arose because of the number of local issues in which he was involved, and that the Council was failing to publish information which it was required to publish. He objected



strongly to the passages in the decision notice which reported that clerks had resigned because of his actions (and as set out above the Council subsequently confirmed that this was not an allegation it made).

## THE HEARING

25. The Appellant represented himself at the hearing and was accompanied by Mrs Connor. Neither the Commissioner nor the Council were represented. We explained to the Appellant that the Tribunal had read the background documents in the case, and understood the history of the matter.
26. The Appellant told us some more about the background and emphasised his long involvement with local issues and the ways in which the Council had failed to publish information which it was required to publish. He took us through his skeleton argument which set out his view as to why s14 FOIA did not apply.
27. We have read his witness statement and that of Mrs Connor, (who is Dr.Kelway's partner and had herself been a member of the Council until 2017). The witness statements set out dissatisfaction with the Commissioner's decision and provide some more background to the issues, including quite serious breakdowns of the relationship, not only between Dr. Kelway and the Council, but also between Mrs. Connor and her fellow councillors. .

## DISCUSSION

### Preliminary issue

28. In this case the Council sent an email to the Commissioner on 28 September 2018, which is in the bundle but largely redacted apart from

most of a paragraph in which the Council denies that it had alleged that three of its clerks had resigned because of the Appellant. The Appellant queried whether the redacted parts of the email were relevant to the appeal. The Tribunal has reviewed the whole email. It was explained to the Appellant that, in broad terms, the email contained general questions and comments by the Council about the tribunal process, and nothing else that was relevant to the issues we had to decide. Applying rule 14(6) of the Tribunal rules, the redacted parts would not be disclosed to the Appellant.

### Decision

29. We should start by saying that this was quite a finely balanced case. We take on board all that the Council has said about the burden that the Appellant's very frequent engagement with it over a period of years has placed upon the very limited resources that the Council has, and remind ourselves that the Council clerk is limited to four hours work a week.
30. We note the steps that the Council have taken to restrict the contact that it has from the Appellant. We also note that the Council has objected to the Appellant contacting councillors through private email addresses, and that the Council says that it has contacted the police in the past about this practice.
31. However, there are a number of important factors raised by the Appellant which we have also taken into account.
32. The Appellant points out that he has been involved in a number of community projects, which he listed in his submission, and that many of his emails to the council are simply ongoing emails in relation to subjects with which he is engaged. He accepted that at the time the requests were made he was in email contact with the Council over a number of issues.

He argues that it is unreasonable for the Council to count all of these emails within the totals presented as evidence that his contact with them is excessive.

33. It is also the case that we have not seen the emails that are complained about other than those set out in the decision notice which the Commissioner describes as being of a 'passive aggressive nature' as they place pressure on the Council to address procedural issues.
34. The requests which are the subject matter of this case, about Council minutes and supporting papers, were the first made by the Appellant in relation to this particular issue. The Council is obliged to produce minutes and background papers, and in those circumstances the Appellant argues that it is hard to see how a FOIA request for the information when the Council does not publish can be seen as vexatious.
35. In his appeal grounds he has referred to the Transparency Code for small authorities like the Council.<sup>1</sup> This is issued by the Secretary of State for Communities and Local Government in exercise of powers under section 2 Local Government, Planning and Land Act 1980. The effect of the arrangements is that smaller authorities are exempt from a routine external audit, but are subject to 'new transparency requirements' instead. As the Code says in paragraph 1 ' Transparency gives local people the tools and information they need to hold local public bodies to account.
36. Paragraphs 29 and 30 of the Code state that:-

29. Smaller authorities should publish the draft minutes from all formal meetings (i.e. full council or board, committee and sub-committee meetings) not later than one month after the meeting has taken place. These minutes should be signed either at the meeting they were taken or at the next meeting.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/388541/Transparency\\_Code\\_for\\_Smaller\\_Authorities.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/388541/Transparency_Code_for_Smaller_Authorities.pdf)

30. Smaller authorities should also publish meeting agendas, which are as full and informative as possible, and associated meeting papers not later than three clear days before the meeting to which they relate is taking place.

37. In our view, there is some force in the argument that if the Council does not comply with these requirements, it is not surprising if FOIA is used to obtain the information.

38. The Appellant also argues that it is wrong to consider other avenues he has used to hold the Council to account (such as those involving the auditor), when considering whether his FOIA request is vexatious.

39. In our view there was a reasonable foundation to the making of the requests for information that the Council had not made available despite the contents of the Transparency Code, and the requests were for information which should have been easily identifiable and disclosable.

40. Behind the requests we recognise considerable persistence from the Appellant which placed some difficult burdens on the Council and its employees (but not to the extent that Council clerks resigned). But although some of the examples of the correspondence we have seen could be described as fairly forceful, they are not based on unfounded accusations, do not use abusive or aggressive language, and are not intended to cause annoyance.

41. We accept that the Appellant has a genuine desire to improve the Council's performance, and was frustrated that in his view it was not responding. We are not at all sure that it is appropriate for the Commissioner to use formal psychological terms such 'passive-aggressive' when describing the nature of an Appellant's correspondence.

42. On the other hand, we do not agree with Dr.Kelway’s view, set out in his witness statement, that FOIA is “charged to bring to book” public office holders: this could be interpreted to indicate an inappropriate motive in its use. Its purpose is to make information available to citizens.
43. In all those circumstances, taking a holistic approach, considering the contents of the request considered by the Commissioner, the importance of councils complying with the Transparency Code, and the history of contact between the Appellant and the Council, by a narrow margin, we do not find that the request was vexatious.
44. However, we reach that conclusion with some hesitation, and it certainly does not mean that requests from the Appellant in the future might not be found to be vexatious, if the surrounding circumstances at the time merited that conclusion.

## CONCLUSION

45. On that basis, we allow this appeal, and the Council should consider any outstanding parts of the requests which have not been provided to Dr Kelway and either provide the information or claim any appropriate exemptions.

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 26 March 2020.

