

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 July 2007

Public Authority: Bromesberrow Parish Council
Address: Crophorne
Bromesberrow Heath
Ledbury
Herefordshire
HR8 1PQ

Summary

Bromesberrow Parish Council (the "Council") received a request for information from two complainants. The complainants requested information concerning a donation the Council had allegedly made to a miners' memorial, and the reasons why the public were not made aware of this donation. The complainants did not receive a response and so complained, separately, to the Commissioner. Following the Commissioner's intervention, the Council confirmed that no such donation had been made and the requested information was therefore not held by the Council. The Council issued a fees notice totalling £560 to the complainants to cover the cost of staff time spent on this matter. The complainants indicated they wished to complain about the fees notices, and so the Commissioner asked to consider both complaints together in determining whether the fees notice was lawful. The Commissioner has concluded that whilst the Council has confirmed that it does not hold the information requested by the complainants, it did so late, and was therefore not entitled to issue a fees notice in respect of the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 5 December 2006 the complainants wrote to the Council together and requested the following information concerning a miners' memorial which had been erected at New Fancy in the Forest of Dean:

“Could you please let us know how much our Parish Council donated to this memorial and also why this donation was never made public to the community which, apparently, funded this?”

3. The complainants allegedly did not receive a response.

The Investigation

Scope of the case

4. The complainants shall be referred to as ‘complainant 1’ and ‘complainant 2’ throughout the Decision Notice, where it is necessary to differentiate between them.

On 5 January 2007 complainant 1 contacted the Commissioner to complain about the Council’s alleged failure to respond to her request. Complainant 2 wrote to the Commissioner on 8 January 2007 to complain about the same issue.

5. The Commissioner began his investigation on 23 February 2007. Following his intervention the Council issued a Fees Notice to the complainants. Having received the Fees Notices, the complainants contacted the Commissioner again and asked him to consider whether the Council could lawfully request payment for complying with their request.

Chronology

6. The Commissioner telephoned the Council on 23 February 2007 and queried whether a written response had been provided to the complainants’ request. The Council explained that such a response had not been provided. The Commissioner reminded the Council of its obligations under the Act, and stated that he would confirm in writing what action the Council was required to take in order to comply with these obligations.
7. On 26 February 2007 the Commissioner wrote to the Council, and asked it to respond to the complainants’ request, in writing, by 28 March 2007. The Commissioner enclosed copies of various items from his ‘Awareness Guidance’ series, which, following their telephone conversation of 23 February 2007, he thought the Council may wish to consider before formulating its reply.
8. The Council wrote to the complainants, in separate letters, on 26 February 2007 with an “update” on the “progress being made regarding [their] request for information”. The Council stated that it had attempted to locate information regarding this donation however that it had not been successful. The Council further explained that it believed “a more detailed investigation would consume excessive resources” and asked the complainants “how much more resources [they] would consider reasonable to expend on such an investigation”.
9. Complainant 1 replied to the Council on 2 March 2007. She explained the background to the request for information. The Forest of Dean Local History

Society (the Local History Society) had commissioned a memorial to honour those who had worked in the mines and quarries of the Forest of Dean. The Council was credited on the Local History Society's website as having made a donation to this memorial. The complainants therefore asked the Council for information concerning this donation. Complainant 1 highlighted to the Council extracts from emails between the complainants and the Treasurer of the Local History Society, dated December 2006, which she believed indicated that her request could be answered quite easily by the Council as she had "no wish to waste the Council's resources on a detailed investigation". Complainant 1 copied this letter to Complainant 2.

10. The Commissioner studied the email correspondence between the complainants and the Local History Society. The Treasurer of the Local History Society had confirmed to the complainants on 13 December 2006 that:

"there has been a dialogue between [name redacted] of your Parish Council and the Forest of Dean Local History Society regarding the matter of a donation towards the ... [miners' memorial] quoted as coming from Bromesberrow Heath Parish Council and I recommend that you contact [the Council] direct on this matter as it [the reference to the Council on the internet] was an incorrect quote. The cheque received was a private cheque and therefore I am unable to provide any further information on this matter."

Having studied this correspondence, the Commissioner was satisfied that the complainants already had the information requested when they made their complaint to him, in that it had been confirmed by the Local History Society that the Council had not made a donation to the miners' memorial. The Commissioner therefore wrote to the Council on 14 March 2007 and advised that it was not required to take any further action in respect of this request.

11. The Council wrote to complainant 1 on 24 March 2007 and advised that "a full report on the donation to the memorial in the Forest of Dean [had] now been produced" and that this report would be sent to her with an "invoice". The Council wrote to both complainants 1 and 2 on 26 March 2007 and provided each with a copy of its report into the miners' memorial donation, and an invoice for £280.
12. Complainant 1 contacted the Commissioner on 27 March 2007 to complain that the Council had issued an invoice (or 'Fees Notice' for the purposes of the Act) in response to her request for information. She asked the Commissioner to consider whether the Fees Notice constituted a lawful demand for payment.
13. The Commissioner considered the complaints could be dealt with more effectively if one of the complainants acted as a single point of contact for him and for the Council. The Commissioner wrote to both complainants on 3 April 2007 and asked if they would be satisfied to proceed in this way.
14. Complainant 1 telephoned the Commissioner on 30 April 2007 and followed this with an email later that day to confirm she would act as the single point of contact for both complainants during the investigation of their complaint. Complainant 2

- confirmed in a telephone conversation with the Commissioner on 1 May 2007 that complainant 1 would be acting on his behalf in this matter.
15. The Commissioner wrote to the Council on 3 May 2007 and advised, for reasons which will be explained in the 'Analysis' section below, that the Fees Notices were unlawful, and recommended that they be revoked.
 16. Having received the Commissioner's letter of 3 May 2007, the Council telephoned the Commissioner on 4 May 2007. It explained that it believed it was entitled to request payment from the complainants and therefore considered the Fees Notices had been issued lawfully.
 17. The Council wrote to the Commissioner on 1 June 2007. It offered a number of explanations as to its handling of the request for information, both in relation to the fee it had requested of the complainants and the background to the complainants' requests.
 18. The Commissioner responded on 15 June 2007. He advised the Council that, as the Council had issued a Fees Notice to the complainants, and the complainants had complained about this fee being requested, the Commissioner's investigation would consider the Council's arguments only in relation to fees.

Analysis

Procedural matters

Section 1 – General rights of access

19. The Commissioner has considered whether the Council has complied with section 1 of the Act.
20. Section 1(1) provides –

“Any person making a request for information to a public authority is entitled –

 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.”
21. The complainants wrote to the Council on 5 December 2006 and requested information about a sum of money it had allegedly donated to a miners' memorial. The Council produced a report into this matter and forwarded the report to the complainants on 26 March 2007. The report was also published in the Parish Newsletter, at the end of March 2007. The report found that the Council had not made a donation to the miners' memorial. The Commissioner has been supplied with copies of email correspondence between the complainants and the Local

History Society which corroborates that the Council did not make such a donation.

22. In view of the above, the Commissioner is therefore satisfied that the Council does not hold the information requested, and that the complainants have been advised of this. The Council has complied with section 1(1) of the Act in respect of this request.

Section 9 – Fees

23. The Commissioner has considered whether the Council has correctly applied section 9 of the Act.

24. Section 9(1) provides –

“A public authority to whom a request for information is made may, within the period for complying with section 1(1), give the applicant a notice in writing (in this Act referred to as a “fees notice”) stating that a fee of an amount specified in the notice is to be charged by the authority for complying with section 1(1).”

25. The period for complying with section 1(1) is, in this case, twenty working days following the date of receipt of the request. The request was made on 5 December 2006, however the fees notice was not issued until 26 March 2007.

26. The Commissioner therefore considers that the Council was not entitled to issue Fees Notices to the complainants, as the period in which it may have lawfully done so had elapsed at the time the notices were issued. The Fees Notice is invalid, and the Council cannot therefore rely upon the Act as a basis for requiring payment from the complainants.

27. Whilst he is not required to do so, the Commissioner has gone on to consider whether the Fees Notices issued by the Council would have complied with section 9 of the Act, if they had been given to the complainants within 20 working days of receipt of the request.

28. The Council had expressed its concern as to the amount of time it would take and therefore the costs it was likely to incur to comply with this request for information. The Commissioner considers that section 9(2) of the Act protects public authorities against incurring unnecessary costs which they will not be able to recover.

29. Section 9(2) provides –

“Where a fees notice has been given to the applicant, the public authority is not obliged to comply with section 1(1) unless the fee is paid within the period of three months beginning with the day on which the fees notice is given to the applicant.”

30. The effect of section 9(2) is to put the onus on the applicant to confirm to the public authority that he is prepared to pay the required fee, or to allow the parties to refine the request in order to reduce the fee to be charged. The

Commissioner's view is that paragraph 9(2) does not entitle public authorities to invoice applicants retrospectively for costs it incurred in complying with requests for information.

31. Section 9(3) provides –

“Subject to subsection (5), any fee under this section must be determined by the public authority in accordance with regulations made by the Secretary of State.”

32. Statutory Instrument 2004 No. 3244 - The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”) detail what fees public authorities may charge in relation to requests for information made under the Act.

33. Public authorities are required to work up to the appropriate limit when complying with a request for information. The appropriate limit for local authorities such as the Council is £450, which is calculated at £25 per hour of staff time and equates to 18 hours' work. Section 13(1)(a) of the Act allows public authorities to make a charge for communication of information where the authority is not obliged to comply with section 1(1) because to do so would exceed the appropriate limit.

34. When calculating the appropriate limit, public authorities are allowed to take into account only the time taken to:

- a) determine whether it holds the information requested;
- b) locate the information requested;
- c) retrieve the information from a document containing it; and
- d) extract the information from a document containing it.

35. In its report into the alleged Council donation towards the miners' memorial, the Council stated that “some 16 hours of the Council's resources had been consumed by this investigation”. This statement demonstrates that the Council did not exceed the appropriate limit, and therefore would not have been entitled to make a charge for communication of this information. It also demonstrates that the Council had calculated the appropriate limit based on a charge of £35 per hour, rather than the £25 per hour as provided for by the Fees Regulations.

36. In its Fees Notice, the Council explained that the £560 charge was requested because it had spent time carrying out the following activities:

- i) examining four years' of archived Council documents;
- ii) producing reports regarding this matter for the Council;
- iii) corresponding with previous Council members to obtain information “related to [the] inquiry”;
- iv) visiting to the memorial;
- v) contacting with trustees of the memorial; and
- vi) producing the report for the complainants.

37. It therefore appears to the Commissioner that the only factor the Council could have taken into account when calculating a charge was the time spent examining

the archived material, as it is the only activity which falls within the factors described at a) to d) in paragraph 34 above.

Section 10 – Time for compliance

38. The Commissioner has considered whether the Council has complied with section 10 of the Act.
39. Section 10(1) provides –
- “Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”
40. The complainants requested information from the public authority by email on 5 December 2006. The Council did not respond in writing until 26 March 2007, when it confirmed that it did not hold the requested information. This response fell outside the twenty working day period and therefore the Council has failed to comply with section 10 of the Act.

The Decision

41. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- Section 1, in that it correctly concluded that the requested information was not held by the Council.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- Section 9(1), in that the Council issued a fees notice outside the twenty working day period required for a response;
- Section 9(3), in that the fee specified in the fees notice was not determined in accordance with the Fees Regulations; and
- Section 10, as whilst the Council did comply with section 1(1) of the Act, it was late in doing so.

Steps Required

42. The Commissioner requires no steps to be taken.

Other matters

43. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

The Council claims to have spent 16 hours carrying out an investigation into whether it made a donation to the miners' memorial. The Commissioner is concerned that the Council's records are maintained in such a way that they do not allow easy access to information. The Commissioner considers that as the request concerned specific public expenditure, the information should have been readily accessible to the Council, for example in payment books, ledgers or audited accounts. In order to ensure compliance with the Code of Practice issued under section 46 of the Act, which concerns records management, and to ensure any future requests may be dealt with appropriately, the Council should consider reviewing its records management practices. In doing so, it may wish to seek the advice of The National Archives. The National Archives may be contacted at the address below:

Records Management Advisory Service (RMAS):

rmadvisory@nationalarchives.gov.uk

National Advisory Services
The National Archives
Kew
Richmond
Surrey
TW9 4DU

Right of Appeal

44. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 5th day of July 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Fees

Section 9(1) provides that -

“A public authority to whom a request for information is made may, within the period for complying with section 1(1), give the applicant a notice in writing (in this Act referred to as a “fees notice”) stating that a fee of an amount specified in the notice is to be charged by the authority for complying with section 1(1).”

Section 9(2) provides that –

“Where a fees notice has been given to the applicant, the public authority is not obliged to comply with section 1(1) unless the fee is paid within the period of three months beginning with the day on which the fees notice is given to the applicant.”

Section 9(3) provides that –

“Subject to subsection (5), any fee under this section must be determined by the public authority in accordance with regulations made by the Secretary of State.”

Section 9(4) provides that –

“Regulations under subsection (3) may, in particular, provide –

- (a) that no fee is to be payable in prescribed cases,
- (b) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and
- (c) that any fee is to be calculated in such manner as may be prescribed by the regulations.”

Section 9(5) provides that –

“Subsection (3) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Fees for disclosure where cost of compliance exceeds appropriate limit

Section 13(1) provides that –

“A public authority may charge for the communication of any information whose communication –

- (a) is not required by section 1(1) because the cost of complying with the request for information exceeds the amount which is the appropriate limit for the purposes of section 12(1) and 12(2), and
- (b) is not otherwise required by law,

such fee as may be determined by the public authority in accordance with regulations made by Secretary of State.”

Section 13(2) provides that –

“Regulations under this section may, in particular, provide –

- (a) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and
- (b) that any fee is to be calculated in such a manner as may be prescribed by the regulations.”

Section 13(3) provides that –

“Subsection (1) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information.”