

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2019

Public Authority: Wark Parish Council

Decision (including any steps ordered)

1. The complainant requested copies of minutes and documents tabled at parish council meetings.
2. The Commissioner's decision is that, on the balance of probabilities, Wark Parish Council ("the Parish Council") now holds no further information within the scope of elements [1] and [3] of the request beyond that published on its website – which is reasonably accessible to the requestor. However, on the balance of probabilities, she finds that the Parish Council did hold further information at the time it responded to the request which it failed to identify. It thus failed to discharge its Section 1(1) duty. In relation to element [2] of the request, the Commissioner finds that the fees that the Parish Council has proposed to charge the complainant are not reasonable and that it failed to issue its fees notice within 20 working days. She therefore finds that the Parish Council has breached Section 9 of the FOIA.
3. The Commissioner does not require the Parish Council to take further steps in relation to elements [1] and [3] of the request, but in relation to element [2], she requires the Parish Council to:
 - Issue a fresh response to this element of the request
4. The Parish Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Freedom of Information Act and may be dealt with as a contempt of court.

Request and response

5. On 3 February 2018, the complainant wrote to the Parish Council and requested information in the following terms:

"[1] A copy of all notices of meetings scheduled for the Parish Council after 31 March 2017 to the current date with copies of all the associated notices of the business to be transacted and all papers tabled for the meetings. Please include with this information copies relating to all meetings held in closed session.

*[2] A copy of **approved** minutes of the business discussed for all meetings held by the Parish Council after 31 March 2017 to the current date. Where approved minutes are not available, please provide a copy of the draft minutes which are pending approval. Please include with this information copies relating to all meetings held in closed session. [complainant's emphasis]*

[3] A copy of all sets of financial management information provided to the Parish Council after 31 March 2017 to the current date if not already included in those tabled for meetings.

[4] A schedule of the dates of meetings held by the Parish Council since 31 March 2017 which have been held in closed session but where the public has not been informed of the meeting. Please also provide the schedule of business to be transacted, details of the decisions made and the minutes of the meetings in the case of items not relating to confidential matters."

6. The Parish Council responded to the complainant on 4 March 2018 referring to the numbered elements in the following terms:

"[1] Agendas and notices for all meetings can be found on website

[2] Draft minutes can be found on website all have been approved except those for minutes of Meeting on January 9th

[3] Please refer to draft minutes Item 19 for meeting held on 29th January regarding Financial Issues.

[4] There were no meetings held in close session where the public was not informed of the meeting."

7. The complainant wrote to the Parish Council the following day to complain about the way it had responded to the request. In particular

she believed that the Parish Council held further information beyond that available on the website. She asked to be furnished with the missing information by the end of the week.

8. The Parish Council does not appear to have carried out a formal internal review as such, but it did send a brief further response to the complainant on 10 April 2018.

Scope of the case

9. The complainant first contacted the Commissioner on 28 March 2018 to complain about the way her request for information had been handled.
10. At the point at which the request was submitted, the Commissioner took the view that it would be of benefit to all concerned if the Parish Council were to undertake a full internal review of the way the request had been handled and wrote out accordingly. The Parish Council wrote to the Commissioner on 6 June 2018, saying broadly that it wished to maintain its position in respect of the information and drawing the Commissioner's attention to its adversarial relationship with the complainant.
11. Following a discussion with the complainant, it was established that, in respect of element [4] of the request, the complainant was seeking information about a Parish Council meeting which related to a complaint involving her partner. She agreed that this matter would be better pursued under a Subject Access Request and therefore the Commissioner has only looked at the way that the Parish Council responded to elements [1] to [3] of the original request.
12. On 5 November 2018, the Parish Council sent a further letter to the complainant. It maintained its position that it held no further information in relation to elements [1] and [3] beyond that which was available on the website, although it had provided further information to the Commissioner explaining the circumstances that had precipitated this stance. However in relation to element [2], it now stated that the information which it held would only be provided on receipt of a fee.
13. The complainant contacted the Commissioner again on 18 December 2018 as she still felt that her request had not been satisfactorily answered and that the fees being charged were not reasonable. The complainant did not appear to dispute that she could access information which was on the website, but argued that not all the information she requested could be found there.
14. The scope of the Commissioner's investigation has therefore been to:

- a. Determine whether further information is held
- b. Determine whether the fees that have been quoted were "reasonable"

Reasons for decision

Extent of Information Held

15. Section 1(1) of the FOIA states 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*
16. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
17. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
18. In its representations to the Commissioner, the Parish Council accepted that it may have been reasonable for the complainant to expect that it would hold further information within the scope of the request and that it may have held this information at the time the request was responded to, but that it did not, as a matter of fact, now hold this information.
19. The Parish Council explained that its previous clerk had departed in acrimonious circumstances after the request was responded to. The Parish Council had provided the clerk with a laptop to be used for official purposes and, since the clerk's departure, had been trying to recover the laptop, the information contained within it and any other information, belonging to the Parish Council, which that individual might have retained.

20. The Parish Council was unable to say definitively which information, within the scope of the request, was being retained by the previous clerk and it accepted that more information should be publicly available. However, it noted that, whilst it was trying to resolve the situation as swiftly as it could, it was unable to provide information over which it held no physical control.
21. Finally, the Parish Council stated to the Commissioner that it now held no further information beyond that which was already published on the website.
22. The complainant felt that this situation was unacceptable and that, if the Parish Council was saying that information had been removed illegally, then it should be pursuing the matter with the police.
23. Whilst the Parish Council's information management systems are clearly deficient and whilst the Commissioner shares some of the complainant's frustration at the situation that has occurred, she reluctantly has to conclude that the Parish Council simply does not, as a matter of fact, *hold* further information within the scope of the request at the present time.
24. The Commissioner also notes that, even if she were to find that information was held by, or on behalf of, the Parish Council in this situation, her powers under Part IV of the FOIA to issue Decision, Information and Enforcement Notices to ensure compliance with the Act can only be used against a corporate body, not against individuals.
25. Given the circumstances, it is impossible for the Commissioner to say what information the Parish Council held *at the time the request was responded to*. On the balance of probabilities, the Commissioner considers it likely that *some* further information would have been held, but she cannot give any definitive view as to the extent of this information.
26. In the circumstances the Commissioner therefore concludes that the Parish Council holds no information beyond that which is on its website.
27. However, it seems clear to the Commissioner that the Parish Council failed to conduct an adequate audit of the information it held within the scope of the request and provide the complainant with an unequivocal statement of the same when it issued its first response.
28. The Commissioner's view is that the Parish Council therefore failed to discharge its Section 1(1) duty at the time it responded to the request. However as it now has no physical control over any additional information it may have had at the time of the request, the Commissioner considers that the Parish Council would be unable to

comply with any step which she ordered to remedy such a breach. She has therefore exercised her discretion not to order any such step.

Fees

29. Section 9 of the FOIA/EIR states that:

- (1) *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).*
- (2) *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. Section 9(3) of the FOIA requires any fees charged by a public authority to be calculated in accordance with the requirements of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations").

31. Regulation 6 of the Regulations states that:

- (1) *Any fee to be charged under section 9 of the 2000 Act by a public authority to whom a request for information is made is not to exceed the maximum determined by the public authority in accordance with this regulation.*
- (2) *Subject to paragraph (4), the maximum fee is a sum equivalent to the total costs the public authority reasonably expects to incur in relation to the request in–*
 - (a) *informing the person making the request whether it holds the information, and*
 - (b) *communicating the information to the person making the request.*
- (3) *Costs which may be taken into account by a public authority for the purposes of this regulation include, but are not limited to, the costs of–*
 - (a) *complying with any obligation under section 11(1) of the 2000 Act as to the means or form of communicating the information,*
 - (b) *reproducing any document containing the information, and*

(c) *postage and other forms of transmitting the information.*

(4) *But a public authority may not take into account for the purposes of this regulation any costs which are attributable to the time which persons undertaking activities mentioned in paragraph (2) on behalf of the authority are expected to spend on those activities.*

32. The Parish Council stated that it only holds copies of the approved minutes in hard copy. It has therefore offered to provide copies of these minutes at 50p per sheet to cover the cost of photocopying and £2.50 to cover the cost of postage. As there were 44 sheets requiring photocopying it stated that it would provide the information on receipt of a payment of £24.50.
33. The complainant has argued that the fees the Parish Council proposes to charge are unreasonable because the minutes would be produced in electronic form and therefore there would be no need to photocopy or scan them. She did not appear to dispute the *level* of the charge, but was opposed to the idea of charging in principle for information which she believed should be available on the Parish Council website for free.
34. The Parish Council explained the process for approving its minutes: following a meeting, the minutes will be typed up and circulated to parish councillors in advance of the next meeting. At each meeting of the Parish Council, one of the first items of business is to approve the minutes of the previous meeting. Once the meeting has voted to approve these minutes, the Chair then signs a single copy of the draft minutes. This is the "approved" copy and is kept for audit records.
35. The Parish Council noted to the Commissioner that, providing copies of the Approved minutes could not be done without reference to the original hard copy document and would therefore require photocopying work to be undertaken as, the Parish Council argued, reproducing an electronic copy would not satisfy the request.
36. The Parish Council also drew the Commissioner's attention to the Government's Transparency Code of Practice for Smaller Authorities which states that:

*"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.*¹ [emphasis added]

37. Finally, the Parish Council noted that, in practice, there was no difference between the versions of minutes published on its website and the "approved" versions – with the exception of the signature on each one. It has pointed out that these draft versions are freely available and therefore it is not unreasonable for it to charge for documents which a requestor could access for free anyway.
38. In 2015, the Commissioner issued Decision Notice FS50584908 to the Parish Council in relation to another Fees Notice which it had issued.² In that notice, the Commissioner found that the Parish Council's proposed charge of 50p per sheet for photocopying was unreasonable because she considered that the Parish Council was actually including costs which were impermissible under the Fees Regulations – namely costs incurred in travelling to and from the nearest photocopying facilities.
39. Whilst the Commissioner can accept that inflation may have increased the costs incurred for photocopying in the last four years, she has difficulty accepting that those costs have increased five-fold from the 10p charge the Commissioner suggested was reasonable in her previous decision notice.
40. The Commissioner accepts now, as she did in 2015, that photocopying is not a straightforward task for a tiny parish council without its own dedicated facilities. However, the law is very clear as to what can and cannot be charged for. In this case, the Commissioner is not satisfied that a 50p per sheet charge is a reasonable reflection of the costs incurred in reproducing the documents. Therefore the Parish Council is not entitled to charge this Fee for the requested information and has thus breached Section 9(3) of the FOIA. The Parish Council is now required at paragraph 3 above to issue a fresh response to this part of the request.
41. Where a public authority does propose to charge a fee for the provision of information Section 9(1) of the FOIA requires it to inform the complainant of the fee required within 20 working days of receiving the

1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/388541/Transparency_Code_for_Smaller_Authorities.pdf

² https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1560198/fs_50584908.pdf

request. The Commissioner also considers it good practice for the public authority to inform the complainant that there is a three-month deadline, from the day on which the fees notice is issued, to pay the fee.

42. From the evidence presented to the Commissioner it is clear that the Parish Council failed to issue its fees notice within 20 working days. It therefore breached Section 9(1) of the FOIA.

Other matters

43. It is clear to the Commissioner that the Parish Council is a tiny public authority and that it lacks both expertise and experience in dealing with requests made under the FOIA. Nevertheless, it should be aware it still has a statutory duty to respond to requests in accordance with the legislation and to assist the Commissioner in determining complaints brought under Section 50 of the FOIA.

Right of appeal

44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF