



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL UNDER SECTION
57 OF THE FREEDOM OF INFORMATION ACT 2000**

Appeal No. EA/2016/0007

BETWEEN:

ANTHONY KELL

Appellant

-and-

INFORMATION COMMISSIONER

Respondent

Before

**Brian Kennedy QC
Alison Lowton
Marion Saunders**

Date of Hearing: 30 June 2016 and 2 August 2016, at Field House, London.

DECISION

Subject matter: Application of section 17(6) of the Freedom of Information Act 2000 ("FOIA").

The Tribunal dismisses the appeal.

Date of Decision: 22 August 2016

Date of Promulgation: 22 August 2016

REASONS

Introduction:

1. The decision concerns an appeal of a Decision of the respondent (“the Commissioner”) dated 7 January 2016, reference: FS50599814 (“the DN”), which is a matter of public record.
2. In the DN the Commissioner held that the Public Authority, in this case Rothbury Parish Council (“the Council”), had correctly refused to respond to a request for information from the appellant, pursuant to section 17(6).
3. The Tribunal is provided with a bundle of documents referred to herein as the Open Bundle, (“OB”) pages 1 – 32 and a bundle including a Case Management Note of 4 February 2016 refusing the Commissioner’s request to have this appeal consolidated and heard together with another similar Appeal between the same parties, and some additional documents and submissions from the Appellant.

Factual Background to this Appeal:

4. Full details of the background to this appeal, the Appellant’s request for information and the Commissioner’s decision are set out in the Decision Notice and are not repeated here, other than to state that, in brief, the appeal concerns the question of whether the Appellant’s requests for information regarding employment details of named employees in Rothbury Parish Council (“the Council”) were vexatious.

5. Chronology:

April 2015	Appellant’s previous request to Council for information re complaint procedures, records management and a gardening services contract
27 April 2015	Initial email from Council to Appellant addressing some matters
14 July 2015	Council formally refuses request as vexatious and informs Appellant that it will not respond to further requests

5 June 2015	Appellant's previous complaint to Commissioner
10 July 2015	Commissioner advises Council to respond to Appellant
14 July 2015	Council refuses requests under s14
7 Oct 2015	DN FS50584415 upholding Council's decision
2 Sept 2015	Appellant's present request for information from the Council. The Council did not respond
1 Oct 2015	Complaint to the Commissioner
7 Jan 2016	Decision Notice upholding Council's refusal
19 Jan 2016	Initial grounds of appeal

6. Relevant Legislation:

FOIA s14 Vexatious or repeated requests.

- (1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
- (2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

s17 Refusal of Request

- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where –
 - (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

7. Commissioner's Decision Notice:

The Commissioner noted that he had issued a previous DN ([FS50584415](#)) concluding that the Appellant's requests were vexatious; the very limited resources of the Council meant that the requests had the potential to cause disproportionate disruption to the Council, the requests lacked discernible value and any acquiescence to the requests would be unlikely to resolve the Appellant's wider issue with the Council. As similar requests from this Appellant had been adjudged vexatious and the Council had previously warned him that future requests would not be answered, it would be unreasonable to expect the Council to issue a refusal notice, and held that s17(6) applied.

8. Notice of Appeal 19 January 2016:

Extensive background has been provided regarding an 'elector rights meeting' at which electors can scrutinise the annual return and all governance statements. The Appellant contends that councillors obstructed this at a meeting on 25th June 2015 by refusing to answer questions. He cites the motive of his request as asking for proof that councillors were provided with sufficient information to allow them to perform due diligence i.e. by allowing inspection of document transfer and correspondence between the Council clerk and all councillors.

He adds that the named individual's employment relationship with the Council has never been "legally defined" and there seems to be no evidence that she was ever "formally appointed". He complains of the Commissioner's "lethargy" in reviewing his complaint, and states that it is unsatisfactory that his complaint has been determined by the same case manager that rejected a previous request, as potential bias must be avoided and seen to be avoided.

He requests that the Tribunal order the release of the information, but also that they order the Council to confirm which documents were provided to council members prior to the endorsement of the annual returns.

9. Commissioner Response:

The Commissioner notes that the Appellant's grounds of appeal contain mostly background to the Appellant's underlying issues with the Parish Council. The Commissioner would dispute that the DN is flawed, but submits that, in any event the nature of the Commissioner's investigation is outside the jurisdiction of this Tribunal. The Appellant has failed to set out in the grounds of appeal why the DN is not in accordance with the law or that the Commissioner ought to have exercised his discretion differently. The Commissioner is content to rely on his Decision Notice and the accompanying documents from his investigation provided with this response.

Further Submissions by the Appellant: 20/06/1916

10. The Appellant argues that the Council has not provided to its electors or its external auditors any evidence that the individual was lawfully appointed by council resolution, refusing access to its minute books in breach of the Local Government Act 1972. The Appellant's concerns were raised by an independent auditor (BDO) performing an audit of the 2015 returns that there is no evidence that the clerk as Proper Officer (with roles as legal advisor, administrator and Responsible Financial Officer to the Council) has any formal employment contract. It is inappropriate to allow the Council to use ss14 and 17 to obstruct proper public scrutiny of its affairs.

Apparent Issues:

11. In 2012 the Appellant offered personal and financial support to ensure the Council's compliance with DPA and FOIA. In October 2012 following a public notice, the Appellant requested an inspection of the annual return and external audit for 2011/12. Despite having made an arrangement, no document was produced and he describes "verbal abuse" from the clerk who stated "you will get nothing from me". The Appellant has produced a letter from his wife as evidence of this. The Appellant asserts that when he raised this incident at the public meeting in December 2012, he was told by Mr Reynolds (then chair) to "take your complaints elsewhere".

12. The Appellant argues further that the annual return was subsequently shown to him, but the external auditor's report had not been attached and the Appellant believes that this was done to conceal the false assurances. In February 2013 the Appellant raised concerns with Councillor Bridgett about a 2012 report from the external auditor, which inferred that the Council's compliance with financial regulations was inappropriate. He states that Mr Bridgett initially expressed concern and conceded a lack of due diligence on his part. However immediately following this he ceased contact with the Appellant, "resorting to persistent false public slur". He claims that the ICO decision of 7 January was based on the review of a single document (an alleged 'list of complaints' made by the Appellant) that has subsequently been proven to contain false statements. It instead is an "invention" by a Mr Reynolds that the Appellant claims has a "recorded history of concealing fact and resistance to open government". This, according to the Appellant, was apparently confirmed in September 2015 by a Mr Gilson, then council chairman, who acknowledged that the Appellant's challenges had a lawful basis and that the Appellant had made no formal complaints to the Council after January 2013. Therefore, the complaint log produced by Mr Reynolds was, he maintains, a fabrication, arising from a personal vendetta against the Appellant with its roots in a criticism of Mr Reynolds for authorising a prior annual return that was subsequently discovered to contain false assurances. Equally the 'chronology' provided to the Commissioner by the Council is a fabrication by the same person, who has dissected 'single page emails' into up to thirty separate 'complaints'.
13. Regarding the paucity of Council funding, the Appellant notes that it has not been slow to employ a lawyer to the tune of £50,000 or a full year's taxation income to resist public scrutiny of its governance. It has received only a 'qualified external audit' for a number of years, and failed to make this or the adverse comments public. It persistently ignores its duties under s16 FOIA and HC33 Code of Practice to willingly cooperate in providing information to the public. The Commissioner did not consider the context or the public interest holistically, placing instead elector rights of scrutiny below FOIA.

14. The Appellant has provided witness statements from an external auditor and a councillor from a neighbouring council to the effect that the Council has a history of concealing wrongdoing and stonewalling information requests to an unreasonable degree.

15. This Tribunal have noted the Appellants grievances but accept the Commissioners' contention that it is not within our ambit or the scope of this appeal to investigate these concerns. The difficulty for the Appellant is that despite such as his concerns are, they do not demonstrate and error on the part of the Commissioner in his DN, which is the subject, matter of this appeal. The papers before us do not provide us with much detail of the history of previous requests and for the sake of completeness and the avoidance of doubt, this Tribunal has made further inquiries and considered carefully another Decision Notice by the Commissioner in relation to a complaint by the Appellant herein. That Decision Notice is No: FS50584415 which itself was the subject of a separate appeal to (a differently constituted Tribunal) First Tier Tribunal which promulgated their decision in that appeal Ref: EA/2015/0244 on the 30th June 2016. Hence applying the Dransfield principles in light of the reasoning in the previous decision in EA/2015/0244 and the detailed analysis of the history and background therein, as between the same parties, we take an holistic approach to this request in assessing whether or not in fact the request under appeal herein is vexatious.

16. Accordingly on the facts now before us and in the circumstances of this appeal, particularly with the history of the detailed findings of previous requests being vexatious, we can see no grounds for finding that the Commissioner erred in his DN or in the reasons for his finding that section 17(6) was applied correctly by the Council.

17. Accordingly we dismiss the appeal.

Brian Kennedy QC

22nd August 2016.