



IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No. EA/2015/0171

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

**ON APPEAL FROM Information Commissioner's
Decision Notice FS50576260
Dated 15th July 2015**

BETWEEN

Mr William Chapman

Appellant

And

The Information Commissioner

1st Respondent

And

Duddon Parish Council

2nd Respondent

Determined on the papers on 9TH February and 6th May 2016 and thereafter.

Date of Decision 27th day of May 2016

BEFORE

Ms Fiona Henderson (Judge)

Mr Paul Taylor

And

Mr Dave Sivers

Subject: Reg 5 EIR – information held

Decision: The Appeal is allowed

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50576260 dated 15th July 2015 which held that Duddon Parish Council (the Council) had complied with FOIA and that no further information was held.

Background

2. A meeting on 16th September 2014 was held between representatives of the Council¹, a representative of the Lake District National Park Authority (LDNPA) and representatives of Cumbria County Council² (CCC). The subject of this meeting was the Greenslack Allotments site and associated access issues.

Information Request

3. The Appellant wrote to the Council on 7th January 2015 asking for information in respect of a meeting held on 16th September 2014 namely:

"I require you to supply me with copies of your notes and any subsequent report drawn up from them, and a copy of the report you presented to the other parties present. I also want to see copies of any documents pertinent to the conduct of that meeting."

4. On 15th January 2015, the Council disclosed a map that they said may have been referred to in the meeting, but said that no report was presented, and no notes or subsequent report were held.
5. The Appellant wrote again to the Council on 3rd February 2015 asserting that he did not accept their response and specifying that the report that he asserted was produced related to access down Occupation Lane and that it included four sworn statements.

¹ The Parish Council Clerk, the Chair of the Council, a second Councillor and the Solicitor acting on behalf of the Council

² 1 councillor and 2 officers

6. The Parish Clerk responded on 27th February 2015 stating that:

- The Council did not produce a report on access down Occupation Lane to other persons present at the meeting on 16th September,
- The Clerk did not have access to other people's notes or files

Complaint to the Commissioner

7. The Appellant complained to the Commissioner on 20th March 2015. He enclosed copies of correspondence with persons from LDNPA and CCC who were also present at the meeting which he argued proved the nature of the matters discussed, that notes were made, and that a report was produced to others present.
8. He went on to detail his belief that the Council's conduct was criminal (pursuant to s77 FOIA) in withholding the information and that it was withheld in order to disguise *"from public scrutiny a criminal act by a Councillor³ and other possible discipline ... matters⁴".* He asserted that this is a criminal offence under s77 FOIA.
9. The Commissioner informed the Appellant by letter dated 15th May 2015 that there was insufficient evidence of the factors that need to be in place for a breach of s77 FOIA and that the Commissioner would not proceed in relation to that aspect of the Appellant's complaint, but that the Commissioner would investigate whether s1 FOIA had been complied with and issue a decision notice.
10. The Commissioner found that no further evidence was held.

Appeal

11. The Appellant appealed on the grounds that the Decision Notice was perverse in light of the discrepancies between the information he had provided from others present at the meeting and the Council's version of events.
12. The Trust were joined upon their own application and relied upon their case in front of the Commissioner in defence of the appeal.

³ The Appellant believes that the involvement of one of the Councillors who has a disclosed pecuniary interest in other land adjacent to Occupation Lane which she has made efforts to develop is in breach of the Localism Act.

⁴ The report that the Appellant believes was produced at the meeting was the subject of District Council's Standards Board Investigation and Hearing and the Appellant's view is that its use by the Council amounts to the recommission of the same disciplinary offence.

13. This case was listed for a paper hearing on 9th February 2016. Upon consideration of the agreed bundle the Tribunal was unable to determine the case as it did not have sufficient information. Directions were issued listing areas in which the Tribunal required further evidence and in response to this the Council provided:

- Witness statement from the Parish Clerk,
- Letter from Council's Solicitor,
- Copy of the Solicitor's attendance note,
- 4 statutory declarations and a report by a former Councillor dated 26.02.2009.

14. The Tribunal has also had the Appellant's response to the Council's further evidence dated 29th March 2016 and the Commissioner's response dated 15th April 2016. The Tribunal further adjourned the case and issued further directions on 6th May 2016 and received additional information from the Council dated 9th May 2016 and additional submissions from the Appellant received 17th May 2016. All parties have consented to the case being determined upon the papers and the Tribunal is satisfied that it can properly determine the issues without a hearing pursuant to rule 32(1) GRC Rules. In reaching this conclusion the Tribunal has had regard to the overriding objective as set out in rule 2 GRC rules in particular proportionality and the resources of all the parties. The Tribunal has made use of adjournment and directions to obtain further evidence without the need for an oral hearing. Whilst there continues to be evidential discrepancies in particular in relation to the production of the 2009 report at the meeting, the Tribunal is satisfied that this is not material in light of the Tribunal's assessment of the scope of the request. Although there is also an evidential dispute about whether the Clerk took notes at the meeting, the Tribunal is satisfied that there is no need for oral evidence on the point because, as set out below, the Tribunal is satisfied on a balance of probabilities that none were held at the date of the request.

Scope

15. The Appellant has set out in detail the ways in which he believes that the conduct of the Council is criminal and in breach of local government standards. Both he and the Council have provided information relating to their view of the legal status of Occupation Lane. The Appellant also has provided arguments relating to the use of the allotments, public money spent on the car park and the adherence to planning

conditions. These matters are outside the jurisdiction of this Tribunal and the Tribunal makes no findings in relation to any of these issues.

16. The Appellant also argues that failure to provide the information to him was an offence pursuant to s77 FOIA. As set out below the Tribunal is satisfied that EIRs are the appropriate regime, however, an equivalent provision arises under r19 EIRs. This appeal is against the Decision Notice pursuant to s50 FOIA⁵ and the Tribunal has no jurisdiction as to whether proceedings should be brought under s77 FOIA and r19 EIRs consequently the Tribunal makes no observations and findings in this regard.

EIRS

17. The Tribunal indicated its preliminary view in the adjournment notice that this case ought to be dealt with under the Environmental Information Regulations 2004. None of the parties have objected to this. The subject of the meeting was to discuss the renewal of the lease of an allotment field and rights of way over Occupation Lane which provides access to the allotments. We are satisfied that the information requested therefore relates to an administrative measure affecting the use of the land pursuant to the definition of environmental information as set out in regulation 2(1)(c) EIRs.

Issues to be determined

18. Reg3(2) EIRs provides:

For the purposes of these Regulations, environmental information is held by a public authority if the information—

(a) is in the authority's possession and has been produced or received by the authority; or

(b) is held by another person on behalf of the authority.

19. Environmental information is defined in r2 EIRs as being:

any information in written, visual, aural, electronic or any other material form...

⁵ Applicable by virtue of r18 EIRs

Notes of the meeting

20. The evidence from the Parish Clerk was that the meeting on 16th September 2014 was *“an informal meeting at the request of Cumbria County Council in order for them to gather further information before renewing the lease for the allotment field to Duddon Parish Council. No minutes were taken.*

For the Parish Council to be quorum it must have a third of the total number of Cllrs present, in no case can the quorum be less than 3. There were only two Parish Councillors present at this meeting so no official business could be conducted by the Parish Council. It is for this reason the Parish Clerk considers that there is no recorded information held on behalf of the Parish Council.”

21. Mr Chapman does not accept that the meeting was at the request of CCC as he has provided the Tribunal with copies of the emails from the Council showing that they had a part in organising the meeting (they chose to invite additional participants e.g LDNPA) and arranged the venue. The Tribunal is satisfied that it is not material to apportion responsibility for the meeting as it is not determinative of the issue in dispute namely the status of the meeting and the scope of the request.

22. The fact that the meeting was not quorate for an official council meeting in our judgment is immaterial. The request was not limited to “official Council meetings”. We are satisfied that this was a meeting in furtherance of Council activity namely renewal of the lease of an allotment field and rights of way over Occupation Lane which provides access to the allotments. The Parish Clerk was written to by the CCC and responded in her official capacity. In her email of 5th September agreeing to the meeting she says *“We would like to set up a meeting”* clearly indicating that she is acting on behalf of an entity (namely the Council) and not in an individual capacity. This was a meeting with an outcome⁶, the meeting made a decision to pursue a course of action which informed part of official Council business; as we know that this course was discussed at Council meetings⁷.

23. We are satisfied that the Council have only addressed their mind to “official” documents of the Parish Council which is too narrow in scope. The Council as a public authority encompasses Councillors who form the Council and staff and

⁶“...it was agreed that the Council will proceed with an application to have the lane declared a public bridleway...it was the intention of the CCC to transfer the allotment field to the Council eventually... they will go back to the County Council to see if they can get a decision on that” Attendance note from Council Solicitor

⁷ P240 bundle

contractors acting on behalf of the Council as EIR r3.2 includes information held on behalf of a public authority. The definition of information is wide enough to include electronic documents like emails, handwritten notes, copies of reports, correspondence and telephone notes of conversations between individuals all of which are capable of being caught within an EIR request if the information is in relation to an individual's activities on behalf of the organisation.

24. The Parish Clerk states that at the beginning of the meeting she and a representative from CCC advised that "*any notes taken were for personal use only*"⁸. The Tribunal is not impressed by the argument that consequently these notes do not fall to be disclosed. None of those present was there in a private capacity.
25. The Tribunal takes into consideration the status of the Solicitor who was present at the meeting. The Council's evidence⁹ was that the Solicitor did not attend the meeting in a formal capacity as Duddon Parish Council's Solicitor. The Solicitor was not paid by Duddon Parish Council for attending the meeting.
26. The Tribunal is satisfied that it is not material whether the Solicitor was paid specifically for attending the meeting. In light of its findings as set out below about the status of the Solicitor at the meeting, the precise arrangements (e.g. whether he was acting pro bono, or this was included in a general retainer or encompassed within a fee for another piece of work) is immaterial and it would not be proportionate or necessary to adjourn again to obtain further evidence on this point.
27. The Appellant contests the assertion that the Solicitor did not attend the meeting in a formal capacity. He relies upon the email from the Council setting up the meeting dated 5th September 2014 which provides:

*"We would like to set up a meeting regarding the allotment field and access over Occupation Lane. [Named individual] who is our solicitor would also like to come to the meeting and he is available Tuesday and Wednesday afternoons..."*¹⁰

He further relies upon the email from the CCC land agent who attended the meeting and who in response to a chaser from the Council about the lease asks:

⁸ P1 adjournment evidence

⁹ Email of 9th May 2016

¹⁰ P225 bundle

“ I assume that [named individual] will continue to act for the PC in relation to the transfer?”¹¹

28. As already set out above, this is a meeting at which Council affairs were discussed and to which the general public were not invited. It is clear from the correspondence that the Solicitor was there as the Council's solicitor and this is supported by the fact that he felt the need to complete an attendance note of what transpired at the meeting which is his professional record of activity undertaken on behalf of a client. The email correspondence in the bundle makes it plain that one of the Councillors is present because she is Chair of the Council. The Parish Clerk is there to represent the Council in her official role.

29. The Tribunal has had regard to the evidence from others present from other organisations: An email from the Area Engagement Officer at CCC indicates that:

“the meeting was very informal and no minutes were taken, as everyone made their own notes”.

The Countryside Access Advisor from LDNPA has disclosed his handwritten notes of the meeting pursuant to FOIA, clearly he did not understand them to be so limited to personal use that they were not disclosable. Consequently, whilst we accept that there was no intent for a formal minute to be made and there was no intention for individual's notes to be circulated; we are satisfied that the announcement at the start of the meeting was intended to convey that those present should make such notes as they believed they would need and did not convey a private or restricted status upon the notes made.

30. The Tribunal is satisfied that to exclude notes of meetings by asserting that they were for personal use would be an improper way to take large swathes of information outside of EIRs and FOIA with no legal basis for doing so. The notes can only have been intended to assist in the furtherance of the official role and as such even if only intended to be used to assist in that role by the individual who took them, their status falls within the ambit of the Regulations.

31. We are satisfied therefore that any notes made of the meeting were caught within the request.

¹¹ P229 bundle

32. The Council's Solicitor has provided a copy of the attendance note that he typed upon his return to his Office on the day of the meeting. We are satisfied that these fall within the scope of the request and should have been disclosed. The evidence from the Council was that the Solicitor made handwritten notes at the meeting which were typed up into the attendance note and destroyed once this was done¹². On a balance of probabilities we accept this evidence, as we are satisfied that there would be no further business need for the original notes once the attendance note had been typed.

33. The evidence of the Parish Clerk was that she has asked the other 2 Councillors and they both state that they did not take notes. The Tribunal accepts this on a balance of probabilities. In reaching this decision, whilst we note that the email from CCC suggests that "*everyone made their own notes*" which could be read as an assertion that every person in the room definitively made notes; we are not satisfied that this is the only reasonable interpretation and that the inference is that any notes that were made were done so individually and not by one person on behalf of the meeting. Additionally we take into consideration that in the presence of a Solicitor acting on behalf of the Council and the Parish Clerk, the Councillors may not have felt the need to make their own notes.

34. In relation to her own notes the Parish Clerk's evidence before the Commissioner was:

*"I do not consider that any notes that I may have made would be liable for disclosure under the FOI Act, the notes were minimal and I no longer have them"*¹³.

Her original evidence to the Tribunal was:

*No subsequent report was drawn up from the minimal notes that I made. For this reason I did not need the notes and destroyed them"*¹⁴.

Following the adjournment, she stated she would "*most certainly have had a notebook and pen at the meeting but she is not absolutely certain that she wrote anything down*".

¹² Email of 9th May 2016

¹³ P125 bundle

¹⁴ P52 bundle

35. The Tribunal finds it inconceivable that in light of her role as Parish Clerk (which encompasses the need to update others not present and her role in administering the allotments)¹⁵ that she would not have written something even if it was just: a list of attendees, the start and end time, the agreed course of action and an outline of what was discussed.
36. Having determined that it is more probable than not that notes were taken, we now go on to consider whether they still existed at the date of the information request. The evidence from the Parish clerk is that at the date of the request when they were looked for they no longer existed.
37. We have looked to the Council's records management policy to see if there is any support for the Parish Clerk's contention that she did not have any notes at the date of the request. We observe that there is no destruction log and that the Cumbria Association of Local Councils website guidance which is the document used by the Clerk for guidance on records management, is not helpful as it does not appear to be comprehensive. We question whether this policy is sufficient for the Parish to meet the requirements as set out in the Lord Chancellors code of Practice on the Management of Records issued under s46 FOIA 2000 as it does not appear to provide for the management of email or other correspondence, health and safety records, personnel/disciplinary records etc. or the destruction of handwritten notes.
38. The Tribunal has considered the likely purpose of the notes as set out above and is satisfied that by the date of the information request:
- there would have been 4 further Council meetings,
 - the lease had already been discussed at the October council meeting¹⁶,
 - from the correspondence we can see that the draft lease had been sent over and renewal was underway.
 - It is also apparent from comparing the correspondence to the LDNPA and the Solicitor's notes, that the discussions at the meeting had been superseded by subsequent correspondence (ie a 25 year lease rather than transfer of the freehold).

¹⁵ Apparent from the email correspondence

¹⁶ P240 bundle

We are satisfied therefore that at the date of the request there was no requirement to retain the original notes and on a balance of probabilities there is no reason to believe that they had been retained.

Subsequent Report Produced From the Notes

39. None of those present at the meeting (including those from CCC and LDNPA) have suggested that a report was produced following the meeting. We have not been shown any reference to one in the Council minutes, (although it is apparent that the lease was discussed) and as such there is nothing to contradict the evidence of the Council that no such report was produced. We accept this evidence.

The 2009 report from a former Councillor with 4 statutory declarations attached.

40. From the LDNPA notes we are satisfied that the correct report has been identified namely one produced in 2009 by a former Councillor with 4 statutory declarations attached to it. The Tribunal has had a copy provided to it with the adjournment evidence.

41. Mr Chapman relies upon the evidence obtained in a letter from LDNPA which states:

"With regard to the report produced by Duddon Parish council – I was shown some documents by their solicitor, but was not actually given anything to take away with me."

42. A copy of the handwritten notes from the LDNPA appear in the bundle which states:

Useful report on O/L by [named former councillor]

4 statutory declarations. Mainly about cycling + walking - some mention of vehicular use

43. The evidence from the Parish Clerk and the Council's Solicitor is clear that they assert that no such report was present and shown at the meeting, although what if any other documents they had at the meeting is uncertain, the Parish Clerk having initially been unclear whether the map was definitively taken to the meeting:

"I enclose a copy of a map which I may have had at the meeting¹⁷".

However, before the Tribunal, the Parish Clerk was firmer in her assertion:

¹⁷ P56 bundle letter 15.1.15

The only document I had taken to the meeting was a map (Appendix 2)".¹⁸

44. The Council state that *"Duddon Parish Council did not produce a report on access down Occupation Lane to other persons present at the meeting on 16 September 2014"*¹⁹

In their letter dated 31st May 2015 they repeat *"No documents were "shown" by the Parish council's solicitor. The solicitor may have referred to historical documents..."*

²⁰

Following the adjournment, the Tribunal has direct evidence from the Council's Solicitor who states that:

"DPC is quite correct in saying that it did not produce the report by [the named Councillor] at the meeting on 16th September 2014 and neither did I. I did refer to the report having been prepared and to the declarations being part of it. However, the report was not produced to and put before the meeting because the meeting was not concerned with the contents of it".

45. The letter from the Countryside Access Advisor from LDNPA²¹ clearly states that he was *"shown some documents by [the Parish's] Solicitor but was not actually given anything to take away with me... I informed [them] that if they make a modification order application, they should include this information with it."*

The Tribunal observes that sufficiently detailed reference to the content of the report was made to identify it and some discussion as to the use to which it might be put was had on the evidence of this letter. The Tribunal also observes that the letter was written on 12.1.15 when the author can be expected to have had a fresher recollection than 17.3.16 which is the date of the Council's Solicitor's letter. The Tribunal also has a copy of the Solicitor's typed attendance note which was made on the date of the meeting, this makes no reference to the report, the context in which it was raised and the purpose for it having been mentioned and in our judgment does not therefore assist in evaluating the Solicitor's recollection in his letter some 18 months after the meeting concerned.

¹⁸ P52 Bundle

¹⁹ P105 Bundle

²⁰ P140 Bundle

²¹ P112 bundle

46. The Tribunal has no written information from the CCC to support either account as any notes that they may have made are not before the Tribunal. The Tribunal is satisfied that there is no need for it to determine whether the document was produced at the meeting, since it is not in dispute from the evidence before the Tribunal that the document was referred to within the discussions that took place on 16.9.14. The terms of the information request were not limited to documents produced at the meeting but also included:

“copies of any documents pertinent to the conduct of that meeting.”

The Tribunal is satisfied that whilst the meeting was not “about” the report it was pertinent to the conduct of the meeting in that it was referred to by the Solicitor during the discussion and must therefore have informed the discussion. We are satisfied therefore that it ought to have been disclosed if held by the Council.

47. The Council's initial case was that it did not hold a copy of the report and that from the way that the report was compiled and paid for the report belonged to the former Councillor who authored it not Duddon Parish Council and the Solicitor was holding it on behalf of that former Councillor and not the Council.²²
48. The Council's argument took no account of why, if it was correct that the document was held for another client, the Council's Solicitor felt able to use that document at a meeting when he was acting on behalf of the Council. It does not appear that the Council's Solicitor was asked whether he held a copy of the document on behalf of the Council prior to the Council providing their response.

49. Following the provision of evidence following the adjournment, the Council's Solicitor stated that the report and statutory declarations:

“has been held in my file since the DPC meeting on 26th February 2009... it was agreed by the DPC that we would submit it to the CCC Highways Department. We did this, on behalf of the Council, on 17th March 2009...”

From this we are satisfied that the report was held by their Solicitor on behalf of the Council at the relevant date, it ought therefore to have been disclosed pursuant to this request. A copy of this report and statutory declarations was attached to the

²² p 53 letter 26 October 2015

adjournment evidence and has now been provided to the Appellant pursuant to these Tribunal proceedings.

Sufficiency of search for copies of the report and statutory declarations

50. Separately from their assertion that the document was not held by their Solicitor on their behalf, the Council state that they do not hold a copy of the report. In its adjournment directions the Tribunal had regard to the minutes and queried why a copy was not attached to the minutes²³ and whether (and if so in what way) it had been made available to the public as per the intention of the February 2009 Council Meeting.
51. Additionally, the Tribunal's adjournment directions noted that this report was the basis of a complaint that was upheld by the standards sub-committee of the District Council in February 2010. This is less than 6 years before the information request. Whilst the disciplinary proceedings were conducted by a different Council it related to the ex-Councillor's membership of the Parish council and the Tribunal would have expected a copy of the report to be annexed to the finding in the Councillor's personnel file. It was not apparent whether this had been looked for and what the document retention policy was in relation to this type of document.
52. The adjournment evidence from the Parish Clerk did not address any of these issues apart from stating that:
- "The Appellant names two members of the public who acquired the 2009 report, in all probability the appellant will already have a copy of the report and as it was available to the public, it is my understanding that it would be exempt under the FOI Act".*
53. This is insufficient to deal with the points raised. The fact that others have a copy of a report does not make it available to the Appellant. If, as the Council appears to concede the document is publically available, they would be expected to direct the Appellant (and the Tribunal) to where it can be found. Moreover, if s21 FOIA is relied upon it needs to be pleaded specifically.²⁴
54. There is no evidence before us that satisfies us that at the relevant date the Council had asked the Solicitor who referred to the report in the meeting whether it was held on their behalf, we are not satisfied that sufficient search was made of the minutes or

²³ P80 and 93 bundle

²⁴ There is no direct equivalent under EIRs although it is likely that r 12(4)(b) would apply

personnel documents. As such we are not satisfied that at the relevant date the Council had undertaken a sufficient search for the material.

Conclusion

55. The Council breached r5(1) EIRs in that they did not provide the Solicitor's attendance note, or the report and statutory declarations. The Tribunal does not require any steps to be taken as the Appellant has now been provided with this information through the Appeal process.

Dated this 27th day of May 2016

Fiona Henderson
Tribunal Judge