



IN THE FIRST-TIER TRIBUNAL
& 0281

Appeal No: EA/2015/0275

GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50584908
Dated: 9 November 2015

Appellant 0275: Dr Peter Kelway
Appellant 0281: Wark Parish Council
Respondent: The Information Commissioner

Heard at: Carlisle Magistrates Court
Date of Hearing: 27 May 2016

Before
Chris Hughes
Judge
and

Anne Chafer and Jean Nelson
Tribunal Members

Date of Decision: 7 June 2016
Date of promulgation 8 June 2016

Attendances:

For the Appellant 0275:	Dr Kelway in person
For the Appellant 0281:	Mrs Annie Hutchinson (Chair of Parish Council)
For the Respondent:	no attendance

Subject matter:

Freedom of Information Act 2000
Data Protection Act 1998

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice in part and allows the appeal in part substituting the following decision notice in place of paragraphs 35-37 of the decision notice dated 9 November 2015.

IN THE FIRST-TIER TRIBUNAL
& 0281

Appeal No: EA/2015/0275

GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

SUBSTITUTED DECISION NOTICE

Dated: 4 June 2016

Public authority: WARK PARISH COUNCIL

Address of Public authority: 12 Broadacres Fourstones Hexham NE47 5LW

Name of Complainant: Dr Peter Kelway

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal of Wark Parish Council and substitutes (to the extent necessary) the following decision notice in place of the decision notice dated 9 November 2015.

Dated this 7th day of June 2016

Tribunal Judge

REASONS FOR DECISION

Introduction

1. The Parish of Wark is situated in one of the most isolated and sparsely populated parts of the United Kingdom. Stonehaugh is an isolated hamlet of 35 homes (originally built by the Forestry Commission for its staff) some miles from the village of Wark but within the Parish. In the 1980s the Forestry Commission transferred a small area of land to an organisation in Stonehaugh for the purpose of a children's playground. In the following decade the Forestry Commission transferred further amenity land to Wark Parish Council.
2. Mrs Hutchinson lives in the village of Wark and has served on the Parish Council for 30 years and is its Chair. Dr Kelway has recently become concerned about certain administrative arrangements. Dr Kelway has sought to clarify the position by FOI requests and correspondence with the Council and its auditors.

3. On 6 April 2015 Dr Kelway wrote to the Council seeking information:-

"I shall be obliged for copies of all correspondence between the Parish Council and the Village Greens Committee (both ways) from 1 January 2007 to the current date under the provisions of the Freedom of Information Act 2000. Please note that this includes copies of all minutes which have been produced by the Village Greens Committee and all financial accounts which should have accompanied them.

Can you please confirm how many pages of documents have been identified so we can agree on the cost as soon as practicable.

Can you also please confirm that the Giles Heron Trust have made payments to the VGC over the last two years and the purposes for which this money was intended. As Councillor Weir is a PC-nominated member of the Giles Heron Trust, can you please confirm whether she was aware of the transaction(s)."

4. The Council provided him with a fees notice in the sum of £16.50 which he paid and he was subsequently sent information consisting of 33 partially redacted pages. He complained to the Information Commissioner ("the ICO") claiming that he had not been sent all the information held by the Council, that the redactions were

inappropriate and that the Council should not have charged him 50p per sheet of paper.

5. Following investigation the ICO, having reviewed the searches and explanations provided by the Council (decision notice paragraph 14), Dr Kelway's views of the motivation of the Council with respect to concealing alleged mismanagement of "Stonehaugh Village Greens Committee" (decision notice paragraph 15), concluded on a balance of probability that no further information was held (paragraph 17).
6. In considering the redaction of personal data (names and home addresses) the ICO concluded that these related to people who were members of "Stonehaugh Village Greens Association", the information was personal data, they would have an expectation that the information would not be disclosed to the world at large and publication could result in unwanted correspondence. The individuals had not been asked to consent to the release of their names. Dr Kelway argued that the individuals were members of a Parish Council Committee and would expect that the public might want to know their identity and it was in the public interest to expose what he asserted was the Council's "irregular practice". The ICO accepted the Council's explanation that the individuals were members of a "Village Greens Association" – a private organisation not part of the Council and were therefore private individuals working voluntarily to provide facilities for residents not carrying out public functions. There was no wider public interest concerning the information to justify its disclosure. He concluded that disclosure would be unfair and breach the First Data Protection Principle and that the redaction was appropriate and had been correctly carried (paragraphs 19-28). On his interpretation of the information before him the ICO concluded that staff time costs were being included in the calculation of the fee and that accordingly the fees notice did not comply with FOIA.

The Appeals

7. On 29 November Dr Kelway appealed against the ICO's decision that no further information was held and that the information was properly redacted and on 4 December the Parish Council appealed against the ICO's findings with respect to charge that the Council had made for providing information. The ICO resisted Dr Kelway's appeal relying on his decision notice; in the light of further information supplied by the Council he reversed his position and accepted that the fees notice

provided by the Council to Dr Kelway represented the costs that the Council reasonably expected to incur in relation to the request and accordingly invited the tribunal to make a partial substitution to the decision notice to reflect this. The two Appellants were made Respondents in the corresponding appeals and represented themselves at the hearing. The ICO, having made submissions, did not attend the hearing. Mrs Annie Hutchinson gave some oral evidence to the tribunal on matters within her knowledge, there was no challenge to the truthfulness of her recollections and the tribunal was satisfied that she was a reliable witness. The tribunal advised the parties that FOIA did not “make windows into men's souls” but only required public bodies to disclose information which was recorded; therefore whether a Councillor was aware of something or not (the final part of the information request) could not constitute a FOIA request if the information was not recorded.

The issues before the tribunal

8. The parties agreed that the issues for the tribunal were to decide were:-
 - (1) The status of Stonehaugh Village Greens Committee/Association (“SVG”) – whether it was a sub-committee of the Parish Council or a free-standing body; if it was a sub-committee then its records were subject to FOIA and the Clerk to the Council could have asked its officers to carry out further searches and provide information to the Clerk.
 - (2) Whether, irrespective of the status of SVG the Council held further information which had not been disclosed.
 - (3) Whether the interpretation of the Data Protection Act adopted by the Council and endorsed by the ICO was correct.
 - (4) If SVG was a sub-committee of the Council whether the names of its officers should be disclosed under FOIA.
 - (5) Whether the fees notice was in accordance with the law.

The status of SVG

9. Land was transferred to an organisation of people in the hamlet of Stonehaugh in the 1980s by the Forestry Commission and that organisation was then responsible for its management. In the 1990s further Forestry Commission land was transferred to the Parish Council and there was an agreement between the Council, SVG and the

Forestry Commission concerning its management. In 2008 the Parish Council passed a resolution (bundle page 130):-

“12. Stonehaugh Play Area.

It was agreed that the Stonehaugh Village Greens Committee should be adopted as a sub-committee of the Council which would have the right to nominate two members...it would be necessary to arrange insurance for the play equipment”

10. However from a document disclosed to Dr Kelway (bundle page 93), the community in Stonehaugh appear to have adopted in 2010 a constitution for “Stonehaugh Village Greens” which contains no reference to the Council and which is inconsistent with the terms of the Council resolution in that there is no mention of Council nominees. The document provides for a loose grouping of residents with the objective to promote social events and promote, develop, manage and utilize the play and amenity areas in Stonehaugh Village.
11. The tribunal was informed that a letter within bundle (page 132) from the Council to “Stonehaugh Village Greens Committee” of 13 August 2014 was not sent. This letter indicates the Clerk to the Council was concerned that the Committee was not functioning as a sub-committee, holding regular meetings, inviting councillors to the meetings and providing the minutes of those meetings. It indicated that the Committee would have to arrange its own insurance.
12. The minutes of the Parish Council of 23 March 2015 record:-

“Police and Public Participation

Mr Kelway raised an issue at some length on the Stonehaugh Village Greens committee, in particular seeking clarification on its status as a sub-committee of the Council. He was advised that references to it as such had been an incorrect simplification. It was entirely independent, and the only involvement of the Parish Council was to be permitted to appoint representatives to its committee.”
13. The oral evidence of Mrs Hutchinson was that she had a liaison role with SVG. SVG functioned in a very informal way as a residents association. The committee usually met in October and December to arrange fundraising for the bonfire night and Christmas parties. The whole community were members. It did not have the same officers 2 years in succession. She had for many years reported back to the Council

on what went on in Stonehaugh which was why the Council had some minutes of meetings and other information. SVG got on with things independently and had recently erected a star-gazing hall without reference to the Council. The 2008 council decision had been taken in her absence and on her return had said that the decision was inadvisable. She believed that the Council had been advised by its District Council not to have a sub-committee.

14. Dr Kelway is concerned about the insurance position with respect to play facilities. While the tribunal understands his concerns the balance of oral and documentary evidence is clear that an association existed long before the 2008 Council resolution, the association paid little or no regard to the resolution and the Council has now accepted that it was a nullity. The tribunal is satisfied that Stonehaugh Village Greens Committee as a question of fact was not part of the Council.

Whether further information was held

15. Dr Kelway in support of this contention indicated that SVG minutes for October and December 2013 existed on the Council's website but had not been supplied to him. He stated that his search of the website had been "quite thorough" and "exhaustive".
16. The tribunal noted that these minutes of SVG had been placed on the Council website as background papers for its own meetings; a practice it had adopted in 2013. The information placed on the website was (as had been demonstrated by Dr Kelway) already publicly available and no inference could be drawn that there was any information within the terms of the request which was not published or supplied to Dr Kelway. The tribunal was satisfied that the searches described and explanations provided in paragraph 14 of the decision notice were reasonable and that on the balance of probabilities no further information was held.

The interpretation of the Data Protection Act

17. Although Dr Kelway disputed the interpretation of the Data Protection Act; s1(1) makes it clear that the names of a living person is sufficient to amount to personal data as it relates to a living person who can be identified from those data and other information which is in the possession of the Council. In this case the data held by the Council includes names, addresses/email addresses, the fact that these individuals are residents in a specific tightly defined location and are members of a specific organisation.

18. The individuals are volunteers helping their community not employees or members of a Council. Even if the Committee were a sub-committee of the Council, the individuals would still be volunteers and not Councillors or employees. They have no expectation that their details will be made available under FOIA to the world at large. Furthermore there is no public benefit in disclosing the personal data. Dr Kelway is able to raise his concerns about governance without knowing this information. The tribunal is satisfied that the ICO was correct in his reasoning with respect to redaction of personal information and Dr Kelway's appeal fails on this point also.

The fees notice

19. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 provide by Regulation 6 for the maximum fee which may be charged for providing information in response to a request for information under FOIA:-

“(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 including informing the person making the request whether it holds the information, and 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, costs of-

...

(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.”

20. In his decision notice the ICO recorded (at paragraph 29) that the Council had charged Dr Kelway 10p per photocopied sheet for his previous information request. He noted the explanation provided by the Council but concluded that the Council (paragraph 35) *“seems to be relying on the cost of staff time in travelling to the nearest suitable photocopying facility to justify its figure. As discussed, this is not permissible...”*

21. The Council is very small and does not possess its own reprographic facilities. The Council has subsequently confirmed and the retired Clerk to the Council explained that the Clerk agreed a charge with the Council for producing and sending to Dr Kelway the requested information. After having done so he submitted a claim to the Council for expenses in the sum of £16.50 for this and other specific incidental expenditure on 15 May 2015. The elements of this sum were copying, postage and package and a mileage charge of 45p per mile for going to the post office where a photocopier was situated and where the information could be posted. The former Clerk stated in an email to the Council (unnumbered supplemental bundle):-

“...in setting a charge I considered alternatives to achieving the outcome. If I was to drive into Hexham it would cost the Council 8 miles (4 each way) at 45p per mile a total of £3.60 plus the cost of copying. The alternative would be for me to use my own basic scanning and copying equipment and charge the Council for this. Overall a cost of 50p per copy seemed to reflect a reasonable average cost.

Clearly for 33 copies it might have been cheaper, if less convenient to drive into Hexham. However I did not do this. I made the copies on my personal equipment and charged the Council for this. Fortunately I have a copy of my expense claim which shows this expense. See below. This will also be on the Council’s accounting records. You will have signed this off.

Therefore there is no doubt that the cost to the Council was £16.50...”

22. The ICO and the tribunal accepted that this was the sum paid by the Council; it was not disputed by Mr Kelway. However Mr Kelway argued that the Clerk had not charged the Council 50p for other copies he made. Guidance suggested that 10p per A4 sheet might be a reasonable charge and 50p was extortionate.
23. The statutory basis for charging is clearly spelt out in regulation 6. The Council charged Dr Kelway its actual costs incurred in paying its Clerk to process the request. In turn these costs were based on reasonable estimates of the costs of one appropriate means of getting the information to Dr Kelway. In the event the Clerk used another approach, using his own equipment which he was not obliged to use. The tribunal is satisfied that the actual facts of the case were that staff time had not been charged; the fees notice was in accordance with the law. The tribunal finds that the underlying facts (found at paragraphs 35-37) were other than as the ICO found and accordingly

that part of the decision notice was not in accordance with the law. The tribunal therefore withdraws those paragraphs and this decision stands in place of that part of the decision notice.

24. Our decision is unanimous

Tribunal Judge

Date: 7 June 2016