

Small is not necessarily better when it comes to FOI

Paul Gibbons, aka FOIMan, looks at the FOI experience of parish councils, and what lessons there are for other public authorities

Whenever we discuss freedom of information, the focus tends to be on government departments, county and borough councils and other large, high profile, public sector bodies. It is worth remembering that one of the most progressive aspects of the UK's Act was its coverage of a wide range of public bodies, including many that most people had never heard of. Schedule 1 of the Act, which lists all the bodies subject to FOI, includes such previously unheard of organisations as 'The Horserace Totalisator Board', 'The Milk Development Council', and several committees including the snappily titled 'Committee on Chemicals and Materials of Construction For Use in Public Water Supply and Swimming Pools'.

Schools, GPs, and pharmacists are amongst other, less high profile public bodies. Passing by the pharmacy counter of their local supermarket, customers may spot an incongruous notice explaining how to access the company's publication scheme. Tesco's and Sainsburys' pharmacies are public bodies as far as FOI is concerned.

Many people are unaware that these organisations can be asked for information. Similarly, there has been a lack of knowledge amongst academics and policy-makers about how well FOI works at this level. Up to now, the focus of FOI research and even anecdote has been on larger organisations. Yet for some people, it is the smaller organisations that have most direct involvement in their lives and that they would most wish to hold to account.

There is a particular kind of public body which is very common, primarily in rural areas of England. Through a combination of decisions that have reached the Information Commissioner and tribunals, and the latest research, we can gain a better understanding of the challenges they face. There may even be some general lessons for the rest of us. In this article, I'm going to look at parish councils and their experience of FOI.

Parish councils

Across England there are nearly 10,000 parish councils — the lowest tier of local government. They can levy tax via a small council tax precept added to the county or city council bill, and

are responsible for local community, planning and environmental issues. Most often, councillors have to be co-opted as there is a shortage of people willing to serve. According to the research paper that prompted this article (of which more later), less than 10% of parish councillors have any political affiliation. Parish councils are very different to other levels of government.

Anyone who has ever been involved in organising a community event, a school fair, or joined the management board of their block of flats (something I have personal experience of), will empathise with parish councillors. Constituents are often your near neighbours and are not usually interested in decisions that are taken, unless they disagree with them, in which case it will be felt both deeply and personally. What's more, with limited resources, a concerted campaign by local residents can have a major impact on the ability of the council to achieve anything at all. Despite central government encouraging the establishment of more parish councils, it has not provided any additional resources to support them.

Decisions involving parish councils

It is easy to see how FOI might present difficulties to councils at this level. On one widely reported occasion, an entire parish council — the councillors of Walberswick Parish Council in Suffolk — resigned after the council was bombarded with 497 FOI requests over a period of two years, mostly from the same four local residents (*Harvey v IC & Walberswick Parish Council*, EA/2013/0022, 21st January 2013).

The Walberswick case is an extreme example of how FOI can go wrong at parish level. The friction between council and residents appeared to originate in discontent over planning decisions, but FOI became the chosen tool by which certain individuals chose to pursue their agenda. The council's limited knowledge of FOI proved to exacerbate matters, in particular the invention of 'exclusion orders' to try to shut down the flow of requests. This led to further requests enquiring about their basis.

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Matters came to a head only with the arrival of county council appointees, a competent clerk, and the intervention of the Commissioner and tribunal.

The tribunal talked of ‘the grossly excessive burden’ that the requests had placed on the council. The requests had led to a doubling of the precept, pleas for extra funding from the district council, and the clerk devoting most of their time to handling FOI requests. Also, infrastructure projects were delayed or cancelled. In alliterative fashion, the tribunal surmised:

‘Remorseless repetition of regressive requests is not a sensible way to improve performance.’

There are several notable features of the *Walberswick* case. The council was able to call on only very limited resources. Councillors and employees had little knowledge of FOI and transparency requirements. The council was dependent on people being willing to serve as councillors, and on their having a good relationship with the local community. Once this broke down, the situation soon got out of hand.

Between January and June this year, the Information Commissioner’s Office issued 9 separate decision notices involving parish councils. They catalogue common themes. Liss, Rainworth, and Quinton parish councils failed to issue valid refusal notices, whilst St Pinnock council failed to respond on time. The Commissioner was supportive of Rothbury and Great Bedwyn councils’ view that FOI

requests were vexatious. Shotswell and Liss parish councils failed to recognise that requests ought to be handled under the Environmental Information Regulations (and parish councils would be far from alone in making that error).

The informality of government at this level is another recurring theme in decisions relating to parish councils, as illustrated by two recent tribunal cases.

In *Chapman v IC & Duddon Parish Council* (EA/2015/0171, 27th May 2016), the frustration of the tribunal is almost tangible as it attempts to explain to the council that the fact that notes of a meeting were taken by councillors ‘for personal use’ is not a sufficient reason to exclude them from consideration.

In *Kelway & Wark Parish Council v IC* (EA/2015/0275, also 27th May 2016), the tribunal hears a justification for disbursement charges which involves the former clerk’s decision to copy materials using his own equipment, rather than travelling 8 miles to a post office.

These decisions provide anecdotal evidence of the difficulties faced by parish councils, and perhaps other small public bodies, when administering FOI requests. The question is whether these cases are representative of what is happening across government at this level.

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Parish councils and FOI — research

Some light is cast by the latest research from Dr Ben Worthy of the University of London’s Birkbeck College, who has previously studied the impact of FOI on central and local government, together with two academic colleagues, Peter John and Matia Vannoni, of University College London. In their paper, ‘Transparency at the Parish Pump: A Field Experiment to Measure the Effectiveness of Freedom of Information Requests’, they describe their approach and what they found out about parish councils and FOI.

The researchers sought to test three hypotheses in particular:

- parish councils are more responsive to FOI requests than what many organisations call ‘business as usual’;
- parish councils that already have publication schemes and are generally compliant with transparency obligations are better at dealing with requests; and
- parish councils that are larger are better resourced and therefore more compliant with FOI than smaller councils.

The first of these is difficult to test, as strictly speaking, under section 8 of the FOI Act, any request in writing will be a FOI request. The researchers dealt with this by dividing the 4,300 councils that they contacted into two groups. The first — the control group — was sent a request for an organisation chart which explicitly stated that they did not want it to be treated as a FOI request. The second — the treatment group — received the same request, but this time cited FOI.

The second and third theories required the team to visit and analyse the websites of all the parish councils to which they were sending these requests. Only 79% of councils actually had a website. Parish councils are subject to a version of the Local Government Transparency Code, so there is a legal requirement to publish certain information including organisation charts. Despite this, only 10% published an organisation

chart on their website, though other information (e.g. council minutes) was more commonly published. In a sign of what was to come, only 16% had a publication scheme.

Research findings

In the event, the response rate overall was very low. Only 14.7% of the councils contacted responded to the request in either form. Of these, many responded later than the 20 working day deadline. What the research didn't show was why this was the case, though the research team commented (based on other research) that:

'Assuming...that delay equals resistance ignores the fact that delay is endemic to all FOI regimes and that smaller bodies generally have fewer resources and less preparation.'

Some might be sceptical that merely saying 'this is not an FOI request' would make a difference, but the research found that councils were more than twice as likely to respond to the request citing FOI as they were the request sent to the control group. 20.4% of the FOI requests were answered as opposed to 9.2% of the requests stating 'this should not be treated as an FOI request'.

Contradicting previous studies, the research found no relationship between compliance and pre-existing transparency. In other words, whilst some parish councils are generally more transparent than others, this didn't mean that they were any more likely to respond to a request for information. Similarly, there did not seem to be much relationship between the size of the parish council and its responsiveness.

What does this tell us about parish councils and FOI?

The results of the study are perhaps not that surprising, particularly given what we have already seen in the cases discussed earlier. As the researchers point out, parish councils have limited resources and less access to training than larger public bodies. Busy clerks are unlikely to prioritise FOI requests, and perhaps

even less so requests from non-residents. As observed by the tribunal in the *Walberswick* tribunal decision referred to earlier, they may not even be used to answering such requests, as most residents would make enquiries via more informal means.

As the ICO's latest annual research on awareness of information rights shows, there remains a lack of awareness of FOI. The ICO's research found that only 53% of people believe they have the right to make requests to public bodies. It is possible — maybe even likely — that awareness of rights in relation to parish councils may be even lower. Even if they are aware that they can make FOI requests to their parish council, individuals may well not be aware that they can take matters further if they are disappointed with the response. Without challenge, there is no incentive for councils to improve their knowledge of FOI. It is only when matters get out of control that they may realise their deficiencies.

Nonetheless, the study does suggest that requestors may improve their likelihood of receiving a response by citing FOI. There seems to be enough awareness of FOI amongst parish councils for some clerks to recognise the terminology and give such requests priority. That most councils still failed to respond to these requests is less encouraging. As well as displaying lack of awareness (and perhaps a little resistance), the research paper speculates that IT infrastructure and failure to update websites with revised contact details may be a problem. Many requests may not have reached their intended destination due to a combination of out-of-date published contact details, and overly efficient spam filters.

What lessons can the rest of us take from this?

Does this research offer any lessons for practitioners in the rest of the public sector or for policy-makers? What can applicants learn about how to improve their chances of receiving the information that they want?

Firstly, the overwhelming message is that a lack of access to resources is inevitably going to lead to low

compliance with FOI. Despite the fact that the research failed to find evidence of a difference in compliance rates between larger and smaller parish councils, the fact remains that the vast majority of parish councils failed to respond. As the paper's authors suggest, not all of this can be explained by resistance to FOI. It is far more likely that they just have too much to do, with very few resources. If public bodies are to comply with their legal obligations, not just under FOI but also other transparency rules, then they must be resourced effectively.

Secondly, awareness of FOI and other obligations at this level is clearly low. Given the lack of resources available to parish councils, and their dependence on volunteers and part-time workers, this is perhaps inevitable. Consideration needs to be given to how parish councils and other smaller public bodies can gain access to training given their limited resources.

Thirdly, even at this level, mentioning FOI doubles the chances of a response. Those making requests to public authorities at all levels should take note. The easier it is to identify a request, the more likely it is that it will be responded to by the public authority. It also undermines arguments often made by FOI's critics that FOI is unnecessary as public authorities would answer informal enquiries without such a statutory requirement. Starting a request with the phrase 'I would like to make a request for information under the Freedom of Information Act', or similar, seems to make a difference.

Finally, whilst many might believe that the ideal for public service delivery is to devolve it as far as possible, the experience of parish councils illustrates that this might not always be the case. Being directly involved in the community that a public body serves can have significant drawbacks. Small and local doesn't necessarily mean better, at least when it comes to complying with FOI and transparency rules.

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