

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

EA/2014/0194

B E T W E E N:-

MAUREEN COMBER

Appellant

-And-

THE INFORMATION COMMISSIONER

Respondent

**RESPONSE
to THE INFORMATION COMMISSIONER by
MAUREEN COMBER**

ICO Ref. FS50531575

Introduction

First of all I should like to make it clear that I did not apply for any information under the 2005 Act. The problem seems to have arisen because it appears that any request to Hampshire County Council (HCC) of whatever nature, is immediately siphoned into FOI or EIR, rather than a simple request to the appropriate officer as was once the norm. A perfect illustration of this is a letter which I wrote to the Chief Executive of Hampshire County Council, dated 14th February 2012.* It was never acknowledged by him, but he apparently asked for it to be dealt with under FOI. I received a brief response on 31st October 2012* from the Head of Information Compliance. Both of these letters should be in the bundle but I will enclose further copies for convenience.

Simply I would not have bothered to request the information if:

1. I had not read the small article in the local newspaper from Nikki Paton which encouraged contacting the Countryside Department for information or,
2. If I had thought that it would be treated as an FOI request. By the time the request is made it is too late as one receives an email saying that it is being considered under either FOI or EIR. Surely at the very least a response should indicate that this would be the case and ask whether the applicant wished to proceed? I would not have thought it important enough to burden the Council's resources under FOI, just for a pro forma.
3. Of course if I had thought it would be treated as having any association with Broxhead Common, I would have been mindful that it had taken me nine months to get the brief reply to my letter of 14th February 2012, and of the request therein, asking me not to contact them again on the subject, which I have not done. I had not realised that request was meant to infer that I should not contact them again about anything at all.

My simple request for a pro forma of who does what in the Countryside Department was just that, and I am sending a copy of one supplied some years previously,* since at para 17 of her response, Ms Vosnick says she has seen no evidence. Ms Vosnick also says that this "*would have been supplied on the basis of a disclosure to the volunteers in that capacity*" so why should I have not expected exactly the same consideration, especially in my position at that time, of the Hampshire County Access Bridleways Officer to The British Horse Society, and of course the prompt from the local newspaper?

There has been a confusing attempt to take a holistic approach and wind my 2011 requests for information with regard to the strange circumstances surrounding the registration of Broxhead Common as common land under the CRA 1965; in with my 29th October 2013

request for the pro forma. The FOI Broxhead requests were made in the last quarter of 2011 as can be seen from the enclosed emails, after a suggestion by my barrister that I should try and investigate more deeply into the subject. Since I had already made a couple of visits to the Commons Registration Department and thought I had seen all of the documents available, the only other way I could think of was to request certain documents under FOI. These were also in the bundle but now enclosed for convenience, they are emails dated, 12-19th December 2011.* Of particular note is that page 3 of the Consent Order from the Appeal Court was missing and not available. The significance of this is, that it is page 3 which records the appeal was withdrawn and not heard, therefore no judgement or orders were given save for the dismissal of the case from ‘*out of that Court*’. Most interestingly it also confirmed the email from Kathy Dunt, a Records Assistant in Chief Executives Department, of 21st April 2011.*

My response to that of Ms Vosnick, Information Commissioner

In her appraisal, Ms Vosnick is citing extracts from the Information Commissioner v Devon County Council, but failing to note the balancing advice given that ***“if the public authority in question has consistently failed to deal appropriately with earlier requests, that may well militate against such a finding that the new request is vexatious”***

In this case I have seen no evidence that the intention was to annoy the Council. Broxhead was not in my mind. However once the issue had been raised again in the implementation of HCC’s ‘Unreasonable complainant behaviour order’, it seemed to me that there may be a small hope that the very strange circumstances concerning the registration of it as common land, may be explained in the process of the appeal to the ICO; however this could not have

been anticipated since on application I had no idea that Hampshire County Council would resurrect Broxhead.

It may be appropriate to note here that in this process of written representation I have seen nothing in the way of written representation from Hampshire County Council as I would expect to do, in say the same procedure by the Planning Inspectorate, but perhaps this process is different? Neither am I informed that there are any 'closed books'. Please may I know why I have not been sent copy of any evidence?

In Paragraph 8 of her report Ms Vosnick says the Council did not respond to my request for an internal review dated 3rd February 2014. **That is false** and their reply dated 17th February* was included with my application for appeal to ICO dated the following day, 18th February 2014. Hampshire County Council concluded that *“having spoken to our corporate solicitors, it was decided that ‘decision to declare a request vexatious are not suitable for internal review’. Therefore, an internal review will not be conducted in this case.”* They suggested that if not satisfied with the outcome of the internal review I should apply to the ICO.

Paragraph 14, 15 & 16

It is inferred that my request was *‘manifestly unjustified, inappropriate or improper use of FOIA.’* The latter it may be but as I have stated, application was not made under that Act by me. If Hampshire County Council wished to consider it as such then it was up to them and it appears they may have made a mistake. Since as requested by them in their letter dated 31st October 2012*, Broxhead, has not been further broached by me, so it is difficult to see how they could include the subject as being vexatious just because of my request for a pro forma on 29th October 2013, or how it could be considered *“likely to cause a disproportionate or*

unjustified level of disruption, irritation or distress?” as I have not personally written to or requested anything from Hampshire County Council since February 2012.

Judge Wikeley states:

“However, these four considerations and the discussion that follows are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list. It is important to remember that Parliament has expressly declined to define the term “vexatious”. Thus the observations that follow should not be taken as imposing any prescriptive and all-encompassing definition upon an inherently flexible concept which can take many different forms.

In any case, given that the legislative policy is one of openness, public authorities should be wary of jumping to conclusions about there being a lack of any value or serious purpose behind a request simply because it is not immediately self-evident.”

Paragraph 17 – see Introduction

Paragraph 18

The issue of the web site may not assist me but neither is it of relevance to Hampshire County Council’s case. I would like to quote the learned Judge Wikeley again when he says: ***“I consider that the IC’s Guidance that “the key question is whether the request is likely to cause distress, disruption or irritation, without any proper or justified cause” provides a useful starting point, so long as the emphasis is on the issue of justification (or not).***

In particular, we must also not forget that one of the main purposes of FOIA is to provide citizens with a (qualified) right to access to official information and thus a means of holding public authorities to account. It may be both annoying and irritating

(as well as both dissatisfying and disappointing) for politicians and public officials to have to face FOIA requests designed to expose possible or actual wrongdoing. However, that cannot mean that such requests, properly considered in the light of all the circumstances and the legislative intention, are necessarily to be regarded as vexatious. The vexed issue of MPs' expenses, a scandal the full extent of which only emerged following persistent use of FOIA by an investigative journalist (see Heather Brooke, The Silent State, chapter 8), is an obvious example that springs to mind. I note that the FTT in Lee v Information Commissioner and King's College Cambridge expressed the same view at [64]."

My contribution to the web site is merely to draw the facts of certain matters to attention for scrutiny by those with an interest in such subjects. Hampshire County Council have consistently taken a negative approach while never suggesting a meeting or any other means of clarifying the concerns with regard to Broxhead Common; matters which are hugely important for the community and surrounding neighbourhood given the development of Whitehill/Bordon as an Eco Town, as well as the commoners themselves of course.

Paragraph 19

Ms Vosnick could equally have noted the following advice from the Upper Tribunal: ***"I accept as a starting point that, depending on the circumstances, a request which is annoying or irritating to the recipient may well be vexatious – but it all depends on those circumstances."***

I would therefore respectfully suggest that Ms Vosnick has misled herself in saying that: *"This is one factor of history and context for the present request as part of the holistic approach set out by the Upper Tribunal in Dransfield"*, since Judge Wikeley appears at

great pains to deliver a balanced and proportional approach to the interpretation of vexatiousness and warns against a tick box approach, or use as determined case law.

Paragraph 20

States “*The DN records at para 32 that the decision is in relation to the request of 29th October 2013.*” As that is the case why are we including matters concerning Broxhead Common?

Further it is said that “*the decision does not affect any future requests which the Applicant may wish to make.*” Please explain what is meant by this as it seems to me that is exactly what the intention is?

Paragraph 21

It is said that I have not set out any specific reasons why such name and contact information would be required, but **that is not correct**. I have stated that HCC Countryside works through its Area teams and my initial request to Nikki Paton specifically mentions this and the reason for my request.*I trust it is also in the bundle which the ICO will have provided?

Also it is said that the Commissioner accepted the Council’s submission that the Appellant had previously been in direct contact with a number of officers from the Countryside team which resulted in lengthy correspondence. I would like to see this evidence please?

Paragraph 22

Since Hampshire County Council had themselves re-introduced the subject of Broxhead Common, I hoped the ICO could help or advise how to resolve the issue in his appraisal, but he says he has not taken this into consideration in his DN (para 20), but surely if an holistic approach is being taken then please may I know why it has been left out?

Paragraphs 26, 27 & 28

The Upper Tribunal says: ***“Many previous cases of vexatious requests have been in the context of a longstanding grievance or dispute. However, a request will not automatically be vexatious simply because it is made in the context of a dispute or forms part of a series of requests. There may be genuine reasons for this. For example, a series of successive linked requests may be necessary where disclosures are unclear or raise further questions that the requester could not have foreseen. Similarly, in the context of a dispute, a request may be a reasonable way to obtain new information not otherwise available to the individual. You should not use section 14 as an excuse to avoid awkward questions that have not yet been resolved satisfactorily. You must always look at the effect of the particular request and consider the questions [the five factors] set out below.”***

It is quite clear that Hampshire County Council is going to great lengths to avoid such questioning.

It is in the normal course of business in my work as a volunteer for The British Horse Society that I made my request on 29th October 2013. I had no reason to believe that it would be used to try and deprive me of my democratic rights as a citizen of the UK. The Commissioner is right and the request will not help in any way with my dispute over Broxhead Common, so why is she contradicting herself in then saying that it might lead to future communication, when I have shown that was finished as from 31st October 2012?

Paragraph 29

Notes that ‘*no evidence has been provided of any serious wrong doing on the part of the Council,*’ but that is because as Judge Wikeley says, “***Ultimately, however, what matters is whether the law has been properly applied,***” in this case the law relating to the correct use of Sec 14 of the Act and/or manifestly unreasonable under regulation 12(4)(b) of the Environment Information regulations (EIR). Paragraph 7 of the IC’s response refers.

However, if such evidence is required, then I can show a small example of the problem by referring to the Council’s letter dated 31st October 2012* from the Head of Information Compliance who states: “*The 80 acres of land to which we believe you refer were provisionally registered as Common Land in pursuance to the 1965 Commons Act. This provisional registration was challenged in 1970. On 18th December 1978 the County Council was instructed by the Commons Commissioner to remove this land from the register following a Court of Appeal Order. This was because the only holder of common rights released his rights of common.*”

This statement is false because:

- There is no point of law on which the status of the common land could be challenged. Broxhead Common is an ancient common with commoners rights and is therefore protected under sec. 193/4 Law of Property Act 1925.
- Although the Rights were challenged it is false to say that there was only one holder of common rights. There were in fact seventeen others plus another who held rights originating from the east side of the common. Lamentably Hampshire County

Council have not recorded this correctly on the register sheets* as can be seen from a copy I have enclosed, but all can be found in the Chief Commons Commissioner's decision which can be seen here:

[http://www.acraew.org.uk/uploads/Hampshire/BROXHEAD%20COMMON%20-%20WHITEHILL%20AND%20HEADLEY%20NO.CL.147\(1\).pdf](http://www.acraew.org.uk/uploads/Hampshire/BROXHEAD%20COMMON%20-%20WHITEHILL%20AND%20HEADLEY%20NO.CL.147(1).pdf)

and here:

<http://www.acraew.org.uk/uploads/Hampshire/BROXHEAD%20COMMON%20-%20WHITEHILL%20AND%20HEADLEY%20NO.CL.147.pdf>

- The Commons Commissioners were not allowed to alter their decisions in any way once they had become final. Mr Squibb made his decisions on 22nd November 1974 which became final under the terms of Sec.7 CRA 1965, and Sec 10 of the same Act which serves as conclusive evidence of the matters registered at the date of registration. In this case that was immediately the Appeal was withdrawn from that Court on 23rd May 1978.
- The commoner who sold his rights of common did not do so under any statutory procedure so this would be of no relevance in law. Also there was another commoner with rights.
- Therefore the land did not cease to be common land as stated. I repeat, there was never a point of law on which it could ever have been disputed in any case.
- In answer to my question as to why, Hampshire County Council has not ensured that an application for the fencing was made to the Secretary of State as part of their duties

concerning the protection of common land, they state: “*As the fencing is not on common land there is no requirement for an application to erect fencing.*”

This is false information.

The terms of the agreement between the parties for the dismissal of the case from the Court of Appeal states that the Council will support any application made to the secretary of state for the fencing of the 80 acres. **Such application has never been made.**

Paragraph 33

From the above it can be seen that seeking further communication from a wider range of council officers would indeed be fruitless, especially junior ones who would not be well versed in the more complicated areas of common land law. On the other hand it was necessary for Hampshire County Council to try and conceal years of false information, failure to disclose the correct documents, and abuse of office, by concealing the facts of the matter.

Paragraph 35

I say that failure to respond adequately and deal with this issue by Hampshire County Council and now the IC’s decision not to uphold my appeal, are compromising my democratic rights under Schedule 1 Article 17 of the Human Rights Act.

Judge Wikeley wisely points out that “***There is, however, no magic formula – all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being***

a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA and warns,

“ However, I repeat that these are first instance decisions which do not carry the status of being legal precedents; in that sense they are not formally a source of case law, however persuasive they may be. They are fact-specific and it is axiomatic that one FTT decision cannot bind another FTT (Hampshire County Council v JP (SEN) [2010] AACR 15; [2009] UKUT 239 (AAC), at [15]). Second, as Judge Jacobs noted in Camden LBC v Information Commissioner [2012] UKUT 190 (AAC) at [20], the danger in this context of engaging in too close an analysis of previous FTT decisions is that “it can elevate issues of fact into issues of law or principle”.

I would like the Tribunal to know that in addition to my voluntary work for The British Horse Society, I was for fifteen years a Councillor for Kingsley Parish Council, eight of those as Chairman. My mentor at that time was Hampshire’s late Master of the Roles, Lord Denning. He instructed us that we must at all times do our work as councillors “without fear or favour”.

From 2007 to 2011, I was the District Councillor for Selborne Ward, East Hampshire. Here I was trained by the Society of Local Chief Executives (SOLACE), that it was not considered rude or vexatious to keep asking the questions from officers, until happy with the answers.

Democracy and Freedom is the prerogative of the English Speaking peoples, and it is incumbent upon us all to try to maintain as much of those basic ideals as we are able to.

I really do hope that the Tribunal will recognise and support this, by allowing my appeal under Sec. 57 FOI 2000. To quote the learned Judge Wikeley yet again: “***Ultimately, however, what matters is whether the law has been properly applied***”

I say that in this case it has not. How are we to hold the Executive to account if we cannot ask a reasonably simple question without it being blown out of all proportion into something it was never intended to be?

In the circumstances I believe I was fully justified in asking for a pro forma to enable me to work with the Area Teams as those of us who volunteer, whether we are Ramblers or Horse Riders, are used to doing.

Finally we are reminded that *the test under section 14 is to discover if a request is vexatious, not whether the requester is vexatious.*

Lord Denning said

“How can the ordinary man maintain his rights in law if he is not supported by it and it is not enforced.”

Thank you for your consideration.

Yours very sincerely

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8th September 2014

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Enc.* A previous pro forma
My letter to HCC CEO dated 14.2.12
Letter from HCC dated 31.10.12
Email from HCC Executive Dept dated 21.4.11
Emails dated 12-19th December 2011

Letter from HCC dated 17.2.2014

Emails of my simple request

Common Rights Register sheet for Mrs Rosemary Cooke (12), the other commoner.

Common Land Register sheet showing pencilled in 80 acres removed.