

**CALDBECK PARISH COUNCIL**

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**The Information Commissioner**  
**Office of the Information Commissioner**

**21 August 2018**

**Dear Ms Denham**

I am writing on behalf of Caldbeck Parish Council to ask if you would review Cumbria County Council's decision not to release a document we have requested under Freedom of Information legislation, where the County Council claims the document is exempt on the grounds that it is a draft document and it is not necessary to disclose it in the public interest, citing the provisions of the Environmental Information Regulations 2004.

The document is a report dated 21 February 2018 by the County Council's Dan Barton, Assistant Director, who conducted an independent review of the County Council's officer decision not to support a footpath by pursuing a Footpath Creation Order. The review was carried out under the County Council's complaints procedure.

We say the document is not a draft, and even if it is, it must be disclosed in the public interest.

In preparing papers for this submission, we question why our request for release of the report under Freedom of Information has been treated by the County Council under the Environmental Information Regulations. It would appear that the Environmental Information Regulations allow for an exemption for 'draft' reports which is not similarly afforded under Freedom of Information. We have therefore gone back to the County Council to ask if it would review whether it was correct to consider our request for release of the February report under Environmental Information Regulations rather than Freedom of Information legislation and have requested a reply by 5 September 2018 (Document L).

Given the advice received from your Office, I am writing now so that the complaint can be logged and processes begun. Should the County Council provide a satisfactory reply to our further request for a review, I will of course contact your Office.

**Recent chronology requesting the document**

On 10 December 2017 we wrote to the County Council asking it carry out a review of the officer decision not to support a footpath by pursuing a Footpath Creation Order which we had requested (Document B).

The Chief Executive appointed Dan Barton, Assistant Director, to carry out the review under the County Council's complaints procedure (Document C).

On 21 February 2018 Dan Barton sent his completed report to the Chief Executive.

On 14 May 2018 the County Council sent us the outcome of its review, including a copy of a report by Dan Barton dated 26 April 2018 but not his report dated 21 February 2018 (Document G). As will become apparent we have reason to believe that Dan Barton's

report dated 21 February 2018 may be substantially different from the report sent to us dated 26 April 2018.

On 29 May 2018 we requested documents under Freedom of Information legislation with a statutory deadline of 27 June 2018 (Document H).

On 10 July 2018 the County Council sent its response (Document I), in which the County Council claimed exemption from releasing the requested report dated 21 February 2018.

Having taken advice from your Office using the webchat facility, on 2 August 2018 we wrote to the County Council asking it to review its decision to claim exemption (Document J) and stated we would be contacting the Information Commissioner on 16 August 2018 if we did not receive a satisfactory response.

The County Council replied on 16 August 2018 and concluded it had correctly followed procedures in claiming exemption for the document (Document K).

### **Background - Caldbeck to Hesket Newmarket footpath**

Before explaining the reasons why we believe the report dated 21 February 2018 should be released, I need to set out the background to our Freedom of Information request.

Caldbeck Parish Council has been pressing to establish a direct, easy to walk, wheel chair accessible footpath and permitted cycle path between Caldbeck and Hesket Newmarket alongside Hesket Lonning, the road linking the two villages. The proposed path will follow the road on the field side of the existing roadside hedges, be fenced off from the rest of the field concerned and be surfaced. It would be approximately one mile in length and is all in the Lake District National Park.

A call for such a footpath was included in the 2005-15 Parish Plan as the top priority item and was overwhelmingly supported by parishioners.

Caldbeck Parish Council has received £100,000 as a generous gift to pay for the mapping, compensation and construction of the footpath and is confident the work can be completed within budget. The gift is from a parishioner and the footpath would be in memory of her late husband.

All ten affected landowners initially agreed to the footpath but two later gave backward. The remaining eight signed option agreements (which have now expired but we understand they are still willing to renew the option) to sell a roadside strip to enable the footpath to go across their land.

The Parish Council asked the County Council to help as it has authority to issue a Footpath Creation Order. The County Council has been reluctant to do so. It has the power but does not have a duty to pursue a Footpath Creation Order. It has also raised concerns about potential challenge to an Order and possible legal costs if an Order were successfully challenged.

The County Council has no objection in principle to an Order. It suggested others could pursue an Order - the National Park or Allerdale Borough Council.

The National Park is supportive but is not able to act without the County Council as Highways Authority giving its support. Whilst the National Park is happy to provide internal staff resources for the legal work, it requires an indemnity for possible external legal costs.

Allerdale Borough Council's responsibilities for footpaths in the National Park are limited to dealing with obstructions to existing footpaths, not creating new footpaths.

The two opposing landowners are not prepared to negotiate, their position having been strengthened by the County Council's decision not to pursue a Footpath Creation Order.

Without the County Council changing its mind and actively supporting the footpath, it is highly improbable that any agreement can be reached with the landowners and hence the footpath will not be established. In these circumstances the gift would be returned.

### **Attempts to engage the County Council**

The Parish Council asked the County Council for help in December 2016 and first met officers in March 2017. Officers were negative and not wanting to get involved. They considered the costs would be at least £250,000 when the Parish Council had detailed costs for the work, including land purchase, within its £100,000 budget. It was agreed officers would talk to the National Park and see if the Footpath Creation Order could be progressed by working in partnership with the National Park.

The May 2018 local elections and forming a new Cabinet led to some delays and on 7 September 2018 we met County Council senior officers, Angela Jones, Assistant Director Economy and Environment and Phil Greenup, Senior Manager of Regulatory Services. Having walked the part of the footpath for which we require the Footpath Creation Order, they recognised the merits and public benefit of the footpath, but they highlighted other priority work and the possible costs if an Order were to be challenged. As they do not have a duty to issue an Order, they would not do so. We asked them again to talk to the National Park (as we had no report as promised in March 2017) and offered to attend.

Officers were due to talk to Cabinet Members before finalising their decision. Two weeks prior to the meeting on 7 September we were sent a copy of an internal report which Phil Greenup had prepared in June but without our input to brief Cabinet members. It contained significant factual mistakes which the County Council recognised. Following discussions with Cabinet members, on 27 September 2017 the County Council confirmed its officer decision not to pursue the Footpath Creation Order.

We have regularly asked the Leader of the County Council, his Deputy and the Cabinet Member now responsible for footpaths to meet to discuss the footpath but they have not done so. Our understanding is that the County Council's Legal Services' advice is that the matter is an officer decision and members should not discuss the footpath with us. And in our recent request for release of documents, we again reiterated our desire to meet, local MPs offering to attend in support (Document J). The Chief Executive's reply dated 15 August 2018 rejected our request for a meeting (Document K).

We tried to engage County Council members first via Allerdale Local Committee, the intention being to gauge local support before going to Cabinet and Council. We presented our request for support to Allerdale Local Committee on 5 December 2017. There was no debate and members were not able to discuss or offer their views. The Chairman read out

a statement which restated the officer decision and suggested we write to the Chief Executive to ask for the decision to be reviewed.

This we did on 10 December 2017 when we also asked if we could take our case to Cabinet/Council (Document B). We were refused permission to make use of public participation at Cabinet/Council as we had asked a similar question at Local Committee and would need to wait 12 months (Document C). Had we known this we would not have gone to Allerdale Local Committee but would have presented our case to either Cabinet or full Council.

In late December 2017/early January 2018 we began a lobbying campaign, talking to the Cumberland News (Phil Coleman) where we got favourable coverage, launching an on line petition which has attracted more than 1,600 signatures, with some 180 positive comments in support of the footpath, and wrote to all County Councillors, given we were not allowed to use the County Council's public participation scheme to address full Council.

The Chief Executive treated our 10 December 2017 letter as a complaint and arranged for an independent review of the case (Document C). The County Council's timetable was to report in January 2018.

On 5 February 2018 we met the reviewer, Dan Barton, an Assistant Director in a different Directorate. The brief we provided him makes our case and counters the County Council's stated reasons for not supporting the footpath (Document D). There were significant delays in the County Council's timetable. We did not receive notification of the outcome until 14 May 2018 (Document G) and only after we had pressed for the response under Freedom of Information (Document F).

### **Reasons for requesting release of 21 February 2018 report**

Our reasons for challenging the County Council's claimed exemption for not releasing Dan Barton's report dated 21 February 2018 are as follows:

- 1. The report dated 21 February 2018 which we request was not material still in the course of completion**
  - i. The County Council claims that the report dated 21 February 2018 Dan Barton sent to the Chief Executive was not complete at that time. Our contention is the report was not a draft or unfinished document and so it is not exempt from disclosure. Under paragraph 3.4.2 of the County Council's Corporate Compliments, Comments and Complaints Procedure (Document A) it is implicit that the review is made and completed by the Assistant Director before it is sent to the Chief Executive. Dan Barton said he had completed his review in his email to me dated 26 February 2018 (Document E) which reads: "I've completed the report and submitted to the Chief Exec. I think it will be OK for me to share this with you, but I would need to wait until I have the go-ahead to do this from her – or it may not be 'proper'." Our reading is that Dan Barton had completed his report, he had finished that stage of the process, but he is awaiting confirmation that he can send a copy of the report, not that the report is draft requiring additional work. If, as appears to be the case, the County Council subsequently prepared a second report dated 26 April 2018 which it sent to us on 14 May 2018, that does not mean the first report was a draft or unfinished document still in the course of completion - it was Dan Barton's completed report as the independent reviewer.

- ii. In the United Nations Economic Commission for Europe's interpretative guidance on the Aarhus Convention it is stated that "... the expression 'in the course of completion' relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared ...". That would appear to apply in this case. As Dan Barton informed us, he had "completed the report" and he alone was involved in making and completing the report under the County Council's procedures.

## **2. There is a strong public interest case for transparency**

- i. Even if the County Council is correct in its argument that the report dated 21 February 2018 was a draft or unfinished document, we argue the public interest in disclosing the information outweighs the public interest in maintaining the exception.
- ii. When reading the County Council's response to its investigation of our complaint received 14 May 2018, we were extremely concerned that the 26 April 2018 report only considered processes, not the merits of the decision (Document G). The report states in para 5.1: "Subsequent to receiving a letter from the Parish Council on [10] December 2017, the Chief Executive commissioned a review tasked with finding out whether the decision-making process was appropriately followed." We therefore asked for a copy of the Chief Executive's commissioning of the review (Document H). The County Council has confirmed there was no written instruction from the Chief Executive to Dan Barton to confine his report to process and exclude the merit of the decision (Document I).
- iii. When we met on 5 February 2018 Dan Barton assured us his report would examine the merits of the officer decision we sought to review. We were insistent that whilst we had concerns about the process, the whole point of the review was to receive a fair hearing for our case, with a recognition of the wider public benefits from the footpath, and for the County Council to change its mind and pursue a Footpath Creation Order. Dan Barton was explicit that it would be possible for his review to conclude that the decision not to pursue a Footpath Creation Order should be reversed. It was clear to us from what he said that he would be looking at the merits of the officer decision which we had asked to be reviewed.
- iv. It therefore behoves the County Council to produce the 21 February 2018 report to show whether his completed review at that point included the merits of the County Council's officer decision which we sought to review, as he had assured us he would, and whether he was subsequently instructed to confine his report to reviewing processes after his report dated 21 February 2018 was seen by the Chief Executive.
- v. Disclosure would facilitate public understanding of matters of public concern. Disclosure would ensure the County Council remains accountable to the public in respect of its operations and decision making, and follows its own procedures. The County Council's Corporate Compliments, Comments and Complaints Procedure 'review stage' puts the review in the hands of the independent Assistant Director appointed and does not envisage that he can be told to rewrite his report if his conclusions are not what the Chief Executive wishes to see.
- vi. Compliance with the County Council's own published procedures should be transparent. The County Council argues that: "effective decision making depends upon

sound evidence and candid communications that allow a full consideration of all the options without any concern over premature disclosure. Decisions need to be thoroughly evaluated and this can only happen when all parties have the confidence that there is no risk of those exchanges being prematurely disclosed. There is a strong public interest in maintaining a safe space for County Council officers to debate live issues and reach decisions away from external interference.” (Document I) To that we respond the initial County Council officer decision not to make the requested Footpath Creation Order had that safe space, but we requested the decision be reviewed as we did not consider the officer decision had been correctly evaluated. Dan Barton was appointed to make the review independently under the County Council’s procedures and he told us he was discussing the issues with the relevant officers whose decision he was reviewing before finalising his report so he was able to make use of the safe space advocated. Nor should there be debate about his report which makes him re-write it as that makes a nonsense of the County Council’s own complaints procedure.

- vii. As mentioned, Dan Barton assured us on 5 February 2018 he was dealing with the merits of the decision, he completed the review just over 2 weeks later, then nearly 12 weeks later we were sent his review which states categorically that he had only been instructed to review the process of the officer decision and not the merits, but that instruction cannot be produced.
- viii. Our letter dated 10 December 2017, which the County Council treated as a complaint, requested a review of the officer decision not to pursue a Footpath Creation Order, not just the process (Document B). We need to know what conclusion was drawn as to the reasonableness of the officer decision.
- ix. The County Council also “highlights that the report has now been completed and has already been disclosed.” (Document I) The County Council has produced a report dated 26 April 2018. It has not produced the report dated 21 February 2018.
- x. Transparency in this case is essential and that public interest must heavily outweigh any public interest in maintaining the exception for what the County Council now says was a draft document because it appears the Assistant Director may have been asked to change it.

### **3. There is a presumption in favour of disclosure**

- i. Regulation 12 (2) requires the County Council to apply a presumption in favour of disclosure.
- ii. So if there were any doubt about any of the grounds we put forward above, the statutory presumption in favour of disclosure should be applied.
- iii. That statutory presumption becomes more important where, as in this case, it appears the County Council may have something it otherwise wishes to hide - a conflict of interest must be resolved in favour of disclosure.
- iv. The County Council’s conduct in this matter adds even more weight to the presumption. As is evident from the concerns we have set out in this letter and the supporting documentation, we believe there are serious criticisms to be made of the County Council’s conduct in handling the whole debate over the footpath, the examination of our complaint, and our requests for the release of information. In these

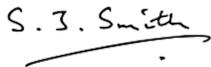
circumstances even more weight should be given to disclosure to ensure the County Council is not seeking to hide any embarrassment and is fully accountable

**4. Whether our request should be considered under Freedom of Information legislation rather than Environmental Information Regulations**

- i. In addition we question why the County Council has chosen to consider our request for information under Environmental Information Regulations rather than under Freedom of Information legislation. The County Council has treated our request for information as being one for environmental information to which the Environmental Information Regulations apply. Caldbeck Parish Council reserves its position on whether those Regulations are correctly applied to the request for information it made dated 29 May 2018 and seeks the view of the Information Commissioner. It is noted that if the Freedom of Information Act 2000 applied to those regulations there would be no exemption for a draft document.
- ii. Our request for the report is to establish whether the scope of the County Council's review changed and what conclusion was drawn as to the reasonableness of an officer decision. These are essentially questions about the workings of administration and the subject matter, whether land might be used for a footpath, is secondary.

Attached is a schedule of supporting information as referenced in this letter. Please let me know if you require any further information. I look forward to hearing from you in due course and do appreciate this may take some time in light of current workloads.

Yours sincerely

A handwritten signature in black ink that reads "S. J. Smith". The signature is written in a cursive style and is underlined with a single horizontal line.

**Simon Smith**

## List of Documents attached

- A. July 2011 version 4 of the Cumbria County Council Corporate Compliments, Comments and Complaints Procedure
- B. 10 December 2017 Caldbeck Parish Council to Cumbria County Council requesting review of the County Council's decision not to support the footpath and that the Parish Council make use of public participation to present its case to Council.
- C. 15, 20 and 21 December 2017 Cumbria County Council to Caldbeck Parish Council - emails. The County Council treated the Parish Council's letter as a complaint and made arrangements to investigate the complaint under its complaint procedures.
- D. 5 February 2018 Caldbeck Parish Council's brief for Dan Barton in preparation for meeting on this date.
- E. 26 February 2018 Dan Barton email to Caldbeck Parish Council, stating he had submitted his completed report to the Chief Executive.
- F. 2 April 2018, 3 May 2018 and 11 May 2018 Caldbeck Parish Council to Cumbria County Council - letters and email sent requesting release of the outcome of the County Council's investigation of the Parish Council's complaint under Freedom of Information.
- G. 14 May 2018 Cumbria County Council to Caldbeck Parish Council results of investigation of complaint.
- H. 29 May 2018 Caldbeck Parish Council to Cumbria County Council requesting documents under Freedom of Information legislation.
- I. 10 July 2018 Cumbria County Council to Caldbeck Parish Council response to Freedom of Information request.
- J. 2 August 2018 Caldbeck Parish Council to Cumbria County Council requesting review of decision to claim exemption from releasing report dated 21 February 2018.
- K. 15 and 16 August 2018, Cumbria County Council to Caldbeck Parish Council responses to request for meeting and results of internal review.
- L. 21 August 2018 Caldbeck Parish Council to Cumbria County Council, requesting review of the appropriateness of using Environmental Information Regulations given the Parish Council requested information under Freedom of Information legislation.