



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0084

**Heard at Brighton
On 22-24 November 2017 (deliberations 10 January 2018)**

Before

JUDGE CHRIS HUGHES

NIGEL WATSON, ANDREW WHETNALL

Between

HASTINGS BOROUGH COUNCIL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Appearances

Appellant: Damien Welfare

Respondent: Peter Lockley

DECISION AND REASONS

1. For the reasons set out below, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 28 March 2017.

2. In about 2012-2014 land-slippage occurred in Hastings. It affected Rocklands Caravan Site (Rocklands) which belongs to Mr and Mrs Guilliard and is on the higher part of the slope, and part of Hastings Country Park Nature Reserve lower down the slope which is owned and managed by Hasting Borough Council (the Council). This area includes a Country Park, a SSSI and a Special Area of Conservation. The landslips affected the Ecclesbourne Glen area of the Nature Reserve. There was significant public concern about the closure of footpaths going through the Glen, the loss of amenity and the damage caused. A community group, Save Ecclesbourne Glen (SEG), was formed to campaign on the issue. This group identified development activities at Rocklands as the cause of the problems.
3. The Council as the planning authority for the area dealt with a planning application for the construction of a new building on the site and, as the authority responsible for the licensing of caravan sites in its area, started the process of issuing a new licence to Rocklands by sending a proposed draft licence to the owners in February 2016.
4. There were contacts between the Council and Mr Guilliard about the issue and technical reports were obtained by both parties to illuminate the causes of the landslips and possible measures to prevent a recurrence. The Council commissioned a report on the issues from Coffey Geotechnics Ltd. The report, provided in May 2014 and published in July of that year made recommendations relating to both the management of the Country Park and of the caravan site. It recommended that further investigations should be carried out in conjunction with the owners of the site. One of the relevant council officers (Mr Hepworth) commissioned consultants to carry out a site licence compliance audit on Rocklands and as a result of correspondence with the owners and their agents he was provided with two reports, one a geotechnical report by Oscus Ltd dated 13 January 2013 which was addressed to the owners' insurers and the other a drainage report by consultants BdR dated 27 August 2014 commissioned by the owners. In Mr Hepworth's view these reports contained useful information relating to the cause of the slips and future risk reduction.
5. On 4 November 2014 another council officer provided them to Coffey Geotechnics Ltd. who had been commissioned to produce a further report looking at measures to be taken as a result of the landslip.
6. In the meantime SEG had become aware of these reports and wrote to the Council asking for them. On 16 December 2014 the Council replied:-

"I am responding to your two emails.... The legal services view is that we cannot share these with a third party and that the permission of the site owners as the

commissioners of the reports is required. I am advised that the council would not be able to share this information even if a FOI request was made. It may be that a direct request to the site owners is the best way to gain access to these reports.

SEG then wrote to the owners (copying to the Council) seeking the reports. The Council wrote to the owners:

"I am writing to say we have said no to letting the campaigners seeing these reports because they were commissioned by yourselves and we felt your consent should be obtained. The decision is obviously yours and there is no pressure from the council on this matter"

Mrs Guilliard replied to the Council:-

"Thank you for your email. As we paid for these reports for ourselves we do not wish them to be released to the rest of the world."

7. On 23 January 2015 Coffey wrote to the Council a letter headed **Ecclesbourne Glen Landslide: Additional Data Review and Further Technical Advice**. The letter stated:-

"This document is based on a review of all the data made available, including information provided by the Council which has been provided as "privileged/confidential" (namely documents commissioned by other parties such as Rocklands' Caravan Park, but which are not in the public domain). In addition, reference is made to information provided by the Save Ecclesbourne Glen Campaign group (SECGCG)."

8. At the request of the Council a version of this document was subsequently produced and supplied to SEG which did not include the material supplied by or on behalf of the owners.
9. From the time of the landslip until June 2016 the Council received about 70 information requests from the public (including from members of SEG) about many varied issues relating to Rocklands, including such matters as its site licence and information about drainage. On 22 June 2016 Mr Heritage wrote to the Council:-

"I would like a copy of the "Second" Coffey geotechnical report concerning the Rocklands caravan site and Ecclesbourne Glen. This is the report you previously refused to disclose me in a previous FOI request due to the impending appeal with a Planning Inspector citing there was evidence of a sensitive nature that may be used for this appeal. Now this appeal is over and a decision has been published may I please have sight of this particular report"

10. The Council responded on 26 July explaining that the information was provided in confidence and accordingly the Council was withholding the information based on the exemption to disclosure provided by s41 FOIA. It maintained its position on review. Mr Heritage complained to the Respondent Information Commissioner (ICO) who correctly identified the information as environmental information to be considered under the Environmental Information Regulations (EIR) and asked the Council to reconsider the request on that basis. Having done so the Council relied on three exceptions contained in Regulation 12(5) to withhold the information:-

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure;

11. In considering these exceptions the ICO acknowledged that the appeal against the terms of the new site licence was a proceeding; she considered that the Council had not provided details of the specific harm disclosure would cause and accordingly did not accept that this exception was engaged. On similar grounds she rejected the Council's arguments with respect to the commercial information exception and the exception contained in 12(5)(f). Having found the exceptions were not engaged the ICO did not consider the balance of public interest and ordered the disclosure of the Second Coffey report.

12. In its appeal the Council argued that the ICO had given insufficient weight to its arguments, giving more detail of those arguments and emphasising that disclosure would prejudice both the Council's and the owners positions in the impending site licence litigation. It repeated its reliance on exceptions in Regulation 12(5)(d), (e) and (f) and also included exception (b):-

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

13. The Council also relied on the exception in Regulation 12(4)(b):-

(b) the request for information is manifestly unreasonable;

14. It argued that the burden of work generated by the SEG campaign and the number of requests was disproportionate to the benefit from the information and the Council's resources should be protected from the disruption.

15. In resisting the appeal the ICO submitted that the Council had not demonstrated that any of the 12(5) exemptions was made out, that 12(5)(b) was not made out and that 12(2) provided for a presumption in favour of disclosure.
16. The tribunal heard evidence from Lisa Greathead, Michael Hepworth and Mr Guilliard.
17. Mrs Greathead had responsibility for handling FOI/EIR requests on behalf of the Council as well as complaints. There had been a significant burden and sometimes requests or responses to the Council had been couched in offensive, insulting and distressing ways. She was not aware of specific links between Mr Heritage and SEG.
18. Mr Hepworth provided a written statement and gave oral evidence. He is an Assistant Director with the Council, responsible for (inter alia) caravan site licensing, parks and open spaces and public realm maintenance including risks associated with cliffs and land owned by the Council. He had been involved with the Rocklands site since May 2014. He confirmed that he had received the Ocus and BdR reports as a result of correspondence with the owners of Rocklands and their agents GVA Grimley Ltd. He could not recall any discussion of the confidentiality of the reports at the time. He confirmed that the rights of the Council to require information from caravan site owners were very restricted and the Council would not have been able to require the owners to provide these reports.
19. A draft of the new site licence, which sought to address issues raised by the landslide had been sent to the owners in February/March 2016. There had been representations, consideration of those representations a further draft and in the end the Council had imposed a new site licence which was the subject of an appeal by the owners to the Lands Tribunal which was due for hearing in April 2018. In closed session the nature of the disputed information was explored, the situation between the Council and the owners at the time of the request and the time of the hearing, the impact that disclosure would have on the ongoing proceedings concerning the site licence and the deliberations of the council through the impact of publicity and representations by the public to the Council and its officers. Disclosure would compromise the confidentiality of the council's preparations for the appeal, by obliging it to respond to questions about its approach; and reveal, directly or by inference, elements of its preparations or intentions. It would also confine the options open to it, in relation to the use that it could make of the disputed information in the appeal. The harm to the confidentiality of the site licensing process would be to the consultations/discussions on the draft licence conditions, at the time of the request. Publication would have led to a loss of trust between the parties. It would also have reduced the likelihood that confidential

documents would be shared by a site owner with the authority on confidential terms.

20. Mr Guilliard gave evidence of public anger and criticism directed at the owners of the caravan park and arising largely from the claim that past activities by the owners had caused the landslide. The campaign has in part attempted to publicise the criticisms in order to dissuade visitors from coming to the site. It has also extensively publicised what have been claimed to be infringements by the owners of the site licence, or development controls, which have been linked by the campaign to the claimed cause of the landslip. This campaign had had a significant effect on the finances of the business. There had been insulting and aggressive behaviour. He identified significant inaccuracies and false statements in the material put out by the SEG campaign, including a claim of an uncontrolled flow of raw sewage on the site from a yellow pipe (the pipe in question as examined and found to be a discarded pipe not connected to any system and not within the caravan site). SEG would use any new information as a hook for further publicity and campaigning. He confirmed that all material supplied by the owners to the Council had been supplied in confidence. In closed session there was a discussion of the impact on the business and the extent to which it could be attributed to SEG.

Consideration

21. In addressing the exception in 12(5)(e) a key issue to be determined was whether the Ocus and BdR reports supplied to the Council were supplied under an explicit or implicit duty of confidentiality. The ICO contends that there was neither an explicit nor implicit duty of confidence and argues that confidentiality could not subsequently be acquired. The reports were supplied by the owners in the context of a dispute with the Council about the causes and consequences of the landslip. The owners were under considerable public pressure and scrutiny and undoubtedly were, by the time they supplied the reports, feeling bruised by the publicity they had received. They were not in a position where the Council could require them to provide the information.
22. The tribunal has not been supplied with contemporaneous record of phone calls at the time the reports were supplied, nor any covering letter (whether from the owners or any of the professionals then advising or representing them) accompanying the reports which sets out the terms upon which they were supplied. It is possible that such documents once existed or indeed still exist which could throw light on the issue. However even if there was no explicit consideration of the basis upon which the documents were handed over an implicit duty clearly arose from the circumstances of the case.
23. It is improbable that the insurance company, which no doubt has issues of its own, would in providing the report to the owners have consented to the publication of the document to the world. The owners, with the difficulties

they face had no desire to put these reports into the public domain. It is unlikely that they would have acted without the consulting their professional advisors and such advisors would be likely to adopt a cautious approach to the release of information in a dispute. They were engaged in difficult, confidential discussions and were seeking to influence the Council's adviser in such circumstances the disclosure of the reports they had was clearly a step in those confidential negotiations on the range of issues between the Council and the owners of Rocklands.

24. The issue only surfaced in recorded form in the Council's reply to SEG in December 2014 when it acknowledged the confidential nature of the reports and when one of the owners' wrote:- *"As we paid for these reports for ourselves we do not wish them to be released to the rest of the world"*. It is a statement of the obvious, which was also seen by the Council. Implicit duties of confidence are the norms of many situations, the ICO's jurisdiction over recorded information, has, on this occasion, led her to undervalue the norms and conventions of everyday life. The circumstances in which the reports were handed over gave rise to an implicit duty on the part of the Council not to use and disseminate the information without the consent of the owners protecting their (and their insurers) confidential information.

25. The second substantive issue is whether the information is commercial or industrial. The ICO adopts a remarkably restrictive approach to this issue in arguing:-

"... the Disputed Information is simply not commercial in nature. It comprises technical information about (i) land stability and (ii) drainage. While those factors have some relevance to the value of the Rocklands site and the profitability of the Owners' business, this does not make the information commercial in nature. The Commissioner submits that for the test to be met, the information must at the very least identify the relevant commercial context and/or give some indication of its own commercial relevance."

26. The value and significance of commercial information resides precisely in its context and commercial relevance. A document such as this needs to be evaluated in its context; which is a matter of public knowledge. Since the commercial context and relevance are publicly known there is no need for that information to be included in the actual report. The two reports which were used in preparing the disputed information, of their nature go to a description of the major asset of a commercial venture, an asset fundamental to the operation of that venture. To a greater or lesser extent the disputed information may give indications of costs or problems which might (or might not) restrict the use which the property could be put and the expenditure which might need to be incurred to ensure the continued exploitation of the asset. It is rather hard to see a more commercial piece of information than that.

27. The legitimate economic interest which the confidentiality protects is that of the owners to run their business free of any unlawful interference, to have confidential exchanges with their insurers and with the council in the context of negotiations which may break new ground in the application of environmental protection considerations to site licencing. Their willingness to share both factual information and differences of expert opinion with the Council in respect of its regulatory functions potentially engages the environmental right to know enshrined in the Environmental Information Regulations and flowing from the Aarhus convention. Disclosure would to an extent allow closer and more informed public participation in the Council's regulatory decision making. The Council has promoted this to an extent by disclosing its own assessment in Coffey 2. What is at issue (ie the disputed information) are the redacted parts of their own report which describe or draw on the two undisclosed reports, and our findings need to reflect the balance of public interest between disclosure to better inform public debate on the one hand, and legitimate protection of certain commercial confidences while regulatory proceedings are still in play on the other. We must have regard to the terms of regulation 12(e) and assess whether the commercial confidentiality at issue is "provided by law to protect a legitimate economic interest". There is no legitimate economic interest in running an unsafe site or a site that causes and may continue to have an adverse environmental impact. There is a legitimate economic interest in trying to reach an agreement on site regulation which meets both legitimate environmental concerns and the fair treatment of an established business.
28. From the analysis of exception (e) set out above it is clear that exception (f) is also engaged; the owners had no duty to provide the information, the Council has no duty to disclose it, the owners have not consented to release it and, given their concerns about further publicity and activity from SEG which could be generated by the release of the information, it is not in their interests to disclose it.
29. In weighing the public interest there is a clear value in disclosing the Coffey 2 report in terms of transparency and the value of greater public knowledge of environmental decision-making. However the main conclusions and recommendations of the Coffey 2 were disclosed accordingly the public is aware of the main issues as seen by the council in approaching the problems caused by the landslip. Disclosure of the information remaining in dispute would cause harm to confidentiality without significantly advancing the public benefit beyond that already achieved.
30. In considering the balance of public interest it is clear that there is a long-running tense relationship between the Council and the owners of the caravan site. However some degree of trust has been built up and some progress has been possible in narrowing the issues between them around the new site licence and the appeal against the imposition of that licence as well as other

issues affecting the site and Ecclestone Glen more generally and through mutual understanding and consensus building optimising the solution. It is also clear that, although there is a shared interest in developing mutual confidence, that trust would have been damaged and the resulting progress in narrowing the issues would have been prejudiced by disclosure of the information provided by the owners and against their express wishes which would have resulted in a significant increase in campaigning and greater pressure on both the owners and Council officers, as well as a feeling of grievance against the Council by the owners for this new increment of pressure on them.

31. While there is clear evidence of economic harm caused to the business, teasing out the contributions of the landslide (with consequent reduction in the number of pitches) and the campaigning about the landslide as the causes of that harm presents some challenges. However it is clearly foreseeable that further disclosure would have resulted in more adverse publicity from SEG and some economic harm would flow from that.
32. The tribunal considered that the argument that the request for information itself was manifestly unreasonable had significant problems. There have clearly been some unlawful actions by persons associating themselves with the campaign, who were not always ready to comply with the urging of campaign leaders to take a responsible approach. They have included harassment of the Guilliards and of owners of caravans on the site, unreasonable and abusive comments to Council staff and a substantial burden on the Council from requests for information. Any popular campaign is likely to attract a fringe of irrational and intemperate individuals who appear incapable of adhering to the norms of civilised conduct. However, the association between the conduct of those individuals and Mr Heritage's request for information is not, on the evidence before the tribunal, a close one. There is a shared concern on a legitimate matter of public interest; but no evidence of a co-ordination. There was no evidence of unreasonable conduct by Mr Heritage. It is important not to allow the abusive fringe to undermine the rights of citizens in a free society to seek information and participate in the public debate by tarring proper conduct with the actions of an irrational few. This ground of appeal was not made out.
33. There can be a difficult dividing line between legitimate environmental concerns, which will have the greatest chance of being expressed responsibly and heard if based on sound information, and the development of less responsible pressures and intrusive actions around a core of legitimate concern. Because of the late withdrawal of Mr Heritage from this case and our decision that as he had withdrawn he could not be represented, we did not hear from the leaders of SEG in defence of their position. We reach no conclusion on whether or not their information requests have been manifestly unreasonable,

the issue is not before us. The concerns about the loss of access to much-loved amenity land are understood and will be mirrored in many areas of coastal erosion. The desire to get to the bottom of the question whether actions on private land contributed to that loss are also understood, as is the need for confidence in the exercise of the Council's regulatory powers, which confidence is undoubtedly best served by participation on the basis of a shared information base. Against those considerations we have to weigh the ongoing nature of negotiations between the Council and the site owners about the best way forward on-site licensing at the time of the request. These have continued and fall, if unresolved, to be considered by another Tribunal. On this basis we accept the argument that the owners could not have been compelled to produce the disputed information (although it may have been a constructive step towards a negotiated outcome) and that it relates clearly enough to legitimate confidential commercial interests of the site owners and perhaps also their insurers. Commercial interests will not necessarily be overriding if it comes to an imposed as opposed to a negotiated solution on site-licencing matters. At the time of the request it is clear that a negotiated solution was being attempted, and that disclosure of information provided by the owners against their wishes would not have been helpful. The public interest in the disclosure is small, the harm likely to be substantial. The tribunal is satisfied that exceptions 12(5)(e) and (f) are made out and the harm arising from them outweighs the benefits of disclosure. On the evidence Mr Heritage's request was not manifestly unreasonable. It is not necessary to consider the other exemptions claimed.

34. For the reasons stated the tribunal is satisfied that the ICO's decision notice is wrong in law and the appeal is allowed.

Signed Judge C Hughes

Judge of the First-tier Tribunal

Date: March 26, 2018

Promulgated: March 26, 2018