



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

Appeal Reference: EA/2017/0218

Heard on 3 December 2018

Before

JUDGE HAZEL OLIVER

MR ROGER CREEDON

MR GARETH JONES

Between

MR IAN DRIVER

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THANET DISTRICT COUNCIL

Second Respondent

Appearances:

The Appellant – In person

The Information Commissioner did not attend

The Second Respondent – Ms Jane Lambert, counsel

DECISION

The appeal is allowed. The Decision Notice dated 7 August 2017 is set aside and substituted by the following notice:

The Council did not act correctly in withholding the residual requested information under section 41(1) because this is not information obtained from another person within the meaning of that section. The Council is to disclose the following information requested by the appellant within 35 days: the names of the five parties paid the sums in compensation listed in the Council's email to the appellant dated 3 August 2017.

REASONS

Background to Appeal

1. This appeal concerns information sought under the Freedom of Information Act 2000 (“FOIA”) on settlements concluded between Thanet District Council (“TDC”) and businesses involved in the export of live animals from the port of Ramsgate (“Ramsgate”).

2. On 12 September 2012 there was an incident at Ramsgate involving a particular exporter which resulted in the death of more than 40 sheep. The exporter was prosecuted, resulting in fines and a suspended sentence. TDC imposed a ban on the export of live animals from Ramsgate from 13 September 2012. This ban was restrained by an interim injunction on 16 October, and a number of exporters brought proceedings for damages against TDC for losses caused by the ban. In *Barco de Vapor & Ors v Thanet District Council* [2014] EWHC 490, the High Court held that the ban had been unlawful and that TDC was liable in damages. TDC settled its liability to the two named parties in this case by way of a consent order. Their identities are in the public domain. TDC subsequently entered into settlement agreements with five other exporters. These five settlement agreements contain the information in issue in this appeal.

3. On 8 April 2016, the Appellant made a request to TDC for information about damages payments and legal fees related to the export of live farm animals from Ramsgate. The first request was:

“For the financial year 2013-14 how much money was spent by Thanet Council in damages payments to the live animal exporters and legal fees. Could you break down the damages payments by recipient name which may be a company or an individual. Could you identify separately money spent by Thanet Council on its own legal fees and money spent by Thanet Council to cover the legal costs of the live animals exporters.”

Substantially the same requests were made for the years 2014-15, 2015-16 and 2016-17, together with two additional questions which are not the subject of this appeal.

4. TDC responded on 10 May 2016. They provided a table showing the total legal costs and compensation settlement payments broken down by year. They withheld information on individual damages, legal fees payments and recipient names in reliance on s41 FOIA, stating that the information was provided in confidence.

5. The appellant requested an internal review on 18 May 2016, saying that he did not believe section 41 applied. TDC provided the outcome on 10 June 2016, and simply stated that the decision was upheld for the reasons set out in their original response.

6. The Appellant complained to the Information Commissioner (the “Commissioner”) on 14 June 2016. During the process of the Commissioner’s investigation, TDC did disclose to the appellant the individual payments made to five parties who reached out of court settlements. They maintained that the identities of those parties could be withheld under section 41. TDC initially also relied on section 43(2) (prejudice to commercial interests) and 38(1) (health and safety), but withdrew reliance on these exemptions during the process. After various

correspondence with the appellant, and attempts to resolve the matter informally, the Commissioner issued Decision Notice FS50640981 on 7 August 2017.

7. The Commissioner did not uphold the complaint. The Commissioner decided that TDC was correct to rely on section 41 FOIA to withhold the information about the identities of the five parties. The Commissioner found that the withheld information was provided to TDC by third parties, because they submitted claims for compensation following the relevant High Court Judgment. The withheld information was not in the public domain, and was not trivial in nature – although it could be assumed that some of the witnesses in the High Court case were affected parties, the actual identities of those who were compensated remained unknown publicly. The Commissioner accepted that an obligation of confidence was implicit from the circumstances, as out of court settlements are widely acknowledged and recognised as private matters. In relation to detriment, the Commissioner was satisfied based on information provided by TDC that disclosure would be highly likely to make the identified claimants targets for non-peaceful and obstructive protest activity, and so adversely affect their commercial operations.

8. In relation to the public interest, the Commissioner accepted that there was a strong and significant public interest in information that would help inform and educate the public about the exporting of live animals. In addition, where a public authority has been found to have acted unlawfully and been required to pay considerable compensation, there is an important and compelling public interest in showing how and why the situation had arisen and who was responsible. However, the Commissioner found that the withheld information would not serve or advance these interests. Disclosure would create a real risk that third parties would be dissuaded from engaging with TDC in settlements of this type in the future, which would not be in the public interest, and would be highly likely to have detrimental consequences for the five parties involved.

The Appeal

9. The Appellant appealed to this Tribunal on 18 August 2017. His grounds for appeal can be summarised as follows:

- a. Relevant information is already in the public domain, both through witnesses identified in the High Court case and reports by campaigning organisations.
- b. The information does not have the necessary quality of confidence as it can be deduced from relevant information in the public domain.
- c. TDC and the Commissioner have failed to evaluate the likelihood of a breach of confidence action by the claimants who settled out of court.
- d. TDC did not properly evaluate the risk of detriment or harm, the claims they put forward are not substantiated (and in some cases untrue), and the Commissioner has accepted these claims without testing their veracity or referring to its own guidance. The test of prejudice as set out in *Hogan v Information Commissioner* should be applied.
- e. There is significant public interest in the disclosure of the identities of the five parties and how much each has been paid – in order to ensure correct tax is paid, and in

light of events being likely to have caused a situation where a person convicted of causing animal suffering has apparently been compensated/rewarded for causing this cruelty.

10. The Commissioner resists the appeal, and maintains her original position.

- a. In relation to information being in the public domain, the Commissioner observes that there is a difference between assumptions and confirmation by TDC, and the information sought would link identities with specific sums received, which is not in the public domain.
- b. In relation to the risk of harm, the Commissioner says that the correct test for harm from disclosure is the balance of probabilities, and strictly the test of prejudice in *Hogan* does not apply. The Commissioner submits that the appellant has put forward a sanitised picture of protests at Ramsgate, evidence suggests that these are not always peaceful and lawful, and disclosure of who had received payments would fuel anger against the recipients and so lead to renewed and intensified focus of protest against them.
- c. In relation to public interest, the Commissioner refers to commercial harm to the parties who received the payments. The Commissioner also invites the Tribunal to give significant weight to the public interest in enabling parties to settle disputes out of court. There is no evidence that the parties may not pay the correct amount of tax, and it is a mischaracterisation to suggest that the payments are compensation or a reward for the incident at Ramsgate.

11. TDC was joined as a party to these proceedings and also resists the appeal. TDC adopts and endorses the Commissioner's response.

- a. In relation to information being in the public domain, the crucial information of the payment which each party received cannot be pieced together from information in the public domain. Keeping this secret is very important as exporters have been the focus of violent demonstrations in the past, and they could be exposed to targeting by objectors to the trade in live animals.
- b. In relation to breach of confidence, TDC maintains that the information does have the necessary quality of confidence, and TDC has concluded that an action for breach of confidence would be brought and would probably succeed if it disclosed the withheld information. Ample evidence of detriment was produced to the High Court in the *Barco de Vapor* case.
- c. In relation to the public interest, TDC submits that the Revenue does not need to rely on FOIA to obtain information from taxpayers, the interest of the public in political debate on live animal exports is not the same as the public interest, and it is in the public interest for public order to be maintained and commerce not disrupted. Knowledge of the identity of the recipients of the payments will do nothing to inform the public debate. The misrepresentation of the settlements as compensation or a reward for cruelty to animals is also a compelling reason for withholding the information.

The Hearing

12. We had a hearing on 3 December 2018. The appellant attended and represented himself. TDC attended and was represented at this hearing. The Commissioner did not attend, having given the Tribunal prior notification of this.

13. The issues were discussed at the start of the hearing and agreed as:

- a. Is section 41 engaged in circumstances where the withheld information is contained in a settlement agreement?
- b. Does the information have the necessary quality of confidence about it?
- c. Has the information been imparted in circumstances conferring an obligation of confidence?
- d. Would disclosure of the withheld information be an unauthorised use of that information to the detriment of the person who originally communicated it?
- e. Does the public interest in disclosure outweighs the public interest in upholding the duty of confidence, such as to provide a defence to a breach of confidence action?

Preliminary issue on exemptions

14. The Tribunal dealt with a preliminary issue about whether TDC should be permitted to rely on two additional exemptions – section 42 (legal professional privilege) and section 43 (commercial interests). These had been raised for the first time in TDC's skeleton argument dated 16 November 2018.

15. TDC submitted that these were argued as a fall-back position, in response to a point raised by the appellant in his reply in which he argued that section 41 did not apply to an out of court settlement (referencing the First-Tier Tribunal decision in ***Derry City Council v Information Commissioner*** EA/2006/0014). This argument was not in the appellant's grounds of appeal and was only raised in his reply. It would be unfair to TDC to prevent it from arguing these alternative exemptions in response to this new point. In ***Derry***, the Tribunal had referred to the possibility of reliance on other exemptions when information about a contract was being sought, including section 43 (see paragraph 32(f)). If TDC was not permitted to rely on these additional exemptions, the appellant should not be permitted to put forward this new argument about section 41.

16. The appellant submitted that TDC had previously clearly said that it was not relying on section 43, or any other exemptions apart from section 41. In an email to the Commissioner dated 11 May 2017, TDC's Information, Governance and Equality Manager confirmed that TDC no longer wished to rely on sections 38(1)(b) and 43(2), "and will now instead be relying on the exemption at section 41(1) exclusively". The new exemptions were only raised in TDC's skeleton argument some 6 days before the hearing. The appellant had based his submissions and case preparation on section 41 only. It would be unfair and unjust to allow TDC to rely on new exemptions at this late stage, in circumstances where he is representing himself, and his duties as a sole carer gives him limited time for preparation.

17. The Tribunal decided that it would not exercise its discretion to allow TDC to rely on new exemptions which were not set out in its response to the appellant's appeal.

18. We took into account the overriding objective, including the balance of fairness between the parties, and ensuring that the parties are able to participate fully in the proceedings. We also took into account the guidance from the Court of Appeal in ***Birkett v The Department for the Environment, Food and Rural Affairs*** [2011] EWCA Civ 1606, which considered reliance on new exemptions by a public authority. This case decided that a public authority is not limited to exemptions relied on in its initial response to a request for information, and new exemptions should be permitted at the stage of responding to an appeal. However, introduction of new exemptions at any later stage is a matter for the discretion of the tribunal – “*any application by the public authority to rely upon a new exception made after the time limit for its grounds of appeal/response would be subject to the Tribunal's case management powers under rule 5; see also rules 22(4) and 23(5) which deal with the submission of notices of appeal and responses out of time.*” (paragraph 28). (Although this case concerned the Environmental Information Regulations, the principles are equally applicable to FOIA).

19. We note that the issue about section 41 not applying to out of court settlements was first raised in these proceedings by the appellant in his reply, dated 25 February 2018 (wrongly dated 2017). It was also referenced in his request for an internal review in May 2016 (see paragraph number 3). TDC was clearly on notice of this argument at the point when it received the appellant's reply (more than 9 months before this hearing), but only raised the issue of new exemptions on 16 November. No explanation was provided for this delay, save that TDC's representative had only just become aware of this point. This was at an extremely late stage in the proceedings, when the appellant had already prepared and exchanged his skeleton argument. TDC had relied on section 41 only during the remainder of these proceedings and was professionally represented throughout. TDC was aware of the availability of other exemptions, but had expressly confirmed in May 2017 that only section 41 was being relied on. We have taken into account the appellant's circumstances as a non-lawyer representing himself, as well as his personal home circumstances.

20. We find that it would be unfair and unjust to the appellant to allow TDC to rely on these new exemptions at the hearing, and it would prevent the appellant from being able to participate fully in the proceedings. No good reason was put forward by TDC for failure to raise these exemptions at an earlier stage (as required by Rule 23(5) on extensions of time for submitting a response). Although this deprives TDC of potential arguments, we find it would be more unfair to the appellant to allow these arguments to be put forward at this very late stage in the proceedings.

21. We therefore proceeded with the hearing on the basis of the section 41 exemption only.

Evidence and submissions

22. We had an agreed bundle of open documents. We also had a small closed bundle consisting of some unredacted versions of emails contained in the open bundle, which included the names of the seven compensated parties and the amounts received by each of them.

23. On behalf of the appellant we had witness statements from Mr Ian Birchall (Chairman of Kent Action Against Live Exports), and Mr Reginald Bell (member of the same protest group and also member of Thanet Against Live Exports). Mr Birchall and Mr Bell gave evidence about the nature and extent of the protests against live animal exports at Ramsgate, and their

reasons for wanting the withheld information. The appellant was also questioned about these issues.

24. On behalf of TDC we had witness statements from Mr Robert Brown (Harbour Master of the Port of Ramsgate), and Mr Tim Howes (Director of Corporate Governance at TDC). Mr Brown gave evidence about demonstrations against the export of live animals at Ramsgate, including a number of specific incidents. Mr Howes gave evidence about the process of reaching out of court settlements with exporters for losses due to TDC's ban on live animal exports in 2012.

25. In addition to the written submissions in the open bundles of documents, we heard submissions from the appellant and from Ms Lambert on behalf of TDC.

26. We have taken all of the relevant evidence and submissions into account in making our decision.

Applicable law

27. The relevant provisions of FOIA are as follows.

1 **General right of access to information held by public authorities.**

- (1) *Any person making a request for information to a public authority is entitled—*
- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*

.....

2 **Effect of the exemptions in Part II.**

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- (2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
- (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

.....

41 **Information provided in confidence**

- (1) *Information is exempt information if:*
- (a) *it was obtained by the public authority from any other person (including another public authority), and*
 - (b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

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43 **Commercial interests**

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- (2) *Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*

.....

58 Determination of appeals.

- (1) *If on an appeal under section 57 the Tribunal considers—*
- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
 - (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

28. In relation to the section 41 exemption (information provided in confidence), the basic requirements for establishing a breach of confidence are as set out in ***Coco v A N Clark (Engineers) Ltd*** [1969] RPC 41:

- a. The information must have the necessary quality of confidence about it. The Commissioner's guidance on section 41 states that, in order to have the necessary quality of confidence, information must be more than trivial and not otherwise accessible in the public domain.
- b. The information must have been imparted in circumstances conferring an obligation of confidence. This can be explicit, or can be implied from the circumstances in which the information is imparted.
- c. There must be an unauthorised use of that information to the detriment of the person communicating it. Separate detriment may not be necessary where the confidential information is personal in nature. But, in a case where the information is commercial in nature, it is necessary to show that there would be detriment to the person who communicated the information.

29. Section 41 requires the information to have been obtained by the public authority from another person. This Tribunal has previously held that a contract between a public authority and a third person does not constitute information "obtained" from another person for these purposes, unless the contract or document recorded more than just the mutual obligations of the contracting parties. The exemption is not designed to cover information that the public authority has generated itself (***Derry City Council v Information Commissioner***, EA/2006/0014, 11 December 2006).

30. Section 41 is an absolute exemption. However, the public interest must still be taken into account in determining whether disclosure would constitute an actionable breach of confidence. The public interest may constitute a defence to an action at common law for breach of confidence. There is an assumption that the information should be withheld unless the public interest in disclosure outweighs the public interest in upholding the duty of confidence.

Discussion and conclusions

31. **Is section 41 engaged in circumstances where the withheld information is contained in a settlement agreement?** This is the first issue to be considered. If section 41 is not engaged, that will determine the outcome of this case. This turns on whether the withheld information was “**obtained by the public authority from any other person**”.

32. The Information Commissioner was satisfied that the withheld information was provided to TDC by third parties, on the basis that the identities of the five claimants were held because they submitted claims for compensation following the High Court judgment. TDC would not otherwise hold the information (paragraph 20 of the Decision Notice).

33. The appellant submits that the settlement agreements with the five exporters are contracts between them and TDC. This means that the information contained in those agreements is not information obtained by TDC from another person. He submits that settlement agreements are simply a form of contract. He refers the Tribunal to the previous decision in *Derry*, which states that “*a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of [FOIA]*”. He also refers the Tribunal to the First-Tier Tribunal decision in *Department of Health v Information Commissioner EA/2008/0018*, which notes that if a contract involves both parties simultaneously stating “these are the terms on which we are prepared to enter into a contract with you”, the terms are mutually agreed and therefore not obtained by either party.

34. The appellant also drew the Tribunal’s attention to paragraphs 17 and 18 of the Commissioner’s guidance on information provided in confidence, which states, “*The contents of a contract between a public authority and a third party generally won’t be information obtained by an authority from another person. This is because the terms of the contract will have been mutually agreed by the respective parties, rather than provided by one party to another*”. Paragraph 60 of the Commissioner’s guidance on outsourcing and freedom of information also states that clauses in a contract would not normally fall within the exemption “*because the information in them has been produced jointly, rather than provided to the public authority*”.

35. We heard some evidence from Mr Howes about the process of concluding the settlement agreements with the exporters. The negotiations were without prejudice, for the purpose of resolving legal proceedings. The key issue was quantum. TDC obtained evidence from the exporters in support of their claims, including details of their accounts, invoices and other paperwork to back up their projections of financial loss. There were also some witness statements and expert reports. This was done to make sure the claims were correct and legitimate.

36. TDC did not dispute at the hearing that settlements agreements are a form of contract. TDC submits that this situation is different from that in *Derry*, as the withheld information was provided by parties who are not before the court and is commercially sensitive. Mr Howes’ evidence was that the agreements were based on evidence provided by these third parties. This is why the Commissioner was satisfied that the information was provided by a third party – the exporters’ identities are held because they submitted claims for compensation. The result of the negotiations may have been generated by both parties, but this was based on commercially sensitive information about market share which could be used by competitors. A combination of the names of the exporters and the amounts paid under these agreements

would reveal market share during the relevant window of five weeks, and this type of indication of the amount of business conducted by each exporter is commercially sensitive.

37. We agree that settlement agreements are a type of contract, containing mutual obligations by both parties which are enforceable in the courts under contract law. We are not bound by either of the First-Tier Tribunal decisions referred to or by the Commissioner's guidance, but we can take these into account in making our decision. We also agree that, in principle, a contract would not normally contain information "obtained" by a public authority from another person. As described in **Derry**, a contract contains the mutual obligations of the contracting parties. A contract contains the result of negotiations, not a set of information provided by one party to another.

38. The withheld information in this case is the names of the five exporters, which becomes more significant if matched up with the information on individual settlement sums which has already been disclosed. We do not agree with the Commissioner that these names are in themselves information obtained by TDC from another person. Each exporter may have originally contacted TDC to make a claim for compensation, and in doing so disclosed their names. However, the names of the contracting parties are an essential part of the mutually agreed terms in each settlement agreement. It would be an artificial distinction to distinguish the names of the parties from all other contractual terms.

39. We have considered TDC's argument that the agreements are based on commercially sensitive information about how the five exporters' claims for compensation have been calculated. The withheld information is the names, not the sums paid. We do accept that the effect of revealing the names associated with each sum would show how much each exporter had negotiated by way of a payment. However, we are mindful that this was a negotiation – the amount paid would not necessarily equate to the amount originally claimed. The negotiations may have been based on specific information provided by each exporter, such as accounts and invoices, but this specific information is not contained in either the withheld information or the settlement agreements as a whole. This is not a case such as that referred to in **Derry** (paragraph 32(e)), where the contract itself contains technical information which may have been provided in confidence.

40. For the above reasons, we therefore find that the withheld information was not obtained by TDC from another person. This means that the exemption in section 41 is not engaged. As TDC has not been permitted to rely on any other exemptions, the appeal is upheld and the withheld information is to be disclosed in accordance with the substitute Decision Notice set out at the start of this decision.

Signed Hazel Oliver

Judge of the First-tier Tribunal

Date: 21 December 2018

Promulgated Date: 27 December 2018