



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice IC-46263-B6B5**

Appeal Reference: EA/2020/0294

**Considered on the papers
On 20 May 2021**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

ROGER CREEDON & NAOMI MATTHEWS

Between

IAN SAMUEL ROXBURGH

Appellant

and

INFORMATION COMMISSIONER

First Respondent

NATURAL ENGLAND

Second Respondent

Cases

**Hope and Glory Public House Ltd, R v City of Westminster Magistrates Court &
Ors [2011] EWCA Civ 31**

DECISION

The appeal is dismissed

REASONS

1. Dr Roxburgh has been concerned about how proposals to re-route part of the Southwest Coast Path were being made. On 19 July 2019 he wrote to Natural England (the authority charged with developing long- distance paths) seeking information:-

“Freedom Of Information Act 2000, Request For All Information Relating To All Dealings Of Natural England With Plymouth City Council As Access and Planning Authority, The HCA [Homes and Communities Agency], And Linden Homes South West Regarding The Proposed Indicative Route Of The Coastal Path At East Quay and Millbay Marina Village

Further to your letter ... of 18 July ... I am seeking a schedule and notes of all of the meetings, events and correspondence leading up to the publishing of the indicative route proposals for East Quay and Millbay Marina Village. I am hereby formally requesting all of this information under The Freedom of Information Act 2000. More specifically I am requesting:-

- 1. A schedule of all meetings held with Plymouth City Council as The Access and/or Planning Authority regarding the indicative route of the proposed path at east Quay and Millbay Marina Village, together with a list of all participants and copies of the notes of each meeting.*
- 2. A schedule of all meetings held with The HCA and Muse Developments acting at Quadrant Quay, Quadrant Wharf and all other land sited in the regeneration area located to the north of Millbay Marina Village, together with a list of all participants and copies of the notes of each meeting.*
- 3. A schedule of all meetings held with Linden Homes South West regarding the proposed path at Millbay Marina Village, together with a list of all participants and copies of the notes of each meeting.*
- 4. Copies of all correspondence from whoever relating to the proposed indicative route at east Quay and Millbay Marina Village.*
- 5. Copies of the notes of all internal Natural England Meetings regarding the proposed indicative route at East Quay and Millbay Marina Village.*

I understand that The Act allows twenty working days to reply. Given, however, that your letter of the 18th of July only allows us until the 15th of August to formally respond I would be grateful if you could reply in a much shorter time.

2. Natural England replied under the relevant information access regime the Environmental Information Regulations (EIR).

- For requests 1-3 it gave dates of meetings, names of participants and confirmed that no meeting notes were kept.
 - For request 4 it provided copy of the letter sent to all identified landowners and tenants within the proposed trail and coastal margin. Other correspondence held in scope of this question was been withheld under exceptions to disclosure in the Environmental Information Regulations:
Regulation 12(5)(d) – Confidentiality of Proceedings and
Regulation 12(5)(f) – Protecting the interests of the person providing the information.
 - For request 5 it sent a powerpoint presentation with redactions made on the basis that the material was not within scope of the request or exempt from disclosure under Regulation 12(5)(d) – Confidentiality of Proceedings
3. Dr Roxburgh sought an internal review of Natural England’s response. On review Natural England maintained its position
 4. On 9 October Dr Roxburgh complained to the Information Commissioner. He disagreed with the redactions made on the basis of confidentiality or the protection of those supplying the information. He criticised the way Natural England had carried out the consultation:-

In its consultation letter of the 18th of July 2019 Natural England provides no reasoning for proposing to move the Coast path from its existing alignment. It simply asserts that it has discussed the matter with Plymouth City Council as The Access Authority.

He went on to argue that it had failed to follow the statutory process for making such a decision. Following correspondence with the Information Commissioner in which a case worker summarised the issues by a letter of 17 June 2020 he wrote:-

Thank you for your comprehensive update which is especially appreciated given the difficulties your Office is facing.

You have fairly summarised our submission. We would simply re-emphasise that it is beyond belief that a Government body does not keep a record/notes of its discussions and meetings with other public bodies; and if it generally does not against all models of best practice, then it should at the very least be totally open about the limited records it does hold.

This is a situation where Natural England and Plymouth City Council as Access Authority are seeking to take a private asset and make it available to the public more widely without compensation. Natural England in doing this is bound to act in accordance with an Approved Scheme signed off by their SoS. There are no State or other personal secrets at issue here and nothing related to any commercial interests.

We can not understand how regulations can be applied to allow Natural England and Plymouth City Council to avoid having to act openly and transparently.

Without knowing the reasons why, and the conversations behind them, we as those most affected by the proposals have no way of responding or of knowing if Natural England has properly taken its Approved Scheme into account.

5. Following her investigation the Information Commissioner reviewed the arguments Dr Roxburgh put forward and the explanations provided by Natural England with respect to the meeting minutes and concluded that they were not held (DN paragraphs 24-34).
6. She explained the statutory process that Natural England followed in discharging its duty under section 296 of the Marine and Coastal Access Act 2009. It had a statutory duty to secure a route around the entire coast of England for access on foot, the 'Coastal Access Duty'. It consulted, published proposals, submitted them and the criticisms of the proposals to the Secretary of State who appointed a Planning Inspector to consider the issues.
7. She was satisfied that the information was confidential:-

47. Consideration of whether the information provided by the third parties has the necessary quality of confidence itself involves two elements. Firstly, the information must be more than trivial, and second, the information must not be publicly available or otherwise accessible. The Commissioner is satisfied that the first element is satisfied; the issue to which the information relates (the proposed route of the English Coast Path) raises potentially sensitive issues around public access over private land and is not a trivial matter. Having viewed the information the Commissioner is also satisfied that there are no grounds for thinking that the information is already in the public domain. The Commissioner is therefore satisfied that the information obtained or created through Natural England's consultation with the third parties has the necessary quality of confidence.

48. The Commissioner has gone on to consider whether the information was provided in circumstances that would give rise to an expectation that it would be treated in confidence. Natural England explained that it invited representations from parties directly affected by the proposed route. They were encouraged to be open and honest with their views about the proposed route, and to suggest alternatives. The Commissioner considers that, being directly affected by the proposed route, the third parties would have been alert to the potential sensitivity of local access issues. An expectation of confidentiality would arise partly because in matters such as land use, planning, or access, there is always the potential for one consultee's view to conflict with that of other interested parties.

8. She concluded that the information gathered at the early stage of the process was in circumstances where the individuals would expect their views to be treated in confidence noting:- *The Commissioner considers that, due to nature of*

these issues, disclosing the information could attract the attention of those who hold different views and this could result in the third parties being contacted or lobbied. She concluded that the initial consultation stage of the proceedings are protected by a duty of confidence provided by common law. She concluded that disclosure would harm confidentiality and make it harder for Natural England to gather information in similar cases in future. In considering the public interest she considered the importance of natural England being able to have discussions in good faith on a confidential basis, while recognising the potential value of the disclosure of information to those wishing to contribute to the process she concluded that the public interest in upholding the exemption 12(5)(d) outweighed the interest in disclosure (DN paragraphs 35-63)

9. In considering whether 12(5)(f) was engaged she considered the statutory test and concluded that the sources of information would be adversely affected by disclosure, they had not consented to it, they could not be required to provide the information and natural England had no right or duty to disclose it except under EIR. In considering the consequences of disclosure she placed substantial weight on the ability of natural England to maintain trust with individuals who could choose to provide information confidentially and the harm it would cause if this ability was lost. She concluded that the balance lay in non-disclosure.
10. The Information Commissioner upheld the decision of Natural England not to disclose the information.
11. Dr Roxburgh appealed arguing:-

“At its heart the Information Commissioner’s decision is arguing that if a persons corporate or individual felt that there comments to Natural England were to be made available to a wider audience then they would be reluctant to comment and that this would damage the process. This is clearly nonsense. Anyone wishing to comment on land use whether in relation to the creation of a Local Plan or a specific planning application does so knowing that to be accepted their comments must be available for publication. The taking of a private asset as In this case to satisfy a wider public interest as Natural England may judge it is an entirely comparable land use matter, and in many ways is more demanding than the development of a Local Plan or the determination of a planning application as it imposes a use as opposed to an owner applying for a use. There is no evidence that the obligation to make comments on planning matters public stops individuals and bodies from bringing their views forward. As a matter of Natural Justice it is clear that any consultations on land use brought forward by Natural England should be subject to the same level of openness and transparency. As such the decision of the Information Commissioner should be set aside.”

12. In resisting the appeal the Information Commissioner relied on her decision notice, indicating that in her view the appeal had not raised any arguments which had not been considered in her decision notice.

13. In its response Natural England supported the Information Commissioner's position and set out an analysis of the public interest. It emphasised that any premature disclosure could make an already complex process more complex and protracted, without the safe space Natural England would get less and lower quality information, it was not in the public interest to have confidential information disclosed and there was a need for Natural England to be able to have free and frank discussions concerning the coastal path with those who are affected – both in relation to the local area in question and in other areas where the coastal path has yet to be completed. It set out the reason for the existence of one of the exemptions and commented on the merits of one of Dr Roxburgh's arguments:-

18 In relation to reg.12(5)(f) specifically, the Aarhus Implementation Guide makes it clear that the essential purpose of the exemption is to encourage the voluntary flow of environmental information from third parties to public authorities. When considering this in the context of public interest, this means that if public authorities are routinely required to disclose environmental information that has been provided to them both voluntarily and in confidence, there is a public interest risk that third parties would be less willing and prepared to provide such information. The impact of disclosure therefore would not only have an adverse impact on those that have supplied the information, but also Natural England itself.

19 In his grounds of appeal, the Appellant argues that "it is clearly nonsense" that individuals would be dissuaded from giving their views if these views were made public. With respect, this argument is misconceived. Most (if not all) consultation exercises undertaken by public bodies allow for confidential responses to be provided to allow for full and frank views to be provided. Whilst some responders may be comfortable with their views becoming public knowledge, this is not always the case and there is a clear public interest in creating a safe space for those who wish to keep their views private.

14. In further submissions Dr Roxburgh argued by analogy that in planning matters there was greater openness, that in the consultation letter he had received from Natural England there was no mention of confidentiality. He made a number of arguments as to the disadvantages flowing from the change of route (which he claimed were supported by the RNLI who had a lifeboat station which would be prejudiced in its operation by the change) he argued that the public interest favoured disclosure.

Consideration

15. The Environmental Information Regulations provide for exemptions to the duty to disclose environmental information:-

Exceptions to the duty to disclose environmental information

12. – (1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –*

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(a) it does not hold that information when an applicant's request is received;

.....

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

...

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

...

(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;

16. In his later submissions Dr Roxburgh suggests that it is “*inconceivable that natural England does not hold notes/records of its meetings*”. That is not explicitly raised in his grounds of appeal. The IC during her investigation explored the issue and set out in her decision notice her reasoning (DN paragraphs 18-35). She set out her fully reasoned conclusions:-

31. *Natural England has provided a detailed explanation of the steps it has taken to check whether it holds any relevant information. The Commissioner is satisfied that the steps would be capable of locating any relevant information, if it was held. She is also satisfied that Natural England has specific reasons for believing no note was taken by it (the officers who attended the meetings have been consulted and confirmed they hold no notes, and the purpose of the meetings themselves was not to make decisions about the coastal path).*

32. *On the question of whether Natural England should have taken a note of the meetings, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or on the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information is held by the public authority. On that point, the Information Tribunal in the case of Johnson / MoJ (EA2006/0085)¹ has commented that the FOIA:*

"... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

17. The tribunal considers that this is a proper approach and her findings entirely consistent with the evidence before the tribunal.

18. Although Dr Roxburgh has indicated that he and the local RNLI coxswain have shared their opinions and he sees no reason why others should not and has also pointed to a lack of any explicit promise of confidentiality in the letter from Natural England inviting responses from local residents and organisations the tribunal is satisfied that in responding to that request individuals had an expectation of confidentiality and they have not consented to any disclosure. The tribunal is satisfied that both exceptions are engaged. Although Dr Roxburgh in his submissions has continued to express scepticism that consultees will not respond fully and argues that in a planning issue he would have greater rights to information and by analogy that should apply here; the tribunal is unconvinced that there is any significant public interest in disclosure of the information. The IC correctly pointed out (DN paragraph 61):-

"61. The complainant has indicated to the Commissioner that disclosure is in the public interest because he feels he was misled as regards the intended route of the path; by withdrawing his objection to the Draft Local Plan he was consequently not entitled to make representations to the planning committee about it. On that point, the Commissioner notes that this particular concern relates to his interactions with Plymouth City Council, and not Natural England, which was the recipient of the request for information in this case. The Commissioner also notes that the complainant may participate in the eight week public consultation process provided for under the Marine and Coastal Access Act 2009, described above. The Commissioner considers that this process provides ample opportunity for those affected to contribute to decision making whilst allowing Natural England the time to produce robust and fully informed coastal access reports."

19. The tribunal is also satisfied that in a case such as this many individuals are highly likely to wish to convey their views to the public authority but will be equally reluctant to share them with their neighbours. The Aarhus Implementation Guide's analysis is clearly correct.

20. The Court of Appeal in *Hope and Glory* indicated that in an appeal against the decision of a regulator the burden lies with the Appellant to show that the regulator was wrong and some weight (depending on the quality of the reasoning and the evidence) should be given to the conclusions of the regulator. In this case the Information Commissioner has provided a careful and complete decision notice which fully supports her conclusion and Dr Roxburgh has not advanced any grounds of substance to cause the tribunal to have any doubt as to the correctness of that decision.

21. The appeal is dismissed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 2 July 2021

Promulgated: 2 July 2021