

OMBUDSMAN'S FINDING ON COMPLAINT BY MARTY SHARPE (DOMINIONPOST) AGAINST HAWKE'S BAY REGIONAL COUNCIL UNDER THE LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987 (LGOIMA)

Background

On 4 September 2008 Mr Sharpe sought from the Council "details of the 3099 'Unverified Hail' sites in the region, i.e. their location and the activity/industry that are known to have the potential to cause land contamination".

On 1 October 2008 the Council refused to provide the information relying on sections 7(2)(b)(ii) and 7(2)(c)(i) of the LGOIMA. The Council stated:

- *The information on 'Unverified HAIL' sites in the Land use database is held on a site specific basis. Any information released should be fully defensible, comprising specific site investigation data and justifiable professional opinion. The 'Unverified HAIL' sites have only the potential to contaminate and have not been investigated; therefore the strategy adopted by Council specifically excludes general information release to the public except on a site specific basis.*
- *Given that the 'Unverified HAIL' data only has the potential to be contaminated, the release of this information could have significant adverse effects upon property values. Hence this information is regarded by Council as 'commercially sensitive' until a site is confirmed as contaminated.*
- *HBRC currently requires that a member of the public requesting information on a site should, in writing, supply the legal description of the site (Lot and DP number) and the site address. This allows potential purchasers, valuers, lawyers and those having a legitimate interest in a potentially contaminated site to access the information. As Council is in the process of updating information, changing categories, etc, it also enables Council staff to advise the person making the enquiries of any other information that may be of assistance.*
- *There is an ongoing process of getting further information and conducting investigations of these sites and there is the need to preserve a free flow of information during the investigation. Many site owners have given information on a confidential basis to facilitate the informal transfer through to investigation phase.*

Mr Sharpe complained to the Ombudsman about this refusal.

The Hazardous Activities and Industries List (HAIL)

The HAIL is a compilation of activities and industries that are known to have the potential to cause land contamination as a result of the use, storage or disposal of hazardous substances. (See *Contaminated Land Management Guidelines No 4*, Ministry for the Environment, August 2006.) The HAIL is a revision of a list of industrial activities first published in 1992 (The *Australian and New Zealand Guidelines for the Assessment and Management of Contaminated Sites*, ANZECC). The list is intended to help local authorities identify sites where contamination might have occurred. It is important to note that the fact that activities listed on the HAIL have been carried on at a site does not indicate that that site is in any way contaminated.

Regional councils have the function of investigating land for the purposes of identifying and monitoring contamination. In fulfilment of its obligations in this regard, in 1995 the Council employed a firm of consultants to compile a list of sites at which HAIL activities had potentially been carried on. More recently, a new database has been designed and the Council has begun the process of updating the 1995 site information. As the presence or absence of contamination on each site is established, the classification of that site will change. At the time of Mr Sharpe's request there were 3099 sites listed which were classified as "Unverified HAIL" – this is, the site has been reported as appearing on the HAIL but its relevant land-use history (and possible contaminated or uncontaminated status) had not been confirmed.

Unreasonable commercial prejudice

Section 7(2)(b)(ii) of the LGOIMA provides for the withholding of information "where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information".

For this section to apply, the information in issue must relate to the commercial position of the entity that is the subject of the information. It is a consistent theme of case law that it is the "commercial purpose" (that is, an intention to make a profit) of an activity that enables that activity to be properly described as a "commercial" activity. There is no doubt that persons not in the business of dealing in land are financially motivated to protect the value of their properties, but this is not the same as having a commercial position. Accordingly, unless the entity that owns the land in question is in the business of dealing in land, this section will not apply.

For those persons in the business of dealing in land (and whether any of the properties have owners in this category is not clear), I have given consideration to whether the revelation of their sites as being unverified HAIL "would be likely unreasonably to prejudice" their commercial positions. In the circumstances, I am not convinced that disclosure of this list would result in unreasonable harm to the commercial position of the owners.

First, the information in issue merely lists sites that in 1995 had been reported by the consultants as having had land uses associated with site contamination as per the ANZECC Guidelines.

Secondly, two district councils in the Hawke's Bay region are known to report unverified HAIL status on LIMs and PIMs and the information is available on a site-specific basis upon request from the Council. Other information sources about a possible HAIL association include historical searches of certificates of title, the HAIL itself, and historic aerial photographs.

Thirdly, advice I have received indicates that it is generally well known within the property fraternity which properties may well have contamination issues due to the nature of the activity/industry on the site.

Fourthly, because a prudent vendor/purchaser is likely to undertake investigations prior to any transaction being entered, the suitability of the site can be established prior to any sale.

Consequently, I do not consider that section 7(2)(b)(ii) applies to the information in issue.

Obligation of confidence

Section 7(2)(c)(i) provides for the withholding of information where that information “is subject to an obligation of confidence ..., where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied”.

The Council has stated:

There is an ongoing process of getting further information and conducting investigations of these sites and there is a need to preserve a free flow of information during the investigation process. Many site owners have given information on a confidential basis to facilitate the informal transfer through to the investigation phase.

I can appreciate that site owners may provide information in confidence to the Council regarding potentially contaminated land. However, the information in issue in this case was not supplied by the owners of the properties. Rather it was compiled by a consultant on behalf of the Council and was gained mainly through a telephone book survey of sites that fell within the land uses specified in the ANZECC Guidelines.

In addition, the fact that the Council will release the information in response to a site-specific request and that some LIMs are noted with it, undermines the argument that this information is held in confidence.

In these circumstances, I do not consider that section 7(2)(c)(i) has been established as a relevant withholding provision.

Privacy

Section 7(2)(a) allows the withholding of information where this is necessary to “protect the privacy of natural persons, including that of deceased natural persons”. This was not a ground for withholding the information relied on by the Council, it was a point raised by me in the course of considering Mr Sharpe’s complaint.

Clearly where the land is owned by a corporate entity, a privacy interest in the information in terms of section 7(2)(a) does not arise. In the case of natural persons, the first question for consideration is whether information that identifies land as being unverified HAIL is “personal information about an identifiable individual”. I had considerable doubt that this was the case.

Section 29A of the LGOIMA provides that where section 7(2)(a) is relied on as a withholding ground, the Ombudsmen must consult the Privacy Commissioner before forming a final view on the merits of a complaint. It is not clear that section 29A applied in this case since the Council itself did not rely on section 7(2)(a) to withhold the information from Mr Sharpe. Nevertheless, I decided to seek the Privacy Commissioner’s views on the refusal of information here.

The Privacy Commissioner was of the view that where the landowners are natural persons, the information on the list was personal information and there was a high privacy interest in it. On this basis I am prepared to proceed on the basis that section 7(2)(a) applies to some (how much is not clear) of the information in issue.

Public interest

But the fact that a withholding ground such as section 7(2)(a) may apply to some of the information in issue is not conclusive. Notwithstanding this, under section 7(1), the information may not be withheld if, “in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available”.

The Privacy Commissioner in her advice to me expressed the view that the public interest in release of the information could be satisfied by individuals being able to make site-specific requests - that is, to access information relating to properties that they either own or in which they are interested.

The Ministry for the Environment has pointed out that while the 1995 consultant's report is a useful screening tool, regional council surveys to verify HAIL status report a low accuracy using similar reports. For example, in the Waikato region about two-thirds of sites could not be verified.

At the time of Mr Sharpe's request, the Council had not updated the information or classified it in accordance with the Ministry for the Environment's 2006 classification and information management protocols or its 2008 draft “subcategories” document. Therefore, some of the 3099 sites to which access was sought were likely to have a verified HAIL status due to the nature of the past or present activity and the known hazardous substances associated with that activity, but they had not at the time been formally verified.

This tentative and evolving nature of the information could prove problematic if the status of the information was not able to be explained. But the release of a contextual statement in conjunction with the release of the information would avoid this. For this reason, I do not consider that these factors undermine the public interest in disclosure. Indeed, the fact that some of the sites are likely to have a verified HAIL status, strengthens the public interest argument for releasing the list.

Furthermore, the Ministry for the Environment in its guidelines and draft “subcategories” document recommended that all land-use information (including where the relevant land-use history had not been confirmed) be provided on LIMs/PIMs within property files and in response to specific information requests. I also understand that two of the region's district councils provide this information in response to specific information requests, though they do this as an exercise of discretion on the basis that there is no legal obligation to do so. This serves to confirm that at both central and local government levels a public interest is recognised to some extent in having this information made available to the public at large.

As already indicated, although the Privacy Commissioner accepted that there was a public interest in current and future owners of the properties being aware of the risk of potential land contamination, she considered that that interest could be satisfied by individuals being able to make site-specific requests. However, as has already been pointed out, only two of the region's district councils note land-use information on LIMs and PIMs. Therefore, not all owners and potential purchasers will have access to this information unless they also know to check with the regional council for information held on its land-use information database. Accordingly, I was not persuaded that the availability of information on a site-specific basis adequately addresses this issue.

Also, in my view, the public interest in disclosure is not limited to property owners or potential owners being able to obtain site-specific information of potential contamination. There is a wider public interest in the public being apprised of

information about sites where there may be a potential for contamination, so that they are in a position to assess for themselves whether there are any risks to the environment or their person. The recent discovery of contamination in a former landfill serves to illustrate what can occur.

I am aware that significant resources are needed to confirm the determination of contaminated sites from potential sites. The Council confirmed that its statutory function of investigating land “for the purposes of identifying and monitoring contaminated land” is hampered by the costs involved and limited resources. In these circumstances I was not satisfied that the public interest was met by allowing the process of verifying sites on an individual basis to run its course. There was no assurance that this would be worked through in a reasonably short time-frame. Release of the information may therefore assist the contaminated land identification programme by encouraging owners to investigate their land and, where they find contamination, to decontaminate it.

In these circumstances, I have formed the opinion that even if section 7(2)(a) applies to the information relating to land owned by individuals, the public interest in making the information available outweighs the withholding ground.

I have emphasised to the Council the importance of releasing the information in conjunction with a contextual statement, which provides:

- the definition of “Unverified HAIL”;
- the other categories used to describe information about land contamination held by the Council;
- a copy of the Hazardous Activities and Industries List; and
- information about the Council’s verification and investigation process.

David McGee
Ombudsman
August 2009