

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 19 November 2007

**Authority:** North Western & North Wales Fisheries Committee  
**Address:** Lancaster University  
Bailrigg  
Lancaster  
Lancashire  
LA1 4YY

### Summary

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1. The complainant requested from the authority "copies of the Committee's annual statements of importation into and harvesting from each mussel lay in the East Menai Fishery, and where the imports came from." The complainant further clarified that the information was required for each of the six fishery areas over the preceding ten year period. The authority refused the request by virtue of sections 41 and 43 of the Freedom of Information Act, stating that the disclosure of the information would "prejudice the commercial interests of the lease holders" and that the "information requested was supplied in confidence." The Commissioner sought copies of the withheld information, a sample of which was provided by the authority. The Commissioner's decision is that the exemption in section 41 is not engaged. He has also decided that section 43 is not engaged and that the information requested should therefore be released. The Commissioner finds that the authority has not complied with section 10(1) of the Act.

### The Commissioner's Role

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2. The Commissioner's duty is to decide whether a request for information made to an Authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

### The Request

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3. The complainant has advised that on 30 March 2005 the following information was requested from the authority in accordance with section 1 of the Act:

*“Copies of the returns showing imports and exports from each of the six fishery areas for the last ten years”*

4. The authority responded to the complainant on 20 May 2005. The authority provided copies of their annual returns for the East Menai Fishery as provided to the National Assembly of Wales for the years 2001 – 2004.
5. The complainant reverted to the authority on 1 June 2005 indicating that the documentation, previously disclosed, was not satisfactory for his purposes.
6. The authority responded with a formal Refusal Notice dated 8 June 2005. The Refusal Notice cited sections 41 and 43 of the Act as the appropriate exemptions stating that disclosure would prejudice the commercial interests of the lease holders and that the information had been provided to the authority in confidence.
7. The complainant wrote to the authority on 15 June 2005 appealing the Refusal Notice and requesting that the authority respond to the points raised.
8. The authority responded to the complainant on 26 August 2005 and indicated that following a review of its initial decision, it took the view that both sections 41 and 43 were appropriate in the circumstances and the information requested would not be disclosed.

## **The Investigation**

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### **Scope of the case**

9. On 10 November 2005 the complainant contacted the Commissioner to complain that the information requested had been wrongly withheld by the authority.
10. During the course of investigations the authority has made available to the Commissioner a sample of the documentation that has thus far been withheld.
11. Accordingly, the Commissioner has considered the authority's use of sections 41 and 43 to refuse to provide the information requested.
12. The Commissioner has also considered whether the authority has complied with its obligations under section 10(1) of the Act.

### **Chronology of the case**

13. The complainant made a complaint to the Commissioner on 10 November 2005. At this stage the authority had issued a Refusal Notice on 8 June 2005 in accordance with section 17 of the Act.
14. The Commissioner wrote to the authority on 19 June 2006 requesting further details in respect of the exemptions being relied upon. It was specifically

requested that the authority provide further details as to how it had applied sections 41 and 43 of the Act.

15. The authority responded to the Commissioner on 12 July 2006.
16. The authority reiterated its position in respect of section 41 and 43 of the Act and requested that the Commissioner applied such arguments to the information in question.
17. In order to clarify the position, the Commissioner contacted the authority on 17 August 2006, seeking clarity on a number of issues.
18. The Commissioner sought copies of the Lease agreements between the authority and lessees.
19. The authority confirmed via correspondence dated 29 August 2006, that it had sought legal advice in respect of the confidentiality issue as well as permission from the leaseholders to release the information. The Commissioner requested details of these matters in writing on 15 September and 6 October respectively.
20. The authority confirmed that it did not possess written legal advice although on 25 January 2007 provided the contact details of one of the lease holders to which the request for information related.
21. The Commissioner wrote to the leaseholder on 1 February 2007 requesting any comments or views as to why the information requested should not be released. The Commissioner did not receive a reply to this correspondence.
22. Having considered the information the Commissioner wrote to the authority on 16 February setting out his views on the withheld information.
23. The authority responded to the Commissioner on 7 March 2007 disagreeing with the Commissioner's conclusions and again indicating that it would be sued for breach of confidence in the event of the information being released.
24. The Commissioner wrote again to the authority on 3 April 2007 once again inviting the authority to provide evidence that the third parties involved objected to the release of the information. However the authority did not adduce any further evidence to persuade the Commissioner that the information should be withheld from disclosure.
25. The Commissioner again tried to obtain the views of the third parties concerning the release of the information, but did not receive a reply to correspondence.

### **Findings of the case**

26. The Welsh Assembly Government is the Grantor of the Fishery Order, The Menai Strait Oyster and Mussel Fishery Order 1962 S.I. 1962 No.705 and The Menai Strait Oyster and Mussel Fishery (Amendment) Order 1964 S.I. 1964 No. 550.

27. The authority, a parliamentary body set up by statutory instrument, is the Grantee of leases to undertake fishing operations within the Menai Straits in the County of Gwynedd.
28. The Grantee has the authority to grant operating leases to various Leaseholders. The Leaseholders currently comprise four commercial companies undertaking commercial fishing in the Menai Straits.
29. Under the terms of the Lease the Leaseholders have a duty to provide, to the Grantee, data relating to their activity within the Menai Straits, including catch tonnage and value.
30. The Grantee thereafter has a duty to collect and collate the data it receives from the Leaseholders.
31. The Grantee has a further duty to comply with the terms of the Fishery Order and provide the Grantor with the annual returns of each of the commercial companies operating within the Menai Straits.

## Analysis

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32. The Commissioner has investigated this case with a view to ascertaining whether the public authority has complied with the Act. He has taken into account all relevant information and will consider the public authority's use of the exemptions. A full text of the relevant statutes referred to is contained in the legal annex.

## Procedural Matters

33. The Commissioner's decision in this matter is that the authority has not dealt with the complainant's request in accordance with the following requirements of the Act:

Section 10 (1) – in that it exceeded the statutory time limit for responding to a request made under section 1(1)

34. The request was forwarded to the authority on 30 March 2005. A response was not made to the complainant until 20 May 2005, 36 working days later.

## Exemptions

### Section 41

35. This section constitutes the main argument put forward by the authority as its justification for withholding the information requested. The authority has made available copies of the Leases provided by the authority to its Tenants. It is noted that the Leases in question do not contain an express confidentiality clause prohibiting the release of information.

36. In assessing the application of section 41 to the information requested, it is therefore necessary, given the absence of any express mention, to consider whether an obligation of confidence has arisen. To assess this, the Commissioner has taken into account the circumstances under which the information was provided to the authority (i.e. a legal requirement), the nature of that information and how such information has been previously handled. The Commissioner has also specifically requested evidence of potential actionable breach from the third party, although they have elected not to respond.
37. In the wording of section 41, information is exempt if 'it was obtained by the public authority from any other person'. This appears to be the case in this instance and reliance upon section 41 would seem appropriate. However the section continues by stating 'the disclosure of that information to the public by the authority holding it would constitute a breach of confidence actionable by that or any other person.'
38. To date, the Commissioner has not been provided with any evidence to suggest that such an actionable breach would arise. In addition the Commissioner is advised that such information has been released to the public in previous years, a fact confirmed by the authority.
39. Whilst the Commissioner acknowledges the inherent public interest test within the common law concept of confidentiality and also recognises the importance of preserving confidence the Commissioner takes the view that the authority has failed to establish that the information is confidential. The Commissioner does not therefore consider that, in this case, there would exist an actionable breach of confidence. The Commissioner is not therefore persuaded that the authority is able to rely upon section 41 to withhold the information that has been requested or that section 41 has been engaged.

### Section 43

40. The authority cited reliance on section 43 of the Act, which exempts information if its disclosure would, or would be likely to prejudice the commercial interests of any person. The Commissioner has not been provided with any evidence that the authority's or any other persons commercial interests would be adversely affected by release of the information requested. The only argument consistently presented being the belief that the authority would be sued for breach of confidence. In correspondence with the Commissioner the authority has stated "the lay-holders (third parties) have stated that they would take action for breach of confidence if this data is disclosed"
41. In addition to requesting that the authority provide evidence from the third parties, the Commissioner has also taken steps to contact the third parties about the disclosure of the information. The third parties involved have not presented any arguments to demonstrate that their commercial interests would be affected by releasing the information. Likewise, the authority has not been able to demonstrate how commercial interests would be detrimentally affected.
42. Consequently, the Commissioner is unable to establish any likelihood of prejudice and the Commissioner is therefore unable to accept that section 43 is

engaged in this instance. In reaching his conclusion the Commissioner has considered the likelihood of prejudice arising from the release of the information. The Commissioner has had regard to the Tribunal decision in EA/2005/005 'John Connor Press Associates vs. The Information Commissioner'. The Tribunal interpreted the exemption at section 43 to mean that the chance of prejudice must be more than a hypothetical or remote possibility: there must be a significant risk.

43. In addition the Commissioner has endeavoured to obtain evidence from those third parties that the authority alleges would be prejudiced by the release of information. None of the third parties involved has elected to make representations to the Commissioner. In considering this fact the Commissioner has had regard to the Tribunal decision in EA/2006/0014 'Derry City Council vs. The Information Commissioner', which concluded "Ryanair (the third party) did not place before us any evidence of its commercial interest, let alone the likely prejudice which it might suffer as a result of disclosure.....In the absence of any such evidence on the point, therefore, we are unable to conclude that Ryanair's commercial interests would be likely to be prejudiced."
44. Taking all matters into consideration the Commissioner is of the view that disclosure of the information would not constitute a significant risk of prejudice to the parties and that the exemption is not engaged in this instant. As the exemption is not engaged, the Commissioner is not able to consider any public interest arguments.

## The Decision

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45. The Commissioner's decision in this matter is that the authority has not dealt with the complainant's request in accordance with the requirements of Part 1 of the Act and has therefore failed to comply with section 1 (1) (b) of the Act for the following reasons:
  - The authority was in error in its application of the exemption under section 41 of the Act.
  - The authority was in error in its application of the exemption under section 43 of the Act.

## Steps Required

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46. The Commissioner requires the authority to disclose to the complainant the information identified and referred to in this Notice in order to ensure compliance with the Act. The Authority must take the steps required by this Notice within 35 calendar days from the date of this Notice.

## Right of Appeal

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47. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 19<sup>th</sup> day of November 2007**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
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Cheshire  
SK9 5AF**