

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 2 January 2008**

**Public Authority:** Hampshire County Council  
**Address:** The Castle  
Winchester  
Hampshire  
SO23 8UJ

### Summary

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The complainant asked the council for information concerning the operations and finances of the River Hamble Harbour Authority.

The council withheld the requested information under s21 (accessible by other means), s12 (appropriate limit), s40 (personal information) and s31 (law enforcement).

The Commissioner found that the council was not entitled to rely on s12 to withhold the information. He found that the council incorrectly applied the exemptions at s21, s31 and s40 to the information. A proportion of the information is exempt under s40.

The Commissioner decided that the requested information should be released to the complainant after redaction of third party personal data.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public 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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2. On 22 November 2006 the complainant requested the following information:
  - (i) the log books of the River Hamble Harbour Authority patrol boats for the financial year 1 April 2005 to 31 March 2006
  - (ii) the raw data on which the accounts of the River Hamble Harbour Authority for 2005 – 6 are based.

3. The complainant made a separate request on the same date asking for:
  - (iii) the job descriptions of staff employed by the River Hamble Harbour Authority
  - (iv) any reports by staff of the Harbour Authority about their work (excluding published reports to the Harbour Management Board or the Harbour Authority) during the financial year 2005 – 6
  - (v) all reports and newsletters (including published committee reports in the name of the Environment Director) written by the Assistant Harbour Master for the environment in the financial year 2005 – 6.
4. The council dealt with parts (ii) and (iii) of the requests under the Act. Its response to these parts of the requests are the subject of this decision notice. The council dealt with parts (i), (iv) and (v) under the Environmental Information Regulations (the Regulations). Its response to those parts of the requests are the subject of a separate investigation by the Commissioner - reference FER0147464.
5. On 15 December 2006 the Council withheld parts (ii) and (iii) of the requested information under s40 (personal information) of the Act. It also relied on s12 (appropriate limit) and s21 (information accessible by other means) to withhold the information in part (ii).
6. On 16 December 2006 the complainant asked the council to review its decision to withhold the information that he had requested.
7. On 12 January 2007, the council reviewed its decisions to withhold parts of the requested information under the Regulations. However, it did not review its decisions to withhold parts (ii) and (iii) of the request - the raw data relating to the Harbour Authority accounts and the staff job descriptions.
8. On 16 January the complainant asked the council to respond to his request for a review of all its decisions. The council replied that his request for review had only referred to its decisions made under the Regulations.
9. On 30 January 2007 the complainant wrote to question the accuracy of the council's observations in this respect. On 31 January the council repeated its assertion that his request for review had not referred to the decisions made under the Act. (The Commissioner's investigation found that the complainant did in fact quote the council reference to his request for job descriptions albeit in connection with one of the decisions made under the Regulations). The council then asked the complainant to confirm his request for review of the two decisions made under the Act. The complainant confirmed this on 31 January 2007.
10. On 21 February 2007 the council reviewed its decision to withhold part (ii) of the requested information - the raw data on which the accounts for 2005 – 6 were based. The council's review upheld its decision to withhold that part of the requested information. However, it informed the complainant that it was still seeking information from the Harbour Authority regarding the job descriptions and

therefore could not review its decision to withhold that part of the information. The council said it aimed to come back with a definitive position regarding the job descriptions by 2 March 2007.

11. On 6 March 2007, the council finally reviewed its decision to withhold part (iii) of the requested information – the job descriptions of staff employed by the Harbour Authority. Its review upheld the original s40 exemption. It also concluded that the job descriptions were exempt by virtue of s31 (law enforcement).

## **The Investigation**

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### **Scope and chronology of the case**

12. The complainant wrote to the Commissioner on 16 January 2007 to complain about the council's withholding of the requested information.
13. On 24 August 2007 the Commissioner requested a copy of the withheld information from the council in order to ascertain whether the exemptions under the Act had been applied appropriately.
14. During the course of his investigation it was apparent that the complainant had requested information in order to discover why there was a 46% differential in harbour dues charged by the council. In response to a request from the Commissioner made on 3 October 2007, the council agreed to provide the complainant with a written explanation. The Commissioner had hoped this might assist in informally resolving the complaint. However, whilst the explanation provided resolution to one of the issues raised by the complainant others remained and he wished to pursue the complaint.

## **Analysis**

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### **Section 21 (information accessible by other means)**

15. The council relied on s21 of the Act to withhold the raw data on which the Harbour Authority's accounts for 2005 – 6 were based. The wording of s21 of the Act is set out in the attached legal annex. The raw data was interpreted by the council to mean the Harbour Authority's invoices and receipts for the year.
16. The council maintained that the s21 exemption applied because the accounts for the year were available on its website.
17. In reviewing the matter the council also maintained that accessibility by other means was provided by the Audit Commission Act. The council informed the complainant of rights under that Act to inspect the accounts and supporting documents apart from those containing personal information. The council then referred to restrictions on the right under the Audit Commission Act to inspect

supporting documentation. It maintained that these restrictions were consistent with the council's refusal of the request namely that editing personal data from the accounts would exceed the cost limit. The council advised the complainant to consider focusing down his request to a particular piece of supporting documentation that he may be interested in.

18. The complainant wrote back to the council on 21 February 2007 explaining that he was investigating the council's justification for giving a 46% discount on harbour dues charged for boats berthing in marinas as against midstream mooring holders. The published accounts on the website did not provide the detail he needed. The council failed to respond to the complainant's point that the availability of published accounts was insufficient to answer his request.
19. In the Commissioner's view it is clear that the complainant had not asked to see the published accounts. He had requested the raw data on which the accounts were based. The fact that the published accounts were available on the council's website was irrelevant to his request.
20. With regard to the suggested alternative availability via the Audit Commission Act, the council's position appears to be that, on the one hand, the documentation was available through the audit channel but that, on the other, that availability was restricted. In the Commissioner's opinion this does not equate to 'availability elsewhere'. To then suggest that the audit channel restrictions are in line with the council's reasons for non disclosure, hence there is no alternative availability after all, seems to be an unnecessary exercise.
21. The Accounts and Audit Regulations 2003 stipulate that public authority accounts and related documents are made available to interested persons for 20 working days on a date specified by the auditor. Such information will only be subject to s21 of the Act if the timing of the request coincided with the time specified by the auditor. In this instance, it is clear that the information was not available via the audit channel. When the complainant asked the council in March 2007 for clarification of the times when he might inspect the documents under the Audit Commission Act, he was informed that a precise timescale was not to hand but that it was usually in the summer months.
22. In light of the above, the Commissioner does not accept that part (ii) of the requested information, the raw data on which the accounts are based, is exempt under s21 of the Act.

### **Section 12 (appropriate limit)**

23. The raw data was withheld on the grounds that invoices and receipts relating to income and expenditure of the Harbour Authority contained personal data such as names and addresses of mooring holders. In the council's view, redaction of this personal data would take the costs of complying with the request in excess of the £450 threshold. In effect, the council considered the information to be exempt by virtue of s12 which provides exemption from disclosure where cost of compliance exceeds the appropriate limit. The wording of s12 is set out in the attached annex.

24. The appropriate limit is prescribed in the Department for Constitutional Affairs' (now MOJ) Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. The Regulations set out what may be taken into account when public authorities are estimating whether the appropriate limit has been exceeded. Costs are limited to those that an authority reasonable expects to occur in:
- determining whether it holds the information requested
  - locating the information or documents containing the information
  - retrieving such information or documents and
  - extracting the information from the document containing it including editing or redacting information.

The task of extracting requested information from a document containing information which has not been requested is caught by the Appropriate Limit and Fees Regulations. However, in this instance, the limitation on cost has been interpreted by the council to include the time taken to redact a document where the process of redaction is to blank out exempt information leaving information which is to be disclosed. This activity does not fall within the Appropriate Limit and Fees Regulations.

25. The Commissioner does not accept therefore that part (ii) of the requested information is exempt by virtue of s12. This accords with the decision of the Information Tribunal in EA/2006/2007 John Jenkins v Information Commissioner and DEFRA.

#### **Section 40 (personal information)**

26. The council relied on s40(2) of the Act to withhold the raw data. The s40 exemption is absolute and as such is not subject to the public interest test. The wording of s40 is set out in the attached annex.
27. The council informed the complainant in its refusal notice that the reason the s40 exemption applied was because the invoices and receipts contained some personal data such as names and addresses of mooring holders.
28. The council did not explain how the data protection principles might be breached by such disclosure. In the Commissioner's view, the individuals concerned would not expect their personal information to be disclosed to others. Such disclosure would therefore be unfair and involve contravention of the first data protection principle. The wording of the first principle is set out in the attached annex.
29. Although the council had correctly identified that the raw data contained personal information that would require redaction, it was incorrect in applying the s40 exemption to the entirety of the raw data. After redaction of the personal data from the invoices and receipts the information would not be caught by the s40 exemption.

30. The council also relied on s40(2) to withhold part (iii) of the requested information - the job descriptions of Harbour staff. It maintained that identification of individuals from the relatively small number employed by the Harbour Authority meant that their job descriptions constituted 'personal information' within the meaning of the Data Protection Act.
31. In correspondence with the Commissioner, the council submitted that the first condition of s40(3)(a) of the Act was engaged because disclosure would contravene the First Data Protection Principle.
32. In the Commissioner's view, public sector job descriptions are commonly available to applicants during the recruitment process. He sees no reason why availability on those occasions should be regarded differently from when they may be requested under the Act. The Commissioner acknowledges that where a position is filled by a named individual, the job description may constitute personal data 'relating to' the employee in that post. However, he does not accept that disclosure of the job descriptions involves contravention of the First Data Protection Principle and therefore it would not be unfair to disclose that information.

### **Section 31 (law enforcement)**

33. In its review the council relied on s31 of the Act to withhold the job descriptions. The wording of s31 is set out in the attached annex.
34. The council maintained that disclosure of the job descriptions would prejudice the prevention or detection of crime (s31(1)(a)); the apprehension or prosecution of offenders (s31(1)(b)) and the assessment or collection of taxes and duties (s31(1)(d)). It also maintained that disclosure of the job descriptions would prejudice the exercise of the council's functions for the purpose specified in s31(2)(a) of the Act – of ascertaining whether any person has failed to comply with the law; and the purpose specified in s31(2)(c) - of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
35. The council maintained that the operational effectiveness of Harbour Authority staff may be prejudiced by the accessibility of job descriptions to those engaging in activities that the Harbour Authority seeks to regulate.
36. The Commissioner has not seen any evidence to support this assertion. He does not believe that the council has demonstrated that prejudice to the exercise of its functions would, or would be likely to, result from disclosure of the job descriptions. Job descriptions in the public sector are commonly available to applicants when posts are advertised and the Commissioner sees no reason why availability on those occasions should be considered differently from when they may be requested under the Act.
37. The s31 exemption is subject to the public interest test and the council provided a brief consideration of factors for and against disclosure. However, as the

Commissioner's decision is that the exemption at s31 is not engaged he has not explored the public interest arguments in this notice.

## The Decision

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38. The Commissioner's decision is that:

- the council did not deal with the request for information outlined at 2(ii) of this notice in accordance with the Act insofar as it incorrectly applied the s21 exemption to that part of the request
- the council was not entitled to rely on s12 to withhold the information outlined at 2(ii)
- the council incorrectly applied the s40 exemption to withhold the information outlined at 2(ii)
- the council did not deal with the request for information outlined at 3(iii) of this notice in accordance with the Act insofar as it incorrectly applied the s40 exemption to that part of the request
- the council incorrectly applied the s31 exemption to withhold the information outlined at 3(iii).

## Steps Required

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39. The Commissioner requires that the council shall provide the complainant with the following information:

(a) the information outlined in 2(ii) of this notice namely the raw data on which the accounts of the Harbour Authority for 2005 – 6 are based. Personal data such as names and addresses of mooring holders is to be redacted from this information.

(b) the information outlined in 3 (iii) of this notice namely the job descriptions of Harbour staff.

The council shall provide the information to the complainant within 35 calendar days of the date of this notice.

## Failure to comply

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40. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session

in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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41. 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 2<sup>nd</sup> day of January 2008**

**Signed .....**

**Jane Durkin  
Assistant Commissioner  
Information Commissioner's Office  
Wycliffe House, Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

### Section 12 provides that –

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

### Section 21 provides that:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

**Section 31** provides that:

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,

- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

**Section 40** provides that:

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

**The First Data Protection Principle** provides that:

1. Personal data shall be processed fairly and lawfully and in particular shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.