

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 17 June 2013

Public Authority: Milford Haven Port Authority

Address: Head Office
Gorsewood Drive
Milford Haven
Pembrokeshire
SA73 3EP

Decision (including any steps ordered)

1. The complainant requested any environmental information contained in Milford Haven Port Authority's (MHPA's) Board minutes taking place on or after 1 January 2011. MHPA provided redacted copies of the minutes but refused to provide all relevant information originally citing regulation 12(4)(e) of the EIR and subsequently also relying on regulations 12(5)(e) and 12(5)(a).
2. The Commissioner's decision is that MHPA has correctly relied on regulations 12(5)(e), 12(4)(e) and 12(5)(a) to withhold the information.
3. The Commissioner requires no steps.

Request and response

4. On 8 April 2012 the complainant wrote to MHPA and requested the following information:

"...can you provide me with any environmental information contained in the minutes of the Port Authority taking place on or after 1 January 2011."
5. Following MHPA's request for the complainant to refine his request, he subsequently confirmed on 16 April that his request covered:

"...minutes of meetings of the governing body only. I am not asking for minutes of subcommittee meetings or staff meetings etc."

6. MHPA responded on 31 May 2012. It provided redacted copies of all Board meetings during the appropriate period but stated that it was withholding other information by virtue of regulation 12(4)(e) on the basis that they were internal communications.
7. MHPA also informed the complainant that any information redacted in white, was not considered to be environmental information for the purposes of the EIR.
8. Following an internal review MHPA wrote to the complainant on 21 September 2012. It upheld its original decision to refuse information on the basis of regulation 12(4)(e).

Scope of the case

9. The complainant originally contacted the Commissioner on 6 June 2012 to complain about the way his request for information had been handled.
10. The complainant was concerned about the amount of information which had been redacted by MHPA. He was also dissatisfied with MHPA's assessment of the public interest test.
11. The Commissioner initially informed the complainant that he would need to contact MHPA directly to request an internal review of its original decision. However, the complainant remained dissatisfied with MHPA's response on receipt of its internal review.
12. The Commissioner has considered the information redacted in white in the minutes provided by MHPA to ensure that it was correctly identified as non-environmental for the purposes of the EIR. The Commissioner is now satisfied that the information redacted in white would not fall within the definition of environmental information as defined by regulation 2 of the EIR. This information therefore falls outside of the scope of this notice.
13. The Commissioner also notes that during the course of his investigation, MHPA has subsequently relied on regulation 12(5)(e) of the EIR in relation to all but two items of withheld information whilst not withdrawing its reliance on regulation 12(4)(e). The Commissioner further notes that MHPA is relying solely on regulation 12(4)(e) in respect of one section of the minutes of 27 January 2012 and regulation 12(5)(a) for one small section of information in the Minutes of 27 May

2011. The Commissioner will therefore consider all three exceptions where relevant.

14. During the course of the Commissioner's investigation, MHPA also released further information to the complainant.

Reasons for decision

Regulation 12(5)(e)

15. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
16. When assessing whether this exception is engaged, the Commissioner will consider the following questions:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
17. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial or industrial in nature?

18. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
19. The Commissioner has considered the information withheld on the basis of regulation 12(5)(e). He notes that it either relates to the commercial activities of MHPA or to those of the various third parties. He is therefore satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

20. In relation to this element, the Commissioner considers that 'provided by law' will include confidentiality imposed on any person under either the common law of confidence, contractual obligation or statute.
21. As stated in paragraph 19 of this notice, the withheld information either relates to the commercial interests of MHPA or to those of various third parties.

Common law of confidence

22. MHPA has argued that the confidentiality for the vast majority of the information withheld by virtue of regulation 12(5)(e) is covered by the common law of confidence. When considering whether the common law of confidence applies, the Commissioner's approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider when looking at common law confidences under this heading are:
 - Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.
 - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
23. Having considered the withheld information, the Commissioner is satisfied that the information is not trivial and is not in the public domain. He has therefore concluded that the information does have the necessary quality of confidence.
24. MHPA has informed the Commissioner that it considers that the information is covered by the common law of confidence. MHPA has explained that there is an implicit understanding that commercially sensitive information relating to its activities discussed at Board meetings would not be disclosed. The Commissioner accepts that the information was discussed and shared in circumstances importing an obligation of confidence.

Contractual obligation of confidence

25. MHPA has also stated that information in respect of point 72 of the minutes of 22 July 2011 is covered by a contractual obligation of confidence between itself and a third party by virtue of a binding confidentiality agreement.

26. The Commissioner accepts that the circumstances and contractual terms under which the information was agreed between MHPA and the named third party were sufficient to create an obligation of confidence. He has therefore concluded that the information referred to in paragraph 25 of this notice is subject to a duty of confidence which is provided by law.

Is the confidentiality required to protect a legitimate economic interest?

27. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the former Information Tribunal, the Commissioner interprets '*would*' to mean '*more probable than not*'.
28. MHPA has stated that disclosure of the information would adversely affect either its own economic interests or those of various third parties. The Commissioner has first considered the disclosure of information MHPA has identified as harming its own economic interests and has then gone on to consider the information whose disclosure MHPA considers would adversely affect those of the various third parties.

MHPA's legitimate economic interests

Proposed development

29. The following arguments relate to points 10, 30, 72 and 90 of the various Board minutes of 2011. MHPA has argued that this information relates to a proposed development which was still in its preliminary stages at the time of the request. MHPA has further argued that disclosure of the information in these points would adversely affect its commercial interests in a number of ways.
30. Firstly it would inflate the value of the land at the centre of the proposed development, preventing MHPA from purchasing it at the lowest possible price. Disclosure of information relating to the commercial viability of the development would also assist its competitors in undermining the proposals. This in turn would impact on MHPA's ability to present a proposed solution to potential lenders in an effective and considered manner.
31. MHPA has also argued that disclosure of the anticipated phases of the development would encourage its competitors to enter into their own agreements with the identified partners therefore undermining its

relationship with these entities and/or developing their own projects in direct competition with MHPA's proposals.

32. MHPA also considers that disclosure of the above information would enable its competitors and other third parties to acquire land, access to which is required by MHPA for the proposed development to be viable. This will inflate the value of the land leading to the creation of 'ransom strips' and distort local land prices even though the proposals were still highly provisional at the time of the request.
33. It has also been highlighted by MHPA that point 72 relates to information with a third party subject to a binding confidentiality agreement still valid at the time of the request. MHPA considers that disclosure would not only undermine the principle of confidentiality but would inhibit potential commercial partners from engaging in preliminary discussions regarding their commercial plans.

Land acquisition

34. MHPA has withheld the information from points 17, 78 and 103 from the minutes of 2011 on the basis that they relate to the acquisition of various areas of land. MHPA considers that disclosure of this information would disadvantage its negotiating position for these areas of land as the landowners would increase the purchase price. Additionally, in respect of the information withheld under point 103, MHPA has argued that it includes its forecast operating net figure which would have informed contractors and relevant landowners of the project value, inflating costs to the detriment of the profitability of the whole project.

Purchase of commercial properties

35. MHPA has withheld information in points 77 and 88 of the minutes of 2011 on the basis that they relate to the purchase of commercial properties.
36. In relation to point 77, MHPA considers that disclosure of the total purchase price for this property would adversely affect its commercial interests as it was in negotiations with a development company which included an option agreement for asset disposal. MHPA has further argued that knowledge of the purchase price would hamper MHPA's ability to maximise the value of this asset. MHPA has also explained that it was also in negotiations for leasing this separately sighted building and disclosure of the previous rental figure would prejudice its ability to rent the building on favourable terms.
37. In relation to the information withheld under point 88 of the minutes, MHPA considers disclosure of this information would inform its

competitors about its strategic plans and assist them to undermine the viability of the proposed development. It also considers that disclosure would have an inflationary effect on local land prices to the detriment of MHPA's ability to acquire land for the purposes of commercial development at best value.

Competitive analysis study

38. MHPA has withheld information from point 107 of the minutes of 25 November 2011 as it relates to a Competitive Analysis Study undertaken to assess MHPA's strengths and weaknesses. It considers that disclosure of this information would be of considerable commercial value to its competitors who would use any potential vulnerability against it. MHPA has further argued disclosure would inform its competitors about areas of business it was or was not interested in pursuing, giving them a distinct strategic advantage over MHPA.

Biomass

39. MHPA has withheld information in point 12 of the minutes of 27 January 2012 on the basis that it relates to an intention to investigate the economics of a specific option for the importation of biomass fuel. The information relates to its strategic plans, the disclosure of which would enable its competitors to undermine these objectives.

Solar Panel Report

40. Information under point 105 from the minutes of 25 November 2011 has been withheld by MHPA on the basis that it provides details of its investment return following the installation of solar panels. MHPA considers that disclosure of this information would disadvantage it vis a vis its competitors.

Third party legitimate economic interests

41. MHPA has also withheld some information on the basis that its disclosure would adversely affect the legitimate economic interests of various third parties.
42. The Commissioner will not accept speculation from a public authority regarding harm to the interest of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. In line with this approach, the Commissioner therefore asked MHPA to consult a number of third parties in relation to disclosure of this information.

Named third party A

43. MHPA has withheld information under point 91 of the minutes of 30 September 2011 on the basis that the commercial interests of the company awarded this contract would be adversely affected by its disclosure. The third party has stated that MHPA were given preferential rates in order to secure the work which it considered strategically important to its business development in the region. The company considers that the price submitted in 2010 was recent at the time of the request (April 2012) and has argued that its competitors would gain a commercial advantage if they knew the minimum rates at which it can operate. The third party has also argued that damage would be caused to its relationship with existing clients who do not enjoy such preferential terms.

Named third party B

44. MHPA withheld information under point 90 of the minutes of 30 September 2011 on the basis that the information concerns discussions with named third party B regarding potential opportunities at a particular location. Named third party B has stated that they are/were also holding on-going discussions with a number of other port operators and that it considers the release of this information would detrimentally impact on its position with the other potential operators as well as with the wider supply chain.

Named third party C

45. MHPA withheld information under point 28 of the minutes of 25 March 2011 as its disclosure would adversely affect the commercial interests of third party C. Third party C has stated that any release of this information would impede its relationship with other suppliers thereby hampering its ability to win contracts in a fiercely competitive market.
46. The Commissioner has considered the arguments put forward by MHPA and the various third parties and accepts that the information referred to in paragraphs 29 to 45 of this notice consists of information which, both now and at the time of the request was of significant commercial value and which, if disclosed may be used to competitive advantage by the competitors of MHPA and the various third parties, thereby adversely affecting their respective legitimate economic interests. The Commissioner is therefore satisfied that the confidentiality is required to protect a legitimate economic interest, whether that of MHPA or those of the various third parties.

Would confidentiality be adversely affected by disclosure?

47. As the first three elements of the test cited at paragraph 16 of this notice have been established, the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of MHPA and the named third parties. He has therefore concluded that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the information.

Public interest arguments in favour of disclosing the information

48. It should be noted that regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public. The Commissioner will therefore always attach some weight to the general principle of transparency.
49. MHPA has also acknowledged that disclosure would serve to inform the public regarding significant development proposals with the potential for environmental impact.
50. MHPA also accepts that where the information relates to the purchase of land, there is a public interest in the disclosure of information which may result in requests for planning permission of designated areas of land.

Public interest arguments in favour of maintaining the exception

51. The Commissioner considers that arguments in favour of maintaining the exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality.
52. MHPA considers that it would not be in the public interest for either its own, or the various named third parties commercial interests to be adversely affected.
53. MHPA has explained that as a Trust Port, it is an independent commercial business which receives no direct public funding. It therefore considers that the normal arguments in favour of transparency and accountability in terms of the expenditure of public money do not apply in this case.

54. MHPA also considers that as an independent commercial business, it makes a valuable contribution to the local and regional economy. It has therefore argued that disclosure of information which would harm its commercial interests would not be in the interests of the local and regional economy.
55. In terms of information relating to the development of projects, MHPA has argued that once formalised, they are subject to the standard planning processes which afford ample opportunity for local scrutiny and for raising objections on environmental grounds. MHPA considers that at the time of the request, the information withheld related to provisional plans only and would have done little to inform public understanding and would have been likely to cause unnecessary confusion and concern.
56. MHPA has further argued that some of the information will eventually be the subject of a public consultation once detailed project proposals are finalised.
57. In relation to information regarding preliminary discussions between MHPA and third parties, MHPA has argued that disclosure would make no meaningful contribution to the public debate on environmental matters.
58. MHPA has also argued that disclosure of information relating to the various third parties would inhibit the willingness of contractors to engage in preliminary discussions regarding commercial plans as they will be concerned that other clients or competitors will become aware of their interest.
59. MHPA also considers that there is a public interest in commercial entities being able to rely on reasonable confidentiality undertakings given in the course of sensitive preliminary commercial discussions.
60. Where the information relates to binding confidentiality agreements between MHPA and a third party, MHPA has argued that disclosure would be in breach of a binding and legitimate non-disclosure agreement and would undermine the principle of confidentiality contrary to the public interest.
61. MHPA has further argued that it is in the public interest that organisations should be able to give and receive information in confidence where this is necessary for the purpose of commercial discussions which may lead to initiatives that will make a contribution to the development of infrastructure and the local and regional economy.

The balance of the public interest arguments

62. The Commissioner has considered the arguments put forward both in favour of disclosure and maintaining the exception. Whilst he is mindful of the explicit presumption in favour of disclosure under regulation 12(2) of the EIR and the importance of informing the public regarding significant development proposals with the potential for environmental impact, he has placed considerable weight on the adverse effect disclosure would have on either the legitimate commercial interests of MHPA of the various named third parties. He also acknowledges the contribution MHPA makes to the local and regional economy and accepts that the usual arguments in favour of transparency and accountability in relation to the expenditure of public money do not apply in this case.
63. The Commissioner therefore considers that the balance is weighted in favour of maintaining the exception and that MHPA was correct to rely on regulation 12(5)(e) for the information withheld under this exception. As stated at paragraph 13, MHPA is also relying on regulation 12(4)(e) in the alternative for this information, however the Commissioner has not gone on to consider this regulation as he holds the application of regulation 12(5)(e) to be correct.

Regulation 12(5)(a)

64. Regulation 12(5)(a) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.
65. In this case, MHPA has withheld information from point 43 of the minutes of 27 May 2011 on the basis that disclosure would adversely affect national security. It considers that disclosure would inform terrorist organisations about security levels at the Port, thereby increasing the risk of a terrorist attack.
66. The Commissioner has considered the information and accepts this view. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

67. It should be noted that regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public. The Commissioner will therefore always attach some weight to the general principle of transparency.
68. MHPA has also acknowledged that disclosure would serve to inform the public regarding MHPA's understanding of and commitment to appropriate security levels at the Port.

Public interest arguments in favour of maintaining the exception

69. MHPA considers that effective Port security is clearly in the public interest given the strategic importance of the Port at a national and regional level. MHPA therefore considers that there is a very significant public interest in maintaining the exception in this case as disclosure would adversely affect security at the Port.
70. MHPA has also argued that disclosure of the information would have done little to inform the public about environmental matters not least because the information was already a year out of date at the time of the request.
71. MHPA would repeat arguments made in paragraph 53 of this notice regarding the fact that MHPA is a Trust Port and an independent commercial business which receives no direct public funding. It therefore considers that the normal arguments in favour of transparency and accountability in terms of the expenditure of public money do not apply in this case.

The balance of public interest arguments

72. The Commissioner has considered the arguments both in favour of disclosure and of maintaining the exception. Whilst the Commissioner is mindful of the presumption in favour of disclosure under regulation 12(2) of the EIR and the public interest in informing the public in relation to the Port's understanding of and commitment to appropriate security levels, he considers that there is a much stronger public interest argument in ensuring that levels of security at the Port are effective. He has also considered MHPA's view that the usual arguments in favour of transparency and accountability of the expenditure of public money are not relevant in this case. The Commissioner has therefore concluded that the balance of public interest is significantly weighted in favour of maintaining the exception in this case and that MHPA were correct to rely on regulation 12(5)(a) in relation to this information.

Regulation 12(4)(e)

73. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. Regulation 12(4)(e) is a class based exception so it is not necessary to demonstrate prejudice or harm to any particular interest in order for it to be engaged.
74. However, regulation 12(4)(e) is subject to the public interest test, therefore where the exception is engaged, the Commissioner must also consider whether in all the circumstances of the case, the public interest

in maintaining the exception outweighs the public interest in disclosure of the disputed information.

75. MHPA has withheld point 8 from the minutes of the Board meeting of 27 January 2012 on the basis of regulation 12(4)(e). The Commissioner has had sight of the withheld information and notes that the Board minutes were circulated to a restricted number of individuals who consist of MHPA's Board. In line with the Commissioner's guidance in relation to regulation 12(4)(e), documents which are circulated so they are available to others within the organisation are internal communications. Clearly the minutes were circulated for consideration by the Board members. The Commissioner is therefore satisfied that the exception is engaged and has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

76. It should be noted that regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public. The Commissioner will therefore always attach some weight to the general principle of transparency.
77. Disclosure would also make a contribution to public debate regarding environmental matters within the region.
78. Although not put forward by MHPA, the Commissioner also considers that there is a public interest in the disclosure of information relevant to a specific development within the region.

Public interest arguments in favour of maintaining the exception

79. The withheld information relates to MHPA's proposed strategy in relation to a specific development in the light of external events. MHPA considers that it is in the public interest that its Board should be afforded a safe space to discuss proposals in relation to its strategic development. It therefore considers that applying the exception will protect this safe space for Board discussions and minimise any adverse impact on the conduct of Board meetings, corporate governance, free and frank discussion and sound decision making.
80. MHPA has further stated that it is envisaged in its constitution and published UK ports policy that MHPA should be able to prepare detailed proposals for the development of port facilities that are likely to generate inward investment, economic activity, employment, and to improve the efficiency of a major trade gateway within the national infrastructure. It considers that its ability to do so would be severely damaged and constrained by premature publication of incomplete proposals and plans.

81. MHPA has also argued that it is in the public interest that the Board should be able to engage in free and frank discussion without fear that disclosure will deter potential contractors and collaborators from becoming involved in proposed projects.
82. Additionally, MHPA has stated that the contested information is provisional and relates to proposals which were not finalised at the time of the request. The disclosure of such information is therefore unlikely to reliably inform the public about environmental matters, or make any meaningful contribution to the public debate. Indeed, if the development were to go ahead, it will be subject to full scrutiny through the planning process.
83. MHPA would repeat arguments made in paragraphs 53 and 71 of this notice regarding the fact that MHPA is a Trust Port and an independent commercial business which receives no direct public funding. It therefore considers that the normal arguments in favour of transparency and accountability in terms of the expenditure of public money do not apply in this case.
84. MHPA has explained that Trust ports are commercial entities, operating in a highly competitive commercial environment. It considers that the overwhelmingly commercial nature of their functions must be a highly relevant consideration when applying the public interest test to internal communications and that its Board should have a safe space to pursue commercial options central to its core functions.

The balance of public interest arguments

85. The Commissioner has considered both the arguments in favour of disclosure of the information and of maintaining the exception. Whilst the Commissioner is mindful of the presumption in favour of disclosure under regulation 12(2) of the EIR and the public interest in facilitating the public to make a contribution to the debate in relation to environmental matters within the region, he has placed considerable weight on the importance of allowing MHPA a safe space to discuss proposals in relation to its strategic development. He is also mindful that it is in the public interest to allow MHPA to be able to fulfil its core functions of generating inward investment, economic activity, employment and improving the efficiency of a major trade gateway within the national infrastructure.
86. The Commissioner has therefore concluded that the balance of public interest is weighted in favour of maintaining the exception and that MHPA were correct to rely on regulation 12(4)(e) for this information.

Right of appeal

87. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

88. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
89. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Anne Jones
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