

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 24 June 2013

Public Authority: Poole Harbour Commissioners
Address: Harbour Office
20 New Quay Road
Poole
Dorset
BH15 4AF

Decision (including any steps ordered)

1. The complainant has requested information relating to the proposal to extend Poole Quay Boat Haven. The Commissioner's decision is that Poole Harbour Commissioners has incorrectly applied the exception where disclosure would have an adverse effect upon the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest (regulation 12(5)(e)). The Commissioner has also decided, on the balance of probabilities, that no further information is held.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the withheld information detailed in paragraph 25 of this decision notice.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

4. Poole Harbour Commissioners is a trust. It is an independent statutory body governed by legislation. Poole Harbour Commissioners ensure that all the varied interests of the port operate in harmony, both for the common good and for the long-term sustainability of the whole harbour and its stakeholders.
5. The Commissioner understands that Poole Harbour Commissioners were required to go through a tendering process in order to appoint the professional team, namely Marina Projects, to assist in formulating proposals for the proposed marina at Poole Boat Haven and the Poole Harbour Masterplan. Marina Projects are acting as consultants to Poole Harbour Commissioners. It is Poole Harbour Commissioners who are undertaking the development of the Boat Haven marina.

Request and response

6. On 27 January 2012 the complainant wrote to Poole Harbour Commissioner's ('PHC') and requested information in the following terms:

"Please provide me with copies of all minutes, emails, internal correspondence, budgets, drawings, and reports relating to your proposal to extend Poole Quay Boat Haven. Please also include copies of correspondence with Poole People Party, Mr Mark Howell and Mrs Mary Parsons regarding your proposal to extend Poole Quay Boat Haven."
7. PHC responded on 22 February 2012 and refused to provide the information stating that the request has been formulated in an unacceptably general manner but stated it is happy to assist in formulating more specific particulars.
8. The complainant requested an internal review on 28 and 29 February 2012 and chased up a response on 27 March 2012 and 30 April 2012.
9. In correspondence dated 2 May 2012, PHC stated that 'information that you have requested does not currently exist or is not covered by the Environmental Information Regulations' and that 'in your recent correspondence you make mention of a request for internal review...We have no record of your request for an internal review. Please provide us with a copy of your request'.

10. The Commissioner wrote to PHC on 29 June 2012 stating that an internal review should have been carried out within 40 working days of 28 February 2012 and requesting that it complete the internal review within 20 working days.
11. On 11 September 2012, solicitors acting on behalf of PHC wrote to the Commissioner. The letter stated that PHC had not issued a refusal notice; its letter of 22 February 2012 was not intended as a refusal notice as it did not consider there had been a valid request for information. It explained that a meeting had taken place between the complainant and the Chief Executive of PHC on 25 May 2012 but no further particulars were received from the complainant. It further stated that as there had been no request for information there can be no determination by the Commissioner pursuant to section 50 of the FOIA. However, it concluded by stating PHC would be willing to carry out a review upon confirmation from the Commissioner that this would be a satisfactory way forward.
12. The Commissioner wrote to PHC on 13 November 2012 stating that his preliminary view was that the request was not formulated in too general a manner, as the wording of the request itself is clear, and therefore the exception at regulation 12(4)(c) of the EIR does not apply and that PHC has breached regulation 9 of the EIR by not providing adequate advice and assistance and regulation 11 of the EIR by not conducting an internal review. The Commissioner stated that he would issue a decision notice recording such breaches and requiring PHC to issue a response or a valid refusal notice taking into consideration the duty to provide advice and assistance unless the Commissioner heard from PHC within 10 working days.
13. On 27 November 2012, PHC wrote to the complainant stating that it will provide copies of any information within the scope of the request, subject to any exceptions, within 20 working days. It also stated that it had already hand delivered the Strategic Environmental Assessment Report to the complainant as soon as it was completed on 26 September 2012.
14. PHC then wrote to the complainant on 19 December 2012 stating that it had approximately 400 pages of information it is willing to disclose, subject to a fee of £40 to cover photocopying charges. It also stated that it was applying the exceptions at regulations 12(5)(e) and 13 to some of the requested information. It stated that there are two categories of information to which it is applying regulation 12(5)(e); the bids received as a result of the tendering process to appoint the professional team to assist in formulating the Poole Harbour Masterplan and proposals in respect of Poole Boat Haven, and the information received from Marina Projects.

Scope of the case

15. The complainant initially contacted the Commissioner on 8 April 2012 to complain that he had not received a response to his internal review request.
16. Following PHC's response of 19 December 2012 (detailed in paragraph 14) the complainant asked the Commissioner for his views on the categories of information the PHC would not be disclosing. On 10 January 2013, the Commissioner provided his preliminary view.
17. On 2 February 2013, the complainant contacted the Commissioner to confirm that he would like a decision notice for the following reasons:
 - Most of the documents received were not requested e.g. hundreds of items from the general public commenting on PHC's proposals.
 - None or very few of the following have been provided; budgets, reports, internal correspondence, minutes. The complainant clarified that he is not interested in seeing commercially sensitive tenders or quotations.
 - There has been a substantial change of policy and the complainant is interested in discovering the internal thought processes which led PHC to make their decisions; decisions which substantially impact the lives of ordinary people. He stated that there must be internal minutes, internal emails, budgets, reports from experts on the viability of the proposed marina, reports on the viability of the proposed water taxi service and reports on likely traffic congestion.
 - PHC are entitled to compete with private undertakings but they must do so fairly e.g. subsidising the proposed marina from other PHC activities would clearly be unfair competition. The only way to establish their intentions is to see their budgets; budgets are not commercially sensitive.
18. The Commissioner has therefore considered PHC's application of regulation 12(5)(e) to the information received from Marina Projects and whether any further information is held.
19. The Commissioner has not considered PHC's application of regulation 12(5)(e) to the bids received as a result of the tendering process because the complainant has clearly stated that he is not interested in seeing tenders or quotations.

20. The Commissioner has not considered the application of regulation 13 to the names, address and signatures of responses received to consultations arising from Poole Harbour Masterplan as there has not been a specific complaint in relation to this.

Reasons for decision

Regulation 12(5)(e)

21. Regulation 12(5)(e) provides that information will be exempt where its disclosure would have an adverse effect upon "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."
22. Regulation 12(5)(e) can be broken down into a four-stage test, which was adopted by the Information Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association*¹. All four elements are required in order for the exception to be engaged:
- The information is commercial or industrial in nature.
 - Confidentiality is provided by law.
 - The confidentiality is protecting a legitimate economic interest.
 - The confidentiality would be adversely affected by disclosure.
23. The Commissioner has considered each of these factors in turn.

Is the information commercial or industrial in nature?

24. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
25. The withheld information in this case consists of three reports prepared by Marina Projects for the benefit of the Commissioners and relating to the Boat Haven proposals as follows:

¹ Appeal number EA/2010/0012

- Market Review and Viability Assessment dated September 2007
 - Addendum to Market Review and Viability Assessment dated October 2007
 - Review of Alternative Marina Access Arrangements
26. The Commissioner notes that the information includes pre-commencement cost projections, capital costs estimates, proposed operating costs, proposed tariff models, analysis of risk profile, wider market tariff analysis.
27. PHC have stated that the operation of a private marina can be nothing else but a commercial activity, involving the sale or purchase of a service, that being the provision of a berth. The Commissioner considers that the information is commercial in nature and has therefore concluded that this element of the exception is engaged.

Is the information subject to confidentiality provided by law?

28. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
29. PHC has stated that the information within the Marina Projects' reports is subject to a duty of confidence owed by PHC to Marina Projects. It stated that this is primarily due to the fact that each of the reports set out confidential financial and other data (for example, berthing charges and capacities) in respect of other marinas that has been accumulated by Marina Projects for the purpose of formulating the viability/market assessments only and in the strictest confidence. PHC asked the Commissioner to note that this is reinforced by the fact that each report is marked 'Confidential'.
30. PHC further stated that the reports all contain various models and calculations assessing the viability of the proposed Boat Haven marina which are extremely confidential, not only because they have been calculated on the basis of the confidential data referred to in the above paragraph, but it would cause significant harm if the information was to get into the hands of the competitors to the proposed marina.
31. PHC's final point on confidentiality was that the information has the necessary quality of confidence as it is neither trivial nor currently in the public domain. Although the Commissioner notes that some of the information is likely to be in the public domain, such as facilities available at existing marinas in Poole, it is possible for information to keep its quality of confidence if, as in this case, it would take time and

effort to find and collate it from multiple sources. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

32. Having regard to the contents of the information and PHC's submissions above, the Commissioner is satisfied that the information is held under a common law duty of confidence and that this element of the exception is engaged.

Is the confidentiality provided to protect a legitimate economic interest?

33. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

Whose interests?

34. In this case, the withheld information was provided by Marina Projects to PHC and PHC has confirmed that it considers that it owes a duty of confidence to Marina Projects in respect of information contained in the withheld reports. The Commissioner therefore considers that the interests of Marina Projects are being argued in this case.
35. The Commissioner considers that if it is a third party's interests that are at stake, the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party.
36. The Commissioner enquired whether the arguments regarding the detriment to Marina Projects have come direct from Marina Projects or whether they are solely the views of PHC. It was confirmed that PHC had discussions with Marina Projects relating to the detriment to Marina Projects from disclosure of the information but it was not clear whether these discussions were as a result of this particular request. However, the Commissioner is satisfied that the arguments in this case reflect the third party's concerns.

Legitimate economic interests

37. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational

damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.

38. The confidentiality must be "provided... to protect a legitimate economic interest". The Information Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd*² that, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
39. As stated in paragraph 34, the confidentiality is designed to protect the economic interests of Marina Projects, specifically that competitors do not gain access to commercially valuable information.

Disclosure would cause harm

40. In order for the exception to be engaged the Commissioner considers that it must be shown that disclosure would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. A public authority needs to establish, on the balance of probabilities, that disclosure would cause some harm. In addition to being able to explain the nature of an implied adverse effect, public authorities must be able to demonstrate the causal link between any such affect and the disclosure of the specific information.
41. The Commissioner considers that in assessing whether disclosure of information would cause harm, public authorities need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure.
42. PHC have quoted paragraph 38 of the Commissioner's guidance on regulation 12(5)(e)³ and stated that '...ensuring that competitors do not gain access to commercially valuable information' is exactly the case here. PHC explained that both the confidential data provided by Marina Projects in respect of other marinas, and the financial and other models that have been produced using such data, would be extremely valuable to competitors of the proposed Boat Haven marina as well as other marina consultants. It explained that Marina Projects' business is built

² Appeal number EA/2010/0106

³

http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/eir_confidentiality_of_commercial_or_industrial_information.ashx

around giving strategic advice to marinas, based on painstakingly collated data and analysis of the marina industry, and that if that data and analysis were to be released in the public domain it would have a severely detrimental effect on their business as the provision of such data and analysis for a fee is the essence of the business.

43. The Commissioner has not considered the above argument in relation to the competitors of the proposed Boat Haven marina as it is the interests of Marina Projects that are relevant. Therefore, the Commissioner has considered the above argument in relation to Marina Projects' interests only.
44. The Commissioner notes that the argument relating to adverse effect is couched in very general terms and is not specifically linked to the withheld information in this case. The Commissioner is not obliged to generate arguments on an authority's behalf or to provide the causal link between the adverse effect and the specific information. An example of the type of argument that the Commissioner would expect could be that the withheld reports contain information as to how PHC could overcome an issue in relation to the protection of marine life or sea defences, where the resolution of such an issue is unique to Marina Projects, but would be valuable to others, and disclosure of the solution would harm the legitimate economic interests of Marina Projects. Another example of the type of argument could be that the information contains details as to the financial arrangements between Marina Projects and PHC, disclosure of which would adversely affect Marina Project's engagement with other customers.
45. Having considered the withheld information as a whole, the Commissioner is of the view that it is concerned with the viability of, and the proposed arrangements for, a specific development in a specific area. He notes that it is PHC themselves who will be developing the proposed marina, as opposed to the work being contracting out, therefore it is not apparent what benefit the development-specific information would be to Marina Projects' competitors. As Marina Projects had already been chosen to act as consultants in assessing the viability of the project, and the process was complete in terms of the production of the reports, the harm caused to their economic interests is reduced further in the absence of particular effects of releasing the information. In addition, as the reports produced by Marina Projects were a direct result of their engagement by PHC, and unique to this particular project, they would not necessarily be of use outside of this specific development.
46. The Commissioner considers that PHC has been given sufficient opportunity to provide evidence and arguments in support of its position. In the absence of specific arguments displaying the causal link,

the Commissioner considers that PHC has not provided sufficient evidence that disclosure of the withheld information would adversely affect Marina Projects' legitimate economic interests. The Commissioner has therefore concluded that the exception is not engaged.

47. As he has concluded that the exception is not engaged, the Commissioner has not gone on to consider any public interest arguments.

Regulation 5(1) – duty to make environmental information available on request

Is further information held?

48. Regulation 5(1) of the EIR states that:

“Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.”

49. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information is not held and he will consider any other reasons offered by the public authority to explain why the information is not held. He may also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
50. The complainant has asserted that most of the documents provided were not requested, those being hundreds of items from the general public commenting on PHC's proposals. He believes that none or very few of the following have been provided; budgets, reports, internal correspondence and minutes. He believes there has been a substantial change of policy and is interested in discovering the internal thought processes which led the Poole Harbour Commissioners to make their decisions. He believes that there must be internal minutes, internal emails, budgets, reports from experts on the viability of the proposed marina, reports on the viability of the proposed water taxi service and reports on likely traffic congestion.
51. During the investigation, PHC confirmed to the Commissioner that that it omitted to supply the complainant with copies of board minutes

recording meetings of the PHC at which the Boat Haven proposals were discussed. PHC explained that these were overlooked because PHC actively publish board minutes (going beyond its statutory duty in doing so) on its website, to keep the public apprised of port business. The Commissioner understands that these minutes have now been provided to the complainant.

52. The withheld information in this case is reports on the viability of the proposed marina, which include financial models, and a review of alternative marina access arrangements which includes viability of the proposed water taxi service and refers to likely traffic congestion. Therefore, the remaining information that the complainant believes is likely to exist is internal correspondence and budgets.
53. The Commissioner enquired as to whether the information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council and whether copies of information may have been made and held in other locations. The PHC explained that the Chief Executive and the Harbour Engineer, who have delegated authority to progress the Boat Haven proposals on behalf of PHC, each have their own hard copy files relating to the Boat Haven recording all correspondence (internal and external) together with any other relevant documentation. Both the Chief Executive and the Harbour Engineer have their own secretary who is responsible for keeping those files updated and the files have been searched and any relevant information pre-dating the request has been made available. PHC also explained that the secretaries have carried out a search of their email inboxes to check for any correspondence or documentation that may, accidentally, have not been printed off for the file. PHC confirmed that there is no electronic storage system – storage is achieved via hard copy only. In addition, PHC stated that it is not aware of any recorded information relevant to the request being destroyed but confirmed that recycling bins on both the Chief Executive and the Harbour Engineer's PC's were checked.
54. The Commissioner also enquired as to what PHC's record management policy says about records of these types and whether there was any legal requirement or business need for PHC to hold the information. Although the Commissioner did not receive a specific response to these enquiries, in the circumstances, he does not consider that there is any evidence that would justify refusing to accept PHC's position that it does not hold any further information relevant to this request. The Commissioner is therefore satisfied that on the balance of probabilities, further information is not held by PHC.

Right of appeal

56. 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

57. 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.
58. 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

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