

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 March 2013

**Public Authority:** Marine Management Organisation  
**Address:** Lancaster House  
Hampshire Court  
Newcastle upon Tyne  
NE4 7YH

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to a particular application for funding operated by the Marine Management Organisation (MMO) on behalf of the European Fisheries Fund (EFF). The MMO provided some of the requested information but withheld the remainder under sections 40(2) (third party personal data) and 43(2) (commercial interests) of FOIA. The Commissioner has been asked to consider the MMO's reliance on section 43(2) of FOIA and has found that the exemption is not engaged. He therefore requires the MMO to disclose the information to which section 43(2) has been applied.
2. 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.

#### Request and response

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3. On 14 February 2012 the complainant wrote to the MMO and requested information in the following terms:

*"Accordingly, I would request that, under the terms of the Freedom of Information Act I am given full visibility of the panel's decisions and scoring and any other analysis that contributed to the decision to refuse [a specified application] under Innovation."*

4. The MMO responded on 3 April 2012. It provided some information within the scope of the request but refused to disclose the rest, citing the exemptions in FOIA set out at sections 40(2) and 43(2) of FOIA as the basis for withholding the information.
5. The complainant wrote to the MMO on 24 August 2012 challenging its decision to release only part of the requested information. The MMO subsequently carried out an internal review, the outcome of which was provided on 24 September 2012. This upheld the MMO's original position.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 18 October 2012 to complain about the way his request for information had been handled.
7. In doing so, the complainant has confirmed that he does not require the disclosure of any information which identifies an individual. Consequently, the Commissioner has not been required to consider the information that has been withheld under section 40(2) of FOIA. Instead, it has been left for the Commissioner to determine whether section 43(2) has been applied correctly by the MMO.

### **Reasons for decision**

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#### **Section 43(2) – commercial interests**

8. Section 43(2) of FOIA states that information is exempt information if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). In his guidance on the exemption<sup>1</sup>, the Commissioner outlined that 'commercial interests' relate to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods and services.
9. The exemption is prejudice-based, which means that the following steps must be met for it to be engaged. First, the harm that is envisaged

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<sup>1</sup>[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_5\\_V3\\_07\\_03\\_08.aspx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx)

would, or would be likely to, occur should relate to the applicable interests described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure. Specifically, the public authority must be able to demonstrate that either disclosure 'would be likely to' result in prejudice or disclosure 'would' result in prejudice; 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'. If all three steps are met, and the exemption is found to be engaged, the public interest in disclosure must then be assessed.

10. The withheld information in this case relates to the assessment and scoring of an application made in respect of the Grant for Innovation fund. The allocation of funding, and hence the application process itself, is operated by the MMO on behalf of the EFF. According to the MMO's website<sup>2</sup>, the EFF "aims to help the fishing industry to become more sustainable and to remain profitable". The funding available for projects under the scheme, which overall runs to many millions, is split into different categories.
11. For example, in respect of the Grant for Innovation category referred to in the request, a fund of £1 million existed to support new ideas that could improve the way the 'under 10 metre' sector functions. The MMO has further explained that the Grant for Innovation "provided up to 90 per cent of funding towards projects that sought to develop new, sustainable ways of working, which in turn may help the long-term future of the sector, through a competitive process." The scheme was launched in November 2010 and has now closed for applications.
12. The MMO has variously claimed that the commercial interests of the following parties would be harmed through disclosure:
  - a) Applicants for funding in the future
  - b) The company that submitted the application
  - c) The MMO

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<sup>2</sup> <http://www.marinemanagement.org.uk/fisheries/funding/eff.htm>

13. In each case it is claimed that a party would be placed at a commercial disadvantage through disclosure. This is in spite of the fact that the Grant for Innovation is now closed.
14. To place the request in context, the MMO has advised that the scoring criteria used for this particular fund is also used outside of the Innovation category and has in fact been developed to ensure the wider delivery of the EFF scheme. In respect of a), the MMO is doubtful whether all potential applicants would have the opportunity to access the information, effectively creating an unfair playing field. For the party described at b), the MMO has indicated that the release of negative markings on the operation of a person's (individual or company) business plan could affect that person's reputation amongst the fishing industry, potentially resulting in the loss of customers. Finally, regarding c), the MMO has explained that the scoring criteria are critical to facilitating the competitive element requisite to the funding process. The disclosure of the criteria would, according to the MMO, afford applicants:

*"with skills in drafting or the funds to secure such expertise the opportunity to tailor applications reflective of all elements deemed essential in the assessment process; this, in turn, would prejudice the MMO's ability to identify and provide funding to the best possible and most deserving applications."*

15. For the purposes of comparison, the MMO has likened the scoring criteria to questions at a job interview; reasoning that giving interviewees advance sight of the questions would make it more difficult to secure the fairest possible result.
16. The Commissioner is satisfied that both a) and b) refer to the applicable interests described in the exemption, namely the commercial interest of a party or parties. This is because in both cases the MMO's arguments make reference to the ability of a party to offer its services in a commercially competitive field. He therefore goes on to consider below whether, in relation to the second step of the prejudice test, there is a causal relationship between disclosure and the prejudice being claimed. In contrast, the Commissioner does not accept that the argument at c) – which concerns the way that the commercial interests of the MMO would be harmed through disclosure - is relevant to section 43(2) of FOIA.
17. The Commissioner is in principle prepared to accept that disclosure of the scoring criteria will have an effect on the way that parties construct their applications for funding. Yet, even if the Commissioner were to agree that disclosure could affect the MMO's ability to identify the most deserving applications – which he has not had to offer a view on – he does not consider that the affect is to the commercial interests of the MMO. This is because the allocation of EFF funding is not in itself a

'commercial' activity and so there is no question that the commercial interests of the MMO are at stake.

18. To return to the description of commercial interests described at paragraph 8, it is the view of the Commissioner that the MMO's argument does not demonstrate to any meaningful extent how its competitive participation in a commercial activity, ie the purchase and sale of goods and services, would suffer – in short, there is no evidence that the MMO is in active competition with any other party. Rather the MMO has highlighted a prejudice not covered by the exemption, specifically its effectiveness in being able to regulate the allocation of funds. The argument therefore falls at the first hurdle of the prejudice test and accordingly has not been considered further by the Commissioner. Instead, as mentioned above, he has gone on to assess the validity of the arguments outlined at a) and b).
19. For the second step of the prejudice test the Commissioner must be satisfied the MMO has demonstrated that the prejudice claimed is of substance and that there is a causal link between the proposed disclosure and the prejudice. In the Commissioner's view, the MMO has not done this. There is no doubt that the prejudice pinpointed in respect of a) and b) is not trivial, in that the effect of disclosure would be detrimental to the parties concerned should the prejudice arise. However, the Commissioner considers that the MMO has not shown a connection between the disclosure of this particular information and the prejudice.
20. In a), the MMO has submitted that if the information was made available there is no guarantee, given the nature of the fishing industry, that all potential applicants would actually make use of the information, thereby creating an unfair playing field. No evidence has been supplied to support this point.
21. The Commissioner does not consider it unreasonable to assume that an assiduous applicant will use all the tools at their disposal to help them with their application. This would include utilising the guidance which is already available on the MMO's website and would similarly extend to the scoring criteria if this was made available. On a broader point, the Commissioner recognises that there will never be any certainty that information disclosed under FOIA will be seen by every party that has an interest in that information. To require such a guarantee would not only have the unwelcome effect of restricting transparency but also essentially undermine the practical application of FOIA. Following on from these considerations, the Commissioner has concluded that there are insufficient grounds to find that disclosure would result in the wider prejudice described by the MMO.

22. The Commissioner has therefore turned to b) and the MMO's narrower argument that says the interests of the person who submitted an application should be taken into account. The Commissioner recognises that a responsible public authority, as the custodian of potentially sensitive information provided by third parties, should be mindful of a third party's interests when deciding whether or not to release information. However, a public authority must consider each information request received on a case-by-case basis. Furthermore, it will not be sufficient for the public authority to speculate on the prejudice that may be caused but instead will need to consider arguments originating from the third party itself. This corresponds with the finding of the Information Tribunal in *Derry City Council vs The Information Commissioner* (EA/2006/0014)<sup>3</sup>. In that case the Tribunal was not prepared to speculate on whether the fears relating to a third party's commercial interests had any justification in the absence of any evidence from the third party on the point (paragraph 24).
23. Put simply, an argument will only have weight if it is reflective of the actual circumstances of a case and not to some future imagined event. The important point in this case is that the request only asks for information relating to one specific application for funding. It therefore follows that it is the interests of the party which submitted the application which are in question; this being the only third party whose commercial interests could be harmed through disclosure.
24. The Commissioner has not been provided with any evidence from the third party that attests to the prejudice being claimed; evidence which is unlikely to be provided in any event as the applicant for funding is the complainant in this case. Accordingly, in the absence of such evidence, the Commissioner has no choice but to disregard the argument made by the MMO.
25. For the reasons outlined above, the Commissioner has decided that the MMO has failed to establish that section 43(2) of FOIA is engaged. He has not therefore been required to consider the public interest arguments attendant to disclosure.

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<sup>3</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i69/Derry.pdf>

## Right of appeal

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26. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

27. 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.
28. 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 .....**

**Rachael Cragg**  
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