

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2017

Public Authority: Department for Transport
Address: Zone D/04
Ashdown House
Sedlescombe Road North
Hastings
East Sussex
TN37 7GA

Decision (including any steps ordered)

1. The complainant has requested the entire appeal file relating to his appeal against Dart Harbour and Navigation Authority (DHNA). The DfT provided the complainant with some information but made redactions under section 40(1) and (2) FOIA. It also withheld some information under section 42 FOIA.
2. The Commissioner's decision is that section 40(1) and 42 FOIA were applied correctly to the withheld information. The Commissioner also considers that the majority of the redactions that were made under section 40(2) FOIA were correct, apart from those made to the name of the Harbour Master at DHNA and the Chair of the Authority and Board members.
3. The Commissioner requires the DfT to take the following steps:
 - Remove the redactions to the name of the Harbour Master at DHNA and the Chair of the Authority and Board members.
4. 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

5. On 11 September 2015 the complainant requested information of the following description:

"Please provide me with a complete copy of the entire appeal file [relating to complainant's appeal against DHNA];

Please advise me who in the Department for Transport, i.e. the senior person, [is] dealing with this appeal; and

Please also provide me with correspondence from the most senior person dealing with this appeal as to exactly why he is questioning the integrity of [three named individuals] and refers to their assertions rather than their statements of fact."

6. Some of the information the complainant requested constituted his own personal data and was therefore exempt under section 40(1) FOIA, the DfT provided a separate subject access request response on 22 October 2015.
7. To the extent that the requested information was not the complainant's own personal data, the DfT responded on 10 November 2015 under FOIA. Some information was disclosed however some information was withheld under section 40(2) (third party personal data) and section 42 (legal professional privilege).
8. The complainant requested an internal review on 11 December 2015. The DfT sent the outcome of its internal review on 15 January 2016. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 23 May 2016 to complain about the way his request for information had been handled.
10. The Commissioner has considered whether the DfT was correct to apply the exemptions cited.

Reasons for decision

Section 40(1)

11. Section 40(1) states that "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."
12. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
13. The DfT has explained that it has withheld some of the requested information under section 40(1) FOIA as it is the complainant's own personal data. This includes the complainant's name, the name of his vessel and the location for which he applied for a mooring. The Commissioner does consider that this information would be classed as the complainant's own personal data.
14. The personal data of the complainant is absolutely exempt under FOIA. Section 40(1) FOIA was therefore correctly applied by the DfT. The Commissioner is aware that this information has been dealt with under the Data Protection Act 1998 (DPA) and that the complainant has been provided with the information that would constitute his own personal data under a subject access request.

Section 40(2)

15. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
16. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.
17. The DfT has informed the Commissioner that it is withholding the names of some other private individuals referred to within the withheld information relating to the complainant's appeal, the names of junior officials within the DfT involved in the appeal and the names of individuals working for DHNA.

18. The Commissioner has first considered whether the withheld information is personal data.
19. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
20. In this instance the information in question is the names of private individuals and DfT and DHNA staff names. This is information from which living individuals would be identifiable. The withheld information is therefore personal data.
21. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires, amongst other things, that the processing of personal data is fair and lawful. The Commissioner has initially considered whether the disclosure of the withheld names under the FOIA would be fair.
22. When considering whether the disclosure of this information under the FOIA would be fair, the Commissioner has to take into account the fact that FOIA is applicant blind and that disclosure should be considered in the widest sense – that is, to the public at large. The Commissioner is not able to take into account the unique circumstances of the complainant. Instead the Commissioner has had to consider that if the information were to be disclosed, it would in principle be available to any member of the public.

Reasonable expectations of data subjects

23. The DfT said that the private third party individuals mainly comprises of those who the complainant sought information from in support of his appeal. The DfT did not contact these individuals but said they thought it reasonable to assume that they would not have expected the letters and information provided to the complainant would be released to the world at large.
24. In relation to junior DfT staff, it was argued that such individuals, below SCS level, would not expect their identities to be released into the public domain. It went on that DfT staff members who corresponded with the complainant as well as with the DHNA and others are part of the harbour's casework team. It said this team primarily works with harbour authorities on matters which need Ministerial or Departmental approval or similar. It explained that only a relatively small part of the work

involves direct contact with members of the public, for example when considering complaints raised in relation to trust port governance or in cases such as the complainant's appeal. The number of complaints, appeals or other cases involving direct contact with members of the public is small, with generally no more than two or three in progress at any one time. It concluded therefore that this team is not primarily a public facing one, so those working in it would not expect their identities to be released into the public domain.

25. In relation to the names of individuals working for DHNA, DfT argued that on the same basis as above, these individuals would not expect their identities to be disclosed into the public domain. However on reflection the DfT said that some of the names redacted could have been released. This includes the name of the Harbour Master at DHNA and the Chair of the Authority and Board members. This is because these are senior positions within DHNA and because the name of the Harbour Master is available on the DHNA website.

Legitimate public interest in disclosure

26. The DfT argued that there does not seem to be a legitimate public interest in disclosing the names of DfT officials. It went on that the appeal arose out of DHNA's refusal to grant the complainant a mooring that he applied for. It said that this in itself is unlikely to be of much wider public interest. Furthermore it said that the officials whose names were redacted were involved in processing and considering the appeal. They did not take the decision about its outcome, which was not taken within the time period to which the request relates. The question of releasing the names of officials so they can be accountable for their decisions does not therefore arise. It went on that the complainant may have an interest in the names of DfT officials and is likely to already be aware of many of them from correspondence he has received from the DfT. However it argued that there seems to be very little by way of legitimate public interest in the wider release of the identity of these individuals. It said that similar considerations apply to the personal data of third party private individuals and DHNA staff.
27. The Commissioner considers that junior DfT staff, not occupying particularly public facing roles would have a reasonable expectation that their identities would not be disclosed into the public domain in the context of their involvement in the complainant's appeal. The Commissioner considers that the same is true for the third party private individuals and for junior DHNA staff. DfT has however highlighted that the names of more senior DHNA officials were also withheld, the Commissioner does not consider that these individuals occupying senior and more public facing positions would have such a reasonable expectation.

28. The Commissioner considers that there is a legitimate public interest in openness and accountability in the handling of appeals. However she agrees that disclosure of the withheld names would not meet the legitimate public interest in any significant way. For the most part therefore the Commissioner is satisfied that section 40(2) FOIA has been applied appropriately. However in relation to the name of the Harbour Master at DHNA and the Chair of the Authority and Board members , the Commissioner considers that the legitimate public interest outweighs the rights of the data subjects and the redactions to the personal data of these individuals should be removed and disclosed.

Section 42

29. Section 42 of FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information. There are two categories of legal professional privilege; those categories are advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
30. The DfT has confirmed that in this case it is relying upon advice privilege.
31. Advice privilege applies to communications between a client and their legal advisers where there is no pending or contemplated litigation. Furthermore the information must be communicated in a professional capacity. The communication in question must also have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.
32. The DfT confirmed that it is satisfied that the information meets the criteria for engaging the exemption in that the legal advice is the following:
- a) confidential;
 - b) made between a client and professional legal adviser acting in their professional capacity; and
 - c) made for the purposes of obtaining legal advice or assistance in relation to rights and obligations.
33. In this case the documents withheld contain legal advice or requests for legal advice from DfT employees to professional legal advisers within the DfT. The DfT has stated that the withheld information remains confidential and has not lost its legal professional privilege as it has not been made available to the public or third parties.

34. Upon viewing the withheld information, the Commissioner noted that there were enclosures and attachments to the legal advice/requests for legal advice and that the exemption may have been applied too widely. The ICO's guidance states that:

19. Any enclosures or attachments to a communication are usually only covered by LPP if they were created with the intention of seeking advice or for use in litigation. The authority must consider each document individually.

20. If an enclosure existed before litigation was contemplated or before it was considered possible that legal advice might be needed, LPP will not usually apply to it. There is however one important exception to this rule. When a lawyer uses their skill and judgement to select pre-existing documents that weren't already held by the client, for the purposes of advising their client or preparing for litigation, then LPP can apply¹.

35. The DfT reviewed the information to which section 42 had been applied and confirmed that it had incorrectly applied the exemption to the enclosures/attachments. It said however that it considered the enclosures/attachments had previously been provided to the complainant. Notwithstanding this, it provided the enclosures/attachments to the complainant.

36. The Commissioner considers that the remaining withheld information is confidential as it has not been made publicly available and is between DfT staff and DfT lawyers. The information reflects legal advice relating to the complainant's appeal against DHNA.

37. Upon considering the information withheld under section 42 FOIA and the submissions provided by the DfT, the Commissioner considers that the section 42 exemption was correctly engaged.

38. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

39. The Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* in which it was stated:

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."

40. The Commissioner considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The Commissioner has also noted the comments of the Tribunal in *Calland v Information Commissioner (EA/2007/0136)* that the countervailing interest must be *"clear, compelling and specific"*.

Public interest arguments in favour of disclosure

41. The DfT acknowledged that there is a general public interest in disclosure as a means of promoting accountability, transparency and furthering public debate. However it argued that the public interest arguments were not particularly strong in this case given the limited subject matter of the appeal relating to a provision in a private Act of Parliament and the small number of people affected by it.

Public interest arguments in favour of maintaining the exemption

42. The DfT argued that the public interest in withholding the withheld information rests in the importance of the concept of legal professional privilege and the rationale behind it, which is to ensure frankness in discussions between lawyer and client which goes to serve the wider administration of justice. Furthermore the DfT confirmed that the complainant had stated that he is seeking his own legal advice which may result in him taking further action in relation to this matter. Therefore it considers that the legal advice is live and is still currently being relied upon in light of any subsequent action.

Balance of the public interest

43. The Commissioner considers that there is a public interest in promoting openness and transparency.
44. The Commissioner does also consider that there is a very strong public interest in the DfT being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain.
45. Upon viewing the withheld legal advice the Commissioner considers that it relates to an appeal made by the complainant and that the complainant has confirmed with the DfT that he does intend to seek his own legal advice on the matter pending the Commissioner's decision and therefore the DfT will continue to rely upon the legal advice it has obtained. The Commissioner has not been presented with evidence that would suggest that the withheld advice has been misapplied or misrepresented in anyway.
46. It is recognised that the concept of legal professional privilege reflects the strong public interest in protecting the confidentiality of communications between lawyers and their clients and there is a public interest in safeguarding openness in communications between a client and their lawyer to ensure access to full and frank legal advice.
47. On balance therefore, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption as there is a strong public interest in legal professional privilege and allowing a public authority to be able to seek and obtain legal advice to fulfil its obligations and regulatory functions. Section 42(1) was therefore correctly applied in this case.

Right of appeal

48. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.
50. 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

Gemma Garvey
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