

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 August 2012

Public Authority: Department for Transport (DfT)

Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested an investigation report prepared by a port authority about an incident involving the vessel ZHEN HUA 23. In addition to this the complainant also requested correspondence relating to this incident between the vessel owners and the Marine Accident Investigation Bureau ("MAIB") and the port authority.
2. The MAIB provided some information but withheld the report on the basis of section 30(2)(iii) or, in the alternative, section 31(1)(g) leading to 31(2)(e). The DfT responded to the request at internal review (the MAIB being a separate branch of the DfT) and also applied section 41(1)(a). The Commissioner's decision is that the DfT correctly applied section 41 in order to withhold the information.

Request and response

3. On 6 May 2011, the complainant wrote to the MAIB, a separate branch of the DfT, and requested the following information regarding an incident involving the vessel ZHEN HUA 23 on 1 March 2008:
 1. *"The report prepared by the port authority.*
 2. *Any information obtained pursuant to the administrative enquiry.*
 3. *Any correspondence with the vessel owners/operators/charterers arising in connection with the incident including any recommendations/advice provided by the MAIB*

4. *Any correspondence with the port authority arising in connection with the incident.*
5. *A list of any information held on the above incident that is not covered in the above requests."*
4. The MAIB responded on 6 June 2011. It provided copies of: the accident report memo, the ship overview, company overview, newspaper cuttings, Marine Incident Database System (MIDs) case details screen, MIDs vessel details screen, MIDs owner screen and MIDs actions screen.
5. The MAIB explained that section 44(1)(a) of the FOIA - statutory prohibitions on disclosure - by virtue of section 12(2)(c) of the Merchant Shipping (Accident Reporting & Investigation) Regulations 2005 ("2005 Regulations") provided an exemption from disclosing the completed incident report form and witness statement and the investigation report prepared for the MAIB.
6. Inspectors notes were also being withheld on the basis of section 31(1)(g) which exempts information from disclosure where it may prejudice any function listed in 31(2), in this case 31(2)(e), which relates to information for the purpose of ascertaining the cause of an accident.
7. The complainant wrote to the DfT, as specified by the MAIB, to ask for an internal review on 4 August 2011. In this review the complainant explained they were not seeking access to the inspectors notes or the incident report form and witness statements but were disputing the MAIB's decision to withhold the investigation report on the basis of section 44 of the FOIA.
8. An internal review was conducted by the DfT and it wrote to the complainant on 2 September 2011 stating that section 44 had been incorrectly cited. However it argued that the decision to withhold the requested information was still correct but on the basis of sections 30(2)(a)(iii) and 31(1)(g) leading to 31(2)(e). The internal review also outlined that section 41 may also be engaged as the report was provided to the MAIB in confidence.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular the complainant argued that the stated exemption was not engaged as the purpose of the MAIB, as set out in section 5(1) of the 2005 Regulations, is to prevent future accidents and the function the MAIB are relying on is

that the information was obtained for the purpose of ascertaining the cause of an accident.

10. The complainant also indicated it wanted the Commissioner to consider the decision of the DfT to also withhold the incident report, witness statements and inspector's notes. However, the Commissioner noted that when the complainant requested an internal review it specifically stated it was not pursuing the disclosure of these items. As such the DfT's internal review focused only on the decision to withhold the investigation report.
11. The DfT sought to rely on section 30(2)(iii) as a basis for withholding the investigation report. This section states that the information is exempt from disclosure if it is obtained by a public authority for the purposes of investigations conducted by the authority and where it relates to the obtaining of information from confidential sources.
12. The Commissioner explained to the DfT that his position with regards to this subsection of section 30 is that it is intended to protect the identities of confidential sources so that they are not discouraged from informing on improper acts. He did not consider that Hutchison Ports was a confidential source within the meaning of section 30(2)(b) and therefore did not consider that section 30(2)(b) was engaged.
13. The DfT had indicated that it would it considered section 31(1)(g) to be engaged in the alternative to section 30(2)(b) and the Commissioner offered the DfT the opportunity to put forward further arguments in support of the application of this exemption. At the same time the DfT also sought to expand on its arguments that section 41 of the FOIA was engaged and provided a basis for withholding the inspection report.
14. The Commissioner has therefore agreed that the scope of his investigation is to determine if the DfT has correctly withheld the inspection report. As section 41 is an absolute exemption the Commissioner will consider the application of this exemption first.

Reasons for decision

15. Section 41(1) of the FOIA states that information is exempt if it was obtained by the public authority from any other person and if disclosure of the information would constitute a breach of confidence actionable by that or any other person. The exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

16. The request in this case was for the inspection report prepared by Hutchison Ports for the MAIB regarding an incident involving the vessel ZHEN HUA 23 on 1 March 2008. The information contained within the report was the findings of a company internal investigation report. The report was provided to the MAIB on a voluntary basis to assist in carrying out its functions under the 2005 Regulations.
17. The information contained within the report is therefore information obtained solely from a third party (Hutchison Ports) and the Commissioner therefore accepts that the first limb of section 41 is met and the DfT obtained the information from another person.

Would disclosure constitute an actionable breach of confidence?

18. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
 - Whether the information has the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.
19. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. The Commissioner notes that the MAIB does publish formal investigation reports into marine accidents on its website. These reports are produced in accordance with the requirements of the 2005 Regulations. However, the report produced by Hutchison Ports is a company internal investigation report, it is not a formal investigation report and it never formed part of an official MAIB report.
20. The DfT explained that the MAIB did approach Hutchison Ports to ask permission to release the report and Hutchison Ports refused this on the basis that it had provided the report in order to assist the MAIB in determining whether an investigation into the accident should be conducted. The information was provided on a full and frank basis and it was Hutchison Ports understanding that it would not be made publicly available and releasing it would go against the MAIB's own publication scheme which states that it will not disclose information provided in confidence.

21. The Commissioner notes that the report provided by Hutchison Ports contains detailed descriptions of the incident including factual information, a detailed narrative, an analysis and sections on marine safety management.
22. Based on the above, the Commissioner accepts that the withheld information cannot be said to be publicly available and as such it cannot be considered the otherwise accessible. After viewing the withheld information, the Commissioner does not consider it to be trivial as it contains a full and frank account of an incident and analysis, the details of which do not appear to be in the public domain. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.
23. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
24. As mentioned at paragraph 20, Hutchison Ports provided the report to the MAIB on the understanding that it would be solely used for the purposes of the accident investigation and it would not be disclosed to third parties. The DfT has stated that the MAIB *“operates in a culture centred on the non-apportionment of blame or liability for industry stakeholders who assist the MAIB in its work”*.
25. The Commissioner recognises that the relationship between the MAIB and its stakeholders is one which relies on the voluntary provision of information to assist the MAIB in its duties and there is an implied obligation of confidence on the part of the MAIB when it received information from its stakeholders for purposes such as those in which Hutchison Ports provided the withheld information to the MAIB.
26. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The report contains details of marine safety, risk assessments and a frank analysis of the incident. The DfT has set out the reasons why it considers the information contained in the report has sensitivity to Hutchison Ports and why disclosure would have a prejudicial impact on Hutchison Ports and this is explained in more detail in the confidential annex.
27. The withheld information was not only provided to the MAIB in confidence by Hutchison Ports, it also contains open and honest views of the incident and the possible contributing factors leading to the incident. The test under section 41 of the FOIA is whether disclosure would constitute a breach of confidence actionable by the person who provided the information or any other person. The Commissioner considers that disclosure of the report could result in an actionable breach of confidence by Hutchison Ports as not only could disclosure impact on the

MAIB's relationships with its stakeholders but also may have a detrimental effect on Hutchison Ports as set out in the confidential annex.

Would a public interest defence be available?

28. As section 41(1) is an absolute exemption there is no public interest. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.
29. The complainant has argued that it is in the public interest that the information is disclosed as following the provision of the Hutchison Report the MAIB determined it was not necessary to undertake a full investigation and produce a report as set out in the 2005 Regulations. As such there is no publicly available information, beyond a basic description of the incident. However, the Commissioner accepts that it is not feasible or necessary for the MAIB to produce formal investigation reports in response to every marine incident or accident and will only do so where it considers there are lessons to be learnt. However, in making this decision the MAIB will rely on engagement with relevant stakeholders to obtain an honest account of incidents and there is an implied duty of confidence inherent in this supply of information.
30. The Commissioner recognises there is always some public interest in the disclosure of information held by public authorities to bring about more accountability and transparency. The DfT also recognises the public interest in disclosure of information which may improve the public's understanding of the scope and nature of the investigations the MAIB carries out and the type of evidence it gathers.
31. However, generally the MAIB places a lot of information into the public domain after an investigation has concluded and is required to publish certain information by the 2005 Regulations. In this case though, the MAIB did not conduct a formal investigation as the report produced by Hutchison Ports in conjunction with other statements regarding the incident, was sufficient for the MAIB to conclude there was no significant safety lesson to be learnt from a formal investigation.
32. In considering this case the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. It is in the public interest that the duty of confidentiality between confiders and confidants is preserved.

33. The DfT has argued that there is a strong public interest in preserving the flow of information to the MAIB to enable it to investigate marine accidents and incidents and maintain maritime safety. It argues that if the report were to be disclosed it may result in a perception that the MAIB does not treat documents and information given to it in confidence and this in turn may restrict the voluntary flow of information, obstructing the MAIB in delivering its general aims of investigating marine accidents and incidents.
34. The Commissioner recognises that an erosion of the confidentiality that exists between the MAIB and its stakeholders would be detrimental to the MAIB given that the Commissioner accepts that the ability of the MAIB to obtain full and truthful information from all those involved in accidents and incidents is essential to the MAIB's ability to carry out its functions effectively. In addition to this, Regulation 12(5) of the 2005 Regulations requires a relevant court to be satisfied that any disclosure of information would be in the public interest having regard to the adverse impact disclosure may have on the current investigation and future investigations by the MAIB.
35. The Commissioner considered whether the factual account of the incident contained within the report could be disclosed without any detriment; however he acknowledges that the report was voluntarily provided to the MAIB in circumstances importing an obligation of confidence and any disclosure from within the report would be likely to undermine this flow of information in the future. The Commissioner does not consider it is therefore possible to disclose parts of the report.
36. Taking into account all the circumstances of this case, the nature of the relationships between the parties and the content of the withheld information the Commissioner considers the MAIB would not have a public interest defence for breaching its duty of confidence. The Commissioner cannot conclude that there is a strong enough public interest argument to disclose the requested information. Therefore the Commissioner finds that the requested information is exempt under section 41 and the DfT was correct to withhold this information.

Right of appeal

37. 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

38. 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.
39. 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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