

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 June 2019

Public Authority: Warrenpoint Harbour Authority

Address: Warrenpoint
County Down
Northern Ireland
BT34 3JR

Decision (including any steps ordered)

1. The complainant has requested information relating to the companies and organisations which were in contract or held licensed agreements with Warrenpoint Harbour Authority (the authority) during the period July 2008 to January 2018. The authority refused to disclose the information citing section 43 of the FOIA.
2. The Commissioner's decision is that the authority has failed to demonstrate sufficiently that section 43 of the FOIA applies. She therefore has no alternative but to conclude that it does not apply and order disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The authority should disclose the requested information to the complainant.
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 5 September 2018, the complainant wrote to the authority and requested information in the following terms:

“1. The names of all companies/organisations who were in contract (as defined in Clause 70 of the Warrenpoint Harbour Authority By Law Regulations) or had licensed agreements with Warrenpoint Harbour Authority during the period July 2008 and January 2018;

2. The commence date and duration of the contracts/licensed agreements with the same parties;

3. I would ask you to specify the port facilities which were utilized in respect of each of the individual contracts or licensed agreements, for example, access to open level facilities or storage sheds that were made available as part of the contract(s) or licensed agreements;

4. The recorded turnover of volume in tonnes over the duration of each contract/licensed agreement;

5. The Port Authorities stated requirements in relation to each contract i.e. licensing, insurance, health & safety and environmental protection.”

6. The authority responded on 5 October 2018. With regards to questions 1 to 4 it refused to disclose the information citing section 43 of the FOIA. In respect of question 5, the authority stated that this element of the request is extremely broad and not entirely clear and asked the complainant to set out exactly what he required. The authority directed the complainant to the ICO and did not offer the option of an internal review.

Scope of the case

7. The complainant contacted the Commissioner on 31 October 2018 to complain about the way his request for information had been handled. He stated that he wished to challenge the application of section 43 of the FOIA on the grounds that he is only seeking to establish the number of contracts issued, their duration and their renewals, specifically of those firms referred to in previous correspondence dated 17 July 2018 to the authority. He commented that he is not seeking to gain any information regarding financial arrangements that may or may not have been entered into only to establish that the required written permissions, which were both primary and statutory, were issued

thereby ensuring the application of regulation was set upon all participants.

8. The Commissioner's investigation has focussed on the application of section 43 of the FOIA to the withheld information. During her investigation the Commissioner asked the authority to clarify what its position was in relation to question 5 (as it had previously asked for clarification due to its initial concerns over the scope of this question) and if any of the withheld information provided was for this element of the request. The authority confirmed that one specific column in the withheld information answered question 5.

Reasons for decision

9. Section 43 of the FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of the public authority or a third party. The exemption is also subject to the public interest test. In addition to demonstrating that section 43 of the FOIA is engaged, a public authority must consider the public interest arguments for and against disclosure and demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
10. The authority advised that disclosure of the withheld information would be likely to prejudice its own commercial interests and those of its customers in revealing details of their commercial relationships. It stated that the authority is a Trust Port, an independent entity which is tasked with operating in a commercially viable manner whilst being accountable to stakeholders. Stakeholders include the local community, the government and other organisations, groups or individuals with an interest in the harbour.
11. It stated that the authority enters into arrangements with a range of businesses including shipping companies and importers and exporters of goods and does so on normal commercial terms. The terms offered to customers for use of the harbour facilities vary depending on the general commercial considerations including the volume of goods handled, duration of contract, the type of trade and other matters in the usual way of commerce. In operating in such a commercial manner, the authority is obliged to offer identical terms of business to each and every customer regardless of the value of their business, the proposed duration of the arrangement or the area in which they operate. It stated that the authority is mindful of its duty to act fairly and does so within the commercial terms which it is obliged to operate.

12. It went to say that it is also obliged to obtain a commercial return on its assets, with the returns generated being reinvested in the harbour for maintenance, improvement and development purposes.
13. It argued that the commercial arrangements with each individual customer are such that there is a legitimate expectation from its customers that any details of their commercial arrangements (including details of any contracts/licenses held, information about other terms of the agreements and volumes of goods being processed through the harbour) are private. Disclosure would be likely to damage the reputation of the authority as a contracting party and thereby limit its ability to enter into commercially advantageous contracts in the future. This would in turn result in a loss of trade. Instead it is important that third parties are able to contract with the authority without the risk of information which is confidential and which would ordinarily remain so in the context of a commercial agreement being disclosed.
14. It also stated that at the time of the request it was in a commercial dispute with the complainant. It believed the disclosure of this information would have been likely to damage the authority's ability to defend and resolve this dispute.
15. It argued that disclosure would also be likely to damage the commercial interests of the customers to whom this information relates. The information sought includes details of confidential contractual arrangements including the term of various contracts and licenses, information about various other terms of the agreements and the volume of goods being processed through the harbour. It stated that this information is quite clearly prima facie commercially sensitive.
16. The Commissioner reviewed the withheld information and advised the authority that she was not convinced from the submissions received that section 43 of the FOIA applied. She stated that the information appeared fairly mundane and appeared to relate to which businesses use the port and on what basic terms. The Commissioner advised the authority that she did not see how this information could be used by the businesses' competitors to their detriment or how disclosure would be likely to damage the commercial interests of the authority itself.
17. The Commissioner therefore gave the authority one final opportunity to provide detailed submissions to substantiate its claim. She also reminded the authority that in order to argue that disclosure would or would be likely to prejudice the commercial interests of a third party it would need to demonstrate that those arguments have originated from the third party itself. She reminded the authority that it cannot speculate on a third party's behalf.

18. The authority responded and provided evidence from three customers that they regarded the withheld information as commercial sensitive. One customer stated that they operate in a highly competitive market and are continually tendering for new work both in and outside of Northern Ireland. It regarded the withheld information as commercial and sensitive to its business. It was opposed to any detail that would provide competitors access to data on its volumes shipped or indeed the nature of the contract and relationship it had with the authority being disclosed. It argued that conclusions could be drawn regarding its capacities for further work and indeed an indication of the efficiencies and competitive advantages it may or may not have from operating out of the harbour. This particular customer felt this could also be misinterpreted or indeed used mischievously by others which may wish to thwart its business.
19. Another customer said that disclosure of volumes of product being exported from one jurisdiction to another, including or excluding the specific nature of the product and/or form in which it is transported, would provide very valuable market sensitive information to its competitors both in Ireland and also in Great Britain and facilitate them in assessing how to attack its market presence in both jurisdictions.
20. The third customer went on to say that its arrangements with the authority are purely commercial and are commercial in confidence. It does not wish its trading arrangements, turnover, volumes, costs or any other sensitive commercial information to be released by the authority to any third party as this could damage its business interests and put the jobs of its employees at risk.
21. Firstly the withheld information does not contain any details on turnover or costs; information which the Commissioner may consider to have more commercial sensitivity. The withheld information is for the names of the companies in contracts or licensed agreements with the authority between specific dates, the dates and durations of these arrangements, the facilities used and the recorded turnover of volume in tonnes over the duration of each agreement.
22. Despite the views of these customers the Commissioner still fails to see how the withheld information itself would be likely to have the effects described. The authority and customers have, for example, stated that the volumes in tonnes, date and duration of their agreement could be used by their competitors to their detriment but it has not stated how and why. It is also not obvious to the Commissioner from viewing the information herself.
23. The onus is on the authority itself to demonstrate that the exemption is engaged; not the Commissioner and to explain in sufficient detail why it

envisages disclosure having the effects described and directly linking these arguments to the contents of the withheld information itself. The Commissioner has allowed the authority two opportunities to provide this information and informed it that she was leaning towards disclosure. Despite this the necessary information and in the level of detail required has not been provided.

24. Similarly, the authority has not explained how disclosure of this information would be likely to damage its own commercial interests. It has argued that disclosure would be likely to hinder its ability to secure future contracts and licenses with future customers. However, the Commissioner would point out that the authority is subject to the FOIA and all third parties should be aware of this and the need and importance of public transparency and accountability. The section 43 exemption is there to protect truly sensitive commercial information so future customers should not be deterred from entering into commercial arrangements with the authority. In this case, the Commissioner does not consider the authority has demonstrated sufficiently that the withheld information is commercially sensitive for the reasons previously given. She therefore does not consider this argument to be compelling enough to warrant the application of this exemption.
25. The authority also stated briefly that disclosure would be likely to prejudice the commercial dispute that was ongoing at the time of the request with the complainant. Again the authority has not explained how the information could be used to the authority's commercial detriment.
26. For the above reasons, the Commissioner has no alternative but to reject the authority's application of section 43 of the FOIA in this case and order disclosure of the withheld information.

Other matters

27. The authority failed to offer the complainant an internal review in accordance with the section 45 code of practice. The Commissioner brought this to the authority's attention during her investigation and the authority has now agreed to offer an internal review to all future applicants.

Right of appeal

28. 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@justice.gov.uk

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

29. 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.
30. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF