

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 September 2022

Public Authority: Maritime and Coastguard Agency
(Department for Transport)

Address: Spring Place
Commercial Road
Southampton
SO15 1EG

Decision (including any steps ordered)

1. The complainant has requested information about a death at sea. The Maritime and Coastguard Agency ("the MCA") relied on section 30 (criminal investigations) and section 40(2) of FOIA (third party personal data) to withhold the information.
2. The Commissioner's decision is that the information in question engages section 30 of FOIA and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps.

Nomenclature

4. The MCA is not listed as a separate public authority in Schedule 1 of the FOIA because it is an Executive Agency of the Department for Transport. However, as it has its own FOI unit and as both the complainant and the Commissioner have corresponded with "the MCA" during the course of the request and complaint, the Commissioner will refer to "the MCA" for the purposes of this notice – although the public authority is, ultimately, the Department for Transport.

Request and response

5. On 16 August 2021, the complainant requested information of the following description:

“In November 2017...Simon Speirs, passed away after being swept overboard from CV30 while taking part in the Clipper Round the World challenge. To understand what happened, I request copies of all of the evidence collected by the MCA during its investigation including all documents, witness statements and any independent advice obtained.”

6. On 14 September 2021, the MCA responded. It refused to provide the requested information. It relied on section 30 and section 40(2) of FOIA to withhold the information.
7. The complainant requested an internal review on 29 September 2021. The MCA sent the outcome of its internal review on 28 October 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 5 December 2021 to complain about the way his request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to determine whether the MCA is entitled to rely on either section 30 or section 40(2) of FOIA.

Reasons for decision

10. Section 30(1) of FOIA states that

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of

- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct”

11. Section 30 of the FOIA is a class-based exemption – meaning that all documents of a particular type will be covered by the exemption. There is no requirement to demonstrate that disclosure might be harmful. The

investigation does not have to be ongoing for the exemption to be engaged – although the status of the investigation may influence the balance of the public interest.

12. The MCA advised the Commissioner that a significant volume of information fell within the scope of the request including:

“witness statements, taped and transcribed interviews...The investigation also contains statements and evidence of MCA witnesses acting as public officials and experts employed by the MCA.”
13. The MCA explained that it had powers under the Merchant Shipping Act 1995 to investigate and, if necessary, prosecute offences committed under that Act.
14. The Commissioner notes that the Merchant Shipping Act 1995 contains several criminal offences including actions likely to endanger the safety of a ship or any of her crew.¹ Part X of the Act gives the Secretary of State for Transport (or MCA employees acting on the Secretary of State’s behalf) powers of investigation:

“For the purposes of seeing that the provisions of this Act...and the provisions of regulations and rules made under this Act are complied with or that the terms of any approval, licence, consent, direction or exemption given by virtue of such regulations are duly complied with.”
15. The Commissioner is therefore satisfied that the MCA has the necessary powers to carry out an investigation and, where necessary to institute criminal proceedings based on those investigations.
16. In this particular case, the Commissioner has not viewed the withheld information. The MCA explained that the information was voluminous and could not easily be transferred. Having looked at the wording of the request, the Commissioner considers it self-evident that, in order to fall within scope, the information must, by definition, have been held by the MCA for the purposes of carrying out a criminal investigation. He is therefore satisfied that the exemption is engaged.

Public interest test

17. The complainant argued that the investigation had run its course, with no developments having taken place for several years. In addition to the

¹ <https://www.legislation.gov.uk/ukpga/1995/21/section/58>

usual public interest in transparency and openness, the complainant also noted that the MCA may have a conflict of interest as it is both regulator of the Clipper Ventures' fleet of yachts and enforcer of breaches of law and code. Finally he argued that, in previous similar instances, the MCA was more willing to share information.

18. For its part, the MCA explained that the investigation was still open and therefore there was a strong public interest in maintaining the exemption in order to risk jeopardising a future prosecution. Whilst it considered that it had explored all the available lines of enquiry it could not rule out new information coming to light in future which might cause it to reconsider matters afresh.
19. In addition, the MCA also pointed to the (published) report carried out by the Marine Accident Investigation Branch which had looked at general issues of health and safety. It argued that this was sufficient to meet any public interest in ensuring that lessons were learnt.
20. The Commissioner recognises that the complainant has his own strong personal interest in the information being withheld. However, in this case the wider public interest is best served by withholding the information.
21. Although the investigation may not currently be in an active phase, the Commissioner recognises that this is not uncommon and that crucial evidence may only emerge several years after an incident occurred. It is not necessary for the MCA to demonstrate that new evidence is likely to emerge, only that it cannot be ruled out. The Commissioner considers that, whilst the likelihood of new evidence emerging may not currently be strong, it should by no means be ruled out.
22. Were new evidence to emerge in this case, a prosecution would be unlikely to be successful if the MCA had already disclosed the findings of its investigation and the evidence it had gathered, to the world at large. There will always be a significant public interest in allowing prosecutions to be brought and ensuring that individuals who are prosecuted receive a fair trial.
23. In addition, the Commissioner notes that disclosing the withheld information (particular prior to that investigation having concluded) would be likely to make future witnesses, in this or any other case, more reluctant to speak candidly with investigators – as they may fear reprisals.
24. In this case the deceased person was buried at sea, meaning that there was no coroner's inquest. The Commissioner recognises that the MCA's files are likely to be the only source of further information about how Mr

Speirs died – and that members of his family with have a strong personal interest in seeing this information.

25. However, the Commissioner is not persuaded that the wider public interest in disclosure is particular strong – which is a relevant consideration given that FOIA requires disclosure to the world at large. Few people take part in events of this type or even sail on boats such as the one involved in the incident. Such health and safety lessons as are to be learned will likely only apply to a handful of people and the resulting public interest would not outweigh the considerable public interest in allowing a criminal prosecution to proceed (should one be brought).
26. The Commissioner also notes the fact that a report has been published already by the Marine Accident Investigation Branch. He agrees with the MCA that this goes a considerable way to satisfy any public interest in ensuring the safety of participants in the event.
27. The Commissioner is therefore satisfied that, in this case, the balance of the public interest favours maintaining the exemption.

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: 0203 936 8963

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

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