

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 July 2007

Public Authority: British Waterways Marinas Ltd
Address: Sawley Marina
Sawley
Nottingham
NG10 3AE

Summary

The complainant requested under the Freedom of Information Act 2000 (the "Act") a copy of an objection that had been made to him operating a sailing school from a marina owned and operated by the public authority. The public authority refused to disclose this information, stating that this was due to "commercial confidentiality". At the start of the investigation the Commissioner established that British Waterways Marinas Ltd was a publicly-owned company, as defined by section 6(1)(b) of the Act, and was therefore a public authority for the purposes of the Act. During the investigation the public authority confirmed to the Commissioner that it believed the disclosure of this information would be a breach of the Data Protection Act 1998 (DPA). After investigating the complaint the Commissioner was satisfied that the complainant was a sole trader, and that the information in question formed part of his personal data. Therefore the Commissioner decided that the information was exempt from disclosure under section 40(1) of the Act but that the public authority should have treated the request as a subject access request under section 7 of the DPA. The Commissioner also concluded that the public authority breached the requirements of section 17 of the Act by failing to issue an adequate refusal notice

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.

The Request

2. By way of background, the complainant ran a sailing school as a sole trader, and had applied to the public authority for permission to operate this school from Hull Marina, which is run by the public authority. In a letter dated 5 May 2005 the public authority informed the complainant that his application to operate a sailing school from Hull Marina had been turned down, due to an objection being received.

3. In a letter dated 15 May 2005 the complainant wrote,

“As you state that a ‘further objection has been raised’, I would like to know exactly who has raised the objection and the precise details of the objection. Perhaps you could send me a copy of their written response.”

The Commissioner has concluded that this forms the initial request for information.

4. The complainant has informed the Commissioner that a meeting took place on 27 May 2005 between the public authority and himself. He has informed the Commissioner that at this meeting he was told that the authority held a written objection to his application, but that due to the DPA it could not disclose it to him.

5. On 10 July 2005 the complainant wrote to the public authority again and stated,

“Under the Freedom of Information Act 2000 I feel that I am entitled to have copy of this objection, and again request a copy at your earliest convenience.”

6. On 19 September 2005 the public authority wrote to the complainant and refused to provide him with a copy of the information concerned as,

“...due to the commercial nature of the objection and the commercial position of the objector, I believe that commercial confidentiality considerations override disclosure considerations.”

7. The complainant then contacted The Waterways Ombudsman, who advised him to contact the Information Commissioner.

The Investigation

Scope of the case

8. On 14 November 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether the public authority was correct in withholding the information in question.

9. Although the complainant did not raise the point, the Commissioner has also considered whether the public authority breached section 17 of the Act when issuing the refusal notice by failing to provide either details of the exemptions it was relying upon, or details of its internal review procedures.

Chronology

10. On 1 February 2007 the Commissioner wrote to the public authority and asked for a copy of the withheld information, together with an explanation as to why it believed that the information concerned was exempt from disclosure under the Act. The Commissioner also informed the public authority that he had formed the view that it was a 'publicly-owned company' as defined in section 6(1)(b), and was therefore subject to the Act. The Commissioner asked the public authority for its submissions if it did not agree with this view.
11. The public authority responded on 5 March 2007, and provided a copy of the withheld information. It informed the Commissioner that it believed that the disclosure of this information to the complainant would be a breach of the DPA. However, the public authority did not specify which of the Act's exemptions it was seeking to rely upon. Additionally, the public authority did not raise any objection to the Commissioner's view that it was subject to the Act.
12. The Commissioner emailed the complainant on 15 March 2007 to clarify whether he was a sole trader.
13. The complainant responded to the Commissioner on 16 March 2007.

Findings of fact

14. From the information provided by the complainant the Commissioner is satisfied that he is a sole trader.
15. The Commissioner has established that British Waterways Marinas Ltd is wholly owned by the British Waterways Board, which is itself listed as a public authority under schedule 1 of the Act. As such, the company is to be regarded as a publicly-owned company, as defined by section 6(1)(b) of the Act, and is therefore a public authority for the purposes of the Act.

Analysis

Procedural matters

16. The Commissioner considered whether the refusal notice issued by the public authority on 19 September 2005 complied with section 17 of the Act.

17. Section 17(1) states that a public authority who is relying on an exemption in order to withhold information must issue a refusal notice “within the time for complying with section 1(1)”, i.e. within twenty working days, which:
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
18. Section 17(7) states:

“A notice under subsection (1), (3) or (5) must –

 - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.”
19. The refusal notice issued by the public authority did not specify which exemptions the public authority was relying upon to withhold the information, nor any reasoning as to why it believed that these exemptions applied. The notice also did not contain details of the public authority’s internal review procedures or the contact details of the Commissioner.
20. The full text of section 17 can be found in the Legal Annex at the end of this Notice.

Exemptions

Section 40(1)

21. Although the public authority has not referred to this exemption the Commissioner has considered whether section 40(1) of the Act applies to the information in question.
22. Personal data may relate to an individual in a professional capacity and not just to their private life. Information about the business of a sole trader may amount to the personal data of the trader, as information about the business will be about the sole trader.
23. After careful consideration of the withheld information the Commissioner is satisfied that the information relates to the complainant in his position as a sole trader. The Commissioner has taken into consideration the fact that the public authority appears to have used the withheld information to influence its decision to turn down the complainant’s application to operate his sailing school from Hull Marina.
24. After taking all this into account the Commissioner has formed the view that the information in question is the personal data of the complainant within the meaning of section 40(1) of the Act.

25. Under section 40(1), requested information that constitutes the personal data of the applicant, is exempt from disclosure under the Act. This exemption is absolute and therefore requires no public interest test to be conducted.
26. In view of the above, the Commissioner considers that disclosure of this information is exempt under section 40(1) of the Act.
26. The full text of section 40 can be found in the Legal Annex at the end of this Notice.

The Decision

27. The Commissioner's decision is that he is satisfied that the information in question is exempt from disclosure under the Act. He believes that section 40(1) applies to the information in question, as he considers the information requested constitutes part of the personal data of which the complainant is the data subject.

He notes, however, that section 40(1) was not relied upon by the public authority.

The Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

By failing to issue an adequate refusal notice the public authority breached section 17 of the Act.

Steps Required

28. The Commissioner requires no steps to be taken.

Other matters

29. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
30. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. Therefore, the Commissioner will go on to make an assessment under section 42 of the DPA as to whether the information in question in this case should be disclosed to the complainant under this access right. However, this assessment will be dealt with separately and will not form part of this Decision Notice, because an assessment under section 42 of the DPA is a separate legal process from the consideration of a complaint under section 50 of the FOI Act.

31. The Commissioner notes that this request should have been dealt with as a subject access request, under section 7 of the DPA from the outset, and he would encourage public authorities to consider requests under the correct access regime at first instance.

Right of Appeal

32. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 9th day of July 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 17

- (1)** A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –
- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2)** Where –
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –
 - (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where:
 - (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under subsection (1), (3) or (5) must-
 - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 40

- (1) 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.
- (2) Any information to which a request for information relates is also exempt information if-
 - (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

- (4)** The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (5)** The duty to confirm or deny-
- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6)** In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.
- (7)** In this section-
- "the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- "data subject" has the same meaning as in section 1(1) of that Act;
- "personal data" has the same meaning as in section 1(1) of that Act.