



Mr John McGoldrick  
By email only  
request-783961-  
16d4b95d@whatdotheyknow.com

Your reference:  
Our reference: ATI2641-IR

28 February 2022

Dear Mr McGoldrick,

### **Request for an internal review – ATI2641**

I write with reference to your request for an internal review into the response received from the Marine Management Organisation (MMO) on 20 September 2021, reference ATI2641.

Following the response issued by the MMO, you requested an internal review on 1 October 2021.

The purpose of this notification is to confirm that an internal review of this matter in accordance with our obligations under the Freedom of Information Act 2000 (FOIA) has been completed, taking into account your request for information submitted on 20 August 2021 and your request for an internal review dated 1 October 2021.

### **Time limit for response to internal review**

Under the FOIA a public authority has up to 20 working days to respond to a request for internal review, which can be extended up to a further additional 20 working days in certain circumstances. I apologise that on this occasion the MMO has fallen short of this timescale.

### **Exemptions to disclosure**

In our response dated 20 September 2021, it was confirmed that we were unable to release the information requested as it had been identified as falling within scope of exemptions to disclosure provided within the FOIA. Provided within our response was full details regarding our application of the exemptions to disclosure together with details of the public interest test applied in reaching the decision on disclosure. The exemptions to disclosure were:

- **Section 41 of the FOIA** which provides an exemption to the disclosure of information where this would constitute a breach of confidence.

In applying this exemption, we confirmed that we were unable to disclose details of contact between the MMO and representatives of the Manchester Ship Canal Company Ltd (MSCC). Within the response provided we explained that given the information held by the MMO relates to pre-application contact we do not consider that there would be any expectation that such information would be subject to disclosure to a third party.

With reference to the information identified as falling within scope of your request, we explained that the information involved relates to early engagement between the MMO and representatives of

the MSCC on proposed changes to the operation of the Warburton bridge, including the potential increase of tolls. This engagement related to the possibility of such changes being made through a Harbour Revision Order (HRO) which was not subsequently pursued formally by MSCC when the MMO explained that a HRO would not be the appropriate mechanism to achieve such changes.

We considered that the exemption was engaged because there would be an expectation of a 'safe space' for the parties involved to consider initial engagement outside of public scrutiny, in confidence. Because there was no legal obligation for MSCC to engage with the MMO on this specific matter, we also considered that there would be a real risk of an actionable breach of confidence were the MMO to disclose this information into the public domain.

- **Section 42 of the FOIA** which provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.

In applying this exemption, we confirmed that we were unable to release certain information as it related to legal advice received by the MMO regarding the interpretation of the case law and its relevance to the HRO process. We explained that as this information was requested and received under the sole purpose obtaining legal advice, we considered that the exemptions to disclosure provided for within Section 42 of the FOIA were engaged.

I will now consider the public interest test conducted in the application of the exceptions identified above.

### **Public Interest Test**

In applying the exemptions identified above, we were required to balance the public interest factors in withholding the information requested against the public interest factors in disclosure. I will now consider the arguments presented in our original response.

### **Factors in favour of disclosure**

In respect of those factors identified in favour of disclosure, we recognised that there were public interest factors in the disclosure of the information you had requested. We recognised that the arguments in favour of disclosure included furthering accountability and facilitating transparency in Government.

### **Factors in favour of withholding the information**

In our response, we confirmed that there were strong and countervailing public interest factors in withholding the information falling within scope of these exemptions.

### **Section 41**

When considering the application of Section 41 of the FOIA, we explained that when engaging with the MMO on pre-application activities there is an expectation that the information provided is confidential and will not be disclosed to the world at large. During this process individuals and companies cannot be compelled to provide information to the MMO and if it were widely known that the MMO may release volunteered information in response to a request for information, it is highly likely that this confidence would be breached and this in turn would impact the MMO's ability to engage and advise on pre-application matters in the future. We consider that the MMO often relies on the free flow of confidential information at pre-application stages to enable it to perform its statutory functions. Were the MMO to breach this trust, the flow of information could diminish and make it more difficult for the MMO to carry out its functions as effectively.

In addition, because the information involved related to commercial aspects of plans being considered by MSCC at the time, release to any third party could result in an actionable breach of confidence being brought against the MMO. This is because the information was provided to the MMO for the sole purpose of pre-application engagement on the possibility of applying for the requested changes under a HRO and there would have been a clear expectation that the information should not be used for any other purpose. If it were to be released into the public domain, even under the FOIA, it would reveal information that could have a commercial impact on MSCC and therefore risk a claim being made against the MMO.

On balance, I consider that the exemption provided for within Section 41 of the FOIA applies to this information and uphold the decision taken not to release this.

## **Section 42**

When considering the application of Section 42 of the FOIA, we explained that there was information identified as falling within scope of your request which included legal advice requested and received by officers of the MMO. We explained that we considered that this information was protected by Legal Professional Privilege as it relates to legal advice received by the MMO regarding the interpretation of the case law referenced and its relevance to the HRO process.

Within your request for internal review, you question whether the advice received was released outside of the MMO. I can confirm that whilst the legal advice received by the MMO was used to inform its engagement with representatives of MSCC the legal advice in its entirety has not been disclosed to any third party outside of the MMO. As such, we consider any LPP within the advice received has not been waived.

I feel that it is also important to explain that the legal advice itself related to the application of The Harbours Act (1964) and the approach made by MSCC on whether their proposals could be authorised by a Harbour Revision Order (HRO). As explained in our previous response, the MMO's position was that the proposals outlined could not be lawfully made under a HRO and therefore no formal HRO application was made to the MMO by MSCC.

Having reviewed the arguments provided within our response dated 20 September 2021, I consider that it is vital that the MMO's preserves its ability to protect from disclosure information subject to LPP and agree with the arguments against disclosure of this information.

## **Conclusion**

In conducting this internal review, I have given careful and detailed consideration to the exemptions to disclosure identified in the original response, together with the public interest test set out. Following this, I am of the view that there are several strong public interests factors in maintaining the exemptions to disclosure.

Additionally, given the comments included within your internal review request, I would like to clarify again that the MMO has not been in discussion with Peel Ports, or any other third-party, about any application under the Transport and Works Act 1992, and in any event would not be the appropriate consenting body. The engagement between the MMO and MSCC in 2018 related solely to whether a HRO would be the appropriate mechanism to implement the proposed changes. We subsequently confirmed that it was the MMO's position that the changes being sought could not be implemented through a HRO and we've had no further contact on the issue since this initial engagement.

In closing, this response now exhausts your rights of review under the MMO's internal review procedures. If you remain dissatisfied with the handling of your request, you have the right to appeal to the Information Commissioner's Office ("ICO"). The ICO can be contacted at

Wycliffe House, Water Lane, Wilmslow, SK9 5AF, by telephone on 0303 123 1113 or at [www.ico.org.uk/complaints](http://www.ico.org.uk/complaints).

Yours sincerely

Jess Chappell-Rosenthal  
Complaints Manager