

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 4 October 2012

Public Authority: Canal & River Trust
Address: First Floor North
Station House
500 Elder Gate
Milton Keynes
MK9 1BB

During the course of the Information Commissioner's investigation British Waterways ceased to exist in England & Wales and its functions were transferred to the Canal & River Trust. Throughout this decision notice reference is made to the Canal & River Trust. It should be noted that the request was made to British Waterways before it ceased to exist and any reference to the Canal & River Trust before it was established should be taken as reference to British Waterways. As part of this decision the Commissioner has considered whether the Canal & River Trust is subject to the EIR.

Decision (including any steps ordered)

1. The complainant requested information from the Canal & River Trust relating to the abstraction of water from the River Tawe to the Swansea Canal and the subsequent abstraction of water from the Swansea Canal to Vale Europe Limited.
2. The Commissioner's decision is that the Canal & River Trust is subject to the EIR and that the withheld information is environmental. He considers that the Canal & River Trust was entitled to rely on regulation 12(5)(e) to refuse to provide the complainant with the withheld information. He considers that the public interest in maintaining the exception outweighs the public interest in disclosure.
3. The Commissioner does not require the Canal & River Trust to take any steps.

Request and response

4. On 8 December 2011, the complainant wrote to the Canal & River Trust and requested information in the following terms:

'1. How much water is abstracted for the canal from the River Tawe each year (last 3 years) at the Panteg Weir?

2. How much water do you think is captured each year (last 3 years) from the many streams that enter the canal (and therefore don't reach the River Tawe) between Panteg and Clydach?

3. How much water is released from the canal into the River Tawe each year (last 3 years) between Panteg and Clydach, excluding abstraction and the amount that spills from the aqueduct at Clydach into the Lower Clydach River?

4. How much water spills from the aqueduct at Clydach into the Lower Clydach River each year (last 3 years)?

5. How many abstraction points are there on the canal, what are their locations and what are their purposes?

6. How much water is abstracted from the canal each year (last 3 years) for the nickel refinery from above (upstream of) the derelict lock at approx SN 69530 01430 in Clydach?

7. How much water is abstracted from the canal each year (last 3 years) for the nickel refinery from below (downstream of) the derelict lock at approx SN 69530 01430 in Clydach?

8. If there are any other abstractions from the canal, how much water is abstracted each year (last 3 years) at each point?

9. How much money is British Waterways paid each year (last 3 years) for the abstractions mentioned above?

10. Do you anticipate any significant changes to any of the above during the next 3 years?'

5. The Canal & River Trust responded on 9 January 2012. It provided the complainant with the majority of the information he requested. It stated that the information requested in part nine of the request was commercially sensitive.
6. The complainant asked for an internal review in relation to the Canal & River Trusts' response to part nine of the request.

7. Following an internal review the Canal & River Trust wrote to the complainant on 17 February 2012. It stated that it considered that information was environmental information falling under the EIR and that it was relying on the exception under regulation 12(5)(e) of the EIR to withhold the information.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the Canal and River Trust's refusal to provide the information he requested in part nine of his request. The Commissioner has therefore restricted his investigation to consideration of whether the Canal & River Trust was entitled to withhold the information the complainant requested in part nine of his request.
9. As British Waterways has ceased to exist in England and Wales it has been necessary for the Commissioner to first consider whether the Canal & River Trust is subject to the EIR.
10. In its submissions to the Commissioner the Canal & River Trust has made a staged argument. Firstly, it contends that it is not a public authority subject to the EIR. Secondly, it has argued that the information covered by part nine of the request is not environmental information and so the request should properly be considered under the FOIA. If the Commissioner accepts this position it considers that section 43 of the FOIA (commercial interests) applies to the information.
11. Alternatively, if the Commissioner considers that the Canal & River Trust is subject to EIR and that the information is environmental, it argues that the information is not information which 'relates to information on emissions' and so regulation 12(9) of the EIR is not applicable. As it does not consider that regulation 12(9) of the EIR applies it considers that the exception under regulation 12(5)(e) of the EIR is engaged and that the public interest favours maintaining the exception.
12. For the avoidance of doubt, the Commissioner considers that the responsibility for answering the complainant's request for information transferred from British Waterways to the Canal & River Trust when the former body was dissolved and the later body was established. Neither party has disputed this.
13. In the course of his investigation the Commissioner has considered all of the arguments made by the complainant and the Canal & River Trust including those not specifically referenced within this decision notice.

Background

14. The Canal & River Trust holds a license, issued by the Environment Agency, authorising an abstraction of water from the Swansea Canal. The Swansea Canal is supplied with water from the River Tawe. There is a weir and abstraction facilities on the River Tawe that are used to supply the Swansea Canal with water.
15. There is an agreement in place between the Canal & River Trust and Vale Europe Limited (formerly Inco Europe Ltd) for the company to abstract water from the Swansea Canal for use in industrial processes. The withheld information is the amount paid each year between 2009 and 2011 by Vale Europe Limited to the Canal & River Trust for this abstraction.
16. The Canal & River Trust has stated that the weir and abstraction facilities on the River Tawe are necessary for more than one purpose. It has stated that they are necessary in order to support valuable wildlife habitat, amenity value and recreational use of the Swansea Canal, as well as for the purposes of abstraction of water to Vale Europe Limited.

Reasons for decision

Is the Canal & River Trust subject to the EIR?

17. The British Waterways Board (Transfer of Functions) Order 2012 No.1659 transferred functions from British Waterways to the Canal & River Trust. In Paragraph 15 of Schedule 3 of the Transfer of Functions Order it states:

'15.— Freedom of Information Act 2000

(1) The Freedom of Information Act 2000 is amended as follows.

(2) In Part 6 of Schedule 1 (other public bodies and offices: general)—

(a) omit the entry relating to the British Waterways Board;

(b) at the appropriate place insert—

"Canal & River Trust, in respect of information held by it relating to functions exercisable by it by virtue of the British Waterways Board (Transfer of Functions) Order 2012 (S.I. 2012/1659)."

18. The Canal & River Trust is not a government department and so it is not subject to the EIR by virtue of regulation 2(2)(a) of the EIR.

19. Regulation 2(2)(b) of the EIR states that bodies covered by the FOIA are also subject to the EIR except for those bodies that are subject to the FOIA "only in relation to information of a specified description". As the Canal & River Trust is only subject to the FOIA in relation to information of a specified description it is not covered by the EIR by virtue of regulation 2(2)(b) of the EIR. Therefore, the Commissioner has gone on to consider whether the Canal & River Trust is subject to the EIR under regulation 2(2)(c) of the EIR.
20. Regulation 2(2)(c) of the EIR states that the definition of public authority includes:

"any other body or other person, that carries out functions of public administration"
21. The Commissioner considers that the Canal & River Trust is a body or person with legal personality as it is registered as a company limited by guarantee.¹ He has therefore considered whether it performs functions of public administration.
22. In the Tribunal Decision of *Network Rail Ltd v Information Commissioner* EA/2006/0061 and 0062 the Tribunal concluded that it is not enough that a body performs public functions, regulation 2(2)(c) of the EIR requires the functions to be administrative in nature. Functions of public administration are a subset of public functions generally. Therefore, it is important to establish both that the body exercises functions that are public in nature and also that these functions are administrative.
23. The Tribunal confirmed that no single factor was decisive when considering whether a body was exercising public functions. It referred to the judgment of Lord Nicholls in the case of *Parochial Church Council for the parish of Aston Cantlow and Wilmcote with Billesley v Wallbank and Another* [2003] UKHL 37 and [2004] 1 A.C. 546 ("Aston Cantlow"):

"Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."
24. The Tribunal also considered two further factors which it deemed relevant; the degree of government control and the performance of any regulatory function.

¹ British Waterways Board (Transfer of Functions) Order 2012 No.1659, section 2, footnote 2 "Canal & River Trust is a company limited by guarantee formed and registered under the Companies Act 2006 (c.46), company number 07807276"

25. The Commissioner has also taken into account the factors the Tribunal considered in the case of *Port of London Authority v Information Commissioner* (EA/2006/0061 and 0062) in determining whether the Canal & River Trust exercises functions of public administration.
26. The Upper Tribunal approved the multi-factor approach taken in *Port of London Authority and Network Rail in Smartsources v Information Commissioner & 19 Water Companies* (case no. GI/2458/2010). The Upper Tribunal confirmed:

"Applying the multi-factor approach means that we have to identify the relevant factors which point one way or the other and weight them in the balance in the process of determining whether the body in question is performing functions of public administration and so a public authority within regulation 2(2)(c)"²

27. The Upper Tribunal also confirmed that a body cannot be a 'hybrid' public authority subject to the EIR only in relation to the functions it performs which are functions of public administration.³ If a body is only performing functions of public administration to a 'de minimis' extent, in that its public administration functions are ancillary to its core functions, it is not a public authority under regulation 2(2)(c) of the EIR.
28. The Commissioner has therefore considered whether the Canal & River Trust performs functions of public administration in light of the binding decision in *Smartsources*.
29. The Transfer of Functions Order transfers a large number of statutory duties previously performed by British Waterways to the Canal & River Trust. Section 2 of DEFRA's consultation document on the transfer of powers states:

"One of the main purposes of the proposed Transfer Order is to modify existing statute law to enable NWC [now the Canal & River Trust] to succeed to those statutory powers and duties that are now held by BW and are necessary for the NWC to be an effective manager and guardian of the waterways being transferred to it".⁴

30. It goes on to state:

² *Smartsources v Information Commissioner & 19 Water Companies* (case no. GI/2458/2010), para 66.

³ *Smartsources v Information Commissioner & 19 Water Companies* (case no. GI/2458/2010), para 102-104.

⁴ http://www.ico.gov.uk/about_us/consultations/~media/documents/consultation_responses/DEFRA_waterways_consultation_20110920.ashx, section 2, para 9.

*'The improvement of rivers to enable navigation and the construction of canals were originally authorised by a large number of Acts of Parliament (well over 300 in the case of BW). Most were passed in the late 18th and early 19th centuries, and nearly all are to some extent still relevant today. For example, it is these Acts that continue to authorise the taking of water and in many respects regulate the relationship between the waterway and its neighbours.'*⁵

31. The consultation document explains that these are enabling Acts, that the Transfer of Functions Order will make the Canal & River Trust the successor to the powers and duties provided by the enabling Acts and that they will exercise these powers as a statutory undertaker.⁶
32. In relation to laws passed relating to the waterways after nationalisation in 1948 the consultation document explains that most of these were of general affect. It states:

*'The general scheme of the proposed Transfer Order will be to provide for the transfer to the NWC [now the Canal & River Trust] of the waterway management duties and powers provided for by these statutes...'*⁷

33. Finally, it explains that in relation to the key post-nationalisation statutes containing important waterway management powers and duties the *"proposed Transfer Order will make provision for these waterway-management powers and duties to pass to the NWC [now the Canal & River Trust]."*⁸
34. In relation to the governance arrangements of British Waterways the laws establishing its statutory basis have now been repealed. It is clear that the Canal & River Trust is a company rather than a creature of statute.⁹ However, it is also clear that the Canal & River Trust will have largely the same statutory powers and duties, will perform *"these duties and powers on exactly the same basis as BW now holds them"* and *"the net effect is intended to be the same."*¹⁰

⁵http://www.ico.gov.uk/about_us/consultations/~media/documents/consultation_responses/DEFRA_waterways_consultation_20110920.ashx, section 2, para 11.

⁶http://www.ico.gov.uk/about_us/consultations/~media/documents/consultation_responses/DEFRA_waterways_consultation_20110920.ashx, section 2, para 12.

⁷http://www.ico.gov.uk/about_us/consultations/~media/documents/consultation_responses/DEFRA_waterways_consultation_20110920.ashx, section 2, para 14.

⁸http://www.ico.gov.uk/about_us/consultations/~media/documents/consultation_responses/DEFRA_waterways_consultation_20110920.ashx, section 2, para 15.

⁹http://www.ico.gov.uk/about_us/consultations/~media/documents/consultation_responses/DEFRA_waterways_consultation_20110920.ashx, section 2, para 15.

¹⁰http://www.ico.gov.uk/about_us/consultations/~media/documents/consultation_responses/DEFRA_waterways_consultation_20110920.ashx, section 2, para 16.

35. The consultation document also explains:

"In addition to waterway specific statutes there is a body of legislation that affects BW by reason of its general status as a navigation authority, harbour authority and statutory undertaker in the same way as other such bodies are so affected. Such statutes will continue to apply to NWC [now the Canal & River Trust] in the same way as they do to BW now.

BW is currently subject to a range of statutory environmental duties under both domestic legislation (such as s.22 British Waterways Act 1995) and legislation originating from the EU such as the Habitats Directive and Water Framework Directive. NWC [now the Canal & River Trust] will succeed to all the environmental statutory duties currently applicable to BW and there will be no derogation from those statutory standards in the way NWC [now the Canal & River Trust] will have to operate."¹¹

36. The Commissioner considers that the Canal & River Trust will have far-ranging statutory powers and duties relating to the exercise of control over users of the waterways and rationing the use of the asset between competing interests, which are typically governmental and partially regulatory in nature. He also notes that the Canal & River Trust is a harbour authority, the basis on which the Duchy of Cornwall was found to be carrying out functions of public administration, in *Bruton v Information Commissioner and The Duchy of Cornwall & The Attorney General to HRH the Prince of Wales* EA/2010/0182.

37. The Commissioner considers that the Canal & River Trust is therefore responsible for exercising extensive statutory powers. In contrast to Network Rail, which is a private company with a commercial motivation, the Canal & River Trust's primary purpose is the protection of the waterway network. Its website states:

'Just a few steps away from our everyday lives, waterways give us a much-needed space where we can escape. Next to our canals and rivers we can relax and reconnect with ourselves, our environment and the people who matter to us. Our waterway network is a national treasure and the Canal & River Trust is here to ensure that it is protected forever.'¹²

38. The Commissioner considers that if the Canal & River Trust did not carry out these statutory functions the government would need to task

¹¹http://www.ico.gov.uk/about_us/consultations/~media/documents/consultation_responses/DEFRA_waterways_consultation_20110920.ashx, section 2, para 17.

¹² <http://canalrivertrust.org.uk/about-us>.

another organisation with them. He does not consider that a private sector body would be able to step in to perform these functions on a commercial basis (as the Tribunal determined would be the case in *Network Rail Limited*).

39. The Commissioner also notes that the Canal & River Trust will receive 800 million pounds of public funding over the next fifteen years¹³, a significant level of public funding.
40. For these reasons the Commissioner considers that the Canal & River Trust performs public functions. He has gone on to consider whether these public functions are also administrative in nature. The Canal & River Trust is tasked with overseeing the activities of many competing interests that have rights to use the waterways, whilst at the same time ensuring that those activities are sympathetic to the continued protection and preservation of the waterways as a resource for future generations. The Commissioner considers that the public functions performed by the Canal & River Trust are governmental in nature and that the process of managing these functions and balancing competing interests is administrative in nature.
41. The Commissioner has to balance these factors in favour of the Canal & River Trust carrying out functions of public administration with any factors that balance against this. The Commissioner notes that the Canal & River Trust is quite independent of government and that there was a clear intention that it should operate independently from government to a very great extent.¹⁴ It is also clear that the government, in January 2012, did not consider that the Canal & River Trust would be subject to EIR. The Canal & River Trust grant agreement summary stated:

“Furthermore, CRT will maintain an information regime that mirrors the provisions of the Environmental Information Regulations and, subject to Parliamentary consent; CRT will have obligations under the Freedom of Information Act in relation to its statutory functions.”¹⁵

42. By implication, a regime mirroring EIR would not be required if the Canal & River Trust was subject to the EIR.
43. The one factor that would indicate that the Canal & River Trust is not performing functions of public administration is the lack of any direct government control. The Commissioner does not consider that this

¹³ <http://archive.defra.gov.uk/rural/documents/countryside/waterways/defra-crt-grant-agreement.pdf>, p 1.

¹⁴ http://www.ico.gov.uk/about_us/consultations/~/_media/documents/consultation_responses/DEFRA_waterways_consultation_20110920.ashx.

¹⁵ <http://archive.defra.gov.uk/rural/documents/countryside/waterways/defra-crt-grant-agreement.pdf>

prevents a conclusion that the Canal & River Trust is carrying out functions of public administration and is therefore subject to the EIR by virtue of regulation 2(2)(c) of the EIR. On balance, he considers that the factors outlined above overwhelmingly weigh in favour of determining that the Canal & River Trust's core functions are functions of public administration. Therefore, the Commissioner considers that the Canal & River Trust is a public authority under regulation 2(2)(c) of the EIR.

44. It is not necessary for the Commissioner to go on to consider whether the Canal & River Trust meets the definition of a public authority under regulation 2(2)(d) of the EIR.

Is the information environmental information for the purposes of the EIR?

45. Regulation 2(1) of the EIR defines environmental information as follows:

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on–

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements; [...]*

46. The Canal & River Trust has argued that the amounts paid to it for the abstraction by Vale Europe Limited are not environmental information. It stated:

‘a. the amounts paid are not (a) information on the state of the elements or on factors affecting or likely to affect the elements listed in Regulation 2 (1) (a) of the EIR;

b. nor are the amounts paid a measure, such as a policy, plan, programme, agreement or activity affecting or likely to affect the elements and factors referred to in Regulations 2 (1) (a) or (b) of the EIR;

c. the payments are, it is correct, set out in the Schedule to the agreement between British Waterways Board and Inco Europe Ltd. However the payments themselves are not likely to affect the elements and factors referred to above. They are not, for example, penalty clauses for activities likely to cause harm to the environment.'

47. The Canal & River Trust recognises that the term 'environmental information' is to be construed broadly but argues that, as the ECJ held in *Glawischnig v Bundesminister für Soziale Sicherheit und Generationen (C-316/01)*, "it is not intended that the term be construed so broadly as to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors (paragraph 24)." It also referred to the case of *Nottinghamshire County Council v Information Commissioner EA/2010/0142* stating:

'In that case, the Tribunal also held that information is not environmental information simply because it has a slight or tangential association with the state of the elements of the environment...In this case, the payments made to British Waterways do not even have a slight or tangential association with the state of elements of the environment.'

48. The complainant has argued that the information is environmental information. He considers that the amount paid by Vale Europe Limited to the Canal & River Trust is information on a measure affecting or likely to affect the state of the elements of the environment and/or factors affecting or likely to affect the state of the elements of the environment. He argues that the extraction of water from the River Tawe to the Swansea Canal is a measure having a significant impact on the environment. He also argues that the amount paid for the abstraction is information on this measure.
49. The Commissioner notes that in order to fall within the definition of environmental information under regulation 2(1)(c) of the EIR the information itself must be on a measure or an activity. The measure or activity (not the information itself) must affect or be likely to affect the elements and/or factors in 2(1)(a) and (b) of the EIR, or be designed to protect the elements in 2(1)(a) of the EIR.

50. The Commissioner considers that the abstraction of water from the Swansea Canal is a measure and/or activity affecting or likely to affect the state of the elements of the environment outlined in regulation 2(1)(a) of the EIR. In particular, the Commissioner considers that the abstraction of water affects or is likely to affect water and/or biological diversity and its components. For example, the abstraction is likely to affect the volumes and flow of water in the Swansea Canal and the River Tawe and upstream and downstream migration of Salmon and Trout (regardless of whether those effects are positive or negative). He considers that the amount paid for the abstraction by Vale Europe Limited is information on the measure and/or activity.
51. Having concluded that the information is environmental information the Commissioner has gone on to consider the Canal & River Trust's argument that regulation 12(9) of the EIR does not apply and that it is entitled to rely on regulation 12(5)(e) of the EIR to withhold the information.

Does the information relate to information on emissions?

52. Regulation 12(9) of the EIR states the following:

'To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).'

53. This means that if regulation 12(9) of the EIR applies the Canal & River Trust cannot rely on regulation 12(5)(e) of the EIR to withhold the information.
54. The complainant has argued that the withheld information is information relating to information on emissions and so regulation 12(9) of the EIR applies. He stated:

'The first definition of "emission" in the full Oxford English Dictionary is "the action of sending forth". There's no doubt that abstraction of water from the canal amounts to "sending it forth" to the customer's plant. The information I have requested is therefore "information on emissions" which, by virtue of Regulation 12(9), is excluded from the exception in Regulation 12(5)(e) and the public interest test is therefore not relevant.'

55. The complainant has referred to Aarhus Convention Implementation Guide which defines emissions as:

"direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land".

56. He has also referred to the Information Tribunal case of *Ofcom v ICO and T-Mobile* EA/2006/0078 and the following extract:

'For all of these reasons we conclude that "emissions" in both subparagraph (b) of the definition of environmental information and regulation 12(9) should be given its plain and natural meaning and not the artificially narrow one set out in the IPPC Directive.'

57. The complainant considers that:

'the "sending forth" of water by a pipe from a canal to an industrial customer (and eventual discharge into a river) is an "emission" for the purposes of the EIRs;

Regulation 12(9) is therefore engaged and Canal & River Trust are not therefore entitled to rely upon Regulation 12(5);'

58. The complainant also considers that the supply of water to Vale Europe Limited from the Swansea Canal clearly comes within the plain and natural meaning of emission. He disagrees with the Canal & River Trust's argument that the definition of emissions is limited to 'emissions' into the environment. He considers that the definition of emissions should include the removal of water from the river via the canal which he considers has a major impact on the environment.

59. Finally, the complainant argues that following the water being used in industrial processes by Vale Europe Limited, or where the water is not used and is returned via overflow, it is apparent that it is returned to the River Tawe. He argues that returning the water to the River Tawe is an emission.

60. The Canal & River Trust considers that the abstraction of water from the environment does not involve any emissions. It has explained that:

'the means of abstraction of water are gravity feed pipes. There is no pumping during this abstraction process and therefore none of the emissions that would result from pumping such as noise and heat. The water is abstracted into a pool on Vale Europe's premises from where it is used in its process. In order to prevent the pool from over-flowing water is returned to the Canal after abstraction through a further gravity feed pipe if not used.'

61. Therefore, it does not consider that information, the amount paid for the abstraction, engages regulation 12(9) of the EIR. It has argued:

- *'An emission means an emission into the environment. This is evident from the wording of Article 4(2) of Directive 2003/4/EC on public access to environmental information (the "Directive"), which Regulation 12(9) of the EIR transposes. Article 4(2) expressly states that the restriction on Member States' application of exceptions applies "where the request relates to information on emissions into the environment". It is also evident from the wording of Regulations 2(1)(b) of the EIR, which refers to "emissions, discharges and other releases into the environment".*
 - *An abstraction involves taking water out of the environment rather than releasing something into it and therefore an abstraction cannot itself be an emission. The means of abstraction by Vale Europe is a flow of water through a pipe under the influence of gravity. There are therefore no ancillary emissions associated with the abstraction.*
 - *If the abstraction process does not involve an emission then it follows that the amount paid for the abstraction cannot be information relating to information on emissions.'*
62. It contends that even if the Commissioner considers that the abstraction process involves an emission then the amount paid for the abstraction is not information relating to information on emissions. It considers that this is supported by Advocate General's Opinions in two cases concerning the relevant provision in Article 4(2) of the Directive, *Ville de Lyon C-524/09* and *Stichting Natuur en Milieu Case C-266/09*. It stated:
- 'Advocate General Kokott's opinion was that information on emissions in this context did not cover all indirect information on emissions because the scope of the exceptions excluded, and in particular the scope of the exception as regards confidential commercial or industrial information, would be severely restricted.'*
63. The Canal & River Trust has also argued that this interpretation of regulation 12(9) of the EIR is necessary in order to be consistent with Article 1 of the First Protocol of the ECHR, which protects property rights including confidential information.
64. The Commissioner has considered all of the arguments made by the Canal & River Trust and the complainant. He has considered his published specialist guidance note entitled *'The Commissioner's approach to information relating to emissions'*.¹⁶ He has also considered the dictionary definitions of 'emission' and 'emit' from the Shorter Oxford English Dictionary. These are as follows:

Emission –

1. *“Something emitted: an emanation.”*
2. *“The action or an act of emitting.”*

Emit -

1. *“Give off, send out from oneself or itself (something imponderable, as light, sound, scent, flames etc); discharge, exude, (a fluid).”*

65. The Commissioner considers that the term emissions should be given its plain and natural meaning and, in accordance with the emphasis placed on the release of information relating to emissions in the Directive¹⁷, he will consequently give a broad interpretation to the definition of emissions under the EIR. However, having considered the Aarhus Convention, the Directive and the European case law cited above he considers that the approach to regulation 12(9) of the EIR outlined in his specialist guidance note is too broad. The Commissioner has therefore revised his position and he is in the process of updating his guidance accordingly. He considers that for regulation 12(9) of the EIR to be engaged the withheld information has to be directly on emissions (under regulation 2(1)(b)).
66. The Commissioner notes that the complainant considers that the “sending forth” of water from the Swansea Canal to Vale Europe Limited is an emission in itself. The Commissioner does not agree with this analysis – he considers that, in line with the Canal & River Trust’s submissions, an emission involves a release into the environment rather than taking something from it. In his view, emissions will generally be a by-product of another activity or process which are added (or potentially added) to the environment and over which any control is relinquished. He notes that the abstraction itself involves taking water from the environment and this is achieved by gravity feed pipes rather than any pumping system or intervention that could be described as “sending forth” the water.
67. The complainant has further argued that the whole process should be considered in determining whether regulation 12(9) of the EIR applies to the withheld information. The Commissioner does not agree with this approach. In this case he has found that the information is environmental because it is on a measure (the abstraction of water) likely to affect the state of the elements of the environment. Whilst in some cases it may be necessary to consider the wider process when reaching a view as to whether something is environmental information, this has not been necessary in this instance. Moreover it is not necessary to consider the whole process when deciding whether section

¹⁷ Directive 2003/4/EC on public access to environmental information.

12(9) applies. In fact as explained above, the Commissioner's view is that for regulation 12(9) to apply the information must be on emissions and therefore fall directly under Regulation 2(1)(b).

68. The withheld information is the payment specifically made for the abstraction of water from the Swansea Canal – the abstraction of the water being the measure and/or activity. The Commissioner does not consider that the withheld information is information on the wider industrial processes for which the water is used by Vale Europe Limited or the subsequent release of the water back into the environment. Even if it were, for the reasons outlined above, he does not consider that regulation 12(9) of the EIR would be engaged as the amount paid for water extraction is not information directly on emissions. It is not enough for information to be on a measure and/or activity that is affecting or likely to affect emissions in order to engage regulation 12(9) of the EIR.
69. As the Commissioner does not consider that regulation 12(9) of the EIR is applicable in this case he will go on to consider the Canal & River Trust's reliance on regulation 12(5)(e) of the EIR.

Regulation 12(5)(e) of the EIR – commercial confidentiality

70. Regulation 12(5)(e) of the EIR states the following:

'12.— Exceptions to the duty to disclose environmental information

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.'

71. The Commissioner will consider the following questions when applying regulation 12(5)(e) of the EIR:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

72. The Canal & River Trust has argued that the withheld information is commercial in nature for the following reasons:

'a. British Waterways has entered into a commercial agreement with Vale Europe under which Canal & River Trust sells water to Vale Europe;

b. the withheld information is the price paid by Vale Europe for that water;

c. moreover, since British Waterways has provided [the complainant] with the information as to how much water was abstracted by Vale Europe in each of the past three years, it would also be possible for the recipient of the information to work out the unit price of that water;

d. we note that the Information Commissioner's Guidance on confidentiality of commercial or industrial information states that a commercial activity will generally involve the sale or purchase of goods or services (as is in issue in this case). The Commissioner's Guidance also indicates that financial information which relates to an "income stream from a charge for goods or services" will be commercial information (paragraph 16). This is precisely the type of information that is in question here;

e. accordingly, the information is clearly, in our submission, commercial information.'

73. The complainant does not dispute this.

74. The Commissioner considers that the information is commercial in nature as it relates to a commercial activity – the sale of water by the Canal & River Trust to Vale Europe Limited for a given price. This element of the test is therefore satisfied.

Is the information subject to confidentiality provided by law?

75. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.

76. The Canal & River Trust has argued that the information is subject to a duty of confidence. It has also argued that the information has the necessary quality of confidence as it is not trivial and is not in the public

domain. It has emphasised the importance to Canal & River Trust of the income generated by water sales and what it considers would be the detrimental impact on its bargaining/negotiation position as a result of the disclosure. It has explained that as far as it is aware the information is only known to itself and Vale Europe Limited. The Commissioner is satisfied that the information is not in the public domain and that it is not trivial and so has the necessary quality of confidence.

77. The Canal & River Trust has stated that Vale Europe Limited has no objection to the information being released and so, the duty of confidence is one that is owed to the Canal & River Trust. It has also stated that Vale Europe Limited has confirmed to the Canal & River Trust that it considered itself to be under a duty of confidence in relation to the withheld information.

78. There are no express confidentiality terms in the agreement between the Canal & River Trust and Vale Europe Limited. However, the Canal & River Trust has argued that a confidentiality term is implied into the contract. It has also stated that there is an equitable obligation of confidence arising at common law. In support of its position it refers to the decision in *South Gloucestershire Council v ICO and Bovis Homes Ltd EA/2009/0032* which states that the Commissioner's agent:

'accepted that, given the nature of the information in the present case, it was clearly confidential so as to deserve legal protection in English law, whether there was a term in the consultants' contracts to that effect or not.'

79. It has argued that for the reasons outlined below in relation to the legitimate economic interest that is being protected by the confidentiality, this information is clearly information that deserves legal protection in English Law.

80. The Canal & River Trust also refers to the DEFRA guidance which makes the following distinction:

*'information which is so closely related to, say, prices and costs, that they are commercially confidential, from those which are of a more general nature whose disclosure would not in any reasonable view cause any adverse affect to the commercial undertaking.'*¹⁸

81. It considers that the withheld information clearly falls into the former category.

¹⁸ DEFRA Guidance 'Chapter 7 – Exceptions', <http://archive.defra.gov.uk/corporate/policy/opengov/eir/guidance/full-guidance/pdf/guidance-7.pdf>, July 2007.

82. Finally, in referring to the reasonable person test included in the Information Commissioner's guidance¹⁹, the Canal & River Trust states that it considers that a reasonable person would consider the pricing information to be confidential.
83. The complainant has not disputed that the information is protected by confidentiality provided by law.
84. The Commissioner considers that the information is covered by confidentiality provided by law. He considers that the nature of the information is clearly commercially confidential so as to deserve legal protection in English law. He notes that Vale Europe Limited considers itself to be under an obligation of confidence to the Canal & River Trust whether this is under an equitable obligation of confidence or an implied contractual term. Therefore, the Commissioner is satisfied that the information is subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

85. The Canal & River Trust has argued that the confidentiality is provided to protect its legitimate economic interests. It has explained that the Canal & River Trust's water sales business involves selling water from canals and rivers, which is not needed for the purposes of navigation, to third parties. It has also explained the following:
- it has around 100 customers around its network and receives queries each month about new arrangements;
 - the total water sales business is a significant source of revenue for the Canal & River Trust;
 - water sales agreements are negotiated on an individual basis;
 - in some locations the Canal & River Trust is in direct competition with water companies for the supply of water;
 - disclosure of pricing information would prejudice the Canal & River Trust's negotiating strength in discussions with prospective customers and give an unfair advantage to its competitors.
86. The Canal & River Trust has emphasised that this is not a hypothetical issue. It considers that the disclosure of the withheld information would

¹⁹ Information Commissioner's Office, http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Practical_application/eir_confidentiality_of_commercial_or_industrial_information.ashx, May 2012, para 21.

adversely affect its legitimate economic interests both in terms of its supply of water to Vale Europe Limited and its negotiating position in relation to potential customers.

87. The complainant has stated that he has misgivings about the legal basis upon which the canal water is taken from the river. However, the complainant recognises that this is an issue for the Environment Agency rather than the Commissioner. The complainant has also claimed that there is no competition issue in this particular case as he considers that it is extremely unlikely that any competitors could develop a competing source of untreated water (other than Vale Europe Limited itself). He also argues that pricing considerations are very specific to particular locations and so the price paid in this particular case wouldn't be of much value to competitors.
88. The Commissioner considers that the confidentiality in this case is provided to protect the Canal & River Trust's legitimate economic interests in maintaining its negotiating strength in discussions with prospective customers and its competitive position in the marketplace. He recognises the complainant's argument that prices will differ depending upon the specific needs of the customer, however, he does not consider that these would differ to the extent that disclosing unit price information would not inform prospective customers negotiating positions and give competitors an unfair advantage. He considers that this is the case in relation to the supply to Vale Europe Limited and to other prospective customers.
89. Therefore, the Commissioner considers that the confidentiality is currently provided to protect the Canal & River Trust's legitimate economic interests.

Would the confidentiality be adversely affected by disclosure?

90. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified. In this particular case the disclosure would completely negate the confidentiality.
91. The Commissioner therefore considers that regulation 12(5)(e) of the EIR is engaged and he will go on to consider the public interest test.

Public Interest Test

Public Interest Factors in favour of disclosure

92. The Canal & River Trust has explained that it took into account the following public interest factor in favour of disclosure:

- The general interest in openness, transparency and accountability in the dealings of public bodies.

93. The complainant has made three main arguments as to why the disclosure would be in the public interest in his internal review request:

'1. You are a public body and are required, amongst other things, to "have due regard to efficiency, economy and safety of operation as respects the services and facilities provided" and "exercise any power ... as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and ..."

2. Your supply of water to the nickel refinery requires the maintenance of a major weir and abstraction facilities on the River Tawe, which have significant environmental impacts (fish migration, river flow reduction, etc) and incur significant public cost in the form of monitoring, countermeasures, etc. They also affect the value of river property rights.

3. The main reason for continuing abstraction is the money to be obtained from the nickel refinery. Canal stretches below Clydach were abandoned and filled in long ago. Presumably the only reason the nickel refinery takes canal water is because it's cheap. I'd like to know how much money is paid for the water so that I can consider the economic sense of the operation in relation to the environmental and other impacts.'

94. The Canal & River Trust disputes points 2 and 3 made by the complainant. It has stated that the principal purpose of the abstraction from the River Tawe is to provide water to the Swansea Canal. Therefore, it does not consider that the supply of water to Vale Europe Limited requires maintenance of a major weir and abstraction facility on the River Tawe as this would be required regardless of this arrangement. It has explained that the Swansea Canal is classified as a "remainder waterway" and that the Canal & River Trust has a duty under section 22(2)(d) of the British Waterways Act 1995 to take into account the desirability of protecting for future use cruising waterways, or as areas appropriate for other public recreational use, remainder waterways with the potential for such use. It states that in accordance with this duty it keeps the Swansea Canal supplied with water because

of the valuable wildlife habitat it provides and its amenity value to those using it for recreation.

95. The Canal & River Trust does not consider that the supply of water to Vale Europe Limited is the main reason for the abstraction. Therefore, it does not believe that the price paid for the water is relevant to understanding the economic sense of the abstraction as the complainant has suggested.
96. The Commissioner considers that there is a public interest in openness, transparency and accountability in the dealings of public bodies. He considers that disclosing the information would inform the public as to whether Canal & River Trust is receiving a reasonable return for the service/product it provides to Vale Europe Limited. He has afforded some weight to this factor. The Commissioner notes that the Canal & River Trust does not consider that the supply of water to Vale Europe Limited is the main purpose of the abstraction facilities on the River Tawe. However, this is one purpose of the abstraction and so the Commissioner considers that the disclosure of the price paid by Vale Europe Limited would shed some light on the balance of the advantages and disadvantages of this abstraction. He has afforded some weight to this factor though not so much weight as would have been the case if this had been the sole or primary purpose of the abstraction of water from the River Tawe.

Public Interest Factors in favour of maintaining the exception

97. The Canal & River Trust considers that the public interest factors in favour of maintaining the exception outweigh the public interest factors in favour of disclosure.
98. It considers that the effect of prejudicing the Canal & River Trust's ability to negotiate similar agreements with third parties on a fully commercial basis would compromise an important source of income that the Canal & River Trust currently uses to invest in the waterways. The annual revenue generated from water sales amounts to a significant sum which is especially important given the current large arrears of maintenance on its historic network. It emphasises the importance of price negotiations and considers that the effect of disclosure would be particularly detrimental where it concerns a larger customer as these prices are more variable than those charged to smaller customers.
99. The Canal & River Trust considers that if the income from Vale Europe Limited was lost as a result of the disclosure then it would remove an important source of income that allows the Canal & River Trust to carry out works on the Swansea Canal to improve its amenity value. It has

stated that if this income was lost then it is unlikely that this work could continue.

100. The Canal & River Trust has also argued that there is a general public interest in favour of preserving the confidentiality of sensitive commercial information. It referred to the Court of Appeal's decision in *Veolia v Nottinghamshire County Council*, in which Rix L.J. stated:

*"it is plain that there is a strong public interest in the maintenance of valuable commercial confidential information, recognised repeatedly in our common law, in our statutes such as FOIA 2000's section 41, and in EU law such as the 2004 Directive. If the penalty for contracting with public authorities were to be the potential loss of such confidential information, then public authorities and the public interest would be the losers, and the result would be potentially anti-competitive."*²⁰

101. The complainant disputes some of the public interest factors cited by the Canal & River Trust in favour of maintaining the exception. He does not consider that the disclosure of the information would lead to the loss of income to the Canal & River Trust. He is also of the opinion that the abstraction has a detrimental impact on the environment and has provided a number of detailed examples. He considers that the information about the income the Canal & River Trust receives is important to understanding whether, on the whole, the abstraction is justified in terms of environmental sustainability.
102. The Commissioner considers that the effect on the Canal & River Trust's negotiating and bargaining position with potential customers in relation to its competitors would be severely affected if the information were to be disclosed. He considers that this is likely to endure until the point at which the price of untreated water has changed to such an extent that the information is considered to be too old to be of use to potential customers or competitors. He considers that this information would be relevant to customers and competitors for some time to come and notes that the Canal & River Trust receives a number of enquiries about the provision of water per month. He has afforded particular weight to this factor as the overall effect on the Canal & River Trust could be severe if it led to a loss of customers and the loss of a proportion of a significant income stream.
103. The Commissioner also considers that there is some inherent public interest in the maintenance of confidentiality. In this particular case he

²⁰ *Veolia v Nottinghamshire County Council* [2010] EWCA Civ 1214 [2011] Env LR 12, para 126.

does not consider that this inherent interest is particularly strong as Vale Europe Limited has no concerns about the information being released and therefore there would be no impact on the relationship between these parties. The Commissioner has afforded little weight to this factor in this case.

Balance of the public interest

104. The Commissioner considers that there is a public interest in openness, transparency and accountability in the dealings of public bodies. He also considers that there is an interest in the public understanding the balance of the advantages and disadvantages of the abstraction and that the price paid by Vale Europe Limited is a relevant factor.
105. The Commissioner also considers that there is a strong public interest in maintaining the Canal & River Trust's bargaining position with potential customers in relation to its competitors which would be severely affected if the information were to be disclosed. He accepts that there is an inherent public interest in the maintenance of confidentiality. However, in the particular circumstances of this case he considers that this is limited.
106. On balance, the Commissioner considers that the public interest in maintaining the exception outweighs the public interest in disclosure. This is mainly due to the severe and enduring effect that the disclosure would have on the Canal & River Trust's legitimate economic interests.
107. The Canal & River Trust is not required to disclose the withheld information.

Right of appeal

108. 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

109. 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.

110. 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

Jo Pedder
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Information Commissioner's Office
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