

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

Date: 14 August 2023

Public Authority: Canal and River Trust
Address: National Waterways Museum
South Pier Road
Ellesmere Port
CH65 4FW

Decision (including any steps ordered)

1. The complainant has requested copies of board papers for a specific meeting. The above public authority ("the public authority") originally stated that none of the requested information fell within the scope of FOIA. It later accepted that some fell within the scope of FOIA and some within the EIR.
2. The Commissioner's decision is that:
 - Some of the information within the scope of the request is environmental and fell to be dealt with under the EIR. Of the remaining information, some falls within the scope of FOIA and some does not fall within the scope of either regime.
 - Of the information that does fall within the scope of FOIA, section 36 has been correctly engaged, but the balance of the public interest favours disclosure.
 - Of the information falling within the scope of the EIR, the public authority has correctly engaged regulation 12(4)(e). For most of the information, the balance of the public interest favours maintaining this exception but, for some, it favours disclosure.
 - Regulation 12(5)(b) is engaged and the balance of the public interest favours maintaining that exception.

- The Commissioner is not satisfied that either regulation 12(5)(a) or 12(5)(e) is engaged.
 - The public authority breached sections 10 and 17 of FOIA as well as regulations 5(2) and 14 of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the information identified in the confidential annex.
 4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 1 November 2022, the complainant wrote to the public authority and, referencing a previous request he had made ("the previous request"), requested information in the following terms:

"You have today published minutes of a board meeting held in August 2022. This request is for the board papers that you failed to publish at the same time.

"This request is in addition to minutes/papers requested via - [the previous request] - which relate to four different meetings."
6. The public authority responded on 23 November 2022. It asked the complainant to clarify the meeting whose papers he was seeking – noting that all the papers sought by the previous request had now been published.
7. The complainant confirmed, on the same day, that he sought minutes of the meeting held in August 2022. He then chased a response.
8. The public authority dealt with this correspondence as a request for an internal review – covering both this request and the previous request. The public authority concluded that it had disclosed all the information it held in respect of the previous request and that the deadline had not expired for it to respond to the present request because it had needed that request to be clarified.

9. The complainant contacted the public authority again on 13 December 2022, noting that this internal review did not provide a substantive response to his request. The public authority responded to this correspondence on 14 December 2022. It claimed to have already responded to the request but, in attempting to demonstrate that, provided a copy of a response it had sent to the previous request. The complainant pointed out that this response was to a different request and that he had still not received a substantive response to his request of 1 November 2022.
10. The public authority issued a further response on 16 January 2023. It now took the view that none of the information within the scope of the request was covered by FOIA. However, had it been covered by FOIA, the public authority considered that it would have been exempt under either section 36 of FOIA, section 42 of FOIA or both.
11. The complainant remained dissatisfied with this position. He asked the public authority to revisit its stance and informed the public authority that he intended to refer the matter to the Commissioner. The public authority declined to issue a further response pending any investigation by the Commissioner.

Scope of the case

12. The complainant first contacted the Commissioner on 18 December 2022 to complain about the way his request for information had been handled.
13. At the outset of the investigation, the Commissioner wrote to the public authority to set out his provisional view of the complaint. He noted that, given the public authority's functions, it seemed likely that some of the information would be environmental and would therefore fall within the scope of the EIR. The public authority's response to date had not considered the position under the EIR. The Commissioner therefore asked the public authority to provide him with copies of all the withheld information and an assessment of whether each piece of information fell under the EIR, FOIA or neither.
14. As the public authority failed to respond within a reasonable time period, the Commissioner was required to serve an information notice to compel a response.
15. The public authority provided a response to the Commissioner on 12 May 2023. It noted that there were nine documents that fell within the scope of the request. Some of them (in its view) fell entirely under EIR,

some of them fell partially under EIR, some fell partially under FOIA and some fell within neither access regime.

16. The Commissioner contacted the public authority again on 16 May 2023. He was of the view that the public authority's assessment of the relevant regime against which to consider each piece of information was broadly correct (though he has set out his reasoning on that point below – should the complainant wish to challenge it). He therefore asked the public authority to issue a fresh response to the complainant that set out which information fell within the scope of which access regime and, where the public authority wished to withhold information, the FOIA exemption or EIR exception it was relying on.
17. The public authority issued its fresh response on 7 June 2023. It disclosed some additional information and relied on the following exemptions and exceptions:
 - Section 36 FOIA – prejudice to the effective conduct of public affairs
 - Regulation 12(4)(e) EIR – internal communications
 - Regulation 12(5)(a) EIR – national security and public safety
 - Regulation 12(5)(b) EIR – course of justice
 - Regulation 12(5)(e) EIR – commercial confidentiality
18. Where information fell outside the scope of both the EIR and FOIA, the public authority exercised its discretion and disclosed some of the information anyway. However it withheld some because it claimed that, had the information fallen under FOIA it would have been entitled to rely on one or more FOIA exemptions to do so.
19. The Commissioner offers no opinion as to whether such information would or would not be exempt if it were covered by FOIA. Where information does not fall within the scope of FOIA, there is no obligation on a public authority to disclose it, no requirement to cite any reason for withholding it and no recourse to the Commissioner if the requester disagrees with the public authority's reasoning. The Commissioner cannot consider whether any disclosure should or should not have taken place voluntarily.
20. The Commissioner has made further comments on the public authority's handling of such requests in the "Other Matters" section of this notice.
21. Rather than analyse matters on an exemption by exemption basis, the Commissioner instead considers that, for the purposes of this notice, it

would be more helpful to go document by document. For each document, he will assess:

- Which access regime(s) the information within each document falls to be considered under.
 - Whether the cited EIR exceptions or FOIA exemptions are engaged and, if they are;
 - Where the balance of the public interest should lie.
22. Finally, the Commissioner will determine whether the request was dealt with in accordance with the procedural requirements of both FOIA and the EIR. He will also address any other matters of request-handling practice that require attention.

Reasons for decision

Document 1 – declaration of interest report

23. Document 1 is a report on the declarations of interests of the various members of the public authority's board.
24. EIR caselaw establishes that information which may not, in itself, have a direct connection to the elements of the environment, may still be environmental information if it is on a measure that affects the elements of the environment.
25. In the Commissioner's view, this information is not environmental because it does not have a sufficiently direct connection to either the elements of the environment, or an environmental measure, to make it information "on" those elements, or that measure.
26. The Commissioner recognises that the public authority has functions relating to the elements of the environment and will, from time to time, carry out, or commission, measures which have an environmental impact. Its board, as the governing body, would be the ultimate overseer of any such measures.
27. The Commissioner therefore accepts that, in principle, information concerning a particular activity of the board may be on an environmental measure – but not all the board's activities will have an environmental impact. Whether a particular piece of information is, or is not, on an environmental measure is a question that is fact-specific and will depend on the information. It will be necessary to consider the purpose for which the information was created, the purpose for which it

is being, or has been, used and how it might inform environmental decision-making.

28. Document 1 does not have any particular connection to any specific environmental measures. It is general information concerning the broad day-to-day running of the public authority and its commercial activities. The Commissioner therefore does not consider this document to contain environmental information.
29. Nor does the Commissioner consider this document to come within the scope of FOIA.
30. The public authority is only partially covered by FOIA. Its FOIA obligations are only triggered when a request seeks information that relates to functions transferred from British Waterways ("transferred functions"). Information which does not relate to a transferred function is not caught by FOIA.
31. The Upper Tribunal in *Canal and River Trust v Information Commissioner and Wolfe* [2023] UKUT 92 (AAC) ("the Wolfe case") recently considered the extent to which FOIA applies to the public authority. The Upper Tribunal ruled that it was not sufficient for the information to merely relate to a transferred function that the public authority could exercise if it wished to do so: the information must relate to a transferred function actually being exercised (or proposed to be exercised).
32. FOIA caselaw establishes that the phrase "relates to" should be interpreted relatively broadly. There does not need to be a direct and immediate connection between the information and the transferred function in question.
33. However, whilst it is not necessary to establish a direct connection, there is still a test of remoteness. The Commissioner is also bound by the Wolfe case.
34. In the Wolfe case, the requester had asked for information on mooring charges. The Upper Tribunal recognised that the public authority did have transferred functions allowing it to levy charges, but that it had levied these specific charges in its capacity as a private landlord. Because the public authority had not been exercising its transferred functions to levy the charges (even though it would have been entitled to), the Upper Tribunal ruled that the information did not relate to the exercise of a transferred function.
35. Whilst the Upper Tribunal did not explicitly address the extent of the phrase "relates to" in this context, the implication of the ruling is that, if information relates to the exercise, by the public authority, of its powers as a private landlord, by definition it does **not** relate to the exercise of a

transferred function – even where the public authority could have exercised a transferred function to achieve a similar effect.

36. The Commissioner also notes that, given that many of the transferred functions relate to maintaining waterways (which would be an environmental measure), in practice the public authority is only likely to hold a limited amount of information that is not environmental, but is covered by FOIA.
37. The declaration of interest report relates to the conduct of the board meeting. It does not relate to the exercising of any transferred function it relates to the overall, general, day-to-day running of the public authority and its commercial activities. The Commissioner therefore considers that the connection between the information and the transferred functions is too remote to bring the information within the scope of FOIA.
38. The complainant has noted that the Charity Commission encourages charities to publish details of their trustees' interests. That may well be the case, but it is not relevant to the question the Commissioner is required to consider. The Commissioner is only required to consider whether the information is caught by FOIA or the EIR. If it is not, the public authority is not required to disclose it (though he notes that neither FOIA nor the EIR **prevent** the information from being disclosed or published voluntarily by the public authority).

Document 2 – Matters Arising report

39. Document 2 is a one page report on matters which had arisen since the previous meeting (July 2022). It contains five actions agreed at that meeting and progress made in addressing them.
40. Of the five actions, the Commissioner considers that three (1, 2 and 4) relate only to the day-to-day running or commercial activities of the public authority. Therefore they do not concern any transferred functions. Nor do they concern any environmental measures. Therefore these actions do not fall under either FOIA or the EIR.
41. Action 3 falls within the scope of FOIA as, although it does not relate to an environmental measure, it does relate to a transferred function (the Commissioner will not specify the function as this might reveal the information being withheld).
42. The public authority has relied on section 36 of FOIA to withhold this information on the basis that disclosure would prejudice both the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

43. In order to engage the exemption, a senior individual within the public authority "the Qualified Person" must provide an opinion stating that disclosure would cause the prejudice envisaged. The opinion must be reasonable.
44. The public authority provided copies of two opinions signed by the public authority's chairman, Mr David Orr CBE. It explained that, when it had originally applied the exemption, it had sought Mr Orr's opinion in relation to all the information being withheld – as, at that point, it was considering the information "without prejudice" as to whether it fell within the scope of FOIA. Now that it had revised its view about the information falling within the scope of FOIA, the public authority had sought a further opinion from its Qualified Person that related only to the information deemed to fall under FOIA.
45. The Commissioner accepts that a public authority is entitled to seek (and subsequently rely on) a fresh opinion from its Qualified Person at any point during the FOIA process – providing that the opinion considers matters as they stood at the point the request was originally refused and is otherwise reasonable.
46. The Commissioner is satisfied that Mr Orr is entitled to act as the Qualified Person for the purposes of section 36 of FOIA. Given that the second opinion supersedes the first, the Commissioner considers that the Qualified Person gave his opinion on 23 May 2023.
47. The Qualified Person considered that disclosure would prejudice both the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation for the following reasons:
 - "Disclosing the information in these documents would or would be likely to have a 'chilling effect' by inhibiting the free and frank advice and exchange of views between Trustees and the Board and the Executive on the Trust's internal workings and its future activity.
 - "These are confidential board papers. They either amount to future actions or live and internal working of the board and executive. They may not come to pass. They are regarding the future activity of the Board, include dates and an indicative forward look and disclosing the information in the documents would or would be likely to prejudice the Trust by removing the 'safe space' in which the Board can receive updates and so that various options can be explored away from intrusive public and media scrutiny which would lead to poorer decision making.

“Disclosing the information in these documents would/would be likely to prevent effective communications/briefings taking place during the time that these live issues are being considered.”

48. The Commissioner does not necessarily have to agree with the Qualified Person's opinion for it to be reasonable. It is not for the Commissioner to substitute his own opinion for that of the Qualified Person. The opinion need only be one that a reasonable person, familiar with the situation, might hold. It must relate to the relevant part of the exemption and must not be irrational or absurd.
49. Given the relatively brief and high level nature of the information being withheld here, the Commissioner does not consider that it is reasonable to claim (as the Qualified Person has done) that prejudice is more likely than not to occur. Members of the board should be expected to be robust individuals, not easily dissuaded from offering divergent opinions. The public authority is required to keep records of decisions it takes and therefore it seems unlikely that it would stop producing similar information in future.
50. However, the Commissioner does accept that it is not irrational to conclude that there may be some inhibition on board members if they fear that information they expect to remain confidential will in fact be disclosed.
51. For that reason, the Commissioner accepts that the Qualified Person's opinion is reasonable – but only at the lower bar of likelihood. This means that the likelihood of prejudice occurring is less than 50%.
52. Having accepted that there is a possibility of prejudice, the Commissioner recognises that there is a public interest in preventing that from occurring. The strength of that public interest will depend on the likelihood and severity of that prejudice.
53. In the present case, as the Commissioner has noted above, board members should be robust individuals and the public authority will need to keep a record of decisions it has taken. Given the relatively high level nature of the information being withheld, the Commissioner is not persuaded that the possibility of any inhibition occurring is considerable or that, if it did occur, it would be significant.
54. The withheld information does not record the opinion of any individual board member nor any discussion that may have taken place. It simply records an action that was agreed at a previous meeting and the progress made against that action – the information would have been more than four months old at the point the request should have been responded to.

55. The Commissioner is therefore of the view that the public interest in maintaining this particular exemption is low. At the same time there is a public interest in seeing how the public authority operates and the progress it is making.
56. In the circumstances, the Commissioner is satisfied that the balance of the public interest favours disclosing action 3.
57. Action 5 concerns an environmental measure and therefore falls to be dealt with under the EIR. The public authority has relied on regulation 12(4)(e) of the EIR (internal communications) to withhold this information.
58. The report as a whole was prepared solely for members of the public authority's board and there is no evidence that it has been shared outside the organisation. It is therefore an internal communication and the exception is engaged in respect of any environmental information it contains.
59. The public authority argued that the balance of the public interest should favour maintaining the exception for the same reasons it cited in support of its application of section 36 – namely that disclosure would impinge upon the safe space board members need in order to discuss controversial matters.
60. For the same reasons as he considered that the balance of the public interest favoured disclosure in respect of action 3, the Commissioner also considers that the balance of the public interest favours disclosure of action 5. Once again, the information being withheld is relatively high level and does not record any individual thinking or deliberation within the organisation – only an agreed outcome.
61. The Commissioner is thus satisfied that the balance of the public interest favours disclosing action 5.

Document 3 – Service Level Agreement memo

62. Document 3 is a memo, sent to the board by the public authority's legal and governance director regarding a proposed Service Level Agreement (SLA) with Powys County Council ("the Council"). The public authority has relied on regulation 12(5)(b) of the EIR (course of justice) to withhold this information.
63. The public authority has explained (and the Commissioner can see from the information itself) that the memo had been prepared for the purposes of providing legal advice to the board about a proposed SLA. The memo explains the potential legal risks associated with the SLA but does not include a copy of the SLA itself.

64. The Commissioner agrees that this document has been prepared by a professional legal adviser for a client (the board) and for the predominant purpose of providing legal advice. It is therefore covered by legal advice privilege.
65. Regulation 12(5)(b) of the EIR covers information whose disclosure would adversely affect the course of justice. This will include (amongst other things) information that is subject to legal professional privilege. This is because legal professional privilege is considered to be such a cornerstone of the justice system that anything which undermines that privilege will, by definition, undermine the course of justice.
66. As the document is covered by privilege, disclosure would breach that privilege and hence adversely affect the course of justice. This is sufficient to engage the exception.
67. The exception is subject to the public interest test, however EIR caselaw confirms that there is a very strong inbuilt public interest in allowing public authorities to seek and to receive good quality legal advice without fear that that advice will be subsequently made available to the world at large. The client must feel free to place the relevant facts candidly before their legal adviser and the adviser must feel free to provide candid advice – even if that advice might be unpopular. It thus follows that there must be equally strong public interest reasons for disclosure.
68. The Commissioner has considered the matter carefully, but does not consider there to be any compelling public interest reasons for disclosing the information. The proposed SLA is not one which is likely to have a widespread public or environmental impact and there will be opportunities to scrutinise the SLA itself (once agreed) without needing the legal advice provided.
69. Whilst the Commissioner recognises that there will always be a general public interest in transparency – particularly on measures having an environmental impact. However he does not consider, in this particular case, that this is sufficient to outweigh the considerable public interest in maintaining the exception. The public authority is therefore entitled to rely on regulation 12(5)(b) of the EIR to withhold this information.

Documents 4 and 5 – financial reports

70. Document 4 is a memo prepared for the board by the public authority's finance director. It sets out the short and long term financial forecasts for the public authority as well as the associated risks and opportunities. Document 5 is a set of powerpoint slides which covers similar ground.

71. Neither document concerns any particular environmental measure (or set of measures). They merely contain a high level appraisal of the public authority's current and future financial positions. The Commissioner is thus satisfied that they do not constitute environmental information.
72. The complainant (albeit without having seen the content of the information being withheld) argued that the information should be caught by FOIA.
73. The complainant pointed to figures from the public authority's most recent annual report which indicate that it spends a considerable portion of its annual income on "charitable activities" – which largely relate to the discharge of the public authority's functions.¹ Information on how the public authority intended to manage its expenditure would therefore affect the extent to which it is able to discharge its transferred functions.
74. Whilst the Commissioner accepts that such an argument has merit in principle, it is not one that applies well to the particular information being withheld – which, in fairness, the complainant has not seen.
75. Documents 4 and 5 do not set out any options for the public authority to take. They do not suggest how any particular budget items should be increased or reduced, nor do they otherwise discuss how the public authority should discharge its transferred functions.
76. Furthermore, even if the Commissioner were to accept that the way in which the public authority **spent** its funds did relate to the discharge of transferred functions, much of the documents discusses the **raising of** those funds in the first place. The raising of funds to support its activities is not a transferred function of the public authority.
77. The Commissioner therefore takes the view that the information in these documents does not relate to the public authority's transferred functions and therefore is not covered by FOIA.
78. The complainant has put forward a number of public interest arguments which he says support disclosure. Unfortunately public interest is not relevant to the question of whether information is, or is not, subject to FOIA.

¹ <https://canalrivertrust.org.uk/refresh/media/thumbnail/46785-canal-and-river-trust-annual-report-2021-22.pdf>

Documents 6 and 7 – strategic papers

79. Document 6 is titled “Strategic Choices Board Report” and the published minutes of the meeting show that it was presented alongside document 7 (“Supplementary Report – Strategic Review July 2022”).²
80. In broad terms, document 6 discusses various strategic options for the public authority to take. Document 7 provides a more factual context to the various options being discussed as well as noting some of the associated risks and challenges.
81. The public authority felt that the issue of whether these documents contained environmental information was one that was finely balanced. On the one hand, it noted that the information lacked specifics that would link it to the elements of the environment, but on the other hand it recognised that the various options would eventually have an environmental impact.
82. The Commissioner considers that the information, when viewed as a whole, is environmental. It is difficult to explain precisely why without revealing the content of the information but, in very broad terms, all of the options being considered were likely to have had some form of environmental impact (whether positive or negative). Some options would have had more impact than others and in some cases the impact would have been more direct than others – but each one would have some sort of environmental impact. Moreover, the information as a whole would assist the public in understanding the rationale and the context for the environmental decisions the public authority was considering.
83. The public authority has relied on regulations 12(4)(e) and 12(5)(e) of the EIR to withhold these documents.
84. Regulation 12(5)(e) applies to information whose disclosure would adversely affect an economic interest.
85. In order to engage the exception, four criteria must be satisfied:
 - a) The information must be commercial or industrial in nature.
 - b) It must be subject to either a statutory or common law duty of confidence.

² <https://canalrivertrust.org.uk/refresh/media/original/47002-trust-board-11-august-2022-minutes.pdf?v=fb8a8b>

- c) That confidence must be necessary to protect an economic interest.
 - d) Disclosure must adversely affect that economic interest.
86. The Commissioner considers that "industrial" information will relate to the production of goods from raw materials.
 87. The basis of commerce is trade and therefore to be "commercial", information must relate to the sale or purchase of goods.
 88. The Commissioner's guidance makes clear that not all financial information will be commercial information. Information about an organisation's income, for example, will only be commercial if it relates to income generated from the sale of goods or services.
 89. Whilst the public authority is a charitable trust, the Commissioner recognises that it will still have commercial interests. He also notes that the public authority receives a sizeable chunk of its income from property investments.
 90. However, the Commissioner does not consider that either document 6 or document 7 concern the public authority's **commercial** activities. They concern the public authority's **finances**, but they do not directly concern the buying or selling of any goods or services.
 91. The Commissioner is therefore of the view that none of the information within the documents is commercial information and it thus follows that regulation 12(5)(e) of the EIR is not engaged.
 92. The Commissioner has provided further reasoning in the confidential annex.
 93. Regulation 12(4)(e) **is** engaged. Both documents were prepared for consideration by the board and that is sufficient to make them internal communications. Whilst some of the **information** each document contains may have originated from, or have subsequently been shared, outside the public authority, there is no evidence that the **documents themselves** have. For the purposes of engaging the exception, the focus is on the form of the information, rather than its content – though the degree to which the information is known outside the public authority will be a relevant factor in weighing the balance of the public interest.
 94. Next the Commissioner turns to the public interest test.
 95. The Commissioner accepts that public bodies will occasionally require a safe space in which to consider ideas. As has been noted above, the

Commissioner considers that senior staff (such as members of the board) should be robust and not easily dissuaded from giving candid advice. Nevertheless, there are occasions where a public authority needs to debate options in private, in order to reach a decision which can then be made public and scrutinised.

96. The Commissioner recognises that the matters discussed in these documents are ones of particular importance to the public authority. The titles of the documents indicate that the board was contemplating important future choices. There are also financial discussions within the documents which, whilst not commercial, would still be sensitive.
97. The complainant has argued that this information can no longer be sensitive because of the time that has now elapsed since his request was made and the progress the board should have made, since the meeting, in developing its options.
98. The complainant also pointed to public statements made by the public authority's chief executive, which indicated that the public authority might need to close canals in future due to real terms cuts in government funding.³ The complainant argued that the strategic choices the board was making must relate to these cuts and therefore there was a public interest in ensuring that the various options had been properly identified and quantified.
99. The Commissioner is not required to determine whether the public interest would favour disclosure now (although the public authority clearly believes it should not), but whether it would have favoured disclosure at the point the public authority should have responded to the request – December 2022.
100. The remarks from the Chief Executive do not appear to have been in the public domain at the point the request was responded to. For obvious reasons the Commissioner cannot confirm or deny whether the complainant has accurately summarised the withheld information, but he (the Commissioner) has carefully considered the complainant's arguments – inasmuch as they are relevant to the situation.
101. Documents 6 and 7 describe the early stages of the various choices – indeed the minutes record that the board asked the executive to carry

³ <https://canalrivertrust.org.uk/news-and-views/news/government-funding-cuts-put-future-of-nations-historic-canals-at-risk>

out further work, prior to the next meeting, to allow it to make an informed decision.⁴

102. The Commissioner therefore takes the view that the public interest should favour maintaining the exception in respect of these documents. Whilst he recognises that there would be a strong public interest in the strategic choices the board was contemplating, he considers that that public interest would be stronger in respect of matters that were more fully developed. Therefore the public authority still required, at the point the request was responded to, a safe space in which to discuss and develop ideas.
103. The public authority has explained that this piece of work was, at the point of the request and today, still being considered. Therefore the discussion was one that was still "live" and one which could be disrupted by premature disclosure before options had been properly developed.
104. The Commissioner considers that, once the board has completed this work, there will be plenty of opportunity for public debate and scrutiny. However, inviting public scrutiny, at the point the request should have been responded to, would have distracted the public authority from its duties by having to defend options it may no longer be considering.
105. Having considered the various arguments, the Commissioner considers that these documents do form part of a policy-making process that was ongoing in December 2022. He is therefore of the view that the balance of the public interest should favour maintaining the exception.

Document 8 – Forward Plan

106. Document 8 is a short document outlining a programme of matters likely to be brought before the board in the coming months.
107. The Commissioner agrees with the public authority that none of the individual items constitute environmental information. The items have brief, generic headings. It is possible that, when some of them are discussed in detail, there may be some environmental aspects, but the mere setting out of this programme of work does not constitute information on any environmental measure.
108. Equally, the Commissioner agrees that this information does not relate to any transferred function. There are no items that would obviously

⁴ <https://canalrivertrust.org.uk/refresh/media/original/47002-trust-board-11-august-2022-minutes.pdf?v=fb8a8b>

relate to any transferred function and the information as a whole is too high level and too generic to be linked to a specific transferred function.

109. The Commissioner is therefore of the opinion that none of the information in this document is covered by either FOIA or the EIR and the public authority is not required to disclose it.

Document 9 – Chief Executive's Report

110. Document 9 is a report, written by the public authority's chief executive, highlighting the work of the public authority in recent months. Some of this document has already been disclosed.

111. The information contained in the document covers a variety of topics and the Commissioner has needed to take an item-by-item approach.

112. The sections of the report that deal with infrastructure and buildings will fall within the scope of the EIR as they relate to measures likely to affect the elements of the environment.

113. Those sections of the report that deal with finances, fundraising and the internal administration of the public authority do not concern any environmental measures and so do not fall within the scope of the EIR.

114. In general, the Commissioner has agreed with the public authority's assessment of the information that is and is not environmental – though he has elaborated on some of the reasoning for agreeing that information is environmental information in the confidential annex. The reason for this is that it is difficult to explain why some of the information is environmental without referencing the content of the information itself.

115. However, there is one area where the Commissioner considers that information is environmental even though the public authority considers otherwise. Again, the Commissioner is unable to provide his full reasoning in the published decision notice but, for the benefit of the complainant, the Commissioner has taken the view that the information is environmental because it is information on the state of human health and safety as it is affected by the elements of the environment or through measures affecting such elements. For the public authority's benefit, a more detailed explanation is included in the confidential annex. This information has, however, already been disclosed.

116. Of the information that is not environmental, the Commissioner does not consider that any is covered by FOIA. In broad terms the remaining information discusses fundraising activities, the internal administration of the public authority and general economic conditions – these are not

matters which relate to any specific transferred function and so the information is not caught by FOIA.

117. Of the information that is caught by the EIR and has not been disclosed, the public authority has relied on regulation 12(4)(e) of the EIR to withhold it. It has additionally relied on regulation 12(5)(a) of the EIR (national security or public safety) to withhold some of this information.

118. For one particular item, the public authority has relied on regulation 12(5)(a). In broad terms, this bullet point relates to reservoir safety.

119. In previous decisions, the Commissioner has accepted that reservoirs form part of critical national infrastructure and are therefore targets for potential terrorists. Any information which might increase the probability of an attack or could otherwise compromise the safety of the site is thus likely to engage the exception.⁵

120. Having considered the precise information being withheld, the Commissioner is not satisfied that its disclosure, at the time the request should have been responded to, would have compromised the safety and security of the sites in question. In two cases, the information does not go beyond what was already in the public domain at the time of the request. In the third case, whilst the precise information does not appear to be in the public domain, the Commissioner equally does not consider that the information would affect the site's security – the Commissioner has expanded on these arguments in the confidential annex to this decision notice.

121. Regulation 12(5)(a) of the EIR is therefore not engaged.

122. The Chief Executive's report was an internal communication at the point at which the request was responded to (although some of the document has since been disclosed). That is sufficient to engage regulation 12(4)(e).

123. Next the Commissioner moves to consider the public interest test.

124. The information the public authority has withheld is a mixture of very specific updates on particular projects and some more generic updates.

125. In respect of the specific projects identified, the Commissioner recognises that this information is unlikely to be in the public domain.

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023812/ic-165176-k4d7.pdf>

The information includes brief, but candid assessments of the status of the project and the risks, challenges and opportunities identified.

126. The Commissioner recognises that, as the body responsible for the overall management of the public authority, it is important that the board is kept informed of developments. Those assessments must be candid so that the board can do its job. If such information is not presented, the board will be unable to discharge its oversight function effectively and make sound decisions. For this information the public interest favours maintaining the exception.
127. For the remaining information, it appears to be either in the public domain or highly generic (or both). There is no good reason to believe that such information would not be provided to the board in future for fear of disclosure. The public interest thus favours disclosure of this information.
128. The various arguments are expanded on in the confidential annex.

Procedural matters

129. The Commissioner's decision is that the request was submitted on 1 November 2022. He does not consider that including a reference, in the request, to the previous request was helpful: the fact that the complainant had made a previous request was irrelevant as it did not affect the scope of what he was currently asking for. It clearly confused the public authority. Nevertheless, the Commissioner considers that the request (or, at least, the relevant part of that correspondence) was clear in what it was seeking. It did not require clarification. Although the public authority attempted to "clarify" the request, the clarification sought amounted to the complainant simply re-stating his original request.
130. The Commissioner does not consider that the public authority issued any substantive response to the complainant's request until 16 January 2023.
131. The Commissioner is therefore of the view that the public authority failed to respond to the request within 20 working days – though he notes that, even if he had accepted that the request was one that required clarification, the public authority still failed to provide a substantive response within 20 working days of receiving the clarification.
132. Several procedural breaches result from the above findings.
133. The public authority breached section 10 as it failed to confirm that it held some information, within the scope of the request, that was covered by FOIA, within 20 working days.
134. The public authority breached section 17 of FOIA as it failed to issue a refusal notice, citing the FOIA exemptions on which it wished to rely, within 20 working days.
135. The public authority breached regulation 5(2) of the EIR as it failed to disclose the environmental information it held, that was not subject to an exception, within 20 working days.
136. The public authority breached regulation 14 of the EIR as it failed to issue a refusal notice, citing a valid EIR exception, within 20 working days.
137. The Commissioner has given consideration to whether he should find a further procedural breach in respect of an internal review, but has decided he should not.

138. There is no statutory requirement, within FOIA, to complete an internal review – however there is such a requirement under regulation 11 of the EIR.
139. The Commissioner has considered the wording of regulation 11 carefully. It requires a public authority to reconsider whether it has met the requirements of the EIR – if the requester asks it to do so. The requester must seek the internal review within 40 working days of the alleged failure to meet a requirement and, when an internal review is sought, the public authority has 40 working days to decide whether or not it has met the requirement.
140. The complainant explicitly sought an internal review on 7 December 2022 – because the public authority had failed to respond to his request. His subsequent correspondence to the public authority indicates that he intended this correspondence to be dealt with as an internal review – despite the fact that he had yet to receive a substantive response. The public authority responded to this correspondence on 8 December 2022 and 16 January 2023.
141. The Commissioner considers that it would have been preferable for the public authority to have simply provided a substantive response to the request, rather than carrying out a review of a request it had yet to respond to. However, he considers that, to the extent that the complainant's correspondence engaged regulation 11, the public authority met its obligations and no breach occurred.
142. The Commissioner considers that it would have been preferable if the public authority had revisited its response of 16 January 2023 – especially given the complex nature of the request. Nevertheless he notes that the complainant did not seek to challenge that response until after he had complained to the Commissioner. On that basis, the Commissioner considers that it would be unfair on the public authority to have recorded a further breach of the EIR.

Other matters

143. The public authority is only covered by FOIA to a limited extent. In this case, although the public authority initially maintained that the information was not covered by FOIA, it stated that it was “applying FOIA without prejudice to whether we have a duty to do so.” The Commissioner recognises that this is done in the spirit of promoting transparency and will sometimes result in the public authority disclosing information, even though it has no legal obligation to do so.
144. However, in this case, the public authority issued a “refusal notice” in which it set out the exemptions that, in its view, would apply, if the information were subject to FOIA. It also set out why these exemptions would apply.
145. Whilst this approach would appear, in principle, to promote transparency, the Commissioner is not convinced that it is necessarily helpful in practice to cite exemptions when there is no legal obligation to disclose the information.
146. Firstly, by applying the FOIA process, even though it is not obliged to, the public authority risks distracting from the real reason why the request is being refused. The reason the information is not being provided is because it is not subject to FOIA and thus there is no obligation on the public authority to provide it. Whether an exemption would allow a public authority not to disclose particular information is irrelevant if there was no obligation to disclose in the first place. The public authority’s response was therefore ambiguous, to the point of being misleading, as to why the information was not being provided.
147. Secondly, responding to the request in such a way gives the requester the misleading impression that they would be entitled to ask the Commissioner to adjudicate on whether any exemptions had been correctly applied – when in fact he would be unable to do so.
148. The Commissioner’s jurisdiction is limited to determining whether a public authority has dealt with a request for information in accordance with its obligations under FOIA (or the EIR). If information has been requested that does not fall under FOIA (or the EIR), no such obligations exist to provide it and thus no exemptions need to be relied upon to comply with those obligations.
149. In such circumstances, the Commissioner will usually only be able to determine whether or not the information fell under FOIA, the EIR or neither. If the answer is neither, the Commissioner cannot require the public authority to disclose the information – even if the public authority has made an obvious error in deciding whether an exemption would

have applied. Only where the Commissioner is persuaded that the information does in fact fall under FOIA (or, as in this case, falls under the EIR) can he go on to consider whether any exemptions have been correctly applied.

150. The public authority's response of 16 January 2023 gave the misleading impression that the complainant was entitled to challenge its use of exemptions on appeal to the Commissioner. Had the public authority identified correctly that the information was not subject to an access regime, the Commissioner would have had no remit to determine whether or not the information should have been made available.
151. The Commissioner would not wish to prevent any public authority from disclosing information voluntarily, where it can safely do so – regardless of any legal obligation to disclose. However, the public authority needs to be clear about where it has a legal obligation to consider information for disclosure – and where it does not. It must also not give the impression that there is any right of challenge to its reasons not to disclose information voluntarily.
152. The Commissioner would also remind the public authority that it must consider whether information is environmental – even if that information does not relate to a transferred function and is therefore not covered by FOIA.

Confidential Annex

153. So as to preserve a meaningful right of appeal for the public authority (should it wish to exercise it), the Commissioner has found it necessary to place certain matters in a confidential annex, which will only be provided to the public authority.

154. The Commissioner has made every effort to try to place as much of his decision (and the reasoning behind it) in this notice – particularly where he has found that information should be withheld. This is so that the complainant is able to understand the decision and to formulate grounds of appeal – should he wish to do so.

155. Nevertheless, there are certain matters that the Commissioner wishes to draw to the public authority's attention or where he considers the public authority might benefit from further guidance. This further analysis cannot be provided in a meaningful fashion without extensive reference to the actual information being withheld.

156. For the benefit of the complainant, the confidential annex includes:

- A detailed list of the information the public authority is required by this decision notice to disclose.
- Further reasoning as to why particular information does or does not fall within the scope of either the EIR or FOIA.
- Further reasoning as to why particular exceptions do or do not apply.

157. For clarity, it may be helpful for the Commissioner to also record that he is only requiring the disclosure of two actions from document 2 and three of the bullet points from document 9.

Right of appeal

158. 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

159. 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.

160. 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