

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 2019

Public Authority: Canal & River Trust

Address: Head Office
First Floor North
Station House
500 Elder Gate
Milton Keynes
MK9 1BB

Decision (including any steps ordered)

1. The complainant has requested information from the Canal & River Trust (CRT) about its 2018 review of mooring agreement charges at Lisson Wide, London. Apart from providing some information in the public domain, CRT withheld most of the requested information, informing the complainant that his request was outside the scope of its obligations under the FOIA.
2. The Commissioner has considered CRT's response and she is satisfied, in respect of this case, that the information requested does not fall within the definition of information to which CRT has obligations under the FOIA.
3. The Commissioner does not require the CRT to take any steps.

Request and response

4. On 25 June 2018 the complainant made the following request for information under the FOIA:

"1. Copies of all general policy documents, guidance, reports or other documents which justify, inform, underpin or explain the general approach being taken by CRT in its 2018 review of mooring agreement charges.

2. All documents including emails, memos, notes of meetings, reports, assessments and other document evidencing CRT's specific consideration of the proposed price rise for mooring agreements at CRT's Lisson Wide mooring in London.

3. If not included in 2, all documents evidencing assessments or comparisons made by CRT relating to Lisson Wide and between Lisson Wide moorings and any other.

4. If not included in 3, full information (as known to and relied on CRT for the purpose of 2 and/or 3 above) about all and any other moorings considered (whether as comparables or for any other purpose) by CRT for the purposes of 2 and/or 3 above."

5. On 27 July 2018 the CRT responded to the complainant saying that it needed extra time in order to consider the public interest before responding.

6. The CRT responded on 10 August 2018 to say that it had no statutory obligation to provide long-term moorings. It explained that Waterside Mooring (the commercial long-term arm of the CRT for the long term, permanent moorings managed by the Canal & River Trust across England and Wales) operates independently from its boat licensing functions, and does not rely on statutory powers under section 43(3) of the Transport Act 1962 but relies on the CRT's land ownership in setting terms and conditions.

7. The CRT provided an internal review on 7 September 2018 in which it maintained its original position, agreeing that the power to demand charges for its services and facilities on inland waterways was transferred to the CRT from the British Waterways Board under section 43 of the Transport Act 1962 but explaining that the corresponding statutory power under section 10 of the same Act to offer that service or facility was not transferred. CRT stated that the latter power was not needed because it could exercise its private law powers to regulate moorings, for example, as a landowner and private company limited by guarantee. The transfer of section 43 powers was therefore irrelevant and it considered the control and pricing of its moorings to be a discretionary commercial activity covered by private law and outside its FOIA obligations.

8. The review nonetheless went on to suggest that, even if the requested information had fallen within its obligations under the FOIA, it would have been exempt under section 43(2)(commercial interests) of that Act. The CRT did provide some information that was in the public domain and therefore accessible to the complainant.
9. In later correspondence with the Commissioner, the CRT provided further details and arguments concerning its view that, even if the FOIA had been applicable, the information was exempt under section 36(2)(b),(c) and 36(4) – prejudice to the effective conduct of public affairs, as well as section 43(1) and (2).

Scope of the case

10. The Commissioner does not consider that the EIR is relevant in this instance. The EIR provides an applicant with the right to formally request access to environmental information. Regulation 2(1) of the EIR clearly defines what environmental information is for the purposes of these regulations. The CRT has clearly set out its reasons why the request is not for environmental information. It is economic or financial information, rather than environmental; it is either irrelevant or only minimally connected with any environmental purpose; it concerns the market rates for private long-term moorings; and access to it would not allow the public to be informed or participate in environmental decision-making. The complainant has not suggested that the EIR applies to his complaint.
11. The complainant contacted the Commissioner on 10 September 2018 to complain about the way his request for information had been handled. He explained that the information barely touched on what he had requested, that the question of whether CRT has powers other than section 43 of the Transport Act 1962 as the basis for charging for moorings is legally irrelevant since the question under FOIA is whether section 43 (which provides for charging) is “exercisable” by CRT and whether the information relates to it.
12. The Commissioner has solely considered whether the CRT has correctly interpreted and applied the British Waterways Board (Transfer of Functions) Order 2012¹ (“the Order”) and whether the CRT is correct in

¹ The British Waterways Board (Transfer of Functions) Order 2012 can be accessed via <https://www.legislation.gov.uk/ukdsi/2012/9780111521045>

asserting that the requested information does not fall within these functions and therefore it is not obliged to provide it in response to an information request.

Reasons for decision

13. The Order dealt with the transfer of functions from the British Waterways Board to the CRT. Schedule 1 lists much of the Transport Acts 1962 (though not section 10(1)(a) which imposed a duty to provide services and facilities on its inland waterways, see paragraph 17 below), the Transport Acts of 1968 and 1971.
14. In Paragraph 15 of Schedule 3 of the Order it states that:

"15.—(1) The Freedom of Information Act 2000(109) 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."
15. The amendment to the FOIA by virtue of the 2012 Order provided that FOIA would apply to information held by the CRT. However, this was limited to the extent that the information had to relate to the statutory functions taken over from the British Waterways Board. Broadly speaking, these functions comprised those giving the CRT the authority to operate and maintain the waterways.
16. The Commissioner therefore has to determine whether the information requested relates to any or all of the functions transferred by the Order.

CRT's view

17. Section 10 of the Transport Act 1962 is as follows:

"(1) It shall be the duty of the British Waterways Board in the exercise of their powers under this Act to provide to such extent as they think expedient –

(a) services and facilities on the inland waterways owned or managed by them, and

(b) port facilities at any harbour owned and managed by them

and to have due regard to efficiency, economy, and safety of operation as respects the services and facilities provided by them."

18. Section 43 of the Transport Act 1962 provides for the following –

"(3) Subject to this Act and to any enactment as is mentioned in the last foregoing section, the British Waterways Board and Canal & River Trust shall each have power to demand, take and recover or waive such charges for their services and facilities, and to make the best use of those services and facilities subject to such terms and conditions as they see fit..."

(8) The services and facilities referred to in subsection (3) of this section include, in the case of the British Waterways Board and Canal & River Trust, the use of any inland waterway owned or managed by them by any ship or boat."

19. In order to determine whether the request falls within the scope of CRT's FOIA obligations requires the consideration of the functions of the Board which were transferred to the CRT by the Order.
20. CRT explained that the Order transferred the charging function under section 43(3) of the Transport Act to CRT but not the duty in relation to the provision of the underlying service. The effect of this is that CRT has a statutory power to charge for its services and facilities but no duty to provide services on inland waterways owned or managed by them. There is no power under the statutory scheme entitling CRT to provide long-term moorings. In these circumstances the transfer to CRT of the power to charge for services and facilities (section 43(3)) is irrelevant as the underlying ability to provide the relevant service and facility has not been transferred, in this case, long-term moorings. CRT concludes therefore that the power is not exercisable in relation to the provision of long-term moorings which is exclusively private, having its own team, functioning separately from the rest of the network operator activities with its own brand and identity.
21. In order to illustrate the absence of any power under the statutory scheme to provide long-term moorings CRT explains the situation prior to the Order and the situation after the Order. After the Order the Trust was not obliged by statute to provide consent in the form of a long-term mooring facility as had been the case previously. It considers that there is no duty to provide such consent implied in the statutory scheme and provides the example of section 17(3) of the British Waterways Act 1995 that envisaged that vessels would be kept on long-term moorings but did not require CRT to provide such moorings.
22. Finally, it underpins its argument by stating that the long-term moorings are a private function not a statutory function such as the provision of

boat licences or facilities in connection with navigation. The private nature of it is reflected in the contractual relationship where it says:

"...there are no public law provisions concerning moorings along the Trust's canals. This is entirely a matter for management by the Trust as property owners."

23. CRT explained to the Commissioner that the provision of long-term moorings is a non-statutory commercial function the revenue from which is used for its charitable objectives. The moorings market is competitive and CRT operates a small proportion of the total inland waterway moorings, smaller still in London.
24. CRT's view is that the requested information is not within the scope of the FOIA. Although it has the power to charge for its "services and facilities" it is irrelevant because the duty to provide those "services and facilities" did not transfer to it under the Order.

The complainant's view

25. The complainant argues that powers under section 43(3) of the Transport Act 1962 are being exercised and that they cannot be evaded by claiming that CRT is using private law powers. He contends that the Functions Transfer Regulations are functions which could be exercised even if they are not actually being exercised. He states that the CRT does not dispute that section 43(3) could be exercised and that the information relates to this function. It follows therefore that the information is in scope, even if CRT is exercising other powers.
26. The complainant further argues that it cannot avoid its obligations by suggesting that it is acting under private law powers. Firstly, because the existence of such a law would not mean that CRT was not exercising its section 43(3) power. Secondly, even if it were not exercising a section 43(3) power, that power would be exercisable and the request relates to that power within the terms of the FOIA.
27. His view is that Schedule 2 of the Order amended the Transport Act 1962 section 43(3) which gave CRT the power to make charges for the use of Lisson Wide mooring and to impose terms and conditions on that use, all of which CRT does through the mooring agreements. His conclusion therefore is that the information he requested falls within the scope of CRT's FOIA obligations.

The Commissioner's view

28. The complainant provided his views regarding the public interest but these have not been reproduced here because, although CRT also provided its public interest arguments, they would only be relevant if the

Commissioner considered the request to be within CRT's FOIA obligations.

29. Schedule 1, part VI of the FOIA includes CRT in the list of bodies and offices that are subject to the FOIA. Its application is limited though to,

"(...) information held by it relating to functions exercisable by it by virtue of the British Waterways Board (Transfer of Functions) Order 2012."

30. The Commissioner notes that there was a public consultation² held in 2011 on the content of the proposed Transfer Order. In its summary of responses to this consultation³ the government justified its decision to limit the applicability of the FOIA to those statutory functions that the CRT inherited from the British Waterways Board through the draft Transfer Order by the need for a balanced approach between its private and public functions. This was to ensure a level playing-field with other navigation authorities in the voluntary and private sectors that provide competing mooring services whilst ensuring public access to information.
31. The Commissioner agrees that the power to charge for the provision of services and facilities under section 43(3) of the Transport Act was not excluded from Schedule 1 of the Order, therefore it was transferred to the CRT. She also agrees that the statutory duty for the British Waterways Board to provide services and facilities such as long-term mooring services was expressly excluded from the functions transferred to the CRT as set out in Schedule 1 of the Order.
32. The Commissioner also notes that the website of Waterside Mooring states the following:

"The Canal & River Trust is a navigation authority which fulfils statutory functions on the one hand, but also chooses to provide and manage long term, permanent moorings across its network as part of its commercial activities on the other. The Trust has no statutory duty to provide long term moorings."

² https://www.legislation.gov.uk/ukxi/2012/1659/pdfs/uksiod_20121659_en_001.pdf

³ https://www.legislation.gov.uk/ukdsi/2012/9780111521045/pdfs/ukdsiem_9780111521045_en.pdf (8.22-8.24)

33. It is the Commissioner's understanding that the FOIA applies to the information held by the CRT on charges imposed in relation to its statutory functions, for example, short-term moorings and boat licences but not on charges imposed in relation to its private functions such as long-term moorings. It is consequently the Commissioner's view that the requested information falls outside CRT's duties under the FOIA.
34. The Commissioner is not upholding any decision to withhold information under the FOIA in this case. She has no remit upon which to decide whether the information should be disclosed because the information does not fall within the functions to which CRT has FOIA obligations.
35. The Commissioner does not consider that the CRT is required under FOIA to supply the information requested. The Commissioner therefore requires the CRT to take no further steps in this matter.

Right of appeal

36. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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

Gemma Garvey
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