



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0204V

Before

Judge Stephen Cragg Q.C. heard via the CVP platform on 13 May 2021

Between

David Wolfe

Appellant

-and-

**The Information Commissioner
Canal and River Trust**

Respondents

The Appellant represented himself

The Commissioner was represented by Laura John

The Canal and River Trust was represented by Tom Hickman QC

DECISION ON SCOPE

DECISION

1. The appeal is allowed to the extent described below.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.
4. The Tribunal considered an agreed open bundle of evidence comprising 220 pages, written submissions from all parties and two bundles of authorities.
5. The Tribunal also considered two further witness statements from the Canal and River Trust (CRT) after the hearing date, and further submissions from all the parties, in a process that continued until 12 July 2021.

BACKGROUND

6. On 25 June 2018 the Appellant made the following request for information under FOIA from the Canal and River Trust (CRT): -
 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.

7. Apart from providing some information in the public domain, the CRT withheld most of the requested information, and told the Appellant that his request was outside the scope of its obligations under the FOIA.
8. In a decision notice dated 21 May 2019 the Commissioner agreed with the CRT and the decision notice reflected the Commissioner's view that the requested information fell outside CRT's duties under the FOIA.
9. The Commissioner recorded that even if the requested information fell within the CRT's duties under the FOIA, the CRT's case was that there would be exemptions under the FOIA which would support withholding disclosure.
10. The Appellant appealed against the decision notice on 14 June 2019 and subsequently the Commissioner changed her view and agreed with the Appellant that the information sought fell within the scope of FOIA. Following an oral hearing, the Tribunal made a decision on 12 February 2021, and concluded that the information sought did fall within the scope of FOIA.
11. The case has now come back before the Tribunal because the CRT continues to submit that exemptions under FOIA mean that the information sought should not be disclosed.

THE PARTIES' POSITION ON THE EXEMPTIONS

12. The first thing to note is that, having found in the decision notice that the request did not fall within FOIA, the Commissioner did not go on to consider whether the CRT was correct to say that one or more exemptions applied to the information and so this issue is being considered for the first time before the Tribunal.
13. **The CRT** submits that the information is exempt from disclosure pursuant to:
 - (a) Section 36(2) FOIA (specifically sub-sections 2 (b) and (c), and (4)) (inhibition of free and frank advice and views and conduct of public affairs); and/or
 - (b) Section 43 FOIA (commercial interests).

14. Section 36 FOIA provides, materially: -

Prejudice to effective conduct of public affairs

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

...

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation,

or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person.”

15. Section 43 FOIA provides: -

43.— Commercial interests.

(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

16. The ICO guidance on confidential information provides, amongst other things, that: -

A business secret might be:

- pricing information, such as how much a company plans to charge for a product it sells; ...

17. The CRT has set out in an open skeleton argument a helpful table of the documents which it seeks to withhold under these exemptions which can be reproduced here. The table includes the relevant page numbers in the closed bundle and the summary for claiming exemption from disclosure.

Document	Title	Summary exemption reason
D1/E1	Internal Note – London Mooring Prices 2018/19	S.36 early draft for internal discussion, principles subject to further work and change,

		proposed responses to public Queries
D2/E2	Price review rationale / process	s.36 early draft for internal discussion, principles subject to further work and change
D3/E3	Table of Mooring prices	S.36: unverified postcodes and 2 bed flat prices redacted as for discussion/illustrative purposes and not taken forward
D4/E4	Table of Mooring prices	S.36 “snap shot” list of indicative market prices (and differentials/uplift percentages) that had not been verified for discussion; historic information and proposed pricing was based on then current thinking S.43(1) and (2)
D5/E5	Table of Mooring sites, proposed price increases and comparator sites	S.36 estimate proposed price increases, market value prices and percentage rises – as above. Also, comparator site info, anomaly comparisons and comments, as part of early deliberations S.43(1) and (2)
D6/E6	Table of Mooring Prices	S.36 indicative competitor prices, as above. S.43(1) and (2)
D7/E7	Talavera auction history Matchmakers wharf auction history Millwall auction History	S.36 auction history more detailed than in public domain S.43(1) and (2)
D8/E8	Table of auction bids Manuscript notations	S.36 as above S.43(1) and (2)
D9/E10	Internal email subject “London boat sales” concerning berth prices at one mooring Site	S.36 officials exchanging provisional views/advice on prices on certain sites
D10/E9	Internal email subject “Talavera Berth Prices”	S.36 officials exchanging provisional views/advice on prices on certain sites

D11/E11	London Mooring Sites price review with manuscript notations	S.36 free exchange of views/advice Internal report to head of WM to summarise progress of price review. S.43 (1) and (2)
D12/E12	Central London Mooring Price Review 2018/9	S.36 as above S.43(1) and (2) commercially sensitive
D13/E13, E14	Mooring maps	S36 draft maps as part of internal workings and final map for internal use only. S.43(1) and (2)
D14/E15	Internal Note to Aid Staff or Media Challenges, Waterside Mooring CRT, London Mooring Site Price Review	S.36 internal document on possible media challenges and responses that would inhibit free and frank deliberations Section 43(2)

18. The CRT argues that: -

Whilst each document must be addressed on its merits, there are effectively three main categories of reasons underpinning the CRT's resistance to the disclosure of documents generated by the 2018 price review, other than in the redacted from set out in documents E1-E14:

- a. First, that many of the documents represent drafts, discussion documents or parts of an iterative process of conducting the price review, and that disclosure of such documentation would inhibit or be likely to inhibit the free and frank exchange of views during future price reviews or the effective conduct of its operations.
- b. Second, the process involved the generation of pricing information through the expenditure of significant time and resources. That information is held confidentially by CRT and not distributed or made public. It is thus in the nature of a "business secret", a form of trade secret under s.43(1). The information is of real value to the CRT and would be of value to its competitors in the non-assignable moorings market (perhaps a broad analogy could be drawn with a database of rental increases compiled by an estate agency or property leasing company).
- c. Third, disclosure of the information would be highly prejudicial to the commercial interests of CRT contrary to s.43 (1) and/or (2):

i. Publication of such information would be used by competitors to set prices in a way commercially advantageous to them (and disadvantageous to CRT) and it would facilitate predatory practices by CRT's competitors in the non-assignable mooring market, damaging CRT's revenues.

ii. Furthermore, auction bid information is not publicly accessible and it would be detrimental to the operation of the bidding system if bidders had knowledge of the level of bids in previous auctions.

19. The CRT have submitted a witness statement from Mr Tom Deards dated 29 March 2019 which covers these issues. Mr Deards is Head of Legal and Governance Services at the CRT. Mr Deards states that the CRT operates its long-term moorings on a commercial basis, through Waterside Moorings (WM) which sits within a discrete team with functional separation from the CRT's network operator activities. Mr Deards explains how the moorings business works as follows: -

14. Typically, when a customer gives notice on a mooring, or if Waterside Moorings creates a brand-new mooring, it will be offered to the market via the Waterside Mooring website ...on either a "buy-it-now" or an "auction" basis.

15. The majority of Waterside Mooring vacancies are advertised for sale via the "buy-it-now" system. ...Once the berth is sold, the price information is removed from the website as Waterside Moorings do not wish to leave this commercial information in the public domain, as the market price can rise steeply from year to year.

...

18. Since 2015, Waterside Moorings has sold some moorings via auction to the highest bidder. In London particularly, moorings are now mainly sold via auction. The mooring vacancy is listed on the website for 14 days with the auction closing date and time.

20. Auction bids must be submitted on-line and the identity of the bidders and bidding history can be viewed while the action is open. ...Auction bid information is removed from the website immediately after the auction ends with no access given to cached information...

21. If auction bid information were to remain within the public domain, this would significantly prejudice the optimal functioning of the auction system, to the detriment of the Waterside Moorings and the wider Trust. Future bidders would have full knowledge of individual bids and bidders for specific mooring berths and may not otherwise bid as high, based on that knowledge of past bids and bidders. It is inconceivable that any commercial auction operator would wish to voluntarily disclose this information for fear of undermining the advantages of the auction system in finding the highest price that someone is willing to pay.

22. A further factor in Central London is that, for historic reasons (i.e. undertakings given by British Waterways to particular mooring customers in the past) many of our moorings are “assignable”, which means that the agreement holder can sell their boat with the mooring — with successors only bound to pay annual published price increases as opposed to participating in an auction.

23. This means that the moorings on these sites never reach the market, with the result that the Waterside Mooring prices for assignable sites have fallen a long way behind the price charged at non-assignable moorings in other areas of London — although we are aware that significant premiums above the cost of the boat (of hundreds of thousands of pounds in some cases) were being paid between assignable mooring customers.

20. Mr Deards explains that in 2017/18 CRT generated around £7m income from its WM business with a profit of about £4m. As a charity, CRT is obliged to use its assets to maximise revenue and the profits generated from WM’s commercial activities are used to further the CRT’s charitable objectives.

21. Mr Deards devotes some time to explaining how the moorings market works. There is a number of other operators who are competitors of WM including Castle Marinas and Tingdene Marinas. He says competitors would be interested in obtaining detailed information on WM’s present and future pricing on individual nearby and comparable moorings, which could lead to ‘predatory’ pricing to coax WM’s customers.

22. In relation to WM’s price review, this took place between February and April 2018, with the outcome communicated on 16 April 2018. Mr Deards says that the following factors were taken into account (see paragraph 38 of the statement): -

- Whether the mooring benefited from assignability or not (comparing prices paid for boats on an assignable mooring with the average value of a similar boat without mooring).
- A combination of auction and “buy-it-now” prices to sell new berths and to replace berth holders who have left (mainly non-assignable) berths. The Trust had been typically able to sell London moorings via auction at or above its proposed prices, particularly for recent sales.
- The facilities at each site (power, water, foul discharge, refuse disposal, storage space and the immediate environment).
- Prices charged by third party operators (including inland marinas), where available.
- Levels of occupancy and the number of boats in London (an increase at a 10% compound annual growth rate (CAGR) since 2012).
- Whether the mooring is for a residential or a leisure mooring
- Location of each site.

23. Mr Deards says it took several months to arrive at this list of factors with some criteria removed after earlier consideration and testing of ideas in earlier iterations included in the withheld material, and it is claimed that disclosure would deprive the CRT of thinking space while formulating policies especially around commercially sensitive issues. The same is claimed for documents showing early projections and pricing proposals, the gathering of (commercially sensitive) information and comparisons, internal emails, internal briefing notes, and maps providing a visual representation of the relative location and distance between the various mooring sites.

24. Mr Deards also claims the benefit of s36 FOIA for documents produced for dealing with customer and media queries about the process outcome and rationale for the price increases.

Qualified person's opinion

25. There is a briefing note dated 28 March 2019 from Mr Deards who is Head of Legal & Governance Services at the CRT, to the qualified person (the Chair of Trustees) (QP) in this case. This sets out the background to the request and the request itself. It is explained that further information is held, and that Mr Deards believes it is exempt from disclosure pursuant to s36(2) FOIA, and the wording of s36(2)(b)(i) and (ii) FOIA is set out.

26. Mr Deards then sets out the documents to which he believes s36(2) FOIA applies, essentially in similar terms to the descriptions set out in the table above. The QP was sent the actual documents, but it is not clear if he considered their contents.

27. The QP was then provided with the terms of the question he would have to answer for the purposes of s36(2) FOIA, and provided with the guidance on definition from the Commissioner's guidance for the terms 'would be likely to', 'inhibit', and 'prejudice'. It seems to me therefore that he was provided with a good explanation of his task.

28. He was also told: -

You also need to consider counter-arguments to withholding this information, such as the legitimate interest of Waterside Moorings customers in having a full understanding of the basis of the increase in their mooring price and the fair amount of public and stakeholder interests that the price review has generated. There is

also general acceptance that openness and transparency create trust and respect of an organisations.

29. The QP was then asked to consider the information in the documents and confirm whether or not the test in s36(2) FOIA is met. The request for an opinion was sent on 28 March 2019. On 29 March 2019 the QP responded by email which said ‘Tom...confirmed thx...?’.

30. **The Appellant** responded to the CRT’s submissions on the exemptions. He outlines his main submissions on the exemptions as follows: -

(a) The CRT’s expressed intention (in undertaking the 2018 Mooring Price Review) was to “reflect” market levels so as not to undercut commercial providers (and to comply with competition law), rather than pursue the income maximisation approach it describes now.

(b) The wide application of commercial confidentiality to all price-setting issues, meant that nothing would ever be provided in relation to charging practices.

(c) The issues here relate to, and need to be determined by reference to, the particular category of information in issue here, namely that relating to the CRT’s setting of mooring fees for its assignable moorings in London. If other matters such as information about non-assignable moorings in London are disclosed as a result that is only because the CRT has chosen (wrongly) to include them in the deliberations on assignable moorings.

31. The Appellant is concerned that the CRT has not understood the difference between assignable and non-assignable moorings and that taking the pricing of the latter into account has the effect of distorting the market and pricing for the former. He argues that disclosure of the requested information under FOIA will allow proper public scrutiny of the CRT’s actions. He emphasises that he is entirely happy to pay the appropriate market rate for an assignable mooring. In setting prices, CRT is not simply another commercial provider, it is the network operator, dealing with an essentially public asset, subject to restrictions such as the Competition Code and the scrutiny which comes from being in scope for these purposes of FOIA.

32. The Appellant questions how information which the CRT has properly gathered in order to ensure that it does not undercut competitors provides any improper basis for competitors to be advantaged.
33. In relation to the QP's opinion the Appellant criticises the paucity of the information provided to the QP, and notes that the QP appears to have given the matter only fleeting consideration.
34. In relation to the public interest the Appellant notes that the information goes to the heart of the way in which the CRT conducts pricing of what is essentially a public asset which it manages as a trustee in the context of its role as network operator. The CRT's inclusion under the auspices of FOIA sets it in a different position to that of a private organisation. The Appellant also emphasises the public interest in the scrutiny of the CRT's price setting processes.
35. Specifically in relation to the application of section 43 FOIA, the Appellant points out again that if CRT has produced and relied on information going beyond the market reflection exercise which it was undertaking, then the production of that information is what he calls 'a self-inflicted wound'. By that I understand him to mean that the CRT should not be able to claim the protection of a FOIA exemption for material which it should not have been considering as part of the price-setting exercise. He objects to the CRT wanting to set prices by reference to the market and then hide the process of doing so from public gaze. He says that the operation of properly conducted public auctions should not be kept secret, and disclosure would increase public confidence.
36. **The Commissioner** set out her position on exemptions in a skeleton argument prior to the hearing of this appeal. She said that in summary her position was: -
- (a) Section 36(2)(b) FOIA is engaged in respect of all of the documents requested. The public interest lies in favour of disclosing document D14/E15, but withholding the rest of this information;
 - (b) It would be necessary to explore with the witness (Mr Deards) at the resumed hearing the extent to which the information in documents D4/E4-D8/E8, D10/E9, D11/E11, D12/E12, D13/E13, E14, and D14/E15 is within section 43(2) FOIA;

(c) Section 43(1) FOIA is engaged in respect of the document at D13/E13, E14, and the public interest lies in favour of withholding it. It is not engaged in respect of the other documents to which the CRT has applied it;

(d) Section 36(2)(c) FOIA is not engaged; and

(e) Accordingly, the document D14/E15 may fall outside the exemptions depending on the evidence of the witness at the resumed hearing.

37. In relation to s36(2) FOIA, the Commissioner was of the view that the QP's opinion was reasonable (although less than satisfactory) in relation to the application of s36(2)(b) FOIA, but not s36(2)(c) FOIA, because this was a residual provision which required a different sort of prejudice (which had not been identified) than that covered by s36(2)(b) FOIA. In relation to s36(2)(b) FOIA the Commissioner noted that the QP did not address the impact of disclosure at the date of the request, but concluded that, on the facts of the case, this did not make the QP's opinion unreasonable. There was also some uncertainty as to how statistical information had been dealt with, but again this did not make the QP's opinion unreasonable in the Commissioner's view.

38. In relation to the public interest balance (other than for D14), the Commissioner's view was that it was in favour of withholding the information. The price review was an important process affecting boat owners and the CRT, robustness of the process was important which required a safe space to explore the calculation and stress-testing of calculations.

39. There was a public interest in the CRT being transparent and accountable in relation to the process adopted. The Appellant wished to ascertain whether the CRT has ultimately set its prices against a benchmark of comparable assignable leisure moorings, offered by private providers, which he considers are the appropriate benchmark for determining the "market rate". However, in the Commissioner's view an explanation of the CRT's approach had been provided, for example in Mr Deard's witness statement at paragraph 38 where he set out a range of factors when considered by WM when setting prices (see above).

40. The Commissioner says that as she understands the disputed information: -

.... it does not contain anything that would enhance the public's understanding of the approach which the CRT actually adopted – rather, the documents contain, or reference, different approaches considered at an earlier stage in the internal discussions. It therefore appears that the CRT has met the public interest in transparency, and that the public interest factor which the Appellant has identified does not apply to these documents.

41. The Commissioner does not apply this approach to document to D14 'which is essentially a set of 'lines to take' in responding to media and public enquiries, and as such it contains material that has been deemed suitable for sharing with the public'.

42. In relation to s43(2) FOIA and its application to documents D4-D8 and D11-D14, the Commissioner accepts that 'some, perhaps a majority, of the information in these documents will fall within the scope of the exemption'. The Commissioner is of the view that: -

The CRT is engaged in an economic activity, in a competitive market, and information that is confidential and commercially sensitive about how it operates and how it intends to conduct itself in the market in future is information which could be used by its competitors, in order to determine their own future conduct on the market. That would cause prejudice to the CRT's commercial interests, and the Commissioner does not consider that it is in the public interest to disclose information that would have this sort of market-distorting effect.

43. However, there was material in these documents which the Commissioner was less sure would be covered by the s43(2) FOIA exemption. This included historic prices going back to 2012 (in D4), information about sites under the control of entities other than the CRT (in D5 and D6); auction histories for four sites, given that some information had already been disclosed (D7 and D8); historical prices and prices on third party sites (D11); maps (D13); a public relations note (also covered above under s36(2)(b) FOIA (D14). The Commissioner wanted to explore these issues with Mr Deards at the hearing: -

... insofar as the CRT can demonstrate that disclosure of information within these documents would distort the behaviour of participants in the moorings market, and that section 43(2) FOIA is engaged on this basis, the Commissioner would accept that it is in the public interest for such documents to be withheld.

44. In relation to s43(1) FOIA the Commissioner was of the view that

The only document which is capable of being considered “something technical, unique and achieved with a degree of difficulty and investment” is document D13 which Mr Deards describes as having required the application of specialist IT software and expertise, and as having taken several days to compile. The Commissioner agrees with the CRT that the public interest lies in favour of withholding this document.

THE HEARING

45. At the hearing, Mr Deards gave evidence and expanded upon his written statement, and answered questions from the Appellant and Commissioner about the applicability of s431(1) and (2) FOIA. He explained that the information was pricing information which had taken several months to collate and develop, and that if disclosed would be of commercial benefit to competitors who did not have the information.
46. It was submitted on behalf of the CRT that the withheld information would be well recognised as being sensitive, pricing information and it was not necessary to go through it line by line as it was difficult to be sure exactly what would be useful to competitors. It was painstakingly prepared information (including maps and spreadsheets) and competitors would not have shared it with the CRT if they had developed such information.
47. In submissions the Appellant made the point again that the CRT should not have taken into account non-assignable mooring prices and it could not claim exemptions in relation to this information, and also doubted the commercial value of other information withheld. The Appellant submitted that the withheld information as described did not appear to explain the process by which the CRT had reached its conclusions on pricing and that more information must surely be available.
48. As a result of this submission, it was agreed that the CRT would perform further searches to confirm whether or not there was further information.

POST-HEARING DEVELOPMENTS

49. As plausible questions were raised about whether there was further information to be disclosed by the CRT, it was agreed by the parties that the CRT would file a letter setting out the searches that had been undertaken in response to the information request in question in this appeal. However, on 11 June 2021 the CRT wrote to the Tribunal to say that: -

...further to this, efforts were made by the Trust to establish the nature of the searches that were undertaken. Unfortunately, the individual who was responsible for conducting the searches has left the Trust and it is not possible to contact them. Nor was any document found setting out what the searches undertaken consisted of. In these circumstances, the Trust decided to re-conduct the searches.... This search has now been completed.

The repeated search uncovered a small number of additional documents that fall within the scope of the freedom of information request and that were not originally included in either the open or closed material, as set out in and exhibited to the second witness statement of Tom Deards, attached with this letter. In particular, an email conversation was found (documents F2/G2 and F3/G3 as appended to the witness statement) which records the Head of Waterside Moorings acknowledging that having reviewed the documents produced as part of the price review and discussed these with colleagues, the market prices that should be aimed for in the price review were £749 per linear metre for residential sites and £572 per linear metre for leisure sites. As set out in the statement, no other explanation of how the final price was arrived at was found.

As also set out in this statement, the Trust accepts that in relation to documents F2/G2 and F3/G3, the parts of the emails that amount to a final decision by the Trust in relation to the London Mooring Price Review are not exempt under the Freedom of Information Act ("FOIA") and should be disclosed to the Appellant if they are, further to any appeal, found to be in scope of FOIA. In addition, the Trust accepts that the letters contained in document F4, which were sent to mooring customers in London explaining the outcome of the price review and how it would be applied to them, should be disclosed if they are in scope of FOIA.

50. Thus the CRT's position is that it is not disclosing the additional information at this stage even though none of the FOIA exemptions would apply to it, despite the Tribunal's previous ruling that information of this type would be within scope of the FOIA, because there is still the possibility of an appeal against that ruling. The CRT went on to say that: -

The Trust claims that document F1/G1 is exempt under s36 FOIA, for the reasons set out in the witness statement. The Trust previously disclosed the briefing note provided to the Trust's Qualified Person and the correspondence confirming his opinion in relation to s36 FOIA as applied to the existing information in this case. The Trust is also disclosing the same in relation to s36 as applied to the new materials referred to above.

51. Mr Deards second statement is dated 11 June 2021. He confirms that: -

Specifically, the Trust's IT team have now carried out a search for all Microsoft Outlook items for the 6 month period prior to the FOI request on 25 June 2018 (incoming and outgoing emails, calendar appointment, notes, tasks etc) for the relevant Trust colleagues for key words and phrases (e.g. 'Lisson' and 'London mooring price review') and also asked those relevant colleagues who are still working for the Trust to search all other places where information may be held.

52. Mr Deards confirmed the contents of the CRT's letter in relation to the additional information discovered during the search. He describes the documents found as follows: -

5.1 Documents F1 and G1: Email from Mark Blackwell to Stuart Mills and Richard Parry dated 8 April 2018 (in advance of a meeting on the London Mooring Price Review the following day) appending an internal summary briefing document, draft template customer letter and internal draft FAQs. The internal draft FAQs document is D14 as already included in the closed bundle (at pages 34-37) so is not appended here. The internal summary briefing document consists of document D12 as already included in the closed bundle (at pp. 28-29) and is therefore not appended here. In addition, the internal note also includes a slightly different version of the internal briefing note already included in the bundle at document D1 (at p. 9) with very minor differences. It is appended here for completeness. The draft template customer letter was an early version of the letter already included in the open bundle at pp. 28-29. In my view this email and its attachments are exempt in their entirety under s36 FOIA. This email (and attachments) was sent in order to provide an agenda and scope to an internal meeting discussing a commercially and reputationally sensitive high-level meeting, attaching a number of draft documents and includes proposals for dealing with anticipated customer challenges. I believe that the disclosure of this correspondence would make it more difficult for the Trust to deliberate and make decisions within a 'safe space' in which a free and frank exchange of views could take place, within the terms of the exemption.

5.2 Documents F2 and G2: Email exchange between Mark Blackwell, Stuart Mills and Richard Parry dated 12-13 April 2018 (following the meeting on 9 April 2018) – which records the fact that the head of Waterside Mooring made an assessment that, based on the information compiled for the price review, the Trust should be aiming for the final market prices of £572 per linear metre for leisure sites and £749 per linear metre for residential sites (as well as some internal discussion on

the timing of price rises across the sites). We found no further explanation of how this price was arrived at and this appears to be the only additional explanation for the price that was settled upon and then adopted. Document G2 shows redactions in red denoting parts of this email exchange that in my view fall outside the scope of the request because they relate to a separate policy of the Trust that did not impact on the London Mooring Price Review. Redactions in black show parts of this email exchange that in my view amount to internal deliberations and are exempt under s36 FOIA. In my view, the disclosure of this discursive and questioning internal discussion would very much inhibit the free and frank exchange of views and open deliberations that need to take place for decision making. This email exchange, other than where section 36 is claimed or outside of the request will be disclosed if the Trust is unsuccessful in any appeal against the decision on scope of FOIA.

5.3 Documents F3 and G3: This further email following on from the emails included in document F2 and G2, from Mark Blackwell to Stuart Mills and Richard Parry dated 13 April 2018 confirms a number of final points in relation to the communications to be sent out by the Trust in relation to the price review. Document G3 shows redactions in red denoting parts of this email that in my view fall outside the scope of the request. The Trust does not claim any exemption in relation to this email. This email, other than where outside of the request, will be disclosed if the Trust is unsuccessful in any appeal against the decision on scope of FOIA.

5.4 Document F4: a series of seven letters sent to mooring customers in London explaining the outcome of the price review and how it would be applied to them, based on their individual circumstances. Due to the disparity in prices paid for moorings across London, the application of the price review resulted in the new market rate being introduced in phases for certain customers. These letters reflect the different phases over which the price was introduced. These letters will be disclosed if the Trust is unsuccessful in any appeal against the decision on scope of FOIA.

53. Mr Deards confirms that the market rate of £572 per linear metre for leisure moorings as outlined in documents F2 and G2 was applied to the Appellant's mooring following the meeting and email exchange referred to above and notified to him in the letter of 16 April 2018.

54. On 28 June 2021 the Appellant made further submissions objecting to the withholding of documents which the Tribunal had already found to be within scope, and questioning whether to have searched back only to 25 December 2017 would have revealed all documents relevant to a price review which was completed in February 2018. He also questioned whether the search had revealed the information necessary for CRT to carry out the comparator choosing process. He emphasised that 'what is in issue here is not the

underlying site data... but the process of deciding which site data and why should be synthesised to deliver a new mooring agreement price’.

55. The Commissioner responded by letter on 29 June 2021. The Commissioner queried when the price review commenced and was completed. The Commissioner asked for additional information about the searches carried out. The Commissioner agrees ‘that that the document ‘F1’, and the information in document ‘F2’ that has been marked in black in document ‘G2’, is exempt from disclosure under section 36(2)(b)(ii) FOIA’. She says:

-

In particular, the IC does not understand that this information will tell Mr Wolfe what he wishes to know, and therefore she does not consider that the public interest in disclosing it is any higher than the public interest in disclosing the information which the Tribunal has previously considered.

56. On 5 July 2021, CRT responded saying that: -

CRT believes it has found everything relevant to the request through the searches already conducted. As was made clear at the hearing, the focus of the request (and the purpose of reviewing the initial search conducted and subsequently of re-conducting the search) is to obtain information that will explain the process that was used to arrive at the final price set for the Appellant’s mooring. It is therefore the final stage of the decision-making that is relevant. It is clear from the material already submitted that this final decision was made in April 2018, and CRT has already set out that it did not find any further explanation for the decision than the material that has already been submitted. CRT considers that a search of Outlook items going back further than 25 December 2017 is unnecessary given that if there were any further relevant material (which, as CRT has already set out, it does not believe there is), it would not date from before 25 December 2017.

57. There is also a third witness statement from Mr Deards dated 12 July 2021. He confirmed that the determination of the new prices was not finalised until April 2018, and this was confirmed in recently disclosed evidence. He confirmed that a specific London Mooring Price Review site was set up on the CRT’s intranet in order to centralise information relating to the review and that this was searched as part of the additional searches carried out by the CRT in June 2021, and he provided more detail about the searches carried out. Finally, Mr Deards notes that in his email to the Tribunal of 28 June 2021 the Appellant asked the CRT to say in clear terms if the contemporary choice of comparators used for

pricing individual mooring sites, including Lisson Grove, was entirely undocumented. Mr Deards responds: -

8. As set out in my second witness statement at paragraph 5.2, the additional search uncovered an email exchange between Mark Blackwell, Stuart Mills and Richard Parry dated 12-13 April 2018 (following a meeting on 9 April 2018 at which the price review was discussed). This records the fact that the head of Waterside Mooring made an assessment that, based on the information compiled for the price review, the Trust should be aiming for the final market prices of £572 per linear metre for leisure sites and £749 per linear metre for residential sites (as well as some internal discussion on the timing of price rises across the sites). The Trust found no further explanation of how this price was arrived at and this appears to be the only additional explanation for the price that was settled upon and then adopted. For the avoidance of doubt, as indicated by the emails referred to above, the outcome of the price review was that the Trust adopted a single market price to be applied across all mooring sites in central London.

58. The Appellant made this final point by email on 12 July 2021: -

The short point is that I cannot see how the explanation, such as it is, can either be commercially confidential or amount to preliminary considerations later overtaken by events. This WAS the point at which the decision was made. The public interest in it being transparent, particularly given the obvious discrepancies in the public information is manifest.

DISCUSSION

59. The fairly prolonged post-hearing discussion involving more searches, more information and more details as to the extent and nature of the CRT's searches has now in my view produced a position where the Tribunal can be satisfied that it has all the relevant information in scope of this request, either in a closed or open format.

60. I accept the CRT's evidence about the extent of the searches carried out and the likelihood that there is no further information available. I also accept that a search back to 25 December 2017 is appropriate for a final decision made in April 2018. I note that the CRT confirmed that there was a separate intranet site for the price review and that this was searched in June 2021. I note that the Commissioner, who has seen all the material and evidence, has not raised any further queries in addition to those raised in response to the second witness statement of Mr Deards.

Section 36 FOIA

61. The case of *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) sets out the approach for the Tribunal to take in cases involving s36 FOIA and a QP's opinion.

The Upper Tribunal at paragraphs 28 and 29 said: -

28. The starting point must be that the proper approach to deciding whether the QP's opinion is reasonable is informed by the nature of the exercise to be performed by the QP and the structure of section 36.

29. In particular, it is clear that Parliament has chosen to confer responsibility on the QP for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect. As Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55):

“It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates.”

62. The UT then continues to describe the two stages involved in deciding whether information is exempt under s36 FOIA at paragraph 31: -

31.....first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition (“prejudice”) would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

63. The UT emphasises that the ‘QP is not called on to consider the public interest for and against disclosure...the QP is only concerned with the occurrence or likely occurrence of prejudice’ (paragraph 32). Going on, the UT explains: -

32...The threshold question under section 36(2) does not require the Information Commissioner or the FTT to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal).

33. Given the clear structural separation of the two stages, it would be an error for a tribunal to consider matters of public interest at the threshold stage.

64. The UT also decided that when considering whether the QPs opinion was reasonable ‘we conclude that “reasonable” in section 36(2) FOIA means substantively reasonable and not procedurally reasonable’ (paragraph 57).
65. In relation to the reasonableness of the QP’s opinion that the exemptions in s36(2)(b) FOIA apply, my view, in agreement with the Commissioner, is that it is not unreasonable. Mr Deards set out the arguments for the QP in his briefing and also the matters which the QP needed to consider reaching a decision. Although the QP has not set out a reasoned decision, in my view it can be assumed that he has considered the briefing and agreed with it that exemptions apply. The QP’s opinion also extends now to the small amount of additional material identified by the CRT as being subject to the exemptions in s36(2)(b). In applying the approach in *Malnick* and in the absence of unreasonableness, it is not the role of the Tribunal to otherwise dispute the QP’s opinion. However, I also agree with the Commissioner that a case was not made to the QP that the exemption in s36(2)(c) FOIA (that disclosure would otherwise cause prejudice) applied, as there would have been a requirement to set out the matters relied upon, and this was not done.
66. The Appellant makes important points about the inclusion of the CRT under the auspices of the FOIA and the increased level of scrutiny which comes with such inclusion, compared with the scrutiny faced by a private organisation. But it is also important to remember that the right to disclosure of information under FOIA comes with many exemptions to which organisations such as the CRT are entitled to rely, albeit subject, in the case of many of the exemptions, to the application of a public interest test if an exemption applies. There is nothing wrong therefore in the CRT seeking to rely on these exemptions and the matters raised by the Appellant do not change my view that the QP’s opinion that the exemptions in s36(2)(b) FOIA apply in this case.
67. In relation to the public interest factors, the Appellant concentrates on the need to subject the CRT to scrutiny of its decision-making process and that is, of course, an important public interest for the Tribunal to consider. However, the process of searching for information within scope of the request has, in this particular instance, and as the Commissioner emphasises, not revealed the kind of information which will cast light on

the process in the way the Appellant would clearly like, in relation to whether or not the CRT has set its prices against a benchmark of comparable assignable leisure moorings, offered by private providers. I have also seen the withheld material and concur in the Commissioner's view as to its utility for the Appellant's purposes and that it does not contain anything that would enhance the public's understanding of the approach which the CRT actually adopted, additional to material already in the public domain. In my view that must lower the public interest in disclosure of the material sought.

68. In addition, I note that the CRT has explained in paragraph 38 of Mr Deards first statement what factors were, in fact, taken into account, which provides the Appellant with some of the information he seeks.
69. I also note that, in assessing the public interest, I am required to give some weight to the QP's opinion. Clearly, if the Tribunal disagreed with the opinion that would reflect the weight given to it. However, I am broadly in agreement with the QP's opinion in the sense that it reflects the briefing provided by Mr Deards, that the price review was an important process affecting boat owners and the CRT, and that the robustness of the process was important and this required a safe space to explore the calculations and stress-testing of calculations.
70. Therefore, it is my view that the CRT has complied so far as it can do with its duty of transparency, that disclosure is not going to assist the Appellant any further, and there are good public interest reasons for non-disclosure which ultimately outweigh those in favour of disclosure.
71. The one caveat to this is that I agree with the Commissioner that this approach does not apply to document D14 'which is essentially a set of 'lines to take' in responding to media and public enquiries, and as such it contains material that has been deemed suitable for sharing with the public'. Although the CRT argued that this was not necessarily what the CRT wanted to put in the public domain, in my view, as this was information which the CRT was prepared to disclose to the public, the public interest factors in favour of non-disclosure are particularly weak and are outweighed by the public interest in knowing what the CRT was willing to disclose, if asked, even after the QP's opinion has been taken into account.

Section 43(2) FOIA

72. As I have found that the exemptions in s36(2)(b) FOIA have been correctly applied (other than to document D14), it is not strictly necessary to go on to consider the application of s43(1) and (2) FOIA in detail.
73. In relation to D14, in my view its disclosure would not be likely to prejudice the commercial interests of the CRT, because this was information the CRT was prepared to make public in any event. Similar public interest factors as those set out above in relation to s36(2)(b) FOIA apply such that the public interest is in favour of disclosure of D14.
74. In relation to the other information for which the exemptions under s43(1) and (2) are claimed I accept the evidence from Mr Deards and the submissions from the CRT that this either amounted to a trade secret (to the extent that it was pricing information), or that it was information carefully compiled and collated in relation to pricing which would be likely to be of interest and use to competitors who had not been through the same exercise as has CRT. Prejudice to the commercial interests of the CRT would be likely as disclosure if the information could be used by competitors to set prices in a way commercially advantageous to them (and disadvantageous to CRT).
75. In my view, the CRT is entitled to the protection of s43(1) and (2) even if, as the Appellant says, the exercise was intended to reflect the current market rate or to consider maximising revenue. In my view also the CRT was entitled to consider and work on a wider set of information than simply assignable moorings if it was of the view that this would be useful to the exercise in which it was engaged. I also accept that the CRT's auction bid information is not accessible to the public and it would be likely to be detrimental to the operation of the CRT's bidding system if bidders had knowledge of the level of bids in previous auctions.
76. In relation to the public interest balance for s43(1) and (2) FOIA, similar factors are taken into account as explained in relation to s36(2)(b) FOIA. In my view, even taking out of the equation any reliance on the QP's opinion, the public interest balance in circumstances where disclosure would add little to what the Appellant already knows, and where commercial interests are clearly at risk, means that the public interest balance is in favour of non-disclosure.

CONCLUSION

77. On that basis this appeal is allowed to the extent that the CRT should disclose to the Appellant the document listed as D14, and other information which is accepted as being within scope but to which none of the claimed FOIA exemptions apply.
78. The CRT states that there is additional material that would fall within the scope of the request and for which it would not claim the exemptions under s36 FOIA or s43 FOIA. However, it is withholding that information on the basis that it does not accept the Tribunal's decision as to the applicability of FOIA to the CRT and is still considering an appeal against the preliminary ruling in this case that FOIA was applicability.
79. In my view, on the basis of that preliminary ruling, that information should be disclosed to the Appellant and I so direct.
80. However, given the possibility of an application for permission to appeal, I will stay that direction until seven days after the time limit for the submission of an application for permission to appeal, or if an application is made, to seven days after the determination of an in-time application to the Tribunal. I recognise that any stay might need to be extended if PTA is refused and the CRT intends to renew to the Upper Tribunal, but a specific application should be made for such an extension.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 7 September 2021