

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 29 March 2011

**Public Authority:** The Environment Agency  
**Address:** Block One  
Government Building  
Burghill Road  
Westbury on Trym  
BS10 6BF

### Summary

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The complainant submitted a request to the Environment Agency for the current draft of the proposed Environment Agency (Inland Waterways) Order it submitted to the Secretary of State for Environment Food and Rural Affairs. The Environment Agency initially refused to disclose the draft Order on the grounds that it did not hold it as it was 'owned' by the Department for Environment Food and Rural Affairs (Defra). Following the intervention of the Commissioner, the Environment Agency contacted the complainant and apologised for misunderstanding his request and confirmed that it did in fact hold a copy of the draft Order. However, it said that it intended to withhold it under section 22 of the Freedom of Information Act 2000 (the Act) as it would be published in the future and the public interest was balanced against disclosure. During the course of the Commissioner's investigation the Environment Agency disclosed a copy of the draft Order requested by the complainant. The Commissioner noted that the Environment Agency's handling of the request resulted in a procedural breach of section 10(1) of the Act in that it failed to respond to the information request promptly and in any event within 20 working days.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## Background

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2. The relevant background in this case is as follows:
  - a. Section 3 of the Transport and Works Act 1992 (TWA) gives the Secretary of State a discretionary power to make an order relating to or to matters ancillary to, the construction or operation of an inland waterway in England and Wales.
  - b. On 24 October 2004 the Environment Agency applied to the Secretary of State for an Environment Agency (Inland Waterways) Order under section 6 of the TWA.
  - c. The procedure and guidance for such applications may be found in the Transport and Works (Applications and Objections) (England and Wales) Rules 2000 and the Guide to Transport and Works Applications Procedures.
  - d. The application by the Environment Agency was accompanied by a draft of the Order in the form that it then sought.
  - e. The application was advertised and objections and representations were sought and received from members of the public.
  - f. In or about August 2008 the Environment Agency submitted an amended version of the draft Order taking into account the objections and representations received from members of the public. A copy of the amended Order was disclosed to the complainant in January 2009 in response to an earlier freedom of information request.
  - g. At the beginning of March 2010 in accordance with section 14 of the TWA the Secretary of State published his final draft of the Order taking into account his own views and the objections and representations made by members of the public.
  - h. [The Environment Agency \(Inland Waterways\) Order 2010](#)<sup>1</sup> came into force on 6 April 2010.

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<sup>1</sup> [http://www.environment-agency.gov.uk/static/documents/Research/040310\\_Environment\\_Agency\\_Inland\\_Waterways\\_Order\\_signature\\_copy.docx](http://www.environment-agency.gov.uk/static/documents/Research/040310_Environment_Agency_Inland_Waterways_Order_signature_copy.docx)

## The Request

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3. The complainant wrote to the Environment Agency on 23 November 2009 making the following request for information:

*'The current wording of the draft of the proposed 'The Environment Agency (Inland Waterways) Order' as it is now placed before the Secretary of State for the Environment, Food and Rural Affairs with a view to his making such an Order under the Transport and Works Act 1992.'*

4. The Environment Agency responded to the request on 22 December 2009. It informed the complainant that it did not have a copy of the current wording of the draft Order because:

*'The draft Order has yet to be placed before the Secretary of State. It is currently being considered and amended by lawyers from the Department for the Environment, Food and Rural Affairs (Defra). The wording and any required changes will be agreed with ourselves before the draft Order is recommended to the Secretary of State. Consequently, we do not have a copy of the current wording to send you as this is owned by Defra'.*

5. The complainant wrote to the Environment Agency on 2 January 2010 to request an internal review of its conclusion that it did not hold the information he had requested.

6. The Environment Agency wrote to the complainant on 9 February 2010. It confirmed that it had submitted its latest draft of the Order to Defra on 5 November 2009 and informed the complainant that it could not release the Order at 'this' time because it is information held by the Environment Agency with a view to its publication. The Environment Agency cited section 22 of the Act as its reason for withholding the information and advised the complainant that the Order will be published as soon as the procedures laid down by the Transport and Works Act 1992 are completed. The Environment Agency also informed the complainant that it anticipated the Secretary of State would make his decision by 31 March 2010 and that he would be able to obtain a final version of the Order when it is published as a Statutory Instrument.

## The Investigation

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### Scope of the case

7. On 3 January 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

*'It is my contention that the EA is in possession of a copy of its draft of the proposed Order as sent by it to the SoS [Secretary of State] at some point prior to the date of my request. Such version of the draft being –*

- i. The later of –*
- ii. that of August 2008, or*
- iii. that of some date unknown after August 2008*
- iv. free from any subsequent amendments or comments by DEFRA civil servants.'*

### Chronology

8. On 16 January 2010 the Commissioner wrote to the Environment Agency to inform it that was conducting an investigation to decide whether it had dealt with the complainant's request in accordance with Part 1 of the Act.
9. On 9 February 2010 the Environment Agency replied to the Commissioner attaching a copy of a letter it had sent to the complainant on the same date signed by its Chief Executive. In its letter to the complainant the Environment Agency stated that it had misunderstood his original request and did in fact hold the information he had requested. This consisted of the draft Order it sent to Defra on 5 November 2009. However, the Environment Agency added that it was withholding this information under section 22 of the Act on the basis that it would be published in the future and the public interest was balanced against disclosure.
10. On 11 February 2010 the complainant wrote to the Commissioner confirming that he had received the letter from the Environment Agency dated 9 February 2010 but disputed that it was justified in relying on section 22 of the Act. He said it was not open to the Environment Agency (under the relevant legislation) to say that the

- draft Order it submitted to Defra on 5 November 2009 would be the same as the final Order, if any, made by the Secretary of State in the future. He therefore invited the Commissioner to make a decision under section 50 as to whether the Environment Agency had dealt with his request in accordance with Part 1 of the Act.
11. On 9 April 2010 the complainant informed the Commissioner that in a letter dated 1 April 2010 the Environment Agency had disclosed to him a copy of the Order which existed when he made his information request on 23 November 2009. It did so, on the basis that Defra had published the final draft Order at the beginning of March 2010 with a commencement date of 6 April 2010. The complaint pointed out that the final Order was different to the draft submitted by the Environment Agency on 5 November 2009 demonstrating that the Secretary of State (Defra) had made modifications using its statutory powers under the Transport and Works Act 1992.
  12. The Commissioner determined that the complainant's letter dated 9 April 2010 was his recognition that the Environment Agency had complied with his information request dated 23 November 2009.
  13. The complainant responded to the Commissioner's phone call by a fax also dated 12 May 2010. The complainant asked the Commissioner for his decision under section 50 of the Act, on the basis that the Environment Agency failed to meet the requirements of the Act by its application of an exemption which was not supported by the facts of the case.
  14. On 19 May 2010 the Commissioner wrote to the Environment Agency to make enquiries concerning its application of section 22(1) of the Act.
  15. On 25 June 2010 the Commissioner sent a further letter to the Environment Agency requesting confirmation that the draft Order sent to the complainant on 1 April 2010 was the version that existed when he made his information request on 23 November 2009.
  16. On 12 July 2010 the Environment Agency replied. It stated that as there was a settled intent to publish the requested information at the time of the request section 22 was engaged and the public interest was balanced against disclosure. However, after the Secretary of State (Defra) advertised its intention on 5 March 2010 to make the final proposed Order law on 6 April 2010, the Environment Agency decided that the public interest had shifted in favour of disclosure. Accordingly, it disclosed the version of the Order that existed when the complainant made his request. The Environment Agency said it did not believe that the Environmental Information Regulations 2004 (EIR) applied to the

- request. However, it added that should the Commissioner find otherwise it would apply the exceptions under Regulations 12(4)(d) – incomplete and unfinished data and 12(4)(e) – internal communications with the public interest balanced against disclosure.
17. On 17 January 2011 the Commissioner wrote to the Environment Agency and requested confirmation that the draft Order disclosed to the complainant on 1 April 2010 was the version that existed at the time he made his information request on 23 November 2009.
  18. The Environment Agency responded on 18 January 2011 confirming that to the best of its knowledge and endeavours the version of the Order disclosed to the complainant was the same as the one which existed at the time of his request.

## Analysis

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### **Is the requested information covered by the Act or the EIR?**

19. The requested information is one of the draft Orders that preceded the final [Environment Agency \(Inland Waterways\) Order 2010](#)<sup>2</sup> which came into force on 6 April 2010. This Order harmonises the regulations relating to the registration and insurance for anyone who keeps or uses a boat on an inland waterway on England. Anyone who fails to comply with the regulations will be guilty of an offence<sup>3</sup>.
20. The Commissioner agrees with the Environment Agency and finds that the requested information is covered by the Act as it is not 'environmental information' within the meaning of the EIR. This is because the information primarily relates to the registration and insurance for anyone who keeps or uses a boat on an inland waterway which is unlikely to affect the environment.
21. The Commissioner is satisfied that the information disclosed to the complainant by the Environment Agency on 1 April 2010 was the information that existed at the time he made his information request on 23 November 2009. This has not been disputed by the complainant.

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<sup>2</sup> [http://www.environment-agency.gov.uk/static/documents/Research/040310\\_Environment\\_Agency\\_Inland\\_Waterways\\_Order\\_signature\\_copy.docx](http://www.environment-agency.gov.uk/static/documents/Research/040310_Environment_Agency_Inland_Waterways_Order_signature_copy.docx)

<sup>3</sup> <http://www.environment-agency.gov.uk/research/policy/116882.aspx>

## Exemptions

22. As the information in this case has been disclosed to the complainant the Commissioner has not considered whether or not the Environment Agency was correct in citing the exemption under section 22 of the Act upon which it previously relied.

## Procedural requirements

23. Section 10(1) of the Act (full wording in legal annex) of the Act states the following:

*"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

24. The public authority breached section 10(1) of the Act as it complied with section 1(1) after 20 workings days.

## The Decision

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25. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the Act:

It failed to comply with section 10(1).

## Steps Required

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26. The Commissioner requires no steps to be taken.

## Right of Appeal

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27. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 29<sup>th</sup> day of March 2011**

**Signed .....**

**Steve Wood  
Head of Policy Delivery  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

**Section 1(1)** provides that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

**Section 10** provides that:

(1) ... a public authority must comply with section (1)(1) promptly and in any event not later than the twentieth working day following the date of receipt.

**Section 17(1)** provides that:

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies

**Section 22(1)** provides that:

Information is exempt information if -

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)