

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 March 2011

Public Authority: Department for Environment, Food and Rural Affairs
Address: Information Rights Team
Area1B, Ergon House
Horseferry Road
London
SW1P 2AL

Summary

The complainant submitted a request to the Department for Environment, Food and Rural Affairs for the current draft of the proposed Environment Agency (Inland Waterways) Order submitted to it by the Environment Agency. The Department for Environment, Food and Rural Affairs initially refused to disclose the information on the grounds that the wording for the Order had not been finalised and a number of exemptions were applied. During the course of the Commissioner's investigation the Department for Environment, Food and Rural Affairs disclosed a copy of the Draft Order requested by the complainant. Accordingly, as the requested information has now been disclosed to the complainant the Commissioner has not considered whether the exemptions were correctly cited. However, the Commissioner has noted that the Department for Environment, Food and Rural Affairs' 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

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

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](#)¹ came into force on 6 April 2010.

¹ http://www.environment-agency.gov.uk/static/documents/Research/040310_Environment_Agency_Inland_Waterways_Order_signature_copy.docx

The Request

3. The complainant wrote to the Department for Environment, Food and Rural Affairs on 27 August 2009 making the following request for information:

'Has the Environment Agency withdrawn the application for the {Environment Agency (Inland Waterways)} Order as made in 2004?

If not, what is the current situation in respect of the consideration by the Secretary of State of such application?

What is the current wording of the draft of the Order as now sought by the Environment Agency?'

4. The Department for Environment, Food and Rural Affairs responded to the request on 3 September 2009. It informed the complainant that the wording for the Order had not yet been finalised.
5. The complainant replied on 20 September 2009 stating that the response had not dealt with the third part of his request. He said he appreciated that the Department for Environment, Food and Rural Affairs may not have decided on the final wording of the draft Order but what he required was a copy of the current wording as sought by the Environment Agency.
6. The Department for Environment, Food and Rural Affairs wrote to the complainant on 23 October 2009 stating that as it was considering applying the exemptions sections 22 and 35 of the Act it required a further 20 working days to respond to enable a public interest test to be carried out.
7. On 20 November 2009 the Department for Environment, Food and Rural Affairs wrote to the complainant stating that it was withholding the requested information under section 22 of the Act as it was intended for future publication and the public interest was in favour of the exemption being maintained.
8. On 21 and 28 November 2009 the complainant wrote to the Department for Environment, Food and Rural Affairs disputing its application of section 22 and requested an internal review.
9. On 17 December 2009 the Department for Environment, Food and Rural Affairs replied to the complainant upholding its decision to apply section 22 of the Act and at the same stated it wished to apply sections

- 35(1)(a) and section 42 to any information not covered by section 22. It also stated that the reason why it had applied the Act as opposed to the Environmental Information Regulations 2004 (the EIR) to the request was because the information sought related to the registration, insurance and management of boats and as such was not 'environmental information' within the meaning of the EIR. It added that if the complainant was unhappy with its decision he should complain to the Commissioner.
10. On 12 January 2010 the complainant wrote to the Department for Environment, Food and Rural Affairs again and formally requested an internal review in respect of the two 'new' exemptions it had applied to his information request, namely those under sections 35(1)(a) and 42.
 11. On 20 January 2010 the Department for Environment, Food and Rural Affairs replied to the complainant stating that it did not carry out further reviews of its internal reviews and reiterated that if he was unhappy with its response he should appeal to the Commissioner.

The Investigation

Scope of the case

12. On 2 January 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the Department for Environment, Food and Rural Affairs had dealt with his request for *'a copy of the current wording of the draft of the Order as now sought by the (Environment) Agency'* within the requirements of Part 1 of the Act by applying the exemptions in sections 22, 35(1)(a) and 42. The scope of the Commissioner's investigation is therefore restricted to this information which was first requested on 27 August 2009.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

14. On 16 January 2010 the Commissioner wrote to the Department for Environment, Food and Rural Affairs 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 and at the time requested a copy of the withheld information.

15. On 1 February 2010 the Department for Environment, Food and Rural Affairs sent to the Commissioner by email a copy of the draft version of the Environment Agency (Inland Waterways) Order² which existed at the time of the complainant's request in 2009 and which it had withheld under sections 22, 35(1)(a) and 42 of the Act.
16. On 17 and 24 May 2010 the Department for Environment, Food and Rural Affairs sent the Commissioner by email a copy of its letter to the complainant dated 17 May 2010 to which it purported to attach a copy of the version of the draft Order³ it had previously withheld under the Act. It stated that as the information was in the public domain there was no longer a public interest in it being withheld.
17. On 21 May 2010 the complainant sent the Commissioner a copy of his letter to the Department for Environment, Food and Rural Affairs of the same date in which he disputed that the version of the draft Order sent to him on 17 May was the same as the one which existed when he made his information requests on 27 August and 20 September 2009. He suggested it was not possible that a draft marked 'Version 15 (BDB amended 05/11/09)' which he presumed had come into existence some 2 to 3 months after his request was the same version as the draft that existed when he made his request.
18. On 25 June 2010 the Department for Environment, Food and Rural Affairs wrote to the Commissioner with further arguments as to why it believed it was justified in applying the exemptions under sections 22, 35(1)(b) and 42 of the Act to withhold the information requested by the complainant. It also confirmed it had since disclosed a copy of the requested information to the complainant but that he had disputed it was the version of the Order that existed when he made his request.
19. At this stage it was apparent to the Commissioner that the complainant was suggesting that the version of the information he had received from the Department for Environment, Food and Rural Affairs on 17 May 2010 was not in fact exactly the same as the version that existed when he made his information requests on 27 August and 20 September 2009.
20. In January 2011 the Commissioner reviewed the entire file and at the same time made a comparison between the electronic version of the withheld information disclosed to him by the Department for Environment, Food and Rural Affairs on 1 February 2010 with the electronic version of the hard copy information it had disclosed to the

² Bearing the reference: '130709 TPE AS'

³ Bearing the reference: 'Version 15 (BDB amended 05/11/09)'

complainant on 17 May 2010. It was apparent from this exercise that the information disclosed to him on 1 February 2010 (namely a draft Order bearing the reference '130709 TPE AS') was not exactly the same as the information disclosed to the complainant on 17 May 2010 [namely a draft Order bearing the reference 'Version 15 (BDB amended 05/11/09)'].

21. The Commissioner's examination of the two documents disclosed by the Department for Environment, Food and Rural Affairs (one to him and the other to the complainant) revealed the following: The electronic version of the document disclosed to the Commissioner on 1 February 2010 contained a number of dated and initialled deletions, comments, annotations and amendments (in the metadata) all of which *predated* the complainant's information requests in August and September 2009. Specifically the dates shown in the metadata were 28 April, 22 May, 10 July, 13 July and 14 July 2009. The electronic version of the document disclosed to the Commissioner on 17 May 2010 (a paper copy of which was disclosed to the complainant on the same day) contained a number of dated and initialled deletions, comments, annotations and amendments (in the metadata) some of which *post-dated* the complainant's information requests in August and September 2009. Specifically the dates shown in the metadata were 28 April, 10 July, 14 July, 12 August, 13 August, 17 August, 15 October and 5 November 2009.
22. As a result of this exercise of comparison the Commissioner concluded that the version of the document disclosed to him was different to that disclosed to the complainant. He also concluded on a balance of probabilities that the version disclosed to him was an earlier version to the one disclosed to the complainant and (in view of the alteration dates on document he received) was probably the one that existed when the complainant made his request.
23. On 14 January 2011 the Commissioner communicated his conclusions to the Department for Environment, Food and Rural Affairs and invited it to agree that the document it sent to him on 1 February 2010 (purporting to be the withheld information) was in fact the version of the document that existed when the complainant made his information requests and not the one it subsequently disclosed to him on 17 May 2010. The Commissioner added that if the Department for Environment, Food and Rural Affairs agreed with his conclusions it should consent to the document sent to him on 1 February 2010 being disclosed to the complainant in satisfaction of his information request.
24. On 20 January 2011 the Department for Environment, Food and Rural Affairs responded to the Commissioner agreeing that the version of the

document disclosed to him on 1 February 2010 could be disclosed to the complainant. Accordingly, the same day this document was sent to the complainant.

25. On 24 January 2011 the complainant acknowledged receipt of this document and reiterated that he required a decision from the Commissioner pursuant to section 50 of the Act as to whether the Department for Environment, Food and Rural Affairs had dealt with his information requests in accordance with Part 1 of the Act. On 22 February 2011 the complainant wrote to the Commissioner again suggesting that the document sent to him on 20 January 2011 was not the same as the version of the document that existed when he made his request.

Analysis

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

26. The requested information is one of the draft Orders that preceded the final [Environment Agency \(Inland Waterways\) Order 2010](#)⁴ 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 offence⁵.
27. The Commissioner agrees with the Department for Environment, Food and Rural Affairs 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 a measure that is unlikely to affect the elements and factors listed in regulation 2(1)(a) and (b).
28. The Commissioner is satisfied on a balance of probabilities that the information disclosed to him by the Department for Environment, Food and Rural Affairs on 1 February 2010 was the information that existed at the time the complainant made his information requests in August and September 2009. The information was described by the Department for Environment, Food and Rural Affairs as 'a copy of the information requested by the applicant' and it is clear from the

⁴ http://www.environment-agency.gov.uk/static/documents/Research/040310_Environment_Agency_Inland_Waterways_Order_signature_copy.docx

⁵ <http://www.environment-agency.gov.uk/research/policy/116882.aspx>

document's metadata that all the annotated changes to it preceded the complainant's information requests. The Commissioner also concludes that the version of the document disclosed to the complainant on 17 May 2010 was not the document that existed at the date when he made his information requests in August and September 2009 as some of the annotated changes recorded in the metadata were made after the requests.

Exemptions

29. As the information requested in this case has now been disclosed to the complainant the Commissioner has not considered whether or not the Department for Environment, Food and Rural Affairs was correct in citing the exemptions under sections 22, 35(1)(a) and 42 of the Act upon which it previously relied.

Procedural requirements

30. 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."

31. In this case the complainant sent his information request on 27 August and followed it up with a further letter on 20 September 2009 which the Department for Environment, Food and Rural Affairs said it received on 25 September 2009. The Department for Environment, Food and Rural Affairs then responded (after requesting an extension of time in which to carry out a public interest test) on 20 November 2009 with a refusal to disclose the requested information under section 22 of the Act. This means it took the Department for Environment, Food and Rural Affairs in excess of 20 working days to respond to the complainant's request and in doing so it breached section 10(1) of the Act.

The Decision

32. 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 respond to the complainant's request promptly and in any event no later than the twentieth working day following the date of receipt in breach of section 10(1) of the Act.

Steps Required

33. The Commissioner requires no steps to be taken.

Right of Appeal

34. 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.

Website: 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 29th 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