

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

Date: 11 June 2021

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 a report from the Canal & River Trust (the Trust) similar to Trust 433, Trust 445 and Trust 454, relating to reservoirs. The Trust denied holding the information until after the internal review when it stated that the information was held but refused to provide it, citing regulation 12(4)(e) of the EIR.
2. During the Commissioner's investigation the Trust also claimed a late reliance on regulation 12(4)(b) and 12(5)(a) of the EIR.
3. The Commissioner first considered the Trust's application of Regulation 12(4)(b) and decided that this exception is not engaged. She then went on to consider the application of regulation 12(4)(e). The Commissioner has decided that this exception is engaged and that the public interest rests in maintaining this exception. As she decided that regulation 12(4)(e) had been correctly applied, she did not go on to consider regulation 12(5)(a). However, the Trust breached regulation 14(1) of

the EIR when it issued its refusal notice.

4. The Commissioner does not require any further action to be taken.

Request and response

5. On 17 May 2020 the complainant made the following request for information under the FOIA/EIR -

"I refer to Board reports Trust433, Trust445 & Trust454 which you failed to publish alongside other board papers and are now the subject of information requests. I am still waiting for you to provide this information. Please (sic) the similar report for your board meeting dated 27 March 2020."

6. The Trust responded on 29 May 2020 and asked him to clarify his request as follows -

"Can you please be more specific with regards to what report you are referring to? There wasn't a specific Toddbrook paper on the agenda at the March meeting."

7. The complainant clarified on the same day -

"As I am sure you are well aware, my request was not for a specific Toddbrook paper. My request was for a report similar to Trust433, Trust 445 and Trust 454. These reports are related to your reservoirs. If the March board information related to reservoirs is now incorporated in a larger report or spread across more than one report please make that information available to me."

8. On 8 June 2020 the Trust denied holding the requested information. The complainant requested a review on the same day and said that he wanted his request to be considered under the FOIA/EIR.
9. The Trust provided an internal review on 9 June 2020 in which it maintained its original position. The reviewer stated that she had checked with a member of the executive team and that he had confirmed that the March board meeting report was generic and related to the Trust's high-risk assets, which included assets across the board, such as embankments, culverts and cuttings. There was only a small section in relation to reservoirs, therefore there was no full report relating to reservoirs similar to earlier papers in the March board pack.

10. The complainant subsequently responded on 9 June 2020 as follows -

"If the March board information related to reservoirs is now incorporated in a larger report or spread across more than one report please make that information available to me. Your response to my request for review indicates that the information I am seeking is incorporated in a larger report. However, you have not provided me with that report as part of your response. Please provide me with a copy of the report."

11. On 10 June 2020 the Trust changed its position and stated that the information was held but cited regulation 12(4)(e) - internal communications - as its reason for not providing it to the complainant.

Scope of the case

12. The complainant contacted the Commissioner on 20 June 2020 to complain about the way his request for information had been handled.

13. When the Trust responded to the Commissioner it informed her, and later the complainant, that it was citing regulations 12(4)(b) and 12(5)(a) in addition to regulation 12(4)(e) that had already been cited.

14. The Commissioner considers that the scope of this case is the Trust's citing of the regulations in paragraph 13 above. Firstly, she intends to consider the citing of regulation 12(4)(b) – manifestly unreasonable. She will only go on to consider regulations 12(4)(e) – internal communications and 12(5)(a) – international relations, defence, national security, public safety if she finds that regulation 12(4)(b) does not apply.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

15. The Commissioner is relying on her recent decision notice [IC-40223-W9M5](#) for much of the analysis in this section.

The Trust's position

16. In particular, the Trust's arguments in this case are virtually identical to decision notice [IC-40223-W9M5](#) and these are set out at paragraphs 12-

27, paragraphs 29-32, paragraphs 34-45, paragraphs 51-57 and 59-67 of that decision notice.

The complainant's position

17. The complainant pointed out to the Trust that it is a criminal offence under section 77 FOIA to deliberately destroy, hide or alter requested information to prevent it being released. He stated that both individuals and public authorities can be charged.
18. Subsequently the Commissioner looked at the complainant's grounds for section 77 and concluded that there was insufficient evidence to support an allegation that information was being deliberately concealed or blocked.
19. His request was for a report similar to Trust433, Trust445 and Trust454. His view is that it is very clear that the Trust holds the information requested. However, he contends that it deliberately failed to disclose this information in its response of 8 June 2020, claiming it was not held.
20. He states that the internal review maintained that the information was 'not held' and that he pointed out that this was incorrect. The further response he received neither provided the information or an explanation.

The Commissioner's position

21. It would appear to the Commissioner that the series of communications from the Trust in response to his request were somewhat misleading. This resulted in frustration for the complainant in the 'not held' response and the lack of an explanation when the Trust altered its position to 'held'.
22. The complainant clearly believes that the requested information should be disclosed whilst the Trust maintains that it is exempt. The Commissioner agrees that the Trust's submission in relation to an earlier decision in February 2019 and the decision itself are relevant to the consideration of this request. When considering the possible application of section 14 of the FOIA or regulation 12(4)(b) of the EIR a public authority is permitted to consider the context of the request and the history of its relationship with the requester. However, the application of section 14 or regulation 12(4)(b) is not a blanket ban on the complainant and all future use of the FOIA and EIR. The complainant is entitled to make information requests in the future and any that are made should be considered on their own merits on a case by case basis. The relevant consideration will then be whether any future request is

vexatious and whether the complainant has continued in a similar manner despite a previous application of section 14 or regulation 12(4)(b) and the public authority has the necessary evidence to support that.

23. Before going further, the Commissioner would like to underline the fact that she can only consider the circumstances up to the time the request of 17 May 2020 was made. She is also relying on further evidence in support of the Trust's arguments regarding regulation 12(4)(b) that were provided on IC-40223-W9M5 (staff statements and email strings). The relevant paragraphs are 51-68 where the Commissioner concluded that regulation 12(4)(b) is not engaged.
24. This complaint does demonstrate that the complainant accused the Trust of concealing information from him which he stated was a criminal offence. The Commissioner can appreciate that the Trust employees would be likely to find this intimidating to a degree and that the 'not held' response might well have been the result of error, a misreading or a misunderstanding. She has nonetheless concluded that the citing of regulation 12(4)(b) is not engaged due to insufficient evidence, though with the same proviso as reached in IC-40223-W9M5 that this might not be the case in any future citing of "manifestly unreasonable".
25. The Commissioner has therefore gone on to look at the Trust's citing of regulation 12(4)(e) regarding the requested information.

Regulation 12(4)(e) – internal communications

26. Regulation 12 –(4) states,

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(e) the request involves the disclosure of internal communications."

27. The concept of 'internal communications' is broad and covers a wide range of information. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. However, in practice the application of the exception will be limited by the public interest test. A 'communication' will include any information intended to be communicated to others or saved in a file where it may be consulted by others. An 'internal' communication is a communication within one public authority. A communication sent by or to another public authority, a contractor, an external adviser or third party will not generally constitute an internal communication.

28. The Commissioner asked the Trust why it had concluded that the withheld information fell within the scope of this exception. The Trust referred to the Commissioner's guidance¹ regarding internal communications which states that the concept of communication is broad and encompasses any information someone intends to communicate to others, or even places on file (including saving in an electronic filing system) where others may consult it. It therefore includes letters, memos, emails, notes of meetings and any other documents if they are circulated or filed so that they are available to others.
29. The proposed high risk infrastructure plan from the March 2020 board meeting was produced as an internal update which was communicated to the board of Trustees for the purpose of providing them with an update on the plans for proposed expenditure to address the condition of the Trust's highest risk assets (including reservoirs, embankments, culverts and cuttings). The Trust states that the report was produced solely for the purpose of giving the board of trustees an update during the board meeting and has not been shared with an external person or organisation.
30. The Commissioner is satisfied that the withheld information is an internal document solely produced for the board of trustees, that it remained an internal communication and therefore engages this exception.
31. As with all EIR exceptions, this is a qualified exception. Even if the exception is engaged, public authorities must go on to apply the public interest test set out in regulation 12(1)(b).
32. Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure.

Public interest test

Public interest arguments in favour of disclosing the requested information

33. The Trust acknowledged that there is a public interest in disclosure to promote transparency and the accountability of public authorities with regard to reservoir and high-risk asset information following the

¹ <https://ico.org.uk/media/for-organisations/documents/2021/2619005/12-4-e-internal-communication-31122020-version-31.pdf>

Toddbrook Reservoir incident in August 2019. It also stated that disclosing information about planned expenditure may provide confidence to the public that maintaining risk assets are a priority to the Trust.

34. The complainant clearly believes that this type of information should be publicly available.

Public interest arguments in favour of maintaining the exception

35. The Trust quotes the Commissioner's guidance where it says that public authorities need,

"...a safe space to develop ideas, debate live issues, and reach away from external interference and distraction".

36. The Trust also repeats the guidance when it says that the need for a safe space will be strongest when the issue is still live but recognises that public authorities may also need a safe space for a short time after a decision is made to properly promote, explain and defend its key points. Its view is that where an issue is live/ongoing and no public announcement has been made, more weight should be attached to this interest. The planned expenditure was only discussed with the Trustees in March 2020 and includes forward planning. The Trust argues that the report content is still very much ongoing and current.
37. The Trust contends that it is already open and transparent with the public regarding expenditure as it provides updates in its annual report and accounts which are publicly accessible. Within these reports the Trust publishes the amount of money spent on an annual basis on asset/reservoir repairs, maintenance, improvements and major works. Nevertheless the Trust feels that it is vital that it has a safe space where information can be shared and developed internally without public interference, especially between the Trustees and the senior executive teams as they are the key decision-makers within the Trust. The nature of the report is the Trust's high risk assets including reservoirs so it is necessary for the Trust to have frank and open discussions regarding the risks, possible scenarios and planned expenditure. As the Trust already reports on actual expenditure in the annual report and accounts it reduces the weight attached to the public interest in disclosing the withheld information as these figures will be disclosed at a later date.
38. Disclosure of the information is likely to inhibit free and frank discussions in the future and the loss of frankness and candour would damage the quality of the advice given by the Trust's employees and lead to poorer decision-making. The information being requested contains information regarding current and live issues regarding planned

works to its high-risk assets. The Trust argues that employees may be less inclined to include key information in communications if that information was to be disclosed. Consequently this would lead to a chilling effect, reducing the quality of information provided to the board which could potentially lead to poorer, less informed decisions. This is specifically important when discussing information in relation to planned expenditure for high-risk assets due to the severity/damage these assets could cause. The Trust suggests that the chilling effect may have a damaging effect on the amount of money planned to go into asset/reservoir works should it result in the board meetings being provided with less information and the risks involved. Clearly this could potentially have a damaging effect on the lives of individuals in the surrounding areas.

Balance of the public interest

39. Firstly, the Commissioner is not entirely persuaded that the release of this information would have a chilling effect to the extent that the Trust suggests, because she considers that the sheer importance of maintaining high-risk assets would mean that the individuals concerned would not be deterred from providing the necessary information on which these decisions are based. Set against this is the fact that the information was still live at the time of the request and concerns sensitive, high-risk assets that might be compromised by the release of the information in however small a degree.
40. Regulation 12(2) specifically provides that public authorities should apply a presumption in favour of disclosure. The Commissioner's guidance says that public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. These factors must then be balanced against the public interest in disclosure.
41. The timing of the request is, however, a persuasive factor. In *DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072, 29 April 2008)* the FTT said:

"This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public."
42. The Commissioner accepts that there is a need for a safe space because, at the time of the request, the issue was still 'live'. The timing of the request is therefore a persuasive factor. However, arguments should always relate to the content and sensitivity of the particular information in question and the circumstances of the request.

43. On balance, the Commissioner agrees with the Trust that the disclosure of this information would highlight the assets including reservoirs and any vulnerabilities they may have. Although the information does not have to be sensitive to engage the exception, its sensitivity is a factor when considering its release. This is sensitive, topical, 'live' information that may affect the confidence of the public should it be released. The argument for release would be that there is an understandable public interest in high-risk assets such as reservoirs. The Commissioner accepts the Trust's assessment that there is a public interest in managing communication and what is released into the public domain about high-risk assets and planned expenditure in order to maintain public confidence.
44. For the above reasons the Commissioner is satisfied that the public interest in disclosure is outweighed by the public interest in maintaining the exception.
45. The Commissioner has not gone on to consider the Trust's citing of regulation 12(5)(a) as she has concluded that regulation 12(4)(e) has been correctly cited.

Regulation 14 – refusal notice

46. Where a public authority is relying on an exception to withhold information specified in a request it must, under regulation 14 of the EIR, issue a refusal notice within 20 working days.
47. A refusal notice must specify the reasons not to disclose the information, including any exception being relied upon and the matters considered in reaching a decision with regard to the public interest.
48. Although the Trust responded within 20 working days of the clarification it had requested, it stated that the information was not held which was incorrect. On 10 June 2020, the Trust altered its position and stated that the requested information was, in fact, held but that it was withholding it.

Right of appeal

49. 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

50. 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.

51. 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

**Pamela Clements
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