

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 February 2019

Public Authority: Canal & River Trust

Address: Station House - First Floor North
500 Elder Gate
Milton Keynes
Buckinghamshire
MK9 1BB

Decision (including any steps ordered)

1. The complainant made two requests for information regarding several meetings.
2. The Commissioner's decision is that the Canal & River Trust ("the Trust") was entitled to rely on Section 14 to refuse both requests. The Commissioner also is satisfied that, on the balance of probabilities, the Trust did issue its refusal notice in respect of Request 1 on the 20th working day and therefore no breach of Section 10 occurred in respect of this request. However, in relation to Request 2, the Trust failed to issue its refusal notice within 20 working days and thus breached Section 10 of the FOIA.
3. The Commissioner does not require the Trust to take any further steps.

FOIA and the Trust

4. The Canal & River Trust is an independent charitable Trust, set up in 2012, responsible for 2,000 miles of canals, rivers, docks and reservoirs, along with museums, archives and the country's third largest collection of protected historic buildings. It has taken over the functions of the former (publicly-owned) British Waterways.
5. Under Schedule 1 of the FOIA, the Trust is only covered by the Act in respect of information relating to the exercise of those statutory

functions which it had transferred to it from British Waterways. The Trust has explained to the Commissioner that, broadly speaking, these functions relate to the operation and maintenance of the inland waterways which the Trust cares for.

Request and response

Request 1

6. On 18 April 2018, the complainant contacted the Trust via the whatdotheyknow.com website and requested information of the following description:

"Please provide via whatdotheyknow.com -

1. The minutes of the Board of Trustees Meeting held on 22 March in York.

2. The unpublished papers from the Board of Trustees Meeting held on 25 January in Coventry.

3. A copy of minute 18/007 (which appears to have been inadvertently left out of published minutes).

4. Copies of any report or presentation made by Jon Horsfall, Matthew Symonds or any other person in connection with minute 18/007. This includes both reports and presentations made during Board meetings, prior to Board meetings or subsequent to Board meetings."

7. The response to the request did not appear on the whatdotheyknow.com website until 18 May 2018. This matter is addressed further below. This response refused the request citing Section 14(1) (vexatious).
8. The complainant requested an internal review on 22 May 2018. The Trust sent the outcome of its internal review on 26 July 2018. It upheld its original position.

Request 2

9. On 29 May 2018, the complainant requested information of the following description:

"I refer to notes of West Midland Waterway Partnership meetings published via your meetings calendar. Although notes have been published for 4 January, 1 February, 1 March and 1 May, I am unable to find those for 5 April.

"Please provide via whatdotheyknow.com:

- Confirmation that the meeting on 5 April took place.

- A copy of the notes."

10. The Trust responded to the request on 7 August 2018. It refused this request citing Section 14(1) of the FOIA.
11. The complainant requested an internal review on 7 August 2018. The Trust wrote to him on 10 August 2018 and informed him that it felt an internal review would serve no useful purpose (bearing in mind the detailed internal review it had carried out in relation to Request 1) and recommended that the complainant now refer the matter to the Commissioner.

Scope of the case

12. The complainant first contacted the Commissioner on 7 July 2018 to complain about the time taken to carry out an internal review in respect of Request 1. Once that review had been carried out, he complained again to the Commissioner on 2 August 2018 about the Trust's use of Section 14(1) in respect of this request.
13. After the Commissioner had already accepted a complaint in respect of Request 1, the complainant made a further complaint in respect of the Trust's use of Section 14(1) in respect of Request 2. Given that both requests were submitted within a reasonably short time frame and that the issues involved in both requests will be broadly similar, the Commissioner considers it appropriate to consider both requests as part of the same complaint.
14. Whilst disputing the Trust's use of Section 14(1) to refuse both requests, the complainant has also asked the Commissioner specifically to look at the timeliness of both responses. Whilst this appears clear-cut in relation to Request 2, in the case of Request 1 there is a dispute about the date

that the response was sent which the Commissioner will look at in more detail below.

15. Therefore the scope of this notice is to determine whether the Trust is entitled to rely on Section 14(1) to refuse the requests and whether its refusal notices were issued within the statutory time period.

Reasons for decision

Timeliness

16. Section 1(1) of the FOIA states 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.*

17. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,*
- (b) states the name of the applicant and an address for correspondence, and*
- (c) describes the information requested.*

18. The Commissioner considers that the request in question fulfilled these criteria and therefore constituted a valid request for recorded information under the FOIA.

19. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"

20. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to Request 2 within 20 working days, the Trust breached Section 10 of the FOIA.

21. In respect of Request 1, the request should have been responded to on 17 May 2018. However, the whatdotheyknow.com website (WDTK) records the response as having been received on 18 May 2018.

22. WDTK is a website designed to help individuals exercise their rights under both the FOIA and the Environmental Information Regulations.
23. Users with a WDTK account can create an information request to any organisation within WDTK's database (or add a new organisation) and the website will send an email to that organisation conveying the request and the request will be published on the WDTK website. Each email related to a specific request is sent from a unique email address, automatically generated for that request. A public authority can respond to the request by replying to the email. If it does so, the email and any attachments are then captured on the same request "thread" so that the requestor (and anyone else) can see the chronology of all correspondence relating to that particular request in one place. The website also records the date that correspondence was sent or received.
24. The Trust supplied an original copy of the email which it stated that it sent to WDTK on the evening of 17 May 2018. The metadata from that email indicates that it was indeed sent on 17 May 2018.
25. Whilst the Commissioner accepts that WDTK (and therefore the complainant) may not have *received* the response until 18 May 2018, her view is that the response was *sent* on 17 May 2018. In the circumstances, she feels it would thus be unfair to record a Section 10 breach against the Trust on the basis of a delay in processing the response via a website. Once an email has been sent, the Trust would have no control over how quickly it reached its intended destination. The Commissioner therefore finds no breach of Section 10 in respect of Request 1.

Were the requests vexatious?

26. Section 14 of FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious."

27. The term "vexatious" is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure*". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.
28. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

29. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: "...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests." (paragraph 45).
30. The Commissioner has published guidance on dealing with vexatious requests¹, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
31. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: "*The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies*".
32. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
33. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: "*In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.*"

The complainant's position

34. The complainant has started from the position that only the request itself can be vexatious and not the requestor.

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatiousrequests.pdf>

35. He has argued that both these requests (and a number of his previous requests) were for information which should already have been in the public domain. In his opinion it therefore follows that any arguments which the Trust puts forward in relation to the burden imposed by the requests should fall away on the basis that, had the information been published sooner, he would not have needed to request it.
36. The complainant further notes that the Board of Trustees meeting of 25 January 2018 took a decision relating to the licensing regime for navigating the various waterways which the Trust maintains. He argues that this decision has had significant consequences for the many users of these waterways and it is therefore important that the process by which this decision was reached is subject to public scrutiny.

The Trust's position

37. The Trust position is that the two requests set out above are vexatious when set in the context of the numerous requests which this particular complainant has made over the years and his broader interaction with the Trust.
38. The Trust has provided the Commissioner with a list of 103 information requests which it has received from the complainant going back to 2012 – only four of which were made after Request 1. It notes that he submitted 19 out of the 127 requests it received in 2016 and 22 out of 118 requests it received in 2017. 7 out of the 46 requests it had received up until the point it received Request 1 in 2018 had also come from the complainant. On average that is approximately one in six of the total requests the Trust received during the period or a request every two and a half weeks.
39. The Trust estimated that, between November 2017 and February 2018 alone, it spent around 75 hours dealing with the complainant's direct requests. It also noted that the complainant had made requests to other public authorities (such as DEFRA and the Charity Commission) which related to the Trust or its activities – which would sometimes require consultation with the Trust before information could be released.
40. In addition, the Trust states that the complainant often makes requests for information which is either already easily accessible (10 of the 103 requests have been refused using Section 21 – Information Reasonable Accessible) or which is out of the scope of FOI (see "FOIA and the Trust" section above) – 19 of the requests have been refused as being outside the scope of the FOIA's application to the Trust. The Trust has argued that, partly because of the volume of requests he makes, the complainant is already well aware of what he is entitled to under the legislation and this practice is therefore evidence that he is making

requests in a bid to cause a nuisance rather than because he is genuinely seeking information.

41. The Trust has also pointed to the complainant's association with a blog called "The Floater" which, the Trust claims, *"is an avowedly anti-Trust publication, which has the express aim of undermining the Trust and the people who work for the Trust."*
42. Of particular concern to the Trust is *The Floater's* use of images scraped from social media accounts belonging to Trust employees without their consent. *The Floater* often uses such images in its articles when referring to a public statement made by that individual. The Trust argues that its employees *"have reported feeling harassed and intimidated by this behaviour."*
43. Finally the Trust has pointed to two articles which alleged that the Trust or one of its employees had committed an offence under Section 77 of the FOIA (deliberately attempting to prevent publication under FOIA) by altering a document. It noted that, despite the Commissioner being unable to find sufficient evidence that an offence had been committed, the complainant repeated the allegation in a further article on *The Floater* – although it admits that this article was subsequently withdrawn.
44. In summary, the Trust argues that the complainant's *"many requests are not motivated by any genuine desire for information on a particular subject but from a deep and personal antipathy towards the existence and activities of the Trust."*

The Commissioner's view

45. The Commissioner's view is that this is a finely balanced decision with strong arguments on both sides. However, in this particular case, she feels that the balance falls in favour of the Trust.
46. In considering this complaint, the Commissioner has had considerable regard to the fact that the Trust is a public authority responsible for maintaining a significant number of assets of historical, cultural and public value. In 2017/18, it received £50.7m of public funding via grants from DEFRA and £46.6m from licencing the use of waterways, rents and mooring fees.²

² <https://canalrivertrust.org.uk/media/original/38445-annual-report-and-accounts-2017-18.pdf>

47. The Trust's creation was somewhat controversial at the time as it represented the transfer of management of significant public assets from the public sector to the charitable sector. It is not for the Commissioner to comment on the merits or otherwise of that decision, but it does highlight a need for ongoing checks and balances to ensure the good management of these assets.
48. It is clear to the Commissioner that such a body deserves scrutiny and should expect that that scrutiny will sometimes be robust. The question for the Commissioner in this case is whether the line between robust scrutiny and harassment has been crossed.

The Floater

49. The Trust has raised the issue of *the Floater* as a key plank of its argument that the requests are vexatious. As mentioned above, it regards *the Floater* as being relentlessly negative and focussed on undermining the Trust's activities. It supplied the Commissioner with a number of *Floater* articles (some of which mentioned the complainant as having contributed) which present a negative view on the Trust.
50. The complainant is not the editor of *the Floater* and should not therefore be held accountable for its editorial line *per se*. The Commissioner has only been able to have regard to those articles where it is clear that the complainant has contributed – and in many instances, it was not clear that he had.
51. The Commissioner also notes that the most recent post on *the Floater* states that the blog will no longer be publishing new articles³ – although it was still operating at the time both requests were made.
52. It is fair to say that the articles which the Trust brought to the Commissioner's attention do not paint it in a favourable light. The Commissioner also looked at other articles on the site and struggled to find many which viewed the Trust favourably – although some reported initiatives that the Trust was undertaking without critical comment.
53. However, the Commissioner also noted that the articles were not polemical. They were usually grounded in facts gleaned from Trust publications or from FOIA requests which had been made. It is not for the Commissioner to determine whether the articles fairly represented

³ <https://www.thefloater.org/the-floater-november-2018/enough-no-more>

the Trust's position but it did appear to her that they were not wholly without merit.

54. The Commissioner's view of the articles that were brought to her attention is that they formed part of an attempt at journalistic scrutiny. That scrutiny was certainly robust and contained an 'angle', but the Commissioner considers that, by and large, it is scrutiny which the Trust should be expected to withstand.
55. Turning to the use of social media photographs, the Commissioner does appreciate that such an action would make the individual involved feel unsettled. However, she also notes that many of the individuals involved appear to hold senior and public-facing roles within the Trust and therefore should expect a higher level of scrutiny for their actions. The images used are ones that the individuals have chosen to publish to the world via Facebook or LinkedIn. The Commissioner also notes that some of the images appear to be corporate shots. The Commissioner does not regard examples of the publication of photographs of senior members of Trust staff that had previously been made available online as valid evidence that the request above was vexatious.
56. Finally on the Section 77 allegation. The Commissioner found, on the basis of the evidence, that no offence had taken place. The allegations related to the metadata of documents supplied via FOIA and the Commissioner was satisfied with the Trust's explanations.
57. Despite this, the complainant chose to publish an article on *the Floater* which featured a picture of an information governance office at the Trust and suggested that this officer had lost his job as a consequence of the complaint the complainant had made.⁴ The Commissioner does consider this to be evidence that the complainant was attempting to target and harass an individual officer at the Trust. The Commissioner regards this example of the publicising by the complainant of allegations against a relatively junior member of the staff at the Trust as valid evidence of a wider pattern of behaviour leading to the request above being vexatious.

Burden

58. Notwithstanding her comments in paras [XX-XX], the Commissioner also recognises that the Trust is still a relatively small public authority.

⁴ <https://www.thefloater.org/the-floater-may-2018/crt-blames-junior-member-of-staff-twice-more-over-fake-document>

59. The number of requests that this complainant makes to this particular public authority is significant and, in the view of the Commissioner, he cannot be unaware of this.
60. There does not appear to be a central theme to the complainant's requests (apart from the obvious one of information relating to canals and boating), however the Commissioner has noticed that the complainant does frequently make requests for minutes of meetings. When making such requests (and when making his complaint to the Commissioner), the complainant frequently points to what he claims amounts to a lack of transparency on behalf of the Trust because the minutes should have already been published.
61. The Commissioner has also noticed that some of these sets of minutes appear to have been published at the time the complainant chose to make his requests or shortly after. This could have been because of the complainant's prompting – or it could be pure coincidence and therefore a little patience on the complainant's behalf would have removed the need for an information request.
62. In this particular case, the Trust has supplied the Commissioner with information which indicates that documents relevant to Request 1 were uploaded to the Trust's website over a month before the request was made.
63. The Commissioner considers that the complainant in this case is familiar with the Trust's website and where he can find minutes. She therefore has to consider that he could have found many of the relevant documents reasonably easily without having to make an information request. This would support the view that the request was vexatious.
64. In the case of Request 2, the meeting of which the complainant had requested minutes had in fact been cancelled. The Trust's argument is that the complainant was well aware of that fact, but made the request anyway. It has supplied information to the Commissioner showing that the information was uploaded onto the Trust's website before Request 2 was made.
65. Finally, the Commissioner has also had regard to the complainant's behaviour in respect of Request 2. When responding to Request 2, the Trust noted that it had already refused Request 1 as vexatious, that, as the complainant had already had an internal review on that request, carrying out a further internal review would serve no useful purpose and that he should make a complaint direct to the Commissioner.
66. Rather than follow the Trust's suggestion, the complainant followed up with a further eight requests for an internal review of his request –

despite being informed on five separate occasions that the Trust did not wish to revisit its response.⁵

67. The Commissioner does not consider that merely asking for an internal review is, in itself, evidence of vexatious behaviour. However, it should have been abundantly clear to the complainant that he had reached the end of that part of the process and that continuing to pursue the matter with the Trust was a waste of both his own time and the Trust's. The Commissioner considers that this episode demonstrates unreasonably persistent behaviour on behalf of the complainant and indicates that he was more concerned with causing the Trust annoyance than seeking information.
68. The complainant has (rightly) pointed to the Commissioner's guidance that it is the request itself that is vexatious and not the requestor. However, the Upper Tribunal in *Dransfield* has emphasised that "*it is important to look at all the circumstances when assessing whether or not a request is vexatious*" and set the correct test in such circumstances as "*was this request vexatious **in the light of the previous course of dealings?***" [paragraph 66 – emphasis added].
69. There is no question in the Commissioner's mind that the requests themselves are not, in isolation, particularly burdensome. Had they been the first and only requests which the complainant had made, the judgement would have been different – but they are not and the Trust is entitled to draw the Commissioner's attention to its previous interaction with the complainant.
70. Whilst the Trust has not presented compelling evidence to suggest that there is an underlying and ongoing grievance between itself and the complainant, by a fine margin, the Commissioner's view is that the situation has now reached the point where the Trust should be able to rely on some degree of protection for its resources.

⁵ Whilst, under Section 50(2)(a) of the FOIA, the Commissioner can refuse to accept a complaint where the complainant has not exhausted a public authority's internal complaints process and whilst the Commissioner would strongly encourage public authorities to carry out reviews, there is no legal requirement, under the FOIA, for a public authority to provide an internal review. The Commissioner does have some powers of discretion and tries to take a pragmatic approach. This means that she will sometimes deal with complaints where no internal review has been carried out – such as where no formal response has been issued, where a public authority has had ample opportunity to carry out a review but failed to do so or where carrying out an internal review would add nothing of value to the response.

71. The Commissioner concludes that both requests were vexatious and therefore the Trust was entitled to use Section 14(1) to refuse them.

Other matters

72. The Commissioner wishes to emphasise that she has made her decision in this case on the facts that have been presented to her and after having balanced the value of the particular requests against the burden to the Trust in complying with those requests.

73. That balancing exercise will necessarily differ from request to request, therefore the Commissioner was somewhat concerned to read in the Trust's internal review response to Request 1 that:

"the Trust will be refusing all current and subsequent requests for information from you under section 14, on the same basis as outlined above."

74. Section 17(6) of the FOIA allows a public authority not to issue to a fresh refusal notice where it has previously refused a request as vexatious and feels it would be unreasonable in the circumstances to issue a fresh refusal notice.
75. However Section 17(6) does not amount to a "blanket ban" on an individual submitting requests under the Act. The Trust does need to give some consideration as to whether the request which it is refusing is in fact vexatious – even if it ultimately concludes that that is the case and relies on Section 17(6) not to issue a fresh refusal notice.

Right of appeal

76. 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@hmcts.gsi.gov.uk

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

77. 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.

78. 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

Ben Tomes
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