Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **27 May 2021**

Public Authority: **Canal and River Trust**
Address: **Aqua House**
20 Lionel Street
Birmingham
B3 1AQ

Decision (including any steps ordered)

1. The complainant has requested the Canal and River Trust (the trust) to disclose a copy of report 445, which provided an update to the board at the meeting of 21 November 2019 on the situation at, and plans for, Toddbrook Reservoir in Whaley Bridge. The trust refused to disclose the requested information citing regulation 12(4)(e) of the EIR.

2. During the Commissioner's investigation the trust 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 decided that this exception is engaged and that the public interest rests in maintaining this exception. As she decided that 12(4)(e) had been correctly applied she did not go on to consider regulation 12(5)(a).

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

Request and response

5. On 5 March 2020, the complainant wrote to the trust and requested information in the following terms:

> "I refer to the minutes of your board meeting on 21 November 2019 -
>
> 19/082 TODDBROOK AND RESERVOIR UPDATE [TRUST445] The Board discussed report Trust445 which provided an update to the Board on the situation at, and plans for, Toddbrook Reservoir, and a status report on the two Inquiries. It also informed the Board about the wider impact on the Trust's management of its estate of large raised reservoirs.
>
> Please provide a copy of TRUST445 which was not included in the minutes and associated documents just released."

6. The trust responded on 25 March 2020. It refused to disclose the requested information in accordance with regulation 12(4)(e) of the EIR.

7. The complainant requested an internal review on 25 March 2020.

8. The trust carried out an internal review and notified the complainant of its findings on 17 April 2020. It upheld its previous application of regulation 12(4)(e) of the EIR.

Scope of the case

9. The complainant contacted the Commissioner on 12 May 2020 to complain about the way his request for information had been handled. He stated that he disagrees with the application of the exception cited and considers the information should be disclosed.

10. During the Commissioner's investigation the trust claimed a late reliance on regulation 12(4)(b) in the first instance, and then regulation 12(4)(e) as before and 12(5)(a) of the EIR.

11. The Commissioner will first consider the trust's application of regulation 12(4)(b). She will only go on to consider 12(4)(e) and 12(5)(a), if she finds that regulation 12(4)(b) does not apply.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

12. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.

13. It is subject to the public interest test, so a public authority must also demonstrate that the public interest in maintaining the exception outweighs the public interest in favour of disclosure.

14. Regulation 12(2) stipulates that a public authority shall apply a presumption in favour of disclosure.

15. Following the lead of the Upper Tribunal in Craven v Information Commissioner & DECC [2012] UKUT 442 (AAC), the Commissioner considers that there is, in practice, no difference between a request that is vexatious under the FOIA and one which is manifestly unreasonable under the EIR – save that the public authority must also consider the balance of public interest when refusing a request under the EIR. The analysis that follows looks at vexatiousness as, if the request is found to be vexatious, then it will also be manifestly unreasonable and hence Regulation 12(4)(b) will be engaged.

16. 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.

17. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

18. 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)

19. The Commissioner has published guidance on dealing with vexatious requests, 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.

20. When considering the question of vexatiousness, a public authority can consider the context of the request and the history of its relationship with the requestor, 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."

21. The trust stated that it acknowledges that, on the face of it, the request is focussed and would not constitute a significant burden. However, it argued that those are not the only considerations. Instead, it commented that it is important to look at all the circumstances when assessing whether a request is vexatious or not, as highlighted in the Upper Tribunal hearing of Dransfield. It quoted from that hearing that the correct test is whether the request is vexatious "in light of the previous course of dealings between" the public authority and the requestor.

22. The trust made reference to an earlier decision notice issued by the Commissioner, involving the complainant, on 13 February 2019, which held that two previous requests were vexatious. It argued that since that decision the complainant has continued unabated with much of the conduct previously complained of. It stated that the content of the trust's submissions in relation to the February 2019 decision remain relevant background to the current request with one exception – reference to Floater website, as this is no longer a going concern.

23. It stated that to bring matters up to date, a search of the website WhatDoTheyKnow shows that the complainant has made 118 requests to the trust since 2012. In addition, it confirmed that the complainant has made numerous requests for information to other bodies including Defra, the Environment Agency and the Charity Commission, regarding the performance and activities to the trust.

24. The trust provided the following data, highlighting the number of requests the complainant has made since 2016, against the overall amount it received:

FOI

Year	**Total**	**Of which are the complainants**
2016	127	19

2017	118	22
2018	46	11
2019	118	3
2020 – Nov	123	6

EIR

Year	**Total**	**Of which are the complainants**
2019	68	4
2020 – Nov	26	3

25. In addition the trust stated that the complainant's requests for an internal review amount to 34% of the total it received from 2016 to 2020 (24 out of 70 reviews).

26. The trust refers to the type of indicators typical of a vexatious request, as discussed in the Commissioner's guidance.

Abusive or aggressive language

27. The trust confirmed that it acknowledges that the complainant's language and tone in the present request is not on the face of it abusive or aggressive. However, it considers the request must be considered in the context of the complainant's previous engagement with the trust. The trust is of the view that the complainant's language and tone has been insistent and demanding. The complainant has also made several unfounded allegations against the trust and the Information Officer alleging dishonest and even criminal conduct. The trust submits that this level of criticism is beyond the level it and its staff should reasonably be expected to receive and that the complainant's conduct causes unjustifiable distress and more broadly stress and irritation.

28. The trust provided a written statement from two trust employees which sets out in more details the toll responding to the complainant's requests has taken.

Burden on the authority

29. The trust advised that the effort required to meet the complainant's requests is so grossly oppressive in terms of the strain on time and resources that it cannot reasonably be expected to comply. It stated that while the request being considered here, in isolation, cannot be regarded as burdensome, it is not the first and only request the complainant has made. It considers it is entitled to draw the

Commissioner's attention to its previous interaction with the complainant. Referring again to the Upper Tribunal hearing of Dransfield it states that "[i]n particular, the number, breadth, pattern and duration of previous requests may be a telling factor" in assessing whether a request can properly be characterised as vexatious. The trust referred the Commissioner to the statistics above. It argued that the Commissioner has previously acknowledged that the trust is a relatively small public authority and that the number of requests the complainant makes to the trust is significant. It is the trust's position that any assessment of the burden should have regard to the Dransfield ruling and the Commissioner's own previous finding in relation to the complainant.

30. The trust also considers it has reasonable grounds to suspect that the complainant makes requests not only in his name but also under one or more pseudonyms. It argued that the effect of this is that the true scale of the burden placed by the complainant on the trust is not reflected in the statistics provided above. It confirmed that the use of a pseudonym under the EIR does not make a request invalid, unlike the FOIA. However, the use of pseudonyms by the complainant is a relevant consideration in determining whether his request is vexatious as it is relevant to the burden imposed by the complainant's course of conduct.

31. It went on to say that the effect of the complainant's request on staff should not be overlooked. It provided a statement to the Commissioner outlining the damaging effect the complainant's requests and conduct more broadly has had on their mental health and ability to do their job. In particular, it refers to them not wanting to come into work because of the sense of being harassed, being unable to switch off from work and the fear of unfounded accusations.

32. It submits that this level of burden is manifestly disproportionate and the distress wholly unjustifiable and above and beyond anything its staff should reasonable be expected to withstand.

Unreasonable persistence

33. The trust confirmed that the Commissioner has previously acknowledged that the complainant's previous unreasonably persistent behaviour indicates that he has in the past been more concerned with causing the trust annoyance than seeking information. It advised that it acknowledges that in relation to this particular request the complainant has not engaged in conduct that could be described as unreasonably persistent. But it must be considered in the context of his previous engagement with the trust. The complainant frequently sends multiple emails on the same day, frequently to accuse the trust of lying or concealing information. It stated that on other occasions, the

complainant writes to remind the trust of issues he has raised previously, to raise new issues and/or to remind the trust of upcoming deadlines. The trust considers these emails to be unnecessary and amount to 'badgering' trust employees. It argued that they achieve nothing other than to add to the already substantial burden of dealing with the complainant's requests. The trust's responses also frequently result in the complainant submitting further follow-up enquiries, questions and new requests.

34. The trust considers the complainant's requests also result in a disproportionate number of internal reviews and this inevitably results in an increased workload for the trust, adding to the unjustified burden to which they and the trust are subjected in responding to the complainant.

Unfounded accusations

35. The trust stated that the complainant has previously made unfounded allegations against its staff, including that they had deliberately removed information from its website that was covered by a request under the FOIA. It argued that the Commissioner accepted in the February 2019 decision notice that the complainant's publication of an article on the Floater website – which featured a picture of the employee concerned and suggested this officer had lost their job as a consequence of the complaint the complainant had made – was evidence that the complainant was attempting to target and harass an individual officer at the trust. It confirmed that the Commissioner accepted this example as valid evidence of a wider pattern of behaviour leading to the request being vexatious. It argued that it repeats and avers those findings in connection with the current request.

Frequent or overlapping requests

36. The trust commented that the complainant submits frequent requests for information both to the trust and other public authorities. New requests are often submitted before the trust has had an opportunity to address the complainant's earlier enquiries. For example, the trust stated, that the complainant made requests for different reports mentioned in the minutes of the board of trustee meetings on 4 April 2020, 12 May 2020, 17 May 2020, 4 September 2020 and 30 September 2020. It also made three separate requests on 5 August 2019 within an hour. It added that the complainant makes similar requests to Defra and the Environment Agency. The number of requests places a disproportionate burden on the trust and his frequent emails and requests represent an unjustified level of disruption to trust employees.

37. The trust refers to the Upper Tribunal decision in Colin Parker v The Information Commissioner [2016] UKUT 427 (AAC) (26 September 2016) and notes:

    "the making of four inter-related requests within a two month period in July – September 2013 was archetypal vexatious behaviour and this, alongside the lengthy history of engagement on the basis of a particular grievance, was indicative of a campaign conducted by Mr Parker against the HRA rather than a request with serious purpose or value".

38. It is the trust's submissions that the parallels between the case and the decision in Parker are readily apparent. The trust considers the complainant's frequent, overlapping and persistent requests are evidence of his campaign against the trust, rather than a request with serious purpose or value.

Deliberate intention to cause annoyance

39. The trust went on to say that the complainant was, until last year, an administrator, moderator and frequent contributor to the Floater website. It commented that the Floater website is no long active, although the organisation continues to be active on Facebook and Twitter. It stated that Floater is an avowedly anti-trust organisation and examples of the kind of articles published were provided to the Commissioner by the trust in connection with the February 2019 decision. It informed the Commissioner that it would be happy to produce them again for her consideration. The trust advised that it acknowledges the Commissioner's conclusions in the February 2019 decision that the complainant was not editor of the Floater and cannot be held accountable for its editorial line per se. That notwithstanding, it is the trust's submission that the complainant's articles and involvement with a campaign group organisation are prima facie evidence of his personal antipathy towards the existence of the trust.

40. It argued further that the complainant often requests information and allows the trust to respond, only to follow up with information already in his possession from publicly available sources in an apparent effort to "catch the trust out" when the response is not as he expected. It said however that he does not provide this information to the trust in the first instance which – given his existing knowledge – he must appreciate would be helpful in responding to his request. The trust submits that this is evidence of the complainant abusing his information rights by using the legislation to cause annoyance to the trust and to try and undermine its staff, rather than to try and obtain information.

41. Additionally, the trust commented that the complainant is a frequent user of the WhatDoTheyKnow website and is able to categorise the

status of his information requests. The complainant has wrongly described many of his requests as "long overdue" or "awaiting internal review" when this is not the case. The trust submits that this is further evidence that the complainant's aim is to undermine and discredit the trust, rather than obtain information.

Scattergun approach

42. The trust drew the Commissioner's attention to the February 2019 decision in which it is noted that there does not appear to be a central theme to the complainant's request. It commented that this remains the case, with the complainant requesting diverse categories of information and lacking any clear focus. It said in 2016 and 2017 the complainant's requests focussed on waterway partnerships and boating. In 2016 he also made requests concerning business plans. In 2018 the complainant began requesting information on waterway partnership action plans and minutes of the meetings of the board of trustees. Requests relating to board minutes continued into 2019 and the complaint also requested information concerning Toddbrook Reservoir. It said to date the complainant has focussed on requesting reports referred to in board minutes and maintained his focus on Toddbrook Reservoir. He has also requested information on statutory dimensions.

43. It is the trust's position that the complainant's numerous, unfocussed requests constitute fishing expeditions seeking to identify any material that could be used to discredit the trust, rather than a targeted effort to obtain specific information.

Disproportionate effort

44. It said that while certain of the complainant's requests in isolation may not appear to be particularly burdensome, this must be considered in the context of his many other requests. It argued that it is required to expend an unjustifiably high level of resources to responding to the complainant's numerous requests. The trust stated that the time needed to deal with the complainant's requests places unjustifiable demands on staff time and limits the time available for other duties.

No obvious intent to obtain information

45. The trust puts forward the view that the complainant is hostile to the activities and existence of the trust. It argued that the complainant's course of conduct, which it submits amounts to harassment of its staff and use of unfounded allegations to try and undermine the trust, are indicative of this hostility. His attempts to try and catch the trust out and refusal to engage constructively with staff dealing with his request is evidence that his requests are not genuine efforts to obtain

information but rather represent an abuse of his information rights to harass, annoy and undermine the trust and its staff.

Complainant's position

46. The complainant refers to the trust's publication scheme and how it has adopted the model publication scheme for non-departmental public bodies. Under this scheme the trust is expected to publish minutes of senior level meetings, and reports and papers provided for consideration at those meetings unless the information is exempt under one of the FOIA exemptions or the EIR exceptions, or its release is prohibited under another statute.

47. He advised that the information request is a report provided for consideration at senior level meetings. It is the complainant's position that a request for a report that is expected to be published under the model publication scheme for non-departmental bodies may not be treated as vexatious in order to frustrate that request.

The Commissioner's position

48. Dealing with the complainant's arguments first, the complainant has stated himself that the publication scheme expects the trust to publish senior level meetings, reports and paper unless they are covered by an exemption or exception. The trust considers this report is exempt under the EIR. The disagreement here is therefore not a matter of the publication scheme but a matter of whether the report to the board is actually exempt.

49. The Commissioner agrees the trust's submission in relation to the February 2019 decision 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 requestor. 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 12(4)(b) and the public authority has the necessary evidence to support that.

50. Before going further, the Commissioner would just like to point out that she can only consider the circumstances up to the time the request of 5 March 2020 was made. Much of the information the trust has supplied in

support of its arguments post dates this request and cannot therefore be taken into account.

51. The trust has argued that the complainant has continued unabated with much of the same conduct since the February 2019 decision. The Commissioner acknowledges that the complainant has made 118 requests to the trust since 2012. Her previous decision noted that the volume of requests was significant. However, it is evident from the data the trust has provided and the chronology of requests that since the 2019 decision the complainant has made noticeably fewer requests for information to the trust. He has not continued to make requests similar to previous volumes and those made since the 2019 decision up to the date of the request have predominantly focussed on the Toddbrook Reservoir in Whaley Bridge, the flooding and dam collapse incident that summer and what actions the trust is taking. His requests have focussed predominantly on this theme and have asked for specific information. The trust's argument that the complainant's requests constitute a fishing expedition seeking to identify any material that could be used to discredit the trust, for the period from the February 2019 decision to the date of the request, therefore appear unsupported. To the contrary, it is clear the requests since the February 2019 decision have been a targeted effort to obtain specific information relating to Toddbrook Reservoir.

52. The Commissioner considers the reduction in the volume of requests will have eased the burden on the trust and its staff and notes the trust has acknowledged that the request itself is not particularly burdensome. Looking at the requests the complainant has made since the February 2019 decision the Commissioner does not consider any appear burdensome in isolation or collectively.

53. The trust has referred to other requests it believes the complainant has made using a pseudonym. Under the EIR the use of a pseudonym does not make a request invalid but if there is sufficient evidence to demonstrate that it is the complainant, it would be appropriate to take them into account when considering the overall burden imposed on the trust as a result of the complainant's behaviour. The Commissioner has reviewed the requests the trust is referring to here and for one applicant she can find no evidence that it is the complainant using a pseudonym. It is accepted that the applicant is interested in very similar information to the complainant but so were many other concerned members of the public that made information requests relating to Toddbrook Reservoir and the actions of the trust in relation to the critical incident that occurred in the summer of 2019. Without firm proof it is difficult to take these requests into account when considering the application of regulation 12(4)(b) of the EIR.

54. The trust has however provided evidence of one email, which came from the complainant's email address but was signed off in a different name, referring to a request in July 2018. The Commissioner can see the trust's argument is not without merit. But the evidence provided only refers to one request potentially being made in another name and the Commissioner is not aware of any others. She accepts it is indicative of the sort of behaviour which could be classed as vexatious and can be added to the overall number of requests he has made to the date of the request, but evidence of one request (having not been supplied with any further evidence of any others) is not enough to warrant the application of regulation 12(4)(b) alone whether in terms of burden or in terms of the complainant's overall conduct.

55. In terms of the language and tone of the complainant's requests and communications, the trust has provided chains of emails between the complainant and the trust. The majority of these communications post date the request and therefore cannot be taken into account. Those that do fall between the February 2019 decision and the date of the request are not abusive or written in a tone which the Commissioner could find unacceptable. They are all emails chasing the trust for a response or requesting an internal review. Some it seems because the trust has not responded on time. These could be viewed as persistent but it is not unusual for applicants to chase a public authority for a response once the statutory time for compliance has expired. It is not unusual or inappropriate and does not make the request itself vexatious.

56. In one or two examples, the Commissioner believes she saw evidence of the complainant chasing a response before the statutory time for compliance has expired. The complainant is well aware of the statutory times for compliance and although the wording of the legislation does state that a public authority should respond 'as soon as possible' and in any event no later than 20 working days from receipt, it would appear reasonable to wait until the timeframe has expired before chasing a public authority. The Commissioner can see how such behaviour can be seen as persistent and potentially 'badgering' and that additional chasers before the timeframe has expired still require an acknowledgement or brief response and add to the overall burden the complainant places on the trust. But again, although this is not ideal or potentially reasonable, the Commissioner does not consider it is enough to warrant the application of regulation 12(4)(b) at this stage based on the evidence she had been provided with. The trust could address this in an alternative manner and ask the complainant to refrain from doing this because of the effects it has.

57. The trust has referred to insistent and demanding behaviour and of the complainant making unfounded allegations against the trust. But it has provided no evidence to support this. If it is referring to matters pre the

February 2019 decision; these matters were taken into account in that decision in which the Commissioner narrowly agreed section 14 applied. It has produced no evidence to support its statement that the complainant has continued unabated in such a manner since that decision up to the date of this request and this is what would be required to support this.

58. With regards to the complainant's correspondence and the trust alleging that he sends multiple emails on the same day accusing the trust of lying or concealing information, raising new issues or to remind the trust of upcoming deadlines, again the majority of communications provided in support of this post date the request and are therefore irrelevant to the circumstances in March 2020 when the request we are considering was made. Those examples that do fall within the period between the February 2019 decision and the request appear to be examples of the complainant chasing the trust. There is no evidence of the complainant making accusations in these examples or of raising new issues. Some appear to be valid and reasonable chasers, as the trust had not responded on time. These cannot be regarded as inappropriate or unjustified if the trust has failed to meet its obligations under the relevant legislation. Others however do appear to suggest that the complainant was chasing the trust before the statutory time for compliance had expired. As stated above the Commissioner agrees this may be construed as overly persistent and potentially unreasonable and will add to the overall administrative burden placed on the trust. But as the Commissioner has already stated, these couple of examples alone are not enough to warrant the application of 12(4)(b) and it would be reasonable to engage with the complainant and ask him to refrain from doing this.

59. With regards to internal reviews, the complainant is entitled to make requests for internal reviews if he considers the trust has not dealt with his requests satisfactorily. It is a statutory part of the process under the EIR and under FOIA it is part of the section 45 code of practice.

60. In terms of unfounded accusations, the trust refers to the Floater website and in particular an example where a publication included a picture of the employee concerned and suggested that the officer had lost their job. Again these are matters which were addressed and discussed in the Commissioner's decision in February 2019. The Floater website no longer exists and the trust has failed to provide any evidence to the Commissioner of the complainant continuing in a similar manner since this decision.

61. In terms of frequent and overlapping requests, again the majority of examples provided of this alleged behaviour post date the request under consideration here. She notes that the complainant made three

information requests to the trust on 5 August 2019 and all within what appears to be an hour. She accepts that this is frequent but they were not overlapping and this is the only example the Commissioner is aware of for the period from the February 2019 decision to the date of this request. They were also very specific and focussed on the Toddbrook Reservoir and clearly stated what information he required.

62. The Commissioner disagrees that the request does not have serious purpose and value. The Toddbrook Reservoir incident was a major event, which attracted significant media coverage and resulted in over 1500 locals having to be evacuated. Trying to access information about this incident, why it happened and what is being done about it has significant value and purpose to those directly affected in the surrounding areas or live close to another reservoir with similar features and indeed the wider public. Whatever is decided will also come at a significant cost to the public purse.

63. On similar grounds the trust has argued that the complainant has tried to "catch the trust out", by requesting information, allowing the trust to respond to then follow up with information already in his possession. It regards this type of behaviour as an abuse of information rights and an attempt to cause annoyance to the trust and undermine its staff. Similarly, the evidence the trust has provided in support of this argument post dates the request. No evidence has been provided to demonstrate this type of behaviour from the February 2019 decision to the date of the request.

64. With regards to the trust's submission that the complainant wrongly describes his request as "long overdue" or "awaiting internal review", there is evidence of delays on behalf of the trust and failure to respond within the relevant statutory timeframes. The descriptions may, now, be inaccurate, if the trust has responded but it cannot be argued that they are not without some merit. The Commissioner is not convinced this demonstrates a clear aim to undermine or discredit the trust. Those wishing to review the requests on the website and how they were responded to can do so. The Commissioner feels others would not be deterred from doing so due to a potentially incorrect status description and would judge for themselves how effectively it was handled.

65. In terms of the effects on staff, the Commissioner has noted what the trust has said and accepts it is difficult to judge or indeed critique anyone that feels genuinely harassed and upset as a result of another person's actions. This cannot and should not be dismissed. However, this alone, considering the remaining views of the Commissioner as outlined above, is not enough to warrant the application of regulation 12(4)(b) of the EIR. It is fair and reasonable to see how the above described actions would lead to staff feeling harassed but it still remains

the Commissioner's position that the trust has failed to provide evidence to support its claim following the February 2019 decision to the date of the request.

66. In conclusion the Commissioner considers the trust is still relying heavily of matters pre the 2019 decision to support the application of regulation 12(4)(b) of the EIR as at March 2020. The Commissioner accepts that they are relevant but she considers the trust needs to demonstrate that the behaviour and conduct criticised in the 2019 decision continued up to the date of this request, warranting the application of regulation 12(4)(b). The trust has simply not produced the necessary submissions or evidence to support this, despite the Commissioner giving the trust ample opportunity to do so. As stated previously, a section 14 application or regulation 12(4)(b) is not a blanket ban on all future use of the information rights legislation.

67. For the above reasons the Commissioner is satisfied that regulation 12(4)(b) of the EIR is not engaged in this case.

68. This is not to say that the Commissioner would not potentially uphold the application of regulation 12(4)(b) of the EIR at a later date. After all much of what the trust has provided in support of its case post dates this request. Just that there is insufficient evidence before the Commissioner now to uphold the application of this exception to the request in March 2020 based on what she knows to be the circumstances at that time.

69. The Commissioner will now consider the trust's application of regulation 12(4)(e) of the EIR.

Regulation 12(4)(e) – internal communications

70. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.

71. The concept of 'internal communications' is broad and covers a wide range of information. 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.

72. The trust advised that the withheld information was produced as an internal update which was communicated to the board of trustees giving

them an update on the situation at, and plans for, Toddbrook Reservoir, and a status report on the two inquiries. It also informed the board about the wider impact on the trust's management of its estate of large raised reservoirs. The trust confirmed that the document was produced solely for the purposes of giving the board of trustees an update during the board meeting and has not been shared with any external persons or organisations.

73. The Commissioner is satisfied that the withheld information is an internal document solely produced for the board of trustees. The trust has confirmed that the withheld information remained internal and had not been circulated or shared outside of the trust with any other public authority or organisation. The Commissioner is therefore satisfied that the withheld information is an internal communication and therefore regulation 12(4)(e) of the EIR is engaged.

Public interest test

74. The trust stated that there is a general presumption in favour of disclosure and in authorities being open and transparent in their actions, especially in the case of Toddbrook Reservoir.

75. However, it argued that it does provide regular updates on Toddbrook Reservoir via its website and has plans to publish information about the restoration in the near future. The trust advised that disclosure would have a negative effect on internal deliberation and decision making processes and it requires the safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction.

76. The trust submitted that the withheld information gives the board an update on the current situation on site at Toddbrook Reservoir, including temporary works completed, permanent work yet to be completed including monetary spend and time frames. It argued that as the restoration is still in the planning stages and the options are still being reviewed, the trust is required to have a safe space to communicate to the trust the estimated costs and estimated timeframes before they are confirmed. It commented again that the plans are intended to be published once they are finalised but it is not in the public interest to disclose information about works before they have been finalised. It confirmed that the report also gives the board an update on one particular issue for which it had received external advice.

77. The trust went on to say that after the update in the report was given to the board, the board members were invited to review and discuss the project and the contents of the report. It confirmed that it is important to have this safe space to inform and discuss with the trustees any

advice given from external companies away from public interference. It said that disclosure would remove the safe space the board requires to discuss particular matters in light of external advice received. Safe space is required to discuss and debate important issues and key advice to enable informed choices and decisions within the trust to be taken.

78. The trust considers disclosure would have a chilling effect. It stated that disclosure would inhibit free and frank discussions in the future and the loss of frankness and candour would damage the quality of advice given by its employees and lead to poorer decision making.

79. The withheld information also provides an update on other reservoirs of a similar construction to Toddbrook and identifies reservoirs which need further work. As these works are still in the planning phases and work has not yet been agreed the trust considers that it is important to be able to discuss this internally and update the board on these matters before they are disclosed to the public. It argued that disclosure would result in the board being delivered less informative information in the future which could affect the project work plans for the future and work being incorrectly prioritised.

80. The Commissioner considers that the rationale underlying this exception is the need to protect a public authority's private thinking space; the space for internal deliberation and decision making away from external scrutiny. The need for safe space will be strongest when the issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight. The timing of the request and the context of the particular information will therefore be an important factor. This was confirmed by the First-tier Tribunal in DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072). The tribunal said:

"The 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."

81. The Commissioner accepts that there may also be a need for safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However this sort of safe space will only last a short time, and once an initial announcement has been made there is likely to be increasing public interest in scrutinising and debating the details of the decision.

82. With regards to chilling effect arguments, the weight accorded to such arguments will depend on the timing of the request, whether the issue is still live and the content and sensitivity of the information in question. If the issue is still live, arguments about a chilling effect on those ongoing

discussions (or closely related live discussions) are likely to carry significant weight. However, once the relevant discussions have finished, the arguments become more and more speculative as time passes. The Commissioner considers it will be harder for a public authority to make convincing arguments about a generalised chilling effect on all future discussions. Civil servants and other public officials responsible for giving advice are expected to be impartial and robust in meeting their responsibilities and not easily deterred from expressing their views by the possibility of future disclosure.

83. The Commissioner considers there is a public interest in openness and transparency and in the public having access to information to enable them to consider and scrutinise the decisions public authorities make on their behalf. In this case, she notes the Toddbrook Reservoir incident attracted significant media coverage, there was a real risk of major flooding if the dam collapsed and over 1500 residents were evacuated from their homes at that time. There are clear and significant public interest arguments in favour of disclosure in this case and in allowing members of the public to see, scrutinise and debate the various options and plans available. The management of the incident itself, the temporary and ongoing maintenance, and the cost of any plan going forward is significant and at a great cost to the public purse. This heightens the public interest in disclosure.

84. However, at the time of the request there was still significant ongoing discussions and deliberations about the incident and what should be done to the reservoir. There was also ongoing discussions about similarly constructed reservoirs and what actions were required there. Much of the information is an update to the board but this update is detailing the ongoing discussions and deliberations that were taking place at that time. One section specifically asks for the board to discuss and consider one proposal and decide a way forward. Although the request was made a few months after the document was created it is clear that the matter and issues discussed in the report were still very much live and under discussion. The Commissioner accepts that the trust is entitled to and requires the safe space to discuss and deliberate ideas and options without external influence or scrutiny, especially at a time when the issues under discussion are live and no firm decisions have been reached. This ensures that full and frank consideration is given to all ideas and the most appropriate course of action is determined. The public interest argument for the need for a safe space is therefore a weighty one in this case.

85. The Commissioner accepts that disclosure would hinder or have a chilling effect on the current discussions covered in the withheld information at the time of the request and again, because the matter was still live, this argument will also carry significant weight. She does

not consider there would be a chilling effect on all future discussions at the trust or on all future board updates or deliberations. She considers senior officials tasked with significant policy decisions would not easily be deterred from offering their free and frank advice in all future discussions just because of the potential of future public disclosure. They will and should expect potential public scrutiny at some point but the timing of that is key.

86. The Commissioner considers there are weighty public interest arguments on both sides in this case. But she considers the timing of the request is key and at the time of the request the trust was still discussing and deliberating internally over the Toddbrook Reservoir incident and how best to proceed. The Commissioner must recognise and therefore value the need for public authorities to have the safe space to discuss and decide on policy options. She acknowledges the significant public interest in disclosure of information relating to this reservoir and those similarly constructed and the amount of public money involved in the incident that occurred, its ongoing management and the likely proposals for the reservoir going forward. But on this occasion the Commissioner has decided that the public interest rests in maintaining this exception.

Right of appeal

87. 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

88. 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.

89. 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

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