

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2012

Public Authority: British Waterways
Address: 64 Clarendon Road
Watford
Herts
WD17 1DA

Decision (including any steps ordered)

1. The complainant asked British Waterways for all the information mentioned in the 21 July 2011 Board Meeting minutes and the agenda and minutes of that meeting.
2. British Waterways failed to issue any response within 20 working days and the complainant referred the case to the Commissioner.
3. During the course of his investigation, a response was issued. However, the complainant asked the Commissioner to issue a formal decision notice about the procedural issues that this case raises.
4. The Commissioner finds that British Waterways has breached sections 10(1), 17(1), 17(1)(b), 17(1)(c) and 17(3).
5. The Commissioner requires British Waterways to issue a new refusal notice in relation to the information that it has withheld which explains:
 - For the information that it has withheld [but not under section 36(2)(b)(i)(ii)] for it to explain which exemption it is relying upon and why.
 - For the information withheld under 36(2)(b)(i)(ii), the name of the qualified person who provided its opinion;
 - Whether that person considered that disclosure would **or** would be likely to prejudice the effective conduct of public affairs;
 - The public interest factors that it has taken into account that favour the disclosure of the information;

- The public interest factors that it has taken into account that favour the maintenance of the exemption; and
 - Why the balance of public interest favours the maintenance of the exemption.
6. Alternatively, British Waterways can conclude in each case that the exemptions were inappropriately applied and provide the information.
 7. British Waterways must take the above steps to comply with the legislation and must do so within 35 calendar days of the date of this decision notice. It should also undertake these steps on the What Do They Know website as requested by the complainant.
 8. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

9. On 10 August 2011 the complainant requested the following information from British Waterways:

'I refer to the board meeting held on 21/7/2011.

Can you please provide via whatdotheyknow.com a copy of all reports, sub committee minutes and other documents [m]entioned in the minutes of this meeting.

Can you also provide a copy of the minutes and agenda, unless these have already been published on your website.'

10. After being reminded by the complainant, British Waterways acknowledged the request on 26 August 2011. It explained that it would answer the request within 20 working days from its receipt on 10 August 2011.
11. British Waterways failed to respond in that time and the case was referred to the Commissioner.
12. After the Commissioner's intervention, British Waterways finally issued its response on 17 January 2012. It apologised for the delay and provided most of the information requested. It refused to provide the June Minutes of the Remuneration Committee because it considered that

the disclosure would or would be likely to, inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. It was therefore applying section 36(2)(b)(i)(ii).

13. However, it did not explain whether its Qualified Person had given an opinion, the threshold which that person considered appropriate or explain whether it had conducted a public interest test, and if so, what factors it had considered that meant that the balance of public interest lay in the maintenance of the exemption.
14. It also redacted numerous other parts of other documents but didn't say what exemption it was applying to those redactions or why those exemptions applied.

Scope of the case

15. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he was concerned that he had not received an appropriate response and about the unacceptable delays.
16. The Commissioner agreed that he would either issue a decision notice to compel a response to be provided or issue a decision notice about the unacceptable delays.
17. British Waterways issued a substandard response on 17 January 2012. A decision notice therefore is required to both ensure a compliant response is issued and to note the procedural breaches of the legislation.
18. The complainant has also requested an internal review, but understands that the substantial issues may need to be considered in a second complaint.

Reasons for decision

19. The FOIA has a number of procedural provisions that are designed to enable a complainant to receive an appropriate response (that can be understood) in good time.

Section 10(1)

20. Section 10(1) of FOIA requires that a public authority complies with section 1(1) promptly and in 20 working days at the latest. Section 1(1)

requires British Waterways to confirm or deny whether it has relevant recorded information and either provide it or rely on an appropriate exemption.

21. British Waterways failed to issue any response within 20 working days and therefore breached section 10(1).

Section 17(1)(b)

22. Section 17(1)(b) of FOIA requires a public authority to state what exemption it is relying on down to subsection. British Waterways made a number of redactions to the information that it did provide and did not explain in its refusal notice what exemption it was applying to the information. It therefore breached section 17(1)(b).

Section 17(1)(c)

23. Section 17(1)(c) of FOIA requires a public authority to explain why an exemption applies where it is not obvious. British Waterways have breached this provision in two ways:

1. For the information that it has applied 36(2)(b)(i)(ii) to, it has not explained:

- whether the Qualified Person has provided their opinion;
- who the Qualified Person is at British Waterways; or
- whether that person considered disclosure would **or** would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

For the Commissioner this is the minimum amount of information that needs to be provided when applying section 36 to explain why the exemption can be applied.

2. For the other information that it has withheld it hasn't explained what exemption it is relying on or why it considers it can apply these exemptions.

Section 17(1)

24. Section 17(1) requires that a compliant refusal notice is issued in 20 working days. British Waterways has not issued a compliant refusal notice and is in breach of section 17(1).

Section 17(3)

25. Section 17(3) requires a public authority when relying on a qualified exemption (one with a public interest component) that it explains the public interest factors that it has taken into account and why the public interest favours the maintenance of the exemption over disclosure.
26. British Waterways has not explained its public interest determination and has also breached section 17(3).

Remedial steps

27. Section 50(4) allows the Commissioner to specify the steps that need to be done to comply with FOIA.
28. The Commissioner has taken the unusual position of specifying two options for the British Waterways. Each option applies to each piece of information that it has withheld.

Option one

29. The first option is to disclose the withheld information that has been requested by the complainant.

Option two

30. The second option is to issue an appropriate Refusal Notice that shows that each piece of withheld information has been considered.
31. A compliant Refusal Notice must:
 1. Explain the exemptions under Part 2 of FOIA that are being applied;
 2. Explain why those exemptions are being applied; and
 3. When the exemption is qualified, explain:
 - a. The public interest factors in favour of disclosure;
 - b. The public interest factors in favour of the maintenance of the exemption; and
 - c. Why the balance of public interest favours the maintenance of the exemption.
32. If British Waterways is continuing to apply section 36(2)(b)(i)(ii) then it must explain as a minimum:
 - a. Who the Qualified Person is at British Waterways;

- b. That they have provided an opinion;
 - c. Whether they consider that disclosure would **or** would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation; and
 - d. That it has conducted a public interest test and why it considers that the balance of public interest favors the maintenance of the exemption.
33. For the avoidance of doubt, any Refusal Notice issued that fails to comply with the requirements of paragraph 31 will not satisfy this decision notice.

Right of appeal

34. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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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