

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2019

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 information about its annual maintenance spend from the Canal & River Trust ("CRT"). CRT initially provided some information that it believed met the scope of the request. When the complainant explained that it did not fulfil his request, CRT stated that it did not hold the requested information and that to provide it would be time-consuming. Although it subsequently provided several further responses to the complainant, CRT still maintained that it did not hold the information.
2. The Commissioner's decision is that CRT did hold the information that it stated was not held. CRT breached section 1(1)(a) of the FOIA by not confirming whether it held the requested information within the statutory time limit and it breached section 1(1)(b) as it was obliged to disclose the information at the time of the request and failed to do so. By failing to provide a valid response to the request within the statutory timeframe of 20 working days, CRT also breached section 10(1) of the FOIA.
3. However, as the information has now been provided, the Commissioner does not require CRT to take any further steps.

Request and response

4. On 31 July 2018 the complainant requested information of the following description:

"Boaters Update saying that 132m was spent on maintenance last prompted me to have a look at the annual report [1]. I can't find a breakdown of this figure. The nearest I can find is the chart on spend on charitable activities on page 39. Can you give me a breakdown under the same headings?"

5. Although the request was eventually acknowledged as an FOI request, CRT did not respond until 8 October 2018 which was clearly well beyond the statutory timeframe. CRT provided some information within the scope of his request.
6. On 12 October 2018 the complainant queried the response he had received on the basis that the figures didn't add up to £132 million, that the figures for 'maintenance' were part of 'maintenance, inspections, repairs and minor works' which suggested that less than £27.6 million was spent on maintenance.
7. The complainant asked for a review on 29 October 2018 and repeated his review request on 6 December 2018 to provide the information he believed was pending and confirm that his request had been valid. On 13 December 2018 he reiterated that his request had been for the breakdown of the maintenance figure against the twelve headings.
8. In the review conducted on 18 December 2018 CRT argued that the information was not held. CRT explained that it was not obliged to create information under the legislation and that the reason it was not easily able to create the information for the £132 million or rounded £131.6 million as per its Annual Report and Accounts was because support costs were allocated against "waterway operation, maintenance and repairs" in total, not across the 12 headings. CRT would have to conduct a separate exercise to consider how support costs might be allocated across each of the 12 headings which would not be of merit or worth the considerable extra time it would take.

¹ <https://canalrivertrust.org.uk/media/original/38445-annual-report-and-accounts-2017-18.pdf>

Scope of the case

9. The complainant contacted the Commissioner on 14 December 2018 to complain about the way his request for information had been handled. The reason for his complaint was that he had requested information on 31 July 2018 and, at that point, had still not received it, despite having asked for a review to confirm that he had made a valid request and for CRT to provide the information. The complainant also provided the Commissioner with two electronic links in order to give context.
10. The Commissioner considers the scope of this case to be whether CRT held the requested information or not at the time of the request and whether it has been provided to him.

Reasons for decision

Section 1 – general right of access to information held by public authorities

11. 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."

12. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held (and, if so, whether all of the information held has been provided). The Commissioner will reach a decision based on the adequacy of the public authority's search for the information and any other reasons explaining why the information is not held, such as the fact that there is no business need to record it.
13. On 17 May 2019 the Commissioner asked CRT to respond to her detailed questions in an effort to establish whether it held the requested information.

14. CRT did not directly answer the Commissioner's questions but copied the Commissioner into another response to the complainant on 21 June 2019 which was in the form of a spreadsheet entitled a "Non statutory analysis of charitable expenditure". In this response CRT explained that it had constructed the apportionment of money by carrying out a separate exercise to consider in detail how support costs might be allocated to each of the twelve headings. CRT stated that it was entirely confident that it did not hold or ever had held the requested information as CRT's finance team had not found it necessary to do so. Essentially CRT said that it had met its statutory audit requirements and did not need to go further. It included a proviso that what it now provided to the complainant was not consistent with Charity Statement of Recommended Practice ("SORP") requirements as it applied a simplified apportionment method but that to make it consistent with SORP would be disproportionate.
15. On 24 June 2019 the complainant responded by stating that the spreadsheet did not make clear which cells, if any, provided the 12 values he had requested. He said that he wanted to make it absolutely clear that his request required CRT to provide him with 12 values corresponding to the 12 headings from the chart on spend which was on page 39 of the Annual Report. His request had not required a change of format and any information beyond row 14 of the spreadsheet was not relevant to his request. By creating this spreadsheet he felt that CRT had attempted to justify the time and effort required to produce a response. He asked for a new response showing just the information against the 12 headings with a covering email explaining that £132 million on maintenance in the 'Boaters Update' is £131.6 million for "Waterways operations, maintenance and repairs".
16. After the Commissioner contacted CRT, it emailed her on 3 July 2019 to say that it intended to provide the complainant with a further response.
17. On 8 July 2019 another response was provided. A further table was attached based on the figures CRT had sent on 21 June 2019. It showed a single figure for total expenditure on waterway operation, maintenance and repair against each of the 12 headings from the chart on page 39 of the annual report. The total was £131.6 million which corresponded with the figure on page 65 of the 2017/2018 annual report against the heading in the Statement of Financial Activities with support costs allocated across 10 of the 12 headings (excluding Museums and Attractions and Third Party Regeneration Projects which did not fall within the definition of waterway operation, maintenance and repair). CRT explained that breaking these figures down any further would involve too many hours of work as it would involve analysis and interrogation of every single cost incurred. CRT also accepted that its description of maintenance could have been more specific.

18. The complainant again responded by stating that this latest response from CRT confirmed the hypothesis he had that it had deliberately falsified the information it had provided to him on 8 October 2018 by including third party regeneration projects and excluding allocated support costs. He pointed out that the latest spreadsheet did not give the figure provided by the audited accounts and that no explanation had been offered. Therefore he requested that CRT provide him with an amended spreadsheet showing 'Allocated Support Costs' as £11.3 million with other figures adjusted accordingly in order that they totalled £131.6 million.
19. On 10 July 2019 the complainant wrote to the Commissioner with his view that if a figure is provided in CRT's Annual Report then it is held. He suggested that the reason CRT had given a different figure was because its response on 21 June 2019 was a rather crude attempt to show that additional analysis would be required to provide a response to his information request. The complainant states that 'allocated support costs' was given a different figure on 21 June and 8 July 2019 to that in the Annual Report. He argues that CRT complained that it had to do additional analysis to provide a value for National Operational and Technical Teams but he refutes this by explaining that his accountants had pointed out that this had been unnecessary as CRT only needed to add up the 11 headings and deduct them from the total of £131.6 million. In short, his view is that CRT could have provided this information within 20 working days.
20. The Commissioner asked the complainant if he accepted that the information he requested had now been provided. He said that it went a long way to doing so and that his accountant's explanation and the discrepancy between CRT's response and the Annual Report filled in the holes. He had asked for an amended spreadsheet on 8 July 2019 but that it had not been forthcoming and, in light of this, he wished the Commissioner to now consider the delay in providing the information.
21. The Commissioner's guidance states that "A public authority will hold *information if it holds the building blocks required to generate it and no complex judgement is required to produce it.*"² A consideration has to be made regarding what is involved in carrying out these tasks because this has a bearing on whether the information is held.
22. In *Michael Leo Johnson v the Information Commissioner and the Ministry of Justice (EA/2006/0085; 13 July 2007)*, the Tribunal considered a

² https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

request relating to the number of cases dismissed in the High Court. In particular, the applicant sought the number of claims that were struck out by each of the Queen's Bench Masters for the years 2001, 2002, 2003 and 2004. The Tribunal considered whether the work needed to identify, retrieve and then manipulate the raw data constituted the creation of new information. The MoJ argued that there was a need to exercise some judgement as to what files recorded a strike out and that even when this raw data had been extracted it had to be further manipulated. The MoJ argued that this was the creation of new information.

23. The Tribunal found that identifying references to a strike out was not difficult, it would be easy to brief someone on the four terms commonly used. Nor did the Tribunal consider that the need to perform some simple mathematical calculation involved the creation of new information. The Tribunal therefore found that the information was held.
24. The Commissioner accepts that the level of skill and judgement required to answer a request will determine whether information is held. It is not always easy to distinguish between the use of a skill and the exercise of judgement. But certainly skill can include a competence or technique that can be learnt. Such skills include the application of mathematical calculations and the writing of basic computer programs to extract information from a database.
25. Fundamentally, a public authority will hold the information, if it holds the necessary building blocks and they can be identified, retrieved and manipulated using only a reasonable level of judgement. The Commissioner therefore agrees with the complainant that CRT did hold the requested information.
26. Consequently the Commissioner's decision is that CRT failed to comply with the duty to confirm whether it held the requested information within the statutory time limit and therefore breached section 1(1)(a). CRT also breached section 1(1)(b) as it was obliged to disclose the information at the time of the request and failed to do so.

Section 10 – time for compliance

27. Section 10(1) of the FOIA states that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

28. CRT breached section 10(1) of the FOIA by responding late to the complainant and disclosing information many months afterwards. The Commissioner wishes to make it clear that the delays involved in this complaint are unacceptable.

Right of appeal

29. 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

30. 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.
31. 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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