



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2019/0204V**

**Before**

Judge Stephen Cragg Q.C. heard via the CVP platform on 19 January 2021

**Between**

**David Wolfe**

Appellant

-and-

**The Information Commissioner  
Canal and River Trust**

Respondents

The Appellant represented himself

The Commissioner was represented by Laura John

The Canal and River Trust was represented by Tom Hickman QC

**DECISION ON SCOPE**

## DECISION

1. The Tribunal finds in favour of the Appellant on the issue as to whether the requested information is within the scope of FOIA.
2. The Tribunal makes directions (as agreed) by the Parties for the determination of the remaining issues in the appeal.

## MODE OF HEARING

3. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
4. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.
5. The Tribunal considered an agreed open bundle of evidence comprising 220 pages, written submissions from all parties and two bundles of authorities.

## BACKGROUND TO PRELIMINARY ISSUE

6. On 25 June 2018 the Appellant made the following request for information under FOIA from the Canal and River Trust (CRT): -

"1. Copies of all general policy documents, guidance, reports or other documents which justify, inform, underpin or explain the general approach being taken by CRT in its 2018 review of mooring agreement charges.

2. All documents including emails, memos, notes of meetings, reports, assessments and other document evidencing CRT's specific consideration of the proposed price rise for mooring agreements at CRT's Lisson Wide mooring in London.

3. If not included in 2, all documents evidencing assessments or comparisons made by CRT relating to Lisson Wide and between Lisson Wide moorings and any other.

4. If not included in 3, full information (as known to and relied on CRT for the purpose of 2 and/or 3 above) about all and any other moorings considered (whether as comparables or for any other purpose) by CRT for the purposes of 2 and/or 3 above."

7. Apart from providing some information in the public domain, CRT withheld most of the requested information, and told the Appellant that his request was outside the scope of its obligations under the FOIA. As explained by the Commissioner in the subsequent decision notice dated 21 May 2019: -

6. The CRT responded on 10 August 2018 to say that it had no statutory obligation to provide long-term moorings. It explained that Waterside Mooring (the commercial long-term arm of the CRT for the long term, permanent moorings managed by the Canal & River Trust across England and Wales) operates independently from its boat licensing functions and does not rely on statutory powers under section 43(3) of the Transport Act 1962 but relies on the CRT's land ownership in setting terms and conditions.

8. In short, the Commissioner agreed with the CRT and the decision notice reflected the Commissioner's view that the requested information falls outside CRT's duties under the FOIA.

9. The Commissioner recorded that even if the requested information fell within the CRT's duties under the FOIA, CRT's case was that there would be exemptions under the FOIA which would support withholding disclosure.

10. The Appellant appealed against the decision notice on 14 June 2019 arguing that: -

...the function in play here is the function of charging (as to which see further below) and is not in any way dependent on CRT having a statutory function of providing long term moorings. But, in any event, there can be no doubt that CRT also has the statutory power to provide long-term moorings (if that is relevant): section 43(3) [Transport Act 1962] itself provides that CRT has the "power... to make best use of their facilities" - "facilities" plainly includes the long-term moorings here; and "make best use of" plainly gives CRT the power (i.e. the function) to provide those long-term moorings (for which it can then charge).

None of that is affected by CRT's argument that it was acting here as a private landowner exercising private power. That is because FOIA applies to information relating to functions "exercisable" by CRT; i.e. functions that CRT could exercise whether or not it is actually exercising them in the particular instance. Thus, where CRT is doing something for which section 43(3) would be "exercisable" (which is the case here, as above), then the information falls within FOIA.

11. Thus, the battle lines appeared to be drawn for this appeal with the Commissioner and the CRT combining to contest the Appellant's appeal.
12. An agreement between the parties was reached that the issue about the applicability of FOIA should be determined before any possible exemptions to disclosure would be considered.
13. However, shortly before the hearing the positions of the CRT and the Commissioner changed.
14. First, the CRT's set out in a written submission dated 6 January 2021 that hitherto, its position had been s43(3) Transport Act 1962 (TA 1962) was not 'exercisable' in relation to long term moorings (as the Appellant claimed). But now the CRT stated: -

13. Having considered the matter further, CRT no longer maintains that the reference to facilities and services in s.43(3) is a reference exclusively to statutory powers and duties. It is accepted that section 43(3) could provide a statutory basis for the imposition and recovery of charges which could also be levied by the CRT under contract as an incident of lease of property where this is for the use of any inland waterway owned by them.

14. However, that does not mean that the information request is within the scope of FOIA. The Appellant's analysis ignores the fact that information must be held in relation to a function that is exercisable "by virtue of" the British Waterways Board (Transfer of Functions) Order 2012 ("Transfer Order 2012"). In other words, the information must relate to a function that could not be exercised if it were not for the British Waterways Board (Transfer of Functions) Order 2012.

15. Responding to this new submission, the Commissioner's position also changed and she now sides with the Appellant. As she explains: -

11. The parameters of the dispute are now the proper interpretation of Schedule 1 Part VI of FOIA, in circumstances where the CRT has dual powers available in respect of a particular function. As the CRT was able to impose charges on long-term moorings pursuant to section 43(3) TA62 as well as under private law, does information about those charges relate to a function exercisable by virtue of the Transfer Order?

...

13. The Commissioner considers that the key word in the language of the legislation, for these purposes, is "exercisable". The proper interpretation of that word must be that where the CRT has available a statutory power/duty that passed to it under the Transfer Order (as, in this case, did section 43(3) of the TA62) then it has a statutory function that is "exercisable". ...it is not necessary to establish that, on the facts, the CRT has chosen to exercise its statutory power – the word is "exercisable", not "exercised". It follows from that that in a situation where the CRT has dual powers available to it, it has a statutory function that is "exercisable" by virtue of the Transfer Order. That function does not cease to be exercisable simply because a private law power exists in parallel to it.

### STATUTORY FRAMEWORK

16. Section 1 FOIA provides 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 specific in the request, and (b) if that is the case, to have that information communicated to him".

17. Section 3(1) FOIA defines a "public authority", materially, as "(a) subject to section 4(4), anybody which... (i) is listed in Schedule 1, ..."

18. Importantly for this appeal, Schedule 1 Part VI FOIA, lists: -

"Canal & River Trust, in respect of information held by it relating to functions exercisable by it by virtue of the British Waterways Board (Transfer of Functions) Order 2012 (S.I. 2012/1659)".

19. Where the CRT holds information that is not of the type specified in Schedule 1 Part VI, that information is outside the scope of FOIA. Section 7(1) FOIA provides explicitly that “Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority.”
20. Thus, it is important to ascertain whether the information sought in this case relates to functions exercisable by the CRT by virtue of the British Waterways Board (Transfer of Functions) Order 2012 (the 2012 Order).
21. The 2012 Order itself was made pursuant to the Secretary of State’s powers conferred by sections 5(1), 6(1) to (3) and 35(2) of the Public Bodies Act 2011 (PBA 2011). The preamble to the 2012 Order states that: -

In accordance with section 8 of the Act, the Secretary of State considers that this Order –

- (a) serves the purpose of improving the exercise of public functions, having had regard to the factors set out in section 8(1) of the Act;
- (b) does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

22. The 2012 Order states, materially, as follows: -

**Transfer of statutory functions**

2.– (1) On the transfer date, the functions exercisable by the British Waterways Board –

- (a) under or by virtue of the enactments listed in Schedule 1 (enactments conferring functions transferred by article 2), and
  - (b) under or by virtue of any local Act,
- are transferred, so far as exercisable in relation to England and Wales, to Canal & River Trust.

(2) Schedule 2 (which makes consequential provision to the 1962 Act and the 1968 Act) has effect.

23. Schedule 1 to the 2012 Order lists a number of enactments “conferring functions transferred by article 2”. Included in the list is the TA 1962, excluding a number of named sections and schedules. Not included in the excluded

sections (and therefore conferring functions transferred by article 2 of the 2012 Order), is s43 TA 1962.

24. Section 43(3) TA 1962 reads: -

(3) Subject to this Act and to any such enactment as is mentioned in the last foregoing subsection, the British Waterways Board, and Canal & River Trust shall each have power to demand, take and recover or waive such charges for their services and facilities, and to make the use of those services and facilities subject to such terms and conditions, as they think fit.

25. Relevant to subsection 3, is subsection 8 which reads: -

(8) The services and facilities referred to in subsection (3) of this section include, in the case of the British Waterways Board and Canal & River Trust, the use of any inland waterway owned or managed by them by any ship or boat.

26. It is now common ground that the functions described in this subsection could provide a statutory basis for the imposition and recovery of charges for long-term moorings, for example, and are functions exercisable by the CRT by virtue of the 2012 Order.

27. Both the CRT and the Commissioner have cited from the same passage of the Explanatory Document which accompanied the 2012 Order to support their respective arguments. Thus, paragraph 8.24 of the Explanatory document reads, materially: -

In response the Government decided that the FOIA should apply to the CRT proportionately, recognising the need both to treat the CRT as something different from BW, and to establish a level playing-field with other navigation authorities in the voluntary and private sectors. The Government therefore decided, subject to parliamentary approval, to apply the FOIA to the CRT, in respect of all those statutory functions that CRT will inherit from BW through the draft Transfer Order. This limited application of the FOIA will have the effect of excluding from the provisions of the Act those broader charitable functions carried out by CRT. It will also exclude bodies that merge with CRT, unless the

FOIA already applies or is made to apply to them at the point of merger.  
..."

28. Further, by section 23 PBA 2011, a scheme for the transfer of property, rights and liabilities may be made by a Minister in connection with an order such as the 2012 Order. Such a scheme, the British Waterways Board Transfer Scheme 2012 (the Transfer Scheme) has been made in this case. The preamble to the Transfer Scheme states as follows: -

The Secretary of State for Environment Food and Rural Affairs has decided to transfer the undertaking of the British Waterways Board in England and Wales to a charity, Canal & River Trust.

As a result of this Scheme, Canal & River Trust is to hold certain waterways infrastructure property as the trustee of the Waterways Infrastructure Trust, a charitable trust which the Secretary of State has established for that purpose. The Secretary of State and Canal & River Trust have agreed that Canal & River Trust must use the other property transferred to it under this Scheme (which it does not hold as trustee) in pursuit of certain specified purposes which have been agreed and formally recorded by the Secretary of State and Canal & River Trust.

The Secretary of State, in exercise of the powers conferred by section 23 of the Public Bodies Act 2011, makes the following Scheme.

The Secretary of State has made the British Waterways Board (Transfer of Functions) Order 2012(b), an order under section 5 of the Public Bodies Act 2011 transferring functions from the British Waterways Board to Canal & River Trust. This Transfer Scheme is made in connection with that Order.

Canal & River Trust, a registered charity, has consented to this Scheme.

29. Provisions to which I have been referred to in the Transfer Scheme are the following: -

**Transfer of property, rights and liabilities to Canal & River Trust**

3. Subject to the following provisions of this Scheme, all property, rights and liabilities of the British Waterways Board transfer to Canal & River Trust on the transfer date.

**Consequential and supplementary provisions**

- 9(1) Transfers under this Scheme have effect-
- (a) irrespective of whether or not they could be transferred otherwise than by this Scheme; and
  - (b) irrespective of whether consent of a third party or any other procedure would be required if the transfer were affected otherwise than by this scheme.

...

- (5) Any reference to the British Waterways Board or any reference which is to be treated as a reference to the British Waterways Board in an instrument or other document in respect of anything transferred under this Scheme or any function transferred under the British Waterways Board (Transfer of Functions) Order 2012 is to be treated as a reference to-
- (a) Canal & River Trust, so far as it relates to anything transferred to Canal & River Trust under this Scheme, or to a function transferred under or by virtue of the British Waterways Board (Transfer of Functions) Order 2012; or
  - (b) Canal & River Trading, so far as it relates to anything transferred to Canal & River Trading under this Scheme.

## THE SUBMISSIONS

### The CRT

30. The CRT's position starts by noting that the Appellant accepts that the CRT has an ability to impose charges for long-term moorings as an incident of its ownership of property and that is, in fact, what it is doing in the present case. Indeed, CRT says this is always the basis upon which it charges for long-term moorings and it never uses the functions transferred by way of the 2012 Order for this purpose.
31. Next, CRT says that its ability to impose long-term mooring charges in this way arises from the Secretary of State's exercise of powers under s.23 PBA 2011 to transfer property from the British Waterways Board to the CRT. Thus, the Transfer Scheme, amongst other things, and as set out above, transferred the property and private rights and liabilities of the British Waterways Board to the CRT.

32. The CRT submits that the question that schedule 1 FOIA essentially requires to be addressed is whether the information to which a FOIA request relates is held by the CRT in relation to a function which it could exercise by virtue of the Transfer Scheme 2012, or whether by contrast the function can be exercised because of the Transfer Order 2012. It is argued that FOIA quite deliberately refers only to information that relates to functions exercisable by virtue of the Transfer Order 2012, and not things that can be done by virtue of the Transfer Scheme 2012. Therefore, if the CRT is doing something by virtue of the Transfer Scheme, it cannot be a function which is exercisable 'by virtue of' the 2012 Order.
33. CRT prays in aid paragraph 8.24 of the Explanatory Document to the 2012 Order set out above, and a similar passage from the Government's Consultation Response document, a precursor to the 2012 Order, which it is said support the approach in FOIA of approximating between the CRT's public functions - arising under the 2012 Order - and its private functions - arising under the Transfer Scheme, especially with reference in the Document to a 'limited application of the FOIA' to 'all those statutory functions that CRT will inherit from BW through the draft Transfer Order'. The CRT also points to the reference in the Document to the need to establish 'a level playing-field with other navigation authorities in the voluntary and private sectors' and notes that such other authorities can also charge for long-term moorings using private powers but not be subject to the requirements of FOIA.
34. The CRT conclude that the information request is inconsistent with this policy rationale because it does not relate to statutory functions that CRT has inherited by virtue of the 2012 Order, but relates to functions that the CRT exercises, in fact, by virtue of the Transfer Scheme.
35. The CRT counters the argument that it can avoid FOIA altogether by always claiming that powers are utilised other than by the exercise of functions

transferred by the 2012 Order, by stating that s43 TA 1962 is used in relation, for example, to short-term moorings.

36. The CRT also relies on the case of *Sugar v BBC* [2012] UKSC 4; [2012] 1 WLR 439. In that case a combination of section 3 and section 7 FOIA and Part VI Schedule 1 FOIA provides that information held by the BBC is only covered by FOIA if it is held for ‘purposes other than those of journalism, art or literature’. The issue as to what is covered by this was considered by the Supreme Court which held that the BBC does not have to show that the predominant purpose of holding the information is (for example) journalism, so long as it can show that it is *a* purpose for holding the information.

37. By analogy, says the CRT, in this case so long as the information can be held other than in relation to the functions exercisable by virtue of the 2012 Order, then it will be excluded from the FOIA. It is submitted that whilst Schedule 1 Part VI is phrased by reference to what is disclosable, the real emphasis is on what is not disclosable: namely information that would be held irrespective of the limited statutory functions transferred to the CRT by the Transfer Order 2012. It ensures that information does not become disclosable just because it could also be (or even is in part) related to such statutory functions.

#### The Commissioner

38. The response of the Commissioner to this is, as set out above, that where the CRT has available a statutory power/duty that passed to it under the 2012 Order then the CRT has a statutory function that clearly is “exercisable” by it. The fact that the function is not actually used in this case is irrelevant.

39. The Commissioner cites the same passage from the Explanatory Document accompanying the 2012 Order, as does the CRT. Rather than supporting the exclusion of activities carried out under the Transfer Scheme from FOIA (as the CRT argues), the Commissioner submits that the Explanatory Document

supports the intention to ensure that all the activities that had hitherto been conducted by the British Waterways Board, and subject to FOIA, remained subject to FOIA after their transfer to the CRT. While the legislature intended to recognise the fact that the CRT is different from the British Waterways Board, it did so by confining the application of FOIA to those functions which the CRT has available under the Transfer Order, as opposed to simply listing the CRT in Schedule 1 without any qualification, in the same way as the British Waterways Board had been.

40. In relation to the *BBC* case, the Commissioner submits that the provision in Schedule 1 relating to the CRT uses materially different language from the provision relating to the BBC. Those provisions define the scope of application of FOIA by explicit reference to what is excluded (using the phrase 'information held for purposes other than...'). However, the provision relating to the CRT does not, and its emphasis is entirely on what is included. Thus, the proper meaning is, in line with the purpose of the provision, that all information relating to the CRT's functions under the Transfer Order is within scope irrespective of whether those functions might overlap with the CRT's powers under private law.

### The Appellant

41. The Appellant re-asserts the points he has made previously in this appeal that applying, the ordinary meaning of the word 'exercisable' in FOIA, this must apply to all the functions transferred by the 2012 Order and which could be exercised by the CRT, and not just the functions transferred under the 2102 Order which are actually exercised by the CRT.

42. The Appellant makes an additional point relating to the Transfer Scheme. He points out that the Transfer Scheme only transferred 'property, rights and liabilities' to the CRT and not 'functions'. The Appellant submits: -

CRT is forced to characterise the private powers it might then exercise in relation to that property as “functions transferred” under the Scheme. Not only are they not “functions” in the ordinary understanding of the term, but nor were they transferred. What was transferred was the property, here the canal, incidental to which CRT now has private powers.

## DISCUSSION

43. I agree with the Commissioner and the Appellant that the key to the case at this stage is the word ‘exercisable’ as set out in Schedule 1 FOIA. In my view the ordinary meaning of the word ‘exercisable’ in the context of FOIA means that FOIA applies to the CRT in relation to functions which it could exercise by virtue of the 2012 Order, whether it is exercising them or not.
44. The concentration on the words ‘by virtue of’ to attempt to avoid this conclusion does not, in my view, assist the CRT. The CRT seeks to argue that this means in effect that a function must actually be exercised under the 2012 Order to be ‘by virtue of’ the 2012 Order. But there is nothing in the words ‘by virtue of’ which can so circumscribe the word ‘exercisable’ so that applies to functions which are actually ‘exercised’. In my view the phrase ‘exercisable by virtue of’ needs to be read as a whole and the plain meaning is that it refers to functions that the CRT could exercise because they have been transferred by the 2012 Order.
45. I do not see how identifying that charges are in fact levied under the Transfer Scheme assists the CRT. Again, there is nothing in the wording in FOIA which identifies that functions actually exercised pursuant to the Transfer Scheme are otherwise exempt from FOIA even where it is accepted that such functions could also be exercised pursuant to the 2012 Order.
46. I also think there is considerable force in the Appellant’s submission that the Transfer Scheme does not transfer any functions at all and that any private ‘functions’ that are then exercised by the CRT are subsidiary to the transfer of property under the Transfer Scheme. In my view that submission is correct

and militates against an interpretation of FOIA which somehow carves out an exemption from FOIA on the basis that the Transfer Scheme is engaged.

47. It seems to me that reference to the Explanatory Document throws little light on the issue, although it is relied upon by both the CRT and the Commissioner. It is true that the Document expresses an intention to limit the application of FOIA to the CRT. But there is nothing in the Document which shows an intention to limit the ordinary meaning of the word 'exercisable', or to indicate that functions which could be exercised by virtue of the 2012 Order (but are, in fact, not so exercised) were to be excluded.

48. I can see there is some force in the CRT's reliance on the reference to a 'level playing field' in the Document, and that other bodies can levy mooring charges without being subject to the requirements of FOIA. But it seems to me that the Document (and FOIA) sought to address the 'level playing field' point by a recognition that FOIA should only apply to those functions which are exercisable by virtue of the 2012 Order. But that of course does not take the matter any further forward: if Parliament had wanted to restrict the applicability of FOIA further it could have used the word 'exercised' rather than 'exercisable', but it did not do so.

49. Finally, in my view the *BBC* case does not assist the CRT and supports the Commissioner's analysis. In that case the point was that even a minor purpose relating to journalism brought the BBC within the relevant exemption as set out in FOIA. In this case there is, in fact, a positive definition which includes information within FOIA even where the information relates to functions which only 'could' be exercised under specific provisions.

#### CONCLUSION

50. For those reasons, the Tribunal finds in favour of the Appellant on the issue of whether the requested information is within the scope of FOIA.

51. The parties have agreed directions for the determination of the remaining issues in the appeal, as follows: -

- (a) By 1 March 2021 the CRT to file any further submissions and/or evidence that it wishes to rely on in respect of the application of any exemptions;
- (b) By 15 March 2021 the Appellant to file any further submissions that he wishes to rely on in respect of the application of any exemptions;
- (c) By 29 March 2021 the Commissioner to file submissions setting out her position on the application of the exemptions;
- (d) By 13 April 2021 the CRT and/or the Appellant to file any submissions and/or evidence replying to the IC's position, if so advised; and
- (e) A reconvened hearing be listed for the first mutually convenient date after 4 May 2021 on the scope issue.

52. Once the remaining issues have been determined, the Tribunal will consider substituting the decision notice, which found that the requested information is outside the scope of FOIA and take account of the result of the resumed hearing when deciding how the appeal will finally be disposed.

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 12 February 2021

Promulgated Date 16 Feb. 21