

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 November 2011

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

### Decision (including any steps ordered)

---

1. The complainant has requested details of a vessel survey on the Oxford Canal during a specified time period. British Waterways disclosed some information to the complainant, but withheld the remaining information under the law enforcement exemption (FOIA section 31) and the personal information of third parties exemption (FOIA section 40(2)).
2. The Commissioner's decision is that British Waterways has correctly relied upon these exemptions to withhold the outstanding information.
3. Therefore the Commissioner does not require British Waterways to take any steps.

### Request and response

---

4. On 28 September 2010, the complainant wrote to British Waterways and made the following request:

*"I wish to be provided with, in MS Excel format, by e-mail, the data held by [British Waterways] relating to the weekly boat survey taken on the Oxford Canal, between 1<sup>st</sup> January 2010 and 28<sup>th</sup> September 2010.*

*This data should contain the following information:*

*1 Vessel registration number*

*2 Name of vessel*

*3 Sector of sighting (ie adjacent bridge number)*

*4 Date of sighting*

*5 Site name of location of sighting*

*6 Name of data gatherer"*

For ease of reference these will be referred to as items (i) to (vi) throughout this notice.

5. British Waterways responded on 27 October 2010. It stated that the requested information was exempt from disclosure under the personal information of third parties exemption.
6. The complainant wrote to British Waterways on 27 October 2010 and expressed dissatisfaction with its response to his request.
7. British Waterways wrote to the complainant on 15 November 2010. It stated that it accepted some of his arguments in relation to items (i) and (ii) – although it did not disclose this information. It also stated that it was not prepared to disclose the requested information as it believed that it was exempt under the law enforcement exemption. It did not make any reference to the personal information of third parties exemption.
8. The complainant wrote to British Waterways on 10 January 2011 and requested an internal review.
9. After conducting an internal review, British Waterways wrote to the complainant on 16 March 2011. This stated that the requested information was exempt under the law enforcement exemption.

### **Scope of the case**

---

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. During the course of the investigation British Waterways informed the Commissioner that it had now disclosed items (i) and (ii) (registration number and name of vessel). However, it confirmed that it was seeking to withhold the remaining information under the law enforcement exemption and the personal information of third parties exemption.
12. Therefore the scope of this case has been to consider the use of these exemptions to withhold the outstanding information in this case – i.e. the information set out in items (iii) to (vi) of the request.

## Reasons for decision

---

13. As noted above, British Waterways has applied two exemptions to all of the outstanding withheld information. The Commissioner has first considered the application of the law enforcement exemption to the information set out in items (iii) to (v) of the request. However, he considers that it is more appropriate to then go on to consider the application of the personal information of third parties exemption in relation to item (vi).

### **The law enforcement exemption**

14. During the course of the investigation British Waterways confirmed that it was relying upon section 31(1)(g), together with sections 31(2)(a) and (b), and section 31(1)(h) to withhold the outstanding information.

15. Section 31(1)(g) states that information is exempt if its disclosure under the FOIA would, or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2). The relevant parts of section 31(2) in this case are:

(a) the purpose of ascertaining whether any person has failed to comply with the law, and

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper.

16. Section 31(1)(h) states that information is exempt if its disclosure under the FOIA would, or would be likely to, prejudice any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in section 31(2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

17. This is a qualified exemption, and is therefore subject to a public interest test.

18. The Commissioner has first considered the application of sections 31(1)(g) and 31(2)(a) to the information set out in items (iii) to (v) of the request.

19. In order to consider whether this exemption has been applied correctly the Commissioner has first considered whether British Waterways has a function to carry out the purpose described in section 31(2)(a).

20. British Waterways is the navigation authority for the majority of inland waterways in Great Britain, and was established by the Transport Act

1962. It has explained that it has discretion in determining the terms and conditions on which it may give permission for vessels to be kept and used on the waterways. Sections 43(3) and 43(8) of the Transport Act 1962 allow it to charge for the use by a ship or a boat of any inland waterway which it owns or manages, and to make the use of any inland waterway it owns or manages subject to terms and conditions that it sees fit.

21. It has stated that the Transport Act 1968 abolished all statutory private and public rights of navigation, and made the use of any British Waterways managed waterway by a vessel conditional on the permission or licence of British Waterways. This means that,

*"Because of the abolition by statute of any right of private or public rights of navigation, and boat present on the waterways owned and managed by British Waterways must have permission which is subject to the grant of a licence and compliance with [the licences] terms and conditions."*

22. The British Waterways Act 1995 made it a requirement for the issue of any licence that a vessel either (a) had a long term home mooring, or (b) be used for 'bona fide navigation' without remaining continuously in any one place for more than 14 days or such longer period as is reasonable in the circumstances. These have been referred to as the 'home mooring' and the 'continuous cruising' requirements.

23. British Waterways has explained that it,

*"...has various options open to it in the event that a boater breaches our bye-laws, terms or conditions and/or does not comply with our statutory powers: -*

- We have powers to prosecute boaters under our bye-laws in the event that they breach the same;*
- Since we issue boat licences subject to various terms and conditions, we are also entitled to terminate a boat licence if the boater breaches the same;*
- If a boater refuses to pay their licence or mooring fees, we could also sue them in the courts for recovery of these fees; and*
- If a vessel is not licensed, we have powers to require the vessel to be removed from the internal waterways within British Waterway's jurisdiction and, if the vessel is not removed by its owner, then we have the power to remove the vessel [...]*

*In addition, if we are aware, or if there is a reasonable likelihood, that the boat is being used as a home, it is our practice to commence legal proceedings seeking appropriate injunctive and declaratory relief to enforce our statutory powers."*

24. British Waterways has explained that the information set out in items (iii) to (v) is information gathered for its enforcement teams, for use in its enforcement actions – especially in regard to whether vessel users are complying with the terms and conditions of their licences.
25. Having considered these submissions in detail, the Commissioner is satisfied that British Waterways was exercising its functions in respect of the use of inland waterways, in order to ascertain whether any person had complied with the law. He is also satisfied that these functions were conferred on it by statute. Furthermore, he is satisfied that it has the power to formally ascertain compliance with the law. He therefore considers that the arguments provided by British Waterways are applicable to this exemption.
26. In reaching a view on the application of this exemption the Commissioner has gone on to consider whether the potential prejudice argued by British Waterways relates to the interest identified in this exemption – i.e. if the prejudice were to occur, would this prejudice its functions for the purpose of ascertaining whether any person has failed to comply with the law?
27. British Waterways has argued that the disclosure of this information would be likely to prejudice its exercise of this function. Having considered its explanation of its functions, and the withheld information the Commissioner is satisfied that the potential prejudicial effects argued by British Waterways do relate to the exercise of these functions.
28. In addition to this, bearing in mind the above arguments, the Commissioner is satisfied that there is a causal relationship between the potential disclosure of the withheld information and prejudice to the functions set out in section 31(2)(a). Furthermore, he is satisfied that the resultant prejudice (if it were to occur) would be real and of substance.
29. Next the Commissioner has gone on to consider whether the disclosure of this information would be likely to prejudice British Waterways' ability to carry out its function as set out in this exemption.

30. In reaching a decision on the question of the likelihood of prejudice the Commissioner considers that the expression 'likely to prejudice' means that the chance of prejudice being suffered should be more than a hypothetical possibility – there must be a real and significant risk.<sup>1</sup>
31. British Waterways has explained that information about boats on its waterways – including their movements – is obtained in order to assist its Enforcement Team to manage and collect appropriate licence and mooring fees, and in order to check that boaters are complying with their contractual and legal requirements. If a boat user is not complying with these, it will take appropriate action against them.
32. It has informed the Commissioner that the waterways that it owns and manages “...can and have been used by boaters and boat owners evading their licence fees that they owe for such use.” Because of the level of detail contained in the withheld information, disclosure would undermine its ability to properly perform its functions as set out above. The information “*would reveal significant levels of detail about our monitoring processes and activities, which could be used to assist people in avoiding [its] enforcement strategy.*” It has further stated that due to the nature of the waterways, its licensing requirements can be avoided by boaters moving their vessels in anticipation of being caught by its Enforcement Team.
33. The withheld information does show exactly when and where on the Oxford Canal this information was recorded. The Commissioner is satisfied that if this information were disclosed it would reveal, in considerable detail, the activities of the British Waterways employees – and therefore show the pattern of enforcement activity on the waterway in question. In addition to this, the Commissioner also notes that this information relates to enforcement activity in the 12 months leading up to the date of the request. Therefore he is satisfied that, at the time of the request, disclosure of the information in question would have given up to date insight into the most recent enforcement activity on this canal.
34. Bearing these points in mind, the Commissioner is satisfied that were the withheld information in question to be disclosed, this would give a detailed insight into enforcement activity on this canal. Given the level of detail, which would include details of the most recent enforcement activity, the Commissioner is satisfied that this information would assist boat users in potentially changing their pattern of usage, in order to

---

<sup>1</sup> *John Connor Press Associates Limited v ICO* [EA/2005/0005], para 15.

avoid the data collectors, or to give a false impression as to their use of the vessel. Therefore the Commissioner is satisfied that were the information set out in items (iii) to (v) disclosed, this would be likely to result in damage to British Waterway's ability to carry out its functions as set out in section 31(2)(a). Therefore the exemption is engaged.

35. As noted above, this exemption is qualified which means that the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure.
36. The complainant has not provided any arguments as to why he believes that there is a public interest in the disclosure of this information. The Commissioner considers that there is a public interest in openness and increasing the transparency in the activities of public authorities. The Commissioner also considers that there is a public interest in ensuring that there is an effective method of regulation on the nation's inland waterways, and that the disclosure of this information would give an insight into those regulation activities.
37. As regards the public interest in maintaining the exemption the Commissioner has been mindful of his conclusions that disclosure of the withheld information would be likely to prejudice the enforcement functions of British Waterways. He considers that there is a strong public interest in avoiding prejudice to those functions.
38. In balancing the public interest in this case the Commissioner has been particularly mindful of the interest in avoiding prejudice to the enforcement functions of British Waterways. Given that these functions are set out by statute (as described above) the Commissioner finds the public interest in avoiding unwarranted prejudice to those functions particularly weighty. Whilst there is public interest in openness and transparency, the Commissioner is not aware of any specific public interest factors in relation to British Waterways' monitoring of vessels on the Oxford Canal in 2010. Therefore he finds the public interest arguments in favour of disclosure more limited in this case.
39. Therefore, after considering these points the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining this exemption. Therefore the information set out in items (iii) to (v) is exempt from disclosure under the law enforcement exemption (sections 31(1)(g) and 31(2)(a)) and should not be disclosed.
40. The Commissioner has gone on to consider the application of the personal information of third parties exemption in relation to item (vi).

### **The personal information of third parties exemption**

41. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
42. In this case the relevant condition is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. This is an absolute exemption, and is therefore not subject to a public interest test.
43. In this case British Waterways has sought to rely upon this exemption to withhold the names of its employees who obtained the vessel data set out in the request, on the grounds that the disclosure of this information under the Act would be unfair and therefore in breach of the first principle of the Data Protection Act 1998 (the "DPA").
44. In order to establish whether this exemption has been correctly applied the Commissioner has first considered whether the withheld information is the personal data of a third party.
45. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified:
  - from that data, or
  - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
46. In this case the information in question is the name of the British Waterways personnel – and is attached to the name of the vessel they recorded in the survey, along with the location of that sighting, and the time and date of the sighting. Bearing this in mind, the Commissioner is satisfied that the outstanding withheld information is the personal data of third parties.
47. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA.
48. The first principle requires that personal data is:
  - processed fairly and lawfully, and
  - that one of the conditions in schedule 2 is met.
49. The Commissioner has first considered whether the disclosure of the withheld information would be fair.



50. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
- whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
  - the individual's reasonable expectations of what would happen to their information; and
  - are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the data subject.
51. In this instance, British Waterways has confirmed that its employees who patrol waterways and obtain boat survey information are junior members of staff. It has informed the Commissioner that it considers that the disclosure of this information would expose these employees to the risk of abuse. Furthermore, it has stated that in previous cases its survey and enforcement activities have resulted in the verbal and physical abuse and assault on its staff. Bearing these comments in mind, the Commissioner is satisfied that disclosure could cause unnecessary or unjustified damage or distress to the individuals concerned.
52. Although British Waterways has provided no arguments as to the reasonable expectations of these individuals, the Commissioner notes that these were junior members of staff. British Waterways has also confirmed that these individuals do not manage anybody, or make decisions on how public money is spent. Given these arguments, and the context in which this information was recorded by British Waterways, the Commissioner does not consider that these individuals would have had any reasonable expectation that their names would have been put into the public domain (via disclosure under the Act) in relation to this matter.
53. Notwithstanding the third parties' reasonable expectations or any damage or distress that may be caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
54. The Commissioner considers that there is a public interest in openness and accountability. However, in the circumstances of this case he considers that there is little public interest in knowing the identities of junior members of British Waterways staff who obtained the vessel information set out in items (i) to (v) of the request. In addition, he notes that the complainant has not provided any arguments as to why there is a compelling public interest in the disclosure of this information.

55. Consequently, and taking into account the lack of any specific arguments in relation to the public interest in releasing this information, the Commissioner does not consider that there is a compelling public interest in disclosure. Therefore the Commissioner considers that the disclosure of the information set out in item (vi) of the request would be unfair and therefore in breach of the first principle of the DPA. Therefore this information should be withheld under the personal information of third parties exemption (sections 40(2) and 40(3)(a)(i)).

## Right of appeal

---

56. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

57. 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.
58. 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**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**