

Information Rights Team
Knowledge and Information Management
Area 1B, Ergon House
Horseferry Road
London SW1P 2AL



Telephone: 08459 33 55 77
Email: informationrights@defra.gsi.gov.uk
Website: www.defra.gov.uk

Dugoutcanoe
(by email to request-69008-1c732647@whatdotheyknow.com)

14 July 2011
Our ref.: RFI 3968

Dear Dugoutcanoe

RFI 3968 – Navigation of waterways and the Countryside and Rights of Way Act 2000

Thank you for your email of 20 June 2011 asking Defra to carry out an internal review of the handling of your request for information concerning waterways and the Countryside and Rights of Way (CRoW) Act 2000. This followed a series of general emails and EIR requests submitted via the Whatdotheyknow.com website which appear in two separate threads on that website -

http://www.whatdotheyknow.com/request/access_to_and_the_navigation_of.

Your request for an internal review concerned the following two questions:

1. Under what powers were the waterways of England and Wales considered to be different to Scotland's waterways?
2. Which groups and/or ministries were the lobbyists that led to the withdrawal of waterways from the CRoW Act 2000?

In accordance with Defra's internal review procedures, we have considered your appeal in discussion with colleagues who handled your original request. We are dealing with your request under the Environmental Information Regulations 2004 (EIRs).

Summary

Defra's response to RFI 3968 was completed within the statutory deadlines and applied the correct legislation. However, it failed to refer to the appropriate exception. As the information you requested is not held, your complaint is not upheld.

I set out below a fuller explanation of our decision.

Chronology

On 15 April 2011 Defra's Customer Contact Unit received your request for information via Whatdotheyknow.com and forwarded it to the appropriate team in Defra for a response.

On 19 April 2011 Martin Gorringe sent you an acknowledgement of your request by email via John Robbins, a Defra colleague.

On 14 May 2011 you wrote to John Robbins pointing out that the response to your request was overdue.

On 16 May 2011 John Robbins replied with an explanation of the 20-working-day deadline under the EIRs and apologised for not giving the correct date in the acknowledgement.

On 19 May 2011 Martin Gorringe wrote to you with Defra's response. The first email was addressed to "Dugoutcanoe" and may well have failed to be delivered. Martin then re-sent the email on the same day to request-65056-81cd2937@whatdotheyknow.com. This response appears on the website under the thread "Access agreements for canoeing on rivers in England and Wales" and is marked as a successful request.

On 20 June 2011 you emailed Defra a request for an internal review via the Whatdotheyknow.com website under the thread "Access to and the navigation of waterways in England and Wales for non-powered craft".

On 28 June 2011 Val Hope of the Information Rights Team sent you an acknowledgement of your request for an internal review on my behalf.

Timeliness (regulation 5)

We have considered whether Defra complied with the requirement in the EIRs to respond to a requester no later than 20 working days after the date of receipt of the request. A letter providing the information within scope of your request was sent to you by email on 19 May, 20 working days following receipt of your request, and Defra has therefore complied with the EIRs.

EIRs or FOIA

We have concluded that the EIRs are the applicable information access regime. This is because information on measures and activities relating to waterways would meet the definition of environmental information set out in regulation 2 of the EIRs, being information on measures or activities affecting or likely to affect the elements of the environment, such as water and natural sites, here specifically waterways.



Exceptions engaged

Defra holds no recorded information on the two questions you submitted. The information is therefore exempt under regulation 12(4)(a) of the EIRs, which relates to information which is not held when an applicant's request is received. In applying a qualified exception we are ordinarily required by the legislation to carry out a public interest test to determine whether or not information should be disclosed or withheld. However, the Information Commissioner believes that a public interest test when the information is not held would serve no useful purpose. The ICO explains that this is because "even if the public interest test favoured disclosure the public authority would still not hold the information to enable it to be released".

Handling

While Defra did not hold an actual document setting out the information relating to powers, as no powers were needed in this particular context, it provided comments to clarify the situation for you. The original response is repeated below for convenience:

In February 1998 Government published the consultation paper *Access to the Open Countryside in England and Wales*, and invited comments on how to give people greater freedom to explore open countryside. In March 1999, Government published the outcome of the consultation, *Access to the countryside in England and Wales: The Government's framework for action*. This included plans to introduce a new statutory right of access on foot for open-air recreation to mountain, moor, heath, down and registered common land.

To address the issue of how to treat water-related activities within the proposed CROW Act, the Government asked the Countryside Agency, Environment Agency, Forestry Commission and English Nature – prior to the publication of the CROW Bill - to consider whether, amongst other things, access to inland waters and watersides should be included with the CROW legislation. They produced a report: *Improving access to woods, watersides and the coast*. For access to inland watersides the report considered 7 different options:

- Full statutory access on foot
- Selective statutory access on foot
- Orders
- Dedication
- Funding conditions/reallocation
- Voluntary approach
- Acquisition/direct action

They concluded that the evidence available about the legal position with regard to access to inland water was both complex and incomplete, and thus inappropriate for inclusion in CROW. As a result, the CROW legislation did not extend to the use of inland waters for water-based recreation, although it allowed access on foot to waters that were within access areas, for fording purposes.

The publication on 3 March 2000 of the Countryside and Rights of Way (CRoW) Bill created a new right of public access to some four million acres of mountain, moor, heath and registered common land. One provision of the Bill that benefited canoeists was that landowners will be able to dedicate land voluntarily for public access, including areas not included in the Bill, such as riversides.

We have now been provided with additional clarification of the basis on which the above conclusion was reached, which you may find helpful in putting the response in context:

The Land Reform (Scotland) Act 2003 created rights of access to most land and water in Scotland. This is often used as an example of what could be achieved with legislation in England. However, the situation in Scotland is different to that in England:

- Population density in England is over 380 people per square kilometre, in Scotland it is just 65.
- This population density difference is, and would be, reflected in the level of use that the rivers are subject to and on the number of landowners affected.
- The existing legal framework in Scotland was very different to that in England, in particular the attitude taken by Scots law to access to land (including rivers and lakes) without express permission was already much more liberal than that of the law of trespass in England.
- English rivers have been heavily used by industry over time and this use has created structures in and beside rivers. This management and associated structures create significant health and safety risks for users and associated liability for those who own them. Scottish rivers are less managed and contain far fewer hazardous structures.

Part 1 of the Land Reform (Scotland) Act 2003 establishes a right to be on land (including inland water) for recreational, educational and certain other purposes and a right to cross land. The rights exist only if they are exercised responsibly. Part 1 also imposes certain duties on local authorities in relation to access on and over land in their areas and, in particular, requires them to draw up and adopt a plan of core paths in their areas. The access established by the Act is underpinned by the Scottish Outdoor Access Code which outlines the rights and responsibilities of users and landowners. The Access Code plays a key role in ensuring that the terms of the Act are adhered to.

We do not believe that the Land Reform (Scotland) Act 2003 model could easily be applied to England given the fundamental differences which already existed between the law of trespass in Scotland prior to the Act and the current law of trespass in England. Also, the introduction of a blanket right to access on or along water would be limited in its usefulness without a complementary general right of access over land to access water.

In responding to your request “Which groups and/or ministries were the lobbyists that led to the withdrawal of waterways from the CROW Act 2000?”, I am satisfied that no information is held regarding your request. This is because (according to colleagues who were working in the area at the time) waterways were not ‘withdrawn’ from the CROW Act 2000, they were never ‘in’ it; the issues of ownership and the situation regarding the law on riparian rights, as set out in the report Improving access to woods, watersides and the coast, meant it was considered inappropriate to be included in the CROW Act. There were therefore no lobbyists involved.



INVESTOR IN PEOPLE



I hope that the above answers your request for an internal review satisfactorily. However, if you remain dissatisfied, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

<http://www.ico.gov.uk/complaints.aspx>

Yours sincerely

Brendan Walsh
Head of the Information Rights Team

