



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

Appeal Reference: EA/2018/0003

**Decided without a hearing
On 13 August 2018**

Before

**JUDGE HAZEL OLIVER
MR MIKE JONES
MR NIGEL WATSON**

Between

JAMES EDMUND HEMPSEY

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

STOCKTON-ON-TEES BOROUGH COUNCIL

Second Respondent

DECISION

The appeal is dismissed.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 7 December 2017 (Decision Notice FER0672111) in which the Commissioner decided that certain information should be not disclosed by the appellant under the Environmental Information Regulations 2004 (“EIR”). It concerns disclosure of information on any restriction placed on Peel Airports regarding the future use of Durham and Tees Valley Airport (“DTVA”) and the surrounding land.

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 24 November 2016 the appellant wrote to the second respondent and requested the following information:

“In the Agreement or Agreements made between six local authorities and Peel Airports in or about 2003 whereby Peel Airports became the majority holder of Durham and Tees Valley Airport and surrounding land:

(a) was any restriction placed on Peel Airports as to the future use of Durham and Tees Valley Airport and surrounding land?

(b) if so, what were the terms of that restriction?”

4. DTVA Limited is part of Peel Airports, which is part of the Peel Group (“Peel”). The shareholding in DTVA Limited is held between Peel and six local authorities, including the second respondent. Peel is the majority shareholder, with the local authorities holding 11% of the shares between them. The parties entered into a Subscription and Shareholder Agreement dated 1 April 2003 (the “SSA”). They also entered into a Deed of Amendment to the SSA dated 29 July 2016 (the “DoA”). The Tees Valley Combined Authority (“TVCA”) was formed on 1 April 2016, consisting of the five local authorities of Tees Valley, and is a potential funder of future development at the airport.

5. The second respondent refused the request on 6 January 2017 on the basis of section 41(1), 43(1) and 43(2) of the Freedom of Information Act 2000 (“FOIA”), and regulations 12(5)(e) and (f) of EIR. Following an internal review, the second respondent wrote to the appellant on 9 March 2017 stating that it determined this was not environmental information under EIR, and it no longer considered that section 41(1) or 43(1) FOIA were engaged. However, section 43(2) FOIA was engaged and the public interest favoured withholding the information. The second respondent also considered in the alternative that regulation 12(5)(e) EIR applied.

6. The requester made a complaint to the Commissioner on 12 March 2017. The decision notice was issued after the Commissioner had obtained representations from the second respondent, viewed a copy of the information falling within the scope of the request, and sent the appellant a copy of her conclusions.

7. The Commissioner decided that the second respondent had correctly applied regulation 12(5)(e) EIR to withhold the requested information. The Commissioner decided that EIR rather than FOIA applied to the information. She found that the information was commercial in nature as it relates to the operation of the airport, and was subject to a duty of confidence provided by law as it had the necessary quality of confidence. She found that the information if disclosed would adversely affect the legitimate economic interests of the parties involved, as it would inform competitors of the detail of the ‘keep open’ commitment in the DoA. Disclosure in the public domain would adversely affect confidentiality. In relation to the public interest, the Commissioner found that there were strong interests on both sides, but the public interest in disclosure was outweighed by the public interest in maintaining the exception. She placed considerable weight on the fact that, at the time of the request, discussions about options were still live and there was an expectation of confidentiality.

The Appeal

8. The appellant appealed against the Commissioner's decision on 22 December 2017. The appellant argues that 12(5)(e) EIR is not engaged, and the public interest in disclosure outweighs the public interest in upholding the exemption. He emphasises the importance of a viable airport to the local population - meaning the public is entitled to know about any restrictions in place, or any lack of restrictions so that those involved can be held to account.

9. The Commissioner's response relies on EIR and the Decision Notice, and maintains that the exemption applies and outweighs the public interest in disclosure.

10. The second respondent also resists the appeal. In final submissions sent to the tribunal on 6 June 2018, the second respondent explains that it has now reviewed the SSA in response to a separate unconnected request, and has released a full copy of this document to the requester in this case. However, they maintain that it was not appropriate to disclose the SSA at the time of the appellant's request. In relation to the DoA, the second respondent maintains its position. This is on the basis that the SSA sets out circumstances which remain directly relevant to current use of the land, which if released outside their intended context could cause unwarranted speculation about the future of DTVA and lead to a loss of confidence by key users and partners contrary to the public interest.

Applicable law

11. The relevant provisions of EIR are as follows.

2(1) *...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—*

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

.....

5(1) *...a public authority that holds environmental information shall make it available on request.*

.....

12(1) *Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –*

(a) An exception to disclosure applies under paragraphs (4) or (5); and

(b) In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12(2) *A public authority shall apply a presumption in favour of disclosure.*

.....

12(5) *For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -*

.....

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

12. Requests for environmental information are expressly excluded from FOIA in section 39 and must be dealt with under EIR, and it is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC.

13. The Court of Appeal gave guidance on determining whether information is "environmental" and the application of regulation 2(1)(c) in ***The Department for Business, Energy and Industrial Strategy v Information Commissioner and another*** [2017] EWCA Civ 844. This requires identifying the measure or activity that the information in question is "on" – meaning it is about, relates to or concerns the measure in question. The measure must then affect or be likely to affect the elements or factors in regulation 2(1)(a) or (b). Merely relating to or being connected to one of the environmental factors, however minimal, is not sufficient. But, the test for environmental information is not restricted to what the information is "specifically, directly or immediately about" and the wider context should be considered.

Evidence

14. We had an agreed bundle of open documents consisting of the appeal, response from the Commissioner, response from the second respondent, appellant’s reply, and supporting documents, all of which we have read. We also had a closed bundle of documents consisting of the SSA and DoA, and an unredacted version of a letter from the second respondent to the Commissioner dated 20 June 2017 (with the redacted version in the open bundle). We had brief final written submissions from the second respondent. We have considered and taken all of this material into account in making our decision.

Submissions

15. Appellant provided various submissions in his appeal and in his reply to the response of the second respondent. He points to the presumption in favour of disclosure under the EIR. He says it is illogical to argue that disclosure would damage the commercial position of the second respondent in its discussions with Peel as all parties were fully aware of the terms of the relevant agreement. His appeal document criticises the Commissioner’s application of the relevant test to the facts, including a failure to show that there “would” be an adverse effect on legitimate economic interests. In relation to the public interest test, the appellant says that the parameters for “safe space” discussions should be known, and submits that there is a suspicion of wrongdoing. The appellant refers to newspaper reports that are critical of the deal relating to DTVA and of the airport more generally. He also refers to recent planning permission for housing on land sold to Peel, and the importance of knowing whether this is in breach of any restrictions.

16. The second respondent's response to the appeal now accepts that EIR applies, supports the Commissioner's decision based on regulation 12(5)(e) EIR, and confirms that it is primarily opposing the appeal in respect of its own legitimate interests. Its position is that the withheld information is significant, detailed and sensitive information that impacts upon its position as a shareholder in DTVA Limited. The future use of airport land and restrictions are a key element of what may ensure that DTVA remains viable. At the date of the request, the withheld information provided visibility of the parties' legal position at a stage where the future of the airport had not been secured. Disclosure would have damaged the commercial position of the second respondent and undermined its discussions with Peel, to the detriment of the second respondent, the residents it serves, and the wider sub-region, as well as the airport itself.

Discussion and Conclusions

17. **Application of EIR.** We find that EIR rather than FOIA applies to the withheld information. The SSA and the DoA relate to the use of land, specifically commercial conditions for its continued use as an airport by the parties to the agreements. We are mindful that environmental information is to be given a broad interpretation, and Regulation 2(1)(c) specifically lists "land" as one of the elements of the environment. We agree with the Commissioner's view that the withheld information falls within Regulation 2(1)(c) of EIR as it is a measure affecting or likely to affect the environment or designed to protect the environment. We note that the second respondent now agrees that EIR applies.

18. **Is the information commercial or industrial in nature?** We find that the withheld information is commercial in nature. The SSA and DoA relate directly to the ongoing operation of DTVA, which is clearly a commercial activity.

19. **Is the information subject to confidentiality provided by law?** We find that the information is subject to confidentiality provided by law, as it has the necessary quality of confidence and was shared in circumstances creating an obligation of confidence. Having viewed the withheld information, we are satisfied that it is not trivial information, and at the time of the request it had not been shared more widely or put into the public domain. The SSA contains express restrictions on disclosure of information, which shows that the parties to this agreement implemented a contractual duty of confidence, and so regarded the SSA and information relating to it as confidential. Although the DoA does not contain an express confidentiality clause, it is closely related to and amends the SSA, and so would also be regarded as confidential by the parties. We also accept that the parties have a genuine interest in the contents remaining confidential, as both the SSA and the DoA set out details of a commercial arrangement between shareholders which could be damaged if the information were to be made public.

20. **Is the confidentiality provided to protect a legitimate economic interest?** We find that the confidentiality is provided to protect a legitimate economic interest, and that this would be adversely affected by disclosure. We are mindful that the test under EIR is that the interest "would" be adversely affected, rather than that it might be so affected.

21. Based on the evidence and submissions from the second respondent, we are satisfied that various legitimate economic interests would have been affected by disclosure of the withheld information. In particular, at the time of the request, discussions were ongoing between the second respondent, TVCA and Peel about the future of DTVA limited and the airport itself. The operation of DTVA is a commercial activity, in competition with other regional airports. The second respondent is a shareholder in DTVA Limited and so has a clear legitimate economic

interest in the success of the airport. We accept that disclosure of the details of any restrictions on use of DTVA and surrounding land in the SSA and/or DoA, at the time of the request, would have adversely affected these legitimate commercial interests by making competitors and the public aware of such restrictions at a time when negotiations were still taking place.

22. We have taken the closed material into account in reaching this conclusion, including the unredacted version of the letter from the second respondent to the Commissioner dated 20 June 2017 which provides further information about the ongoing discussions at the time. This closed material shows the Tribunal how the SSA and the DoA interrelate, and how ongoing negotiations about use of land would affect other parts of the agreements – including the application of any restrictions under the DoA. Having viewed the explanation from the second respondent provided in the closed material, we are satisfied that its legitimate commercial interests would have been adversely affected by disclosure at the time of the request.

23. The appellant makes the point that all parties were already aware of the contents of negotiations, so revealing this information publicly would not damage those negotiations. However, the damage would be caused by third parties gaining access to this information. The information could have been used by competitors, and there would have been public comment on the position before all matters had been finalised. This would have undermined the second respondent's position in discussions with Peel because the commercial position of all parties would have been damaged, and this in turn would have jeopardised the future of DTVA.

24. We note that we have reached this conclusion based on the position at the time of the request. The second respondent has raised a wider argument in its closing submissions about the DoA's relevance to current use of land at the airport, saying that speculation about the future of the airport if this was released may lead to a loss of confidence contrary to the public interest. This appears to be a new argument in this case that was not raised to the Commissioner and with the appellant. It is not necessary for us to decide this point as we are not considering the position if a similar request were to be made today.

25. **Would confidentiality be adversely affected by disclosure?** In light of the above findings on confidentiality and protection of legitimate economic interests, including the potential harm that would occur if confidentiality was not protected, we find that confidentiality would be adversely affected by disclosure.

26. **Does the public interest in maintaining the exception outweigh the public interest in disclosing the information?** We find that the public interest in maintaining the exception does outweigh the public interest in disclosing the information.

27. This was a relatively finely balanced question. We are mindful that the starting point in EIR cases is a presumption in favour of disclosure. DTVA is an important regional asset. The public importance of DTVA means that there is a need to be open and transparent, so that the public can understand what is happening with DTVA and its future, and hold the public authorities involved to account. The information provided by the appellant shows that there is particular public interest in DTVA because of concerns about a lack of flights and future viability. The recent planning permission for housing on land sold to Peel raises suspicion about the basis for the public authorities' actions, and in particular that there is no or insufficient restriction on future use of the airport. The public interest in disclosure of specific information about any restrictions on the use of DTVA and its surrounding land is, therefore, genuine and significant.

28. However, non-disclosure of the withheld information is also in the public interest, primarily because disclosure of this information at the time would have damaged the negotiations

between the shareholders in DTVA Limited at a time when the future of DTVA was not secured. This would have damaged the interests of the second respondent as a shareholder in DTVA Limited, with a consequential effect on public funds. It would also have damaged the interests of both local residents and the public as a whole, due to the risk that successful negotiations would have failed and DTVA might not have been able to continue to operate.

29. Like the Commissioner, the Tribunal gives particular weight to the fact that discussions about options were still live at the time of the request, and there was an expectation of confidentiality underpinning these discussions. There is a public interest in allowing public authorities some “safe space” to discuss and negotiate without public scrutiny, so that all options can be considered and the best outcome achieved. This public interest would not continue indefinitely, but was clearly a significant factor at the time of the request. The public interest in ensuring that DTVA continued to operate was, in fact, furthered by ensuring that the second respondent was able to negotiate effectively.

30. Taking all of the above matters into account, we find that the public interest in favour of withholding the information outweighs the public interest in disclosure. Although there is significant public interest in the information, we find that disclosure at the time of the request would have undermined the ongoing discussions about the future of DTVA. This would have caused substantial damage to the public interest in continued successful operation of DTVA and the second respondent’s interests as a shareholder. This finding is confined to the balance of public interests at the time of the request when specific negotiations were ongoing, and the answer might be different if the same request were to be made today.

31. We uphold the decision of the Information Commissioner and dismiss the appeal.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date of Decision: 22 August 2018
Date Promulgated: 23 August 2018