



First-tier Tribunal
General Regulatory Chamber
Information Rights

Appeal Reference: EA/2018/0005

Decided without a hearing
On 13 August 2018

Before

JUDGE HAZEL OLIVER
MR MIKE JONES
MR NIGEL WATSON

Between

DARLINGTON BOROUGH COUNCIL

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

The appeal is upheld in part.

SUBSTITUTED DECISION NOTICE

The Information Commissioner's Decision Notice stands, except as follows.

The "withheld information" contained in the Deed of Variation to the subscription and shareholders agreement dated 29th July 2016 is: (a) the definition of "Material Adverse Event" in paragraph 1.1; and (b) Schedule 1 in its entirety.

The final bullet point of paragraph 2 is amended as follows (amended text in bold and italics):

"Failed to demonstrate that Regulation 12(5)(e) is engaged ***save in relation to the withheld information. The public interest in disclosure of the withheld information is outweighed by the public interest in upholding the exemption under Regulation 12(5)(e).***"

The first bullet point of paragraph 3 is amended as follows (amended text in bold and italics):

"Disclose the requested information to the complainant ***save for the withheld information.***"

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 27 November 2017 (Decision Notice FS50682871) in which the Commissioner decided that certain information should be disclosed by the appellant under the Environmental Information Regulations 2004 (“EIR”). It concerns disclosure of an agreement relating to Durham Tees Valley Airport (“DTVA”).

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 29 March 2017 the appellant received the following request:

“I attended the planning committee meeting where I learned that LAs and Peel entered into an agreement in April 2016 that provided for keeping Teesside open to KLM and Eastern for a period of 5 years i.e. until April 2021. Please provide a copy of that agreement.”

4. DTVA 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 appellant. 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”). The request relates to a Deed of Amendment to the SSA dated 29 July 2016 (the “DoA”), which provides for keeping DTVA open to KLM and Eastern Airways for a period of five years. As the DoA amends and cross-refers to the SSA, the two agreements are interlinked.

5. The appellant refused the request on 23 May 2017 on the basis of section 43(2) of the Freedom of Information Act 2000 (“FOIA”), and this was upheld following an internal review. The requester made a complaint to the Commissioner, and the decision notice was issued after the Commissioner had obtained representations from the appellant and viewed a copy of the information falling within the scope of the request.

6. The Commissioner decided that the appellant had incorrectly handled the request under FOIA rather than the EIR. The Commissioner also found that the appellant had failed to demonstrate that regulation 12(5)(e) EIR was engaged (commercial confidentiality), and therefore the information should be disclosed. In particular, the Commissioner found that the information was commercial or industrial in nature and was subject to confidentiality provided by law, but confidentiality was not provided to protect a legitimate economic interest. This was on the basis that: there was a relatively remote likelihood of the harm occurring; the appellant had failed to identify any specific adverse effects and link these to specific withheld information; and the appellant had not explained the causal link between disclosure and any ensuing adverse effects.

The Appeal

7. The appellant appealed against the Commissioner's decision on 22 December 2017. The appeal was put on the basis of both FOIA and EIR. The appellant argues that all of the information requested falls within section 43(2) FOIA and/or regulation 12(5)(e) EIR, and the public interest in upholding these exemptions outweighs the public interest in disclosure. The appellant provided further detail in support of its argument that these exemptions apply.

8. The Commissioner's response relies on EIR and the Decision Notice, and maintains that there is still insufficient explanation about why disclosure would adversely affect the stated interest in relation to each bit of information in the entire agreement referred to. However, the Commissioner also notes that some of the withheld information was highlighted, and this is identical to information that she had decided was exempt from disclosure in a different case (Decision Notice FER0672111). The Commissioner does not oppose the appeal in relation to this highlighted information.

9. In final submissions sent to the Tribunal on 2 July 2018, the appellant has narrowed the scope of its appeal. The appellant has released the SSA in full in response to a separate unconnected request, and has also sent this document to the requester in this case. The appellant also agrees that the DoA can be released to the requestor, subject to specific redactions agreed between Peel and Stockton Borough Council.

10. The appeal is now limited to consideration of whether the following information should be disclosed from the DoA (together the "withheld information"):

- a. In paragraph 1.1, the definition of "Material Adverse Event".
- b. Schedule 1 in its entirety.

The appellant is no longer appealing the remainder of the Commissioner's decision. The Tribunal understands that the appellant accepts that the SSA and the remaining information in the DoA is now subject to disclosure under FOIA and/or EIR.

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". The wider context should be considered. It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way.

Evidence and submissions

14. We had an agreed bundle of open documents consisting of the appeal, response from the Commissioner and supporting documents, all of which we have read. We also had a closed bundle of documents consisting of the SSA and DoA. We had final written submissions from the appellant. We have taken all of this material into account in making our decision.

Appellant's submissions

15. As noted above, the appeal is now brought in relation to two specific items only. The appellant submits that release of the DoA without this information being redacted would prejudice its commercial interests under FOIA, and adversely affect the confidentiality of commercial information under regulation 12(5)(e) EIR.

16. The appellant submits that the redacted information contains details of the commercial viability tests upon which the future of the airport depends. The release of this information may weaken public perceptions of DTVA's future viability. This would be harmful because potential customers are likely to be concerned about booking flights at an airport which they consider has an uncertain future, and a failure to increase flight bookings would be likely to mean a failure to secure new airlines and retail investors. This would prevent DTVA from expanding and making any progress.

17. The appellant also submits that there is a real risk this information would be of interest to competitors. DTVA is geographically in the middle of its two main regional airport competitors. Successful operation of DTVA would be likely to threaten the trade of those competitors, and it would not be in "anyone's" interests for threatened competitors to have access to information which could damage DTVA's commercial standing.

18. The appellant has produced a letter from Peel dated 19 December 2017 in support of the appeal, which is included in the open bundle. The letter explains that the agreement provides for circumstances in which the DTVA could be downsized or closed by the shareholders, dependant on whether certain financial parameters on commercial viability are exceeded. The letter states that these conditions are of a commercially confidential nature and may affect market confidence in the future operations of DTVA if widely known. An example is given of circumstances in which the financial unviability tests are met such that DTVA could be downsized or closed, but the shareholders decide to continue full operations or defer a decision. If the financial tests were known, this may lead to a loss of confidence in DTVA from partners such as the main airlines KLM and Eastern Airlines, any of the tenants or other airport users, and also the public who may be concerned about booking future travel – in circumstances where there was actually no reason to lose confidence.

19. In its appeal document, the appellant also makes the point that at the time of the request the DoA was a commercial transaction that had yet to be completed as the relevant condition precedent was unfulfilled. Discussions with Peel about supporting the viability of DTVA were conducted in private with an expectation of commercial confidentiality. Disclosure at that stage had the potential to undermine the confidence in this commercial confidentiality and destabilise what had been agreed. If the DoA had not been able to proceed, DTVA may not have been able to continue to operate.

20. In relation to the public interest, the appellant accepts that DTVA is an important regional asset and a matter of genuine public interest. However, at the time of the request, disclosure would have risked destabilising what had been agreed. Release of the information now would prejudice the future of the airport and be useful to competitors and others who did not want DTVA to succeed. It would also risk undermining future working relationships and inhibit discussions between the appellant, other local authorities, Peel and DTVA Limited. This would risk damage to the interests of the appellant as a shareholder, and damage the appellant's objectives in retaining a viable airport as part of its economic and transport priorities – which is

likely to be detrimental to the communities which the appellant and the other local authorities represent. The appellant also notes that a significant amount of information is already in the public domain through public reports taken to the appellant's Cabinet, and democratic oversight by Members concerning elements of the agreement that were not put into the public domain.

21. As noted above, the Commissioner does not now oppose the appeal in relation to information highlighted in the DoA. Schedule 1 of the DoA is highlighted in the copy of the DoA seen by the Tribunal. The definition of "Material Adverse Event" is not highlighted in this copy of the DoA.

Discussion and Conclusions

22. **Application of EIR.** We find that EIR rather than FOIA applies to the withheld information. The DoA relates to the use of land, specifically commercial conditions for its continued use as an airport by the parties to the agreement. 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.

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

24. **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 it had not been shared more widely or put into the public domain. We also accept that the parties have a genuine interest in the contents remaining confidential, as the DoA sets out details of a commercial arrangement between shareholders which could be damaged if the information were to be made public. The related 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.

25. **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. The Commissioner was not satisfied on this point. However, the appellant has provided additional information to the Tribunal, including the letter from Peel.

26. Based on the evidence and submissions from the appellant, we are satisfied that various legitimate economic interests may be affected by disclosure of the withheld information. We accept that the release of information about commercial viability tests which affect the future operation of DTVA could damage public perceptions about the viability of the airport. This may limit future bookings and so affect the ability of DTVA to attract new airlines and investors. As explained by Peel, this could also cause a loss of confidence from partner airlines, as well as

tenants and other users – and this could happen in circumstances where the parties to the agreement wish to continue operating DTVA. These consequences would damage the legitimate interests of both the appellant and Peel in keeping DTVA operating successfully. We also accept that this information could advantage competitor regional airports and enable them to act in ways to damage DTVA's commercial standing. In addition, at the time of the request, various conditions precedent had not been fulfilled, and so disclosure at that point would undermine commercial confidentiality and destabilise the agreement between the parties.

27. The key issue is whether this damage “would” occur, rather than whether it is likely to occur. The submissions of the appellant were not always helpful on this point, as they focussed on the FOIA test using words such as “may” or “likely”, rather than being clear on how their interests would be affected. Similarly, the letter from Peel refers to consequences which “may” occur.

28. However, having viewed the withheld information ourselves as part of the closed bundle, we are satisfied that legitimate economic interests would be adversely affected in the way described by the appellant and Peel. This is not simply a possibility. In particular, the withheld information provides detail about financial viability tests for downsizing or closure of DTVA which would affect market confidence if publicly known - especially in circumstances where these tests are either met or close to being met. We find that this would affect the behaviour of third parties, including airline partners and the public, and this in turn would affect the operation of DTVA and damage the interests of the shareholders. We also accept that, at the time of the request, elements of the agreement had not been completed. Disclosure of commercially confidential information at this point would have damaged confidence between the parties, and so destabilised the agreement which was awaiting completion.

29. **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.

30. **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 in relation to the withheld information does outweigh the public interest in disclosing the information.

31. As noted by the appellant, DTVA is an important regional asset for the Tees Valley. 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 viability, and hold the public authorities involved to account. The public interest in disclosure of specific information about any agreement to keep DTVA open is genuine and significant.

32. However, non-disclosure of the withheld information is also in the public interest, primarily because disclosure of this information would damage the future viability of DTVA as discussed above. There is substantial public interest in ensuring that DTVA can continue to operate, and the DoA aims to achieve this. Disclosure of the withheld information at the time of the request would have prejudiced the future of DTVA. This in turn would damage the interests of the appellant as a shareholder in DTVA Limited, with a consequential effect on public funds. It would also damage the appellant's objectives in retaining a viable airport as part of its economic

and transport priorities. We note that air connectivity is part of a wider strategy for local and regional growth, and is designed to benefit the local community.

33. The appellant also submits that a significant amount of information is already in the public domain through public reports taken to Cabinet, and there has been democratic oversight by Members concerning confidential elements of the agreement. As set out in the appellant's grounds of appeal, the master plan for securing a sustainable airport was considered by both a Scrutiny Committee and Cabinet, and commercially sensitive information was considered by Members in non-public appendices. This is not a substitute for open disclosure of the information. However, it is an indication that the public interest in oversight of the plans for DTVA has been partly met by this scrutiny by elected representatives, and we note that this scrutiny would have taken place in all six local authorities involved in the agreement.

34. 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 viability of DTVA. This would cause substantial damage to the public interest in continued operation of DTVA, the appellant's interests as a shareholder, and local transport strategy. This is sufficient to outweigh the public interest in disclosure, in circumstances where there has been oversight of the provisions by elected Members of the local authorities involved.

35. We note that the Commissioner did not oppose the appeal in relation to Schedule 1 of the DoA, but this does not cover the separate definition of "Material Adverse Event" in section 1.1 of the DoA. However, the definition in section 1.1 is a key definition used for the purposes of Schedule 1. The two are inextricably interlinked, and the disclosure of this definition on its own would be capable of causing the same damage as disclosure of Schedule 1. We therefore find that the whole of the withheld information is covered by the reasoning set out above.

36. We uphold the appeal in part in relation to the withheld information only (as set out in paragraph 10). The withheld information does fall within section 12(5)(e) EIR and the public interest in maintaining the exception outweighs the public interest in disclosing the information. We amend the Decision Notice of the Information Commissioner in the terms set out at the start of this decision.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 22 August 2018