

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 August 2012

**Public Authority:** Department for Business Innovation & Skills  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

#### Decision (including any steps ordered)

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The complainant has requested information relating to Kent County Council's bid for funding to support a railway station and flights from Kent International Airport (Manston). The Commissioner's decision is that the Department of Business Innovation and Skills (BIS) has correctly applied the exemption under section 40(2) of FOIA to some of the withheld information, however it has incorrectly applied the exception under regulation 12(5)(e) of the EIR to the remaining withheld information. The Commissioner therefore orders BIS to take the following steps: -

- disclose the remaining withheld information to the complainant.

BIS must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Request and response

1. On 25 February 2011, the complainant wrote to BIS and requested information in the following terms:

"Please would you send me a copy of Kent County Council's bid document for £10m of funding from the Regional Growth Fund to support a station at Thanet Parkway and flights from Kent International Airport to a European destination."

2. BIS responded on 25 March 2011. It stated that it was withholding the requested information under sections 40 (personal data of third parties) and 43(2) (prejudice to commercial interests) of FOIA.

3. Following an internal review BIS wrote to the complainant on 25 March 2011. It stated that it was upholding the original decision to withhold the requested information under the above sections. It also stated that it now believed that section 41 (information provided in confidence) also applied to some of the requested information. It had further decided that some of the information was environmental and was consequently excepted from disclosure under regulation 12(5)(e) (confidentiality of commercial or industrial information).
4. Following the Commissioner's intervention, BIS disclosed most of the requested information to the complainant. However, it continued to withhold the remaining requested information ("the withheld information") under sections 40, 41 and 43(2) of FOIA and regulation 12(5)(e) of the EIR.

### Scope of the case

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5. The complainant contacted the Commissioner to complain about the way her request for information had been handled, in particular the application of the exemptions under the above sections of FOIA and the EIR to the withheld information.
6. The Commissioner discussed the case with BIS, who agreed to disclose some further information previously withheld under section 40(2) of FOIA. This notice therefore concerns the rest of the withheld information.
7. The Commissioner considers that the withheld information is environmental as per the provisions of regulation 2(1)(c) of the EIR as it constitutes information on proposed measures likely to affect the state of certain elements of the environment, i.e. air (via the factor of noise) land and landscape.
8. "Environmental information" is defined at regulation 2 of the EIR. In order to be environmental, information must fall within one or more of the definitions set out at regulation 2(1)(a) – (f) of the EIR. It must be definable as 'information on' any of the subjects covered by those six sub-sections.
9. To define information as environmental under regulation 2(1)(c), the information must: -
  - (a) be information on a measure or activity and

- (b) the measure or activity must affect or be likely to affect the elements and factors of the environment, as per regulations 2(1)(a) and (b).

This means that the information must firstly be information on such a measure or activity and secondly that measure or activity must have an effect on the state of the elements of the environment in regulation 2(1)(a), either directly or via 2(1)(b)

10. The Commissioner considers all the information in this case to be information on the measures of building a station at Thanet Parkway and scheduling new flights from Kent International Airport. He considers that these measure will clearly have an effect on the state of the elements of the environment in 2(1)(a). Some of the information covered by this request is CVs of individuals that were submitted as part of the bid for the funding needed to support the building of the station and the scheduling of the new flights. In most contexts the Commissioner would not consider CVs of individuals to constitute environmental information. However, in this context the CVs were submitted as supporting papers to a bid to fund a measure with a clear environmental impact. In this particular context therefore, the Commissioner considers that the CVs are information on a measure likely to affect the state of the elements of the environment in 2(1)(a) and are environmental information. The Commissioner has therefore considered BIS' arguments in relation to the exemption at section 40(2) of the Act under the exception provided by regulation 12(3) and 13 of the EIR. He has also applied the exception under regulation 12(5)(e) of the EIR to the withheld information.

## Reasons for decision

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### Regulation 12(3) and 13 of the EIR

11. Regulations 12(3) and 13 of the EIR provide an exception for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in regulation 13(2) or 13(3) is satisfied.
12. One of the conditions, listed in regulation 13(2), is where disclosure of the information to any member of the public would contravene any of the data protection principles as set out in schedule 1 to the Data Protection Act 1998 (the DPA.)
13. BIS has said that it is withholding the personal curricula vitae (CVs) of individuals attached to the bid documentation by relying on the provision that information shall not be disclosed if it constitutes the

personal data of someone other than the applicant and it satisfies one of two conditions relating to the Data Protection Act 1998 (DPA 1998). In this case the relevant condition is the first condition which is that disclosure would contravene any of the data protection principles. BIS has argued that disclosure would be unfair and therefore contravene the first data protection principle.

14. The first data protection principle requires that the processing of personal data be fair and lawful and,
  - at least one of the conditions in schedule 2 is met, and
  - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
15. In order to reach a view on whether this exception could be applied, the Commissioner initially considered whether or not the information in question was in fact personal data.
16. Personal data is defined in the DPA 1998 as:
  - '...data which relate to a living individual who can be identified –
  - (a) from those data, or
  - (b) from those data and other information which is in the possession of, or is likely to come into the possession of the data controller,
17. In this case the Commissioner is satisfied that the information is obviously personal data .
18. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure would contravene the first data protection principle.
19. BIS has argued that disclosure would contravene the first data protection principle because it would not be fair to the individuals concerned. BIS has not provided any detailed arguments as to why disclosure would be unfair except to say that the individuals concerned provided their personal information as part of the bid documentation and would expect that BIS would respect their personal data in accordance with the DPA 1998.
20. In considering the fairness of disclosure the Commissioner has taken into account the following factors:
  - The expectations of the individuals
  - The possible consequences of disclosure

- Whether the legitimate interests of the public are sufficient to justify any negative impact on the rights and freedoms of the data subjects
21. The Commissioner's guidance on personal information states that it is important to draw a distinction between the information which senior staff should expect to have disclosed about them and what junior staff should expect to be disclosed. The rationale for this is that the more senior a person is the more likely it is that they will be responsible for making influential policy decisions. The individuals concerned are all senior employees within their own areas, however they are not themselves responsible for the bid documentation and how it is analysed and scrutinised, nor are they public sector employees upon whom there is a greater expectation of transparency. They have provided their personal information in order to assist the bid process. The Commissioner's view is that in these circumstances the individuals concerned would have a reasonable expectation that their personal information would not be disclosed. The CVs also contain information about the individuals' professional lives prior to the roles they are now in, which they would not expect to be disclosed.
22. As regards the consequences of disclosure the Commissioner does not think that there is anything especially sensitive in the information which would have adverse consequences for the individuals for instance in terms of their careers or reputation. Indeed, if there were clear and compelling legitimate interests in favour of disclosing these CVs then he would be likely to conclude that disclosure would be fair. However, whilst the Commissioner is of the view that there is some legitimate interest in the CVs being disclosed, as this would assure the public that there are suitably qualified individuals in the organisations which are part of the bid, he is not convinced that this is a compelling enough reason to disclose the CVs. Disclosure would add very little to the information which has already been disclosed and would not serve to inform the public any further regarding the bid process.
23. The Commissioner has decided that disclosure of the CVs of these individuals would contravene the first data protection principle. Consequently, the Commissioner has found that this information is exempt under regulations 12(3) and 13 of the EIR.

### **Regulation 12(5)(e) of the EIR**

24. Regulation 12(5)(e) of the EIR states that:

(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.

25. The Commissioner considers that this exception can be broken down into four elements, all of which are required in order for the exception to be engaged:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would confidentiality be adversely affected by disclosure?

26. The above criteria have been applied to the remaining withheld information.

### **Is the information commercial or industrial in nature?**

27. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

28. The remaining withheld information relates to specified companies who provide air and rail travel services for profit and includes information such as their passenger figures, demand for their services and route development discussions.

29. The Commissioner is satisfied that the withheld information is commercial in nature as it relates to a commercial activity.

### **Is the information subject to confidentiality provided by law?**

30. The Commissioner considers that “provided by law” will include confidentiality imposed on any person under the common law duty of confidence, contractual obligation or statute. There is no need under regulation 12(5)(e) for the information to have been obtained from

another. The exception can therefore also cover information created by the public authority and provided to another, or to information jointly created or agreed between the public authority and a third party. The Commissioner has considered the common law duty of confidence in this case and whether or not it applies to the remaining withheld information.

**Does the information possess the necessary quality of confidence?**

31. BIS has explained to the Commissioner that the remaining withheld information contains in-depth detail relating to ongoing commercial negotiations. It contains financial proposals, route development discussions and passenger demand figures. BIS is of the view that the information possesses the necessary quality of confidence as it contains specialist information and knowledge, which is not available to the public. It relates to extensive and important ongoing commercial negotiations between the parties involved. The Commissioner, having viewed the information, is satisfied that it has the necessary quality of confidence in that it is neither generally accessible nor trivial.

**Was the information imparted in circumstances importing an obligation of confidence?**

32. BIS have informed the Commissioner that the information was provided to Kent County Council by the individual companies in support of the Council's bid for funding under the Regional Growth Fund. The information was provided by Kent County Council in confidence on the understanding that it would not be shared with external parties who were not involved with the bid or the Regional Growth Fund. Since BIS manages the Regional Growth Fund, the information was passed to it by Kent County Council on the understanding that confidence would be maintained. The information held by Kent County Council was passed to it by other parties, i.e. the airline, the rail company and the airport, also with the understanding that it would be kept in confidence and only disseminated to those involved with the bid or the Regional Growth Fund. Therefore a duty of confidence is owed by BIS to Kent County Council and by Kent County Council to the specified third parties. The Commissioner is satisfied that there is an explicit obligation of confidence in those circumstances.

**Is confidentiality provided to protect a legitimate economic interest?**

33. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.

34. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probable than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:
- "Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".*
35. BIS believes that disclosure of the information would adversely affect the economic and commercial interests of one of the specified companies (a rail company) as it would weaken its position in a competitive environment. It also believes that disclosure would adversely affect the economic and commercial interests of Manston airport in relation to its ongoing discussions with the specified airline. BIS believes that such disclosure would undermine the airport's position in ongoing negotiations with the specified airline.
36. BIS argues that these interests must be protected as, if a relationship of trust and confidence is not maintained between Manston airport and the specified airline, the airport's ability to engage meaningfully with other such companies would be prejudiced, which would severely undermine the airport's position in relation to future contractual negotiations with the specified airline and other airlines. Similarly, if the information relating to the commercial activities of the rail company were to be disclosed, this could damage that company's position within a competitive market and as a consequence damage its relationship of trust and confidence with Kent County Council.
37. The Commissioner is satisfied that the information is commercially sensitive information provided in confidence, some of which relates to ongoing commercial negotiations and the rest of which relates to commercial activities such as forecasts of passenger demand figures. Disclosure of the information, according to BIS, would adversely affect the economic and commercial interests of the specified rail company and of Manston airport itself. The Commissioner considered the withheld information and the arguments provided by BIS.
38. The Commissioner has also considered the arguments provided by Kent County Council regarding the rail company and Manston airport, as well



as the specific arguments advanced by those companies themselves, as they are the parties whose commercial interests would be directly affected by disclosure of the withheld information. These are as follows: -

### **Manston airport's arguments**

Manston airport argues that no information should be made public at this time which could identify in any way the airline or the route contained within the bid documentation. Despite the fact that the bid was unsuccessful, negotiations for the route are ongoing and are at a sensitive stage. Disclosure of such identifying information to the public could threaten the success of those negotiations.

### **The rail company's arguments**

The rail company argues that no information relating to its passenger numbers and demand generation should be disclosed to the public. The reason for this is that its franchise is due to expire in 2014 and such information would be useful to any potential bidder.

### **Kent County Council's arguments**

Kent County Council agrees with the above arguments from Manston airport and the rail company. The Council believes that there is a strong need to protect the economic interests of those companies by not disclosing the withheld information. It believes that the information is commercially sensitive and confidential and disclosure could have a detrimental economic impact on not just the specified companies, but the wider local community.

### **BIS's arguments**

39. BIS states that, at the time of the request, confidentiality was required to protect the economic interests of the companies. It considers that the information is clearly concerned with issues that may affect the ability of the airport to negotiate effectively with the airline and if this information was disclosed, it would prejudice the airport's position because the negotiations are still ongoing. It is a general principle of negotiations that one side would not reveal all of its internal thinking to the other side in advance because this is likely to prejudice its ability to get the best deal by highlighting any weaknesses in its position and revealing what it hopes to achieve. BIS argues that early exposure of the details would damage the negotiations, thereby causing commercial prejudice.

40. BIS has argued that disclosure of the information relating to the rail company, i.e. forecasts of passenger demand figures, would weaken the rail company's position in a competitive environment as market-sensitive information would be revealed to competitors when rival companies are not obliged to provide the same information, thereby placing the company at a competitive disadvantage in the market.
41. BIS considers that disclosure of the information would harm the confidential nature of that information by making it publicly available and will also harm the legitimate economic interests that have been identified above.
42. Legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.
43. To satisfy this element, disclosure would have to adversely affect the legitimate economic interests of the party or parties that the confidentiality is designed to protect. Moreover, that confidentiality must be objectively required at the time of the request in order to protect the relevant interests.
44. The Commissioner requested BIS and the third parties involved to submit detailed arguments as to how disclosure of the relevant information would adversely affect their economic interests. No arguments were submitted except for those brief arguments reproduced in paragraphs above, which state only that the information is commercially sensitive and of a confidential nature and that disclosure would prejudice the negotiating position of the airport and airline and would affect the position of the rail company in a competitive market. They do not go into any detail and do not explain how exactly the negotiating position and the market position would be prejudiced or affected by disclosure of the information.
45. Whilst the Commissioner can imagine that this type of effect might conceivably arise it is up to the public authority to explain in detail the causal links that would give rise to the prejudice and why they would occur. The Commissioner notes that Manston airport is concerned that identifying the relevant airline and revealing route development discussions could prejudice its negotiating position by undermining the relationship of trust and confidence between the airport and the airline and perhaps causing the airline to withdraw from the negotiations. He

also notes BIS's comments about the possible impact of revealing internal thinking to the other side in negotiations. However, BIS has also stated that the information was originally provided on the understanding that it would only be disseminated to those involved with the bid or the regional growth fund. As it would appear that both the airport and the airline are involved with the bid this seems to undermine the argument about revealing information to the other side to negotiations.

46. The Commissioner understands that both BIS and the third parties have concerns about releasing the information in question. However, his decision on whether an exception is engaged is informed by the strength of the submissions provided by the public authority. Furthermore, the Commissioner is mindful that in general the strength of the arguments for withholding information must outweigh the EIR's explicit presumption in favour of disclosure, set out by regulation 12(2).
47. It is the view of the Commissioner that the arguments provided in favour of the application of regulation 12(5)(e) are vague and do not go beyond largely generic submissions for withholding information under the exception; arguments, in short, that are not of sufficient detail and depth to show how exactly an adverse effect 'would' occur. This is despite the public authority being afforded, in the Commissioner's view, a number of opportunities to provide full arguments to support its position that the identified information should be withheld.
48. In this instance the Commissioner considers that the arguments submitted have failed to meet the high threshold required to show that disclosure would adversely affect the relevant economic interests. In particular, the Commissioner has concluded that the public authority failed to demonstrate a causal relationship between disclosure and the adverse effect being claimed. As such BIS, did not provide adequate arguments showing that the third element required to engage the exception at regulation 12(5)(e) had been met, therefore the exception is not engaged.
49. In the absence of any further evidence from BIS to support its position on this point, the Commissioner is unable to conclude that the exception at regulation 12(5)(e) is engaged. Because the Commissioner considers that the exception is not engaged he is not required to consider the public interest test in relation to disclosure.

## Right of appeal

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50. 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)

51. 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.
52. 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** .....

**Lisa Adshead**  
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