

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 12 November 2015

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested information about the task of the Independent Airports Commission. The Department for Transport (DfT) refused to provide the requested information under section 35(1)(a) or section 36(2)(b)(ii) and section 36(2)(c) in the alternative and section 42 FOIA. So far as the withheld information is environmental, the DfT said it was relying upon regulation 12(4)(d) and (e) and regulation 12(5)(f) of the Environmental Information Regulations 2004 (EIR).
2. The Commissioner's decision is that the DfT should have dealt with the request under EIR, however it was correct to apply regulation 12(4)(d) EIR to the withheld information and the public interest favours maintaining the exception. The Commissioner also considers that the DfT has now identified all of the information it holds relevant to the scope of the request and that Regulation 12(4)(a) applies in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 25 February 2015 the complainant requested information of the following description:

"All records of discussions or proposals for the task of the "Independent Airports Commission" (subsequently incorporated into the Airport

Commission's formal terms of reference) as announced by the Secretary of State on 7 September 2012."

5. On 14 April 2015 the DfT responded. It provided the complainant with some information, but made redactions under section 40(2) FOIA. It withheld some information in full under section 35 and 36 FOIA.
6. The complainant requested an internal review on 15 April 2015. The DfT sent the outcome of its internal review on 14 May 2015. It provided the information originally withheld under section 35(1)(a) FOIA, it said the information withheld under section 36(2)(b)(ii) fell outside the scope of the request and it upheld the application of section 40(2) FOIA.
7. The complainant wrote to the DfT on 18 May 2015 as he considered that there must be further information held relevant to the scope of the request.

Scope of the case

8. The complainant contacted the Commissioner on 20 May 2015 to make a complaint as he considered that further information was held by the DfT falling within the scope of his request.
9. During the course of the Commissioner's investigation, the DfT did confirm that it held further information within the scope of the request. Some of this information was provided to the complainant and some was withheld under section 35(1)(a) or section 36(2)(b)(ii) and section 36(2)(c) in the alternative and section 42 FOIA. So far as the withheld information is environmental, the DfT said it was relying upon regulation 12(4)(d) and (e) and regulation 12(5)(f) EIR in the alternative.
10. The complainant wrote to the Commissioner again as he was still of the view that further information was held by the DfT and provided submissions in support of this position. He also confirmed that he wanted the Commissioner to investigate the application of exemptions/exceptions to the further information located and which was withheld.
11. The Commissioner has considered which legislation the request should have been dealt with under and whether the DfT was correct to withhold some of the further information located during the Commissioner's investigation. The Commissioner has also considered whether there is any further information held.

Reasons for decision

Is the request for environmental information?

12. Regulation 2(c) EIR defines environmental information as “measures...such as policies, legislation, plans, programmes...and activities affecting or likely to affect” the state of the elements of the environment. In this case the withheld information relates to the formulation of government policy on future airport capacity. The withheld information reflects different Government Departments’ and Minister’s views and deliberations on airport capacity which resulted in agreed terms of reference for the Airports Commission in 2012. It said that this still reflects in development of this policy as the Airport Commission was set up to consider airport capacity and report back to Government with its recommendations. It reported its findings in July 2015 and these findings are now under consideration by the Government. The withheld information clearly relates to a measure which will or will be likely to affect the environment. He does therefore consider that the withheld information is environmental under regulation 2(c) EIR and the request should therefore be considered under this legislation.

Regulation 12(4)(d)

13. Regulation 12(4) of the EIR states that for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that – (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data.
14. The DfT explained that there are 18 pieces of withheld information which it considers is material which is still in the course of wider completion in conjunction with formulating and developing policy. It explained that the withheld information relates to a policy on future airport capacity. It said that at the time the request was made the independent Airports Commission had not reported its findings/recommendations to Government. It clarified that even now the recommendations of the Airport’s Commission have been communicated/reported, it is still not at the stage where a decision has been made as to if and how those recommendations will be taken forward.

15. The Commissioner has issued guidance on this subject¹. This states that:

*"The fact that the exception refers to both **material** in the course of completion and unfinished **documents** implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy."*

16. The complainant has argued that this exception "would only be appropriate if the setting of terms of reference was itself an act of developing government policy, as opposed to inviting an independent body to provide advice for the future development government policy". The DfT has argued that "exchanges of views on the task of the Airports Commission prior to its being established are bound up closely with the policy questions which the Airports Commission considered."
17. The Commissioner acknowledges that the Airports Commission was set up as an independent commission tasked with examining the need for additional UK airport capacity and to make recommendations to government as to how this can be met in the short, medium and long term. The Commissioner considers that the setting of terms of reference of the Airports Commission is inextricably linked to the policy issues it has considered to feed into the Government's policy making decision in this area.
18. After viewing the withheld information and taking into account the complainant's and DfT's submissions as set out above, the Commissioner considers that it is part of material which is still in the course of completion. The material relates to the formulation and development of the DfT's policy position regarding future airport capacity. The Commissioner therefore considers that regulation 12(4)(d) EIR was correctly engaged in this case.
19. As regulation 12(4)(d) EIR is subject to the public interest test, the Commissioner has gone on to consider the public interest factors in favour of disclosure and the public interest factors in favour of maintaining the exception.

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_material_in_the_course_of_completion.aspx

Public interest arguments in favour of disclosing the requested information

20. The DfT has explained that it believes the following public interest arguments favour disclosure:

- Open policy making may lead to increased trust and engagement between citizens and government.
- Discussions on the Airport's Commission's task are bound up with the policy formulation questions which it was set up to advise on. There is a high level of interest in the matters which the Airports Commission considered. Any decisions on future airport capacity enhancements would have a significant impact on persons living nearby. It would also have significant environmental and economic impacts.
- The Terms of Reference of the Airports Commission have been finalised and a final version published on their web-site.

Public interest arguments in favour of maintaining the exemption

21. The DfT has explained that it believes the following public interest arguments favour maintaining the exemption:

- Exchanges of views on the task of the Airports Commission prior to its being established are bound up closely with the policy questions which the Airports Commission considered. Although the Airports Commission has now reported on its recommendations, it was still working on producing these in February 2015 when the applicant first made his information request. The Government is still considering its response to the recommendations presented in July 2015, so the policy issue remains very much live.
- There is the strong possibility of legal challenge once a decision is taken.
- Officials need space in which to develop their thinking and explore options in communications and discussions with ministers and other officials.
- Disclosure of internal deliberations relating to a high-profile and controversial policy issue would be likely to have a chilling effect, inhibiting free and frank discussions on similar matters in the future. The loss of frankness and candour would in turn be likely to damage the quality of advice and deliberation and lead to poorer decision making.

- Disclosure of the process of interdepartmental consideration risks undermining the collective responsibility of Government. Moreover, some of the withheld information records the views of individual Ministers. There is a strong public interest in withholding that information to preserve the principle of collective responsibility. It is an important constitutional principle, enshrined in the Ministerial Code, that ministers should be able to express their views freely in private while maintaining a united front when decisions have been reached.

Balance of the public interest arguments

22. The Commissioner gives weight to the general public interest in the government operating in an open and accountable manner. He considers that greater transparency leads to a better public understanding of particular issues and enables the public to assist in the decision making process where possible. The Commissioner also notes the significance and levels of public interest in any future decisions taken by the Government relating to airport capacity/expansion, including the overall environmental impact and cost to the taxpayer (at national and local level) based upon the terms of reference and subsequent recommendations of the Airports Commission.
23. The Commissioner is also mindful that the final terms of reference of the Airports Commission have now been published. However discussions and exchanges prior to agreeing the terms still have to be considered in light of the fact that the policy issues to which those terms of reference were agreed is still live and furthermore publication of some of those exchanges would disclose the differing views of individual Ministers. So whilst the DfT has taken the decision to publicise the final agreed terms of reference of the Airports Commission, the Commissioner does not consider that this diminishes the DfT's arguments in maintaining the exception in relation to the discussions, exchanges and material behind the final published terms of reference.
24. The Commissioner considers that effective policy making depends on good decision making which depends not only on sound evidence but candid communications that allow a full consideration of all the options without any concern over premature disclosure. Government policy needs to be thoroughly evaluated before it can be properly implemented and this can only happen when all parties have the confidence that there is no risk that those exchanges will be disclosed prematurely. The impact on these processes and weight to be given to these arguments must be determined on the circumstances of each case.
25. In this case the withheld information relates to exchanges of views on the task of the Airports Commission prior to its being established which the DfT has confirmed are bound up closely with the policy questions

which the Airport Commission ultimately considered. The Airport Commission did not provide its recommendations until July 2015 and a decision on airport capacity has not yet been taken by the Government based upon those recommendations. The policy in question, to which the withheld information relates, was still therefore live at the time of request. Therefore there is a strong public interest in maintaining the safe space for Government to fully consider the recommendations the Airports Commission has now made. This also increases the likelihood and severity of the chilling affect arguments presented by the DfT in relation to the specific policy process in question and more generally, which gives greater weight to the public interest arguments in favour of maintaining the exception. On balance the Commissioner considers that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception. Regulation 12(4)(d) EIR was therefore correctly applied in this case.

26. As the DfT has applied regulation 12(4)(d) EIR to all of the withheld information and the Commissioner has found that it was appropriately applied, he has not gone on to consider any of the other exceptions any further.

Is there any further information held by the DfT? – Regulation 12(4)(a)

27. The complainant is still of the view that further information is held by the DfT. He provided the Commissioner with evidence in support of this position which was put to the DfT.
28. The complainant has queried whether the file '*120912 - Aviation Connectivity Commission possible names Wednesday lunchtime - REDACTED-2*' is a later iteration of the file '*1 -120906 document*'. The DfT confirmed that this is not the case. It said that the information contained within document "10. 01 - 120912 - Aviation Connectivity Commission possible names Wednesday lunchtime -REDACTED--2", is the same as that in document 34 "01 – 120906 – Document (unredacted)". It said that the filename was changed for ease of identification during consideration of the complainant's initial request, with an incorrect date being applied to it.
29. The complainant has also suggested that document '*11. 04 120906 - Aviation Connectivity Commission possible names ver2 -REDACTED—1*' is pertinent to this case and should have been released in response to this request, rather than (or at least as well as) a separate case. Having reviewed the information in question, the DfT accepts that the complainant may be correct as regards the first page of that document. The first page was however provided to the complainant under a separate FOIA request.

30. The DfT has confirmed that all information it holds within the scope of this request has now been considered and either provided to the complainant or the DfT has explained why it is being withheld.
31. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
32. In order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any further information which falls within the scope of the request.
33. In this case the DfT has reviewed what information it holds falling within the scope of this request again as part of the Commissioner's investigation. It has also now answered the specific questions put to it by the complainant about the information it holds. On balance the Commissioner is now satisfied that the DfT has identified all information it holds falling within the scope of the request and has either provided this information to the complainant or has explained why information has been withheld.

Right of appeal

34. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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
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