

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

**Date:** 7 December 2017

**Public Authority:** Stockton-on-Tees Borough Council  
**Address:** Municipal Buildings  
Church Road  
Stockton-on-Tees  
TS18 1LD

**Decision (including any steps ordered)**

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1. The complainant has requested information on any restriction placed on Peel Airports regarding the future use of Durham and Tees Valley Airport and the surrounding land.
2. The Commissioner's decision is that Stockton-on-Tees Borough Council ('the Council') has correctly applied regulation 12(5)(e) to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

**Background**

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4. Durham Tees Valley Airport Ltd [formerly Teesside Airport, until 2004] ('DTVA') is part of Peel Airports which is itself part of the Peel Group. DTVA was formerly owned by five local authorities and now six local authorities, as follows:  
Stockton-on-Tees Borough Council  
Middlesbrough Borough Council  
Redcar and Cleveland Borough Council  
Hartlepool Borough Council  
Durham County Council

Darlington Borough Council (who acquired a proportion of Durham County Council's shares as part of local government reorganisation)

5. In 2003 these Authorities entered into an agreement with Peel Airports Ltd and Peel Holdings PLC (collectively 'Peel Group') under which Peel Group acquired a 75% holding in DTVA. Peel Group's shareholding was later enlarged to 89%.
6. The Tees Valley Combined Authority ('TVCA') was formed on 1 April 2016. This Authority consists of the five initial local authorities of Tees Valley. TVCA is a potential funder of future development at the airport. Stockton-on Tees Borough Council is the lead authority for shareholders and has responded to the complainant and the Commissioner in this case.

## Request and response

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7. On 24 November 2016, the complainant wrote to the Council and requested information in the following terms:

"Whilst I would reserve the right to seek further information as to the terms of the 2003 Agreement, for the purposes of this Request I am asking for the following:

In the Agreement or Agreements made between the 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."

8. The Council responded on 6 January 2017. It stated that it held information within the scope of the request that it considered to be exempt in reliance of sections 41(1) and 43(2) of the FOIA and regulations 15(5)(e) and (f) of the EIR.
9. Following an internal review the Council wrote to the complainant on 9 March 2017. It stated that in reviewing the information it determined that it was not environmental information as determined by the EIR and that it no longer considered that section 41(1) was engaged. Nevertheless the Council considered that the information engaged section 43(2) and the public interest favoured withholding the information. The Council also considered regulation 12(5)(e):

"In the event that the information could be deemed to be environmental"

## Scope of the case

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10. The complainant contacted the Commissioner on 12 March 2017 to complain about the way his request for information had been handled.
11. The Commissioner considers that the request should have been considered under the EIR as the information relates to the state of the elements of the environment and factors affecting the elements of the environment. She has therefore considered the Council's alternative submission on the application of regulation 12(5)(e) to withhold the requested information.

## Reasons for decision

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### Regulation 12(5)(e) – confidentiality of commercial information

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

"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;"
13. In considering the application of this exception the Commissioner considers that four criteria must be met:
  - (i) The information has to be commercial or industrial in nature;
  - (ii) The information has to be subject to a duty of confidence provided by law. This will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.
  - (iii) The confidentiality has to be required to protect an economic interest; and
  - (iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information.

*Is the information commercial or industrial in nature?*

14. The first criteria to be considered is the nature of the information. For information to be commercial in nature, it must relate to a commercial activity, either of the public authority or a third party. The essence of

commerce is trade and as such a commercial activity will generally involve the sale or purchase of goods or services, usually for profit.

15. The Council argues that the information is commercial in nature as it relates to a commercial activity, the operation of the airport. The information comprises points from the Subscription and Shareholders Agreement in place regarding DTVA relating to the potential for, or restrictions on, development and implementation of the airport. The information impacts the airport's options to sustain itself.
16. The Commissioner accepts that the nature of the information is commercial as it relates to a clear business activity in respect of the airport's options to sustain itself and therefore its viability.

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

17. With regard to this element of the exception the Commissioner considers if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
18. The Council explained that there is a 'non-disclosure of information' confidentiality clause in the Subscription and Shareholders' Agreement ('the Agreement') of 1 April 2003 – clause 25. The Council clarified that the Agreement was amended in 2016 by a deed of amendment ('DoA') and both documents should be read consistently. The Council considers that there is a binding obligation of confidentiality provided by both documents and therefore the information is subject to confidentiality provided by law.
19. The Commissioner considers that the Council is relying on the information being subject to a common law of confidence. The inclusion of a confidentiality clause does demonstrate that the information in the Agreement carries an explicit duty of confidence with it. The Commissioner has also taken into account the commercial nature of the information between the shareholders as well as the fact that the information is not trivial in nature as it relates to significant ongoing discussions between the Authorities and the Peel Group. The Commissioner notes the information had not previously been made available at the time of the request. Some information has been disclosed during the course of her investigation and the Council has advised her that further information will be disclosed in due course as it anticipates that some of the commercial issues with the Peel Group will be settled by mid to late November, at which point:

"we will potentially be in a position to release more information publically in any event."

20. The Commissioner having viewed the withheld information is satisfied that the information has the necessary quality of confidence in accordance with the common law of confidence and has not been placed in the public domain at the time of the request. She therefore considers that the information is subject to a duty of confidence provided by law.

*Is the confidentiality required to protect a legitimate economic interest?*

21. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. 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.
22. The Council explained that the requested information relates to the development at the airport which has a direct link to the economic interests of the Tees Valley.
23. The Council argued that it is the commercial interests of the Authorities (including the Council), DTVA Ltd, Peel Group and the recently formed TVCA that would be likely to be prejudiced by disclosure. The Commissioner has therefore considered whether the legitimate economic interests of these parties would be adversely affected by disclosure of the withheld information.
24. At the time of the request and continuing at the time of drafting this decision notice discussions between the Authorities, TVCA and the Peel Group remain active with on-going discussions in relation to the future of DTVA Ltd and the airport. The Council's position is that the requested information is significant, detailed and sensitive information which impacts on its position as a shareholder in DTVA. It argued that disclosure would seriously compromise its ability to effectively negotiate and achieve a commercially viable solution.
25. The Commissioner notes that although the Agreement dates from 2003 the information remains current with the DoA added in 2016. The operation of the airport is a commercial activity which operates in a competitive environment with other regional airports. The overall plan to sustain and develop the airport is a commercial activity. The requested information comprises information which if disclosed would adversely affect the legitimate economic interests of the parties involved by informing competitors of the detail of the 'Keep open' commitment in the DoA.

26. The Commissioner has taken into account the timing of the request as well as the arguments put forward by the Council and the complainant. She accepts that the withheld information consists of information which is of commercial value and which, if disclosed, would be likely to impact on the Council's commercial interests. This would harm the legitimate interests of the Authorities and the Commissioner considers that this criterion is satisfied.

*Would confidentiality be adversely affected by disclosure?*

27. As the first three elements of the test have been established, the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of the information by making it publicly available and would consequently harm the legitimate economic interests of the Council. She therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

### **Public interest test**

*Public interest arguments in favour of disclosing the information*

28. The Council acknowledged that there will always be some public interest in disclosure to promote the transparency and accountability of public authorities, greater public awareness and understanding of environmental matters. It is aware that the development and implementation of future plans for the airport is a matter of considerable importance for the Tees Valley. It accepts that there is a strong public interest in being open and transparent about the options being pursued and agreements reached with the Peel Group to ensure the viability of the airport.
29. The Council recognises the considerable amount of public money and public debate surrounding the airport. It therefore accepts that accountability and transparency could be enhanced by disclosure which, in turn:
- “would assure the public that proper processes are followed and decisions made in accordance with the Council's fiduciary duty.”
30. In requesting an internal review the complainant explained his considerations that suitable flights for ordinary travellers are no longer available from DVTA. He disputes the premise that passengers are not supporting the local airport. He argues that the future economic

prosperity of the Teesside region will be assisted by a viable airport linking Teesside with important locations including London. He references the "Save Teesside Airport" campaign and its "thousands of followers" to demonstrate the public concern throughout the region.

31. The complainant explained his contention that:

"The public are entitled to know all relevant important facts about the Airport and its future. Few things are more important than knowing whether Peel is committed to retaining the Airport – which would be the case if a restriction is in place – or unconcerned with its future because lucrative opportunities are available from other uses – which the current planning application seems to suggest."

32. The complainant also explained that disclosure of the information would enable the public:

"to ensure that its elected representatives exercise their powers for the public good."

33. The complainant explained to the Council his opinion that the public interest in disclosure would assist the public in understanding:

"what is presently happening at the Airport and what the future holds."

34. In his arguments in support of disclosure the complainant also commented on the Authorities' spending of public money:

"It is public knowledge that considerable monies have been paid out by the local authorities to Peel. Additionally there is the important issue of the amount received by the local authorities from Peel in 2003."

*Public interest arguments in favour of withholding the information*

35. The Council argues that the public interest in disclosure must be weighed against not undermining the ongoing discussions with the Peel Group to secure the best outcome for the long-term viability of the airport.

36. The Council argues that it is in the public interest that it is able to function effectively in a commercial environment. The Council considers that disclosure of the requested information at the time of the request would have placed the Authorities at a disadvantage, delaying progress which would have been detrimental to the communities they represent.



37. The Council explained that at each key stage decisions on the options taken forward revert back to the Council's elected members to consider. The Council acknowledged that this does not amount to disclosure to the world at large but considers that the public's elected individuals represent the public's interests and

"this does to an extent strike a reasonable balance in the public interest."

*Balance of the public interest arguments*

38. The Commissioner has considered all these arguments. She considers that arguments in favour of maintaining an exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality.
39. The Commissioner usually attaches weight to the argument that disclosure of withheld information will help to engage the public and ensure transparency. She does so in this case but she also recognises there are counter arguments.
40. The Commissioner accepts the timing of the request is a factor when considering the public interest in disclosure; in this case the request was made at a point when the Council states options were still being considered. As already discussed progress has already been made with the negotiations and further information will be disclosed outside of this request.
41. The Commissioner accepts that there is a public interest in allowing public authorities the time to discuss and negotiate on matters away from public scrutiny so as to allow for all options to be considered and the best outcome to be achieved.
42. The Agreement does contain an express obligation of non-disclosure of 'Restricted information'. The Commissioner apportions some weight to this. Although it is not a legislative requirement for the Council to keep information confidential, the Council considers that the existence of the Agreement does provide for a 'binding obligation of confidentiality' covering the requested information. The Commissioner accepts that there is a strong public interest in maintaining the confidentiality provided by law.
43. The Commissioner does accept that there is always a public interest in ensuring that public authorities are transparent and able to demonstrate they are acting appropriately and in the best interests of the public. It is



important that public authorities are accountable for the decisions they make and the money they spend and generate.

44. The Commissioner is of the view that, whilst there are strong public interest arguments on both sides, the public interest in disclosure is, in all the circumstances of the case, outweighed by the public interest in maintaining the exception. In reaching this decision she has 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.
45. Therefore, the Commissioner is satisfied that, in response to this request at this time, the Council correctly withheld the information and she has determined that regulation 12(5)(e) exception is engaged.

## Right of appeal

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46. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.

48. 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 .....**

**Gerrard Tracey  
Principal Advisor  
Information Commissioner's Office  
Wycliffe House  
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SK9 5AF**