

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

Date: 26 July 2018

Public Authority: Department for International Development
Address: 22 Whitehall
London
SW1A 2EG

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for International Development (DFID) for a copy of the Terms of Reference for an external individual expert appointed by DFID to investigate the St Helena airport project. DFID refused to disclose this information citing the exceptions contained at regulations 12(5)(a) (adverse effect on international relations), 12(5)(b) (course of justice) and 12(5)(e) (confidentiality of commercial and industrial information) of the EIR. The Commissioner has concluded that the Terms of Reference are exempt from disclosure on the basis of regulation 12(5)(b) and that in all of the circumstances of the case the public interest favours maintaining the exception.

Background

2. St Helena is a small self-governing UK overseas territory in the South Atlantic, previously only accessible by sea. DFID provides financial and technical assistance to St Helena as one of three Overseas Territories which are eligible for official development assistance.
3. DFID's aims for the UK's financially dependent Overseas Territories are to ensure the provision of basic services and to help them become economically self-sufficient, with the aim of reducing and eventually removing the need for subsidies from the UK government.
4. In 2004, DFID commissioned a feasibility study into building an airport on St Helena, with the rationale that improved access would help reverse economic decline by opening the island to increased revenues

from tourism. In 2010, DFID commissioned a report from consultants looking at options for access to improve St Helena's economic and social sustainability. In 2011, the St Helena Government signed a design, build and operate fixed price contract with Basil Read, a South African construction company to build an airport on St Helena. The total budget for the project was set at £285.5 million.

5. The airport had planned to start operating in May 2016. However, test flights in April 2016 revealed dangerous wind conditions on the airport approach, an effect known as 'wind shear'. Although the airport subsequently handled a small number of flights, the wind conditions precluded the operation of the planned commercial service. These began in October 2017 following further testing of the wind conditions on the island.
6. The House of Commons Committee of Public Accounts published a report in December 2016 about the St Helena Airport project. The report was critical of DFID's management of the project, in particular its failure to foresee and address the impact of difficult wind conditions on landing commercial aircraft safely.¹

Request and response

7. The complainant submitted the following request to DFID on 22 October 2017:

'This is a request, under the Freedom of Information Act and the Environmental Regulations for full information of the terms of reference and any subsequent instructions - including the allocation of supporting financial, legal and human resources - for work in relation to the St Helena Air Access Project to be undertaken by [name redacted], as indicated by the DFID Secretary of State when she told the International Development Committee on 19 December 2016:

'I have appointed an external individual expert to undertake a detailed review of the project and programme. I think that is right. That, to me, speaks to transparency and value for money.'

"Please also provide information on when [name redacted] work was completed; or, if not yet completed, whether there is a date by which he has been asked or is expected to complete and present this review."

¹ <https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/767/767.pdf>

8. DFID responded on 20 November 2017 under reference number F2017-369 and refused to confirm or deny whether it held any information on the basis of regulations 12(3) and 13(2)(a) (personal data exceptions) of EIR.
9. The complainant contacted DFID on 1 December 2017 and asked for an internal review of this response. His email also asked whether:

'Would it help if the question were rephrased? Eg:

"This is a request, under the Freedom of Information Act, for full information of the terms of reference and any subsequent instructions for work in relation to the St Helena Air Access Project to be undertaken by an external individual expert appointed by the DFID Secretary of State, as she informed the International Development Select Committee on 19 December 2016. Please also provide information on whether this detailed review has been completed or, if not, whether there is a date by which the external expert has been asked - or is expected - to complete it."

That formulation is shorter, purely to avoid further misinterpretations. Let me make explicit that I do not expect 'full information' to include any sums to be paid into any individual's personal bank account. It would, however, be helpful to know if the expert was given a budget for this 'detailed review', including, for example, provision for supporting staff or for any visit to St Helena; as well as other expenses to facilitate access to UK and St Helena officials and commercial companies who have at any stage been involved in the project. I would, of course, understand if names of individuals or companies were redacted - for good reasons, such as protecting personal data - from the terms of reference and subsequent instructions given to the reviewer.

Given earlier delays and misinterpretations, I would be grateful if DFID's review of this further refusal could be completed as speedily as possible; and if you could also confirm now (before starting your review) that you understand from my suggested rewording that I am not seeking any personal data whose disclosure is not permitted under the FOIA.'

10. DFID contacted the complainant on 4 and 18 January 2018 and explained that it held information falling within the scope of this request but it needed additional time to consider the balance of the public interest under section 43(2) (commercial interests) of FOIA.
11. DFID provided him with a substantive response to his request on 1 February 2018. It explained that having assessed the information it decided that it should be considered under the EIR rather than under

FOIA. DFID also confirmed that it held a copy of the Terms of Reference (ToR) and that the review had been completed. However, DFID explained that it considered the actual ToR to be exempt from disclosure on the basis of regulations 12(5)(a) (adverse effect on international relations), 12(5)(b) (course of justice) and 12(5)(e) (confidentiality of commercial and industrial information) of the EIR. DFID did however confirm that the overall budget allocated to the expert was £29,750 of which £19,663 was paid inclusive of VAT and all travel expenses.

Scope of the case

12. The complainant contacted the Commissioner on 4 February 2018 in order to complain about DFID's refusal to provide the ToR. He acknowledged that he has not asked DFID to undertake an internal review of its response to this request. However, he has explained that he assumed that DFID would respond to this refined version of his request as part of its internal review of request F2017-369 rather than deal with this as an entirely new request.
13. Technically, in the Commissioner's view the refined request contained in the complainant's email of 1 December 2017, ie request F2018-011, is a new request for information. Nevertheless, given the history of this request the Commissioner accepted the complaint about request F2018-11 at this stage.

Reasons for decision

Regulation 12(5)(b) – The course of justice

14. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. The threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
15. The course of justice element of this exception is very wide in coverage, and can encompass, amongst other types of information, material covered by legal professional privilege (LPP).

DFID's position

16. In its responses to the complainant DFID explained that the withheld information attracted LPP and was relevant to a live and ongoing legal case. It argued that disclosure of the withheld information would provide an indication of arguments relevant to this case, the strength or weaknesses which DFID might have, thus unbalancing the level playing field under which adversarial proceedings are meant to be carried out. DFID was of the opinion that disclosure of the withheld information would therefore harm the course of justice.
17. DFID provided the Commissioner with more detailed submissions to support its reliance on regulation 12(5)(b) to withhold the ToR. The Commissioner has not included these submissions in this notice as they contain detailed and extensive reference to the withheld information itself.

The complainant's position

18. The complainant argued this request was not for advice to DFID on an ongoing legal case, simply for the ToR for the review by an individual expert of an expensive publicly funded project which everyone, DFID included, knows has not turned out well. He therefore disputed DFID's position that disclosure of the withheld information would harm the course of justice.

The Commissioner's position

19. In the Commissioner's view litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. This type of privilege can only be relied upon in circumstances where the following criteria are met:
 - Where litigation is underway or anticipated. Where litigation is anticipated there must be a real likelihood of litigation taking place; it is not sufficient that litigation is merely a possibility.
 - The dominant purpose of the communications must be to obtain advice to assist in the litigation; and
 - The communications must be made between a professional legal adviser and client although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.

20. Furthermore, in relation to enclosures or documents attached to communications with a lawyer, the Commissioner's guidance on section 42 of FOIA (the LPP exemption) contains the following qualifications:

'19. Any enclosures or attachments to a communication are usually only covered by LPP if they were created with the intention of seeking advice or for use in litigation. The authority must consider each document individually.

20. If an enclosure existed before litigation was contemplated or before it was considered possible that legal advice might be needed, LPP will not usually apply to it. There is however one important exception to this rule. When a lawyer uses their skill and judgement to select pre-existing documents that weren't already held by the client, for the purposes of advising their client or preparing for litigation, then LPP can apply.'

21. The Commissioner is satisfied that the withheld information can be said to meet the various criteria set out above, including the qualification described by her guidance on section 42 of FOIA. She is therefore satisfied that the ToR attract litigation privilege. The Commissioner has elaborated on why she has reached this finding, with reference to the withheld information itself, in a confidential annex, a copy of which will be sent to DFID only.
22. The Commissioner is of the view that disclosure of information which is subject to LPP will have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR. She considers the likelihood of this happening to be more probable than not especially given that in the circumstances of this request, the case is still ongoing and the legal advice is live. Regulation 12(5)(b) is therefore engaged.

The public interest test

23. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosing the withheld information

24. The complainant argued that the highly critical report of the Public Accounts Committee into the planning by DFID for the St Helena Airport provided ample evidence in support of the strong public interest in

disclosure of information concerning the project. More specifically, he argued that the public is entitled to know whether the ToR and resources for DFID's review into the project were wide enough to identify faults at any stage - and by any commercial or governmental organisation - in how the project was planned and implemented. Furthermore, the complainant noted that DFID had confirmed that the report cost just under £20,000 including VAT and travel expenses. The complainant suggested that this level of expenditure would not have bought much time for a single expert of the calibre and experience to review such a major project. It is thus even more clearly in the public interest to know how widely or narrowly the ToR were drawn. In the complainant's view, there is in this case an overwhelming public interest in accountability for public spending and in accountability for decision making in DFID, in order to increase understanding of the decision making process and thereby deter the repeat of the 'fiasco' (the description the complainant noted of the Public Accounts Committee) that was the outcome of the St Helena airport project.

Public interest in favour maintaining the exception

25. DFID argued that there was a clear and significant public interest in upholding the long-established principle of legal professional privilege. It noted that this approach had been fully recognised by the Commissioner in previous decision notices. DFID argued that this approach was merited in this case and that disclosure of would weaken confidence in this fundamental principle. Furthermore, it argued that the public interest in maintaining the exception attracted further additional weight given that the legal advice related to live and ongoing legal proceedings. In DFID's view this made the public interest in maintaining the course of justice overwhelming.

Balance of the public interest arguments

26. As the complainant suggests, the Public Accounts Committee's report into the planning of St Helena Airport project contained a damning assessment of the project. The Commissioner agrees with the complainant that the findings of this report clearly point towards the significant public interest in disclosure of information by DFID about its decision making in relation to the project. In the specific circumstances of this request this interest focuses on the ToR and the Commissioner agrees with the complainant that disclosure of these would provide the public with an insight into the steps DFID has taken to investigate how the project was managed. Given the problems with the project, as identified in the Committee's report, the Commissioner agrees with the complainant that there is considerable merit in this public interest being met and thus the ToR being disclosed.

27. However, the Commissioner considers that there is a significant public interest in maintaining LPP due to the importance in safeguarding openness in all communications between client and lawyer to ensure access to full and frank advice, which in turn is fundamental to the administration of justice. In the particular circumstances this case she agrees with DFID that these arguments attract additional, and ultimately compelling, weight given that the information relates to an ongoing legal case. Therefore, despite the considerable public interest in disclosure of the ToR, the Commissioner has concluded that this is outweighed by the public interest in maintaining the exception.
28. In light of this finding, the Commissioner has not considered DFID's reliance on the other exceptions that it cited.

Right of appeal

29. 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

30. 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.
31. 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

Jonathan Slee
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