

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 January 2019

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

#### Decision (including any steps ordered)

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1. The complainant, on behalf of Heathrow Hub Ltd, has requested from the Department for Transport (DfT) information associated with any appraisal Heathrow Airport Ltd was asked to carry out of an 'Extended Northern Runway' proposal. DfT released some relevant information and the complainant considers that DfT holds further information.
2. The Commissioner's decision is as follows:
  - On the balance of probabilities, DfT has made available to the complainant all the information it holds that is relevant to his request, and has complied with regulation 5(1) of the EIR.
3. The Commissioner does not require DfT to take any remedial steps.

#### Request and response

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4. On 13 April 2018 the complainant wrote to DfT and requested information in the following terms:

*"Please provide all the information held by the SoS and/or officials and/or the Department for Transport about [1] whether, at any time*

*from the date the Airports Commission was set up to date, the SoS and/or officials and/or the Department for Transport formally or informally requested Heathrow Airport Limited to review and appraise the ENR scheme promoted by HHL/RIL and/or [2] requested or discussed any form of commitment or undertaking that Heathrow Airport Limited would not object to implementing the ENR scheme if chosen by the Government."*

5. DfT responded on 15 May 2018. DfT did not confirm whether it was handling the request under the FOIA or the EIR. It said it does not hold information relating to the first part of the request (as it had interpreted it) and that it had identified information it holds relating to the second part of the request (as it had interpreted it). DfT released this information to the complainant – an email dated 2 September 2016, with some personal data redacted.
6. The complainant requested an internal review on 18 May 2018 and on 6 June 2018 he confirmed to DfT the nature of his dissatisfaction; namely that the disclosure of one email seemed at odds with oral evidence the Secretary of State for Transport had given to a Transport Select Committee on 7 February 2018. DfT sent the complainant the outcome of its internal review on 4 July 2018. It upheld its original position.

## Scope of the case

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7. The complainant contacted the Commissioner on 22 July 2018 to complain about the way his request for information had been handled.
8. The Commissioner has first considered whether the request is for environmental information that should be considered under the EIR, rather than the FOIA. Her investigation then focussed on whether, on the balance of probabilities, DfT holds further information within the scope of the complainant's request.

## Reasons for decision

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### **Is the request for environmental information?**

9. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR if it meets the definition set out in regulation 2(1)(a) to 2(1)(f).
10. Regulation 2(1)(c) appears to have most relevance in this case. Regulation 2(1)(c) says that information is environmental information if

it concerns measures (including administrative measures) such as policies, legislation, plans and programmes or activities affecting or likely to affect the elements and factors referred to in regulations 2(1)(a) and 2(1)(b). The elements in regulation 2(1)(a) include air, atmosphere, land, landscape and natural sites. The factors in regulation 2(1)(b) include noise.

11. The complainant has requested information concerning any assessment carried out on an alternative proposal for a third runway at Heathrow airport – the Extended Northern Runway (ENR); a proposal which the complainant considers is quieter, as well as simpler and cheaper. The Commissioner is satisfied that such information, if held, can be categorised as environmental information and she will therefore consider the request under the EIR.

**Regulation 5(1) – duty to make environmental information available on request**

12. Under regulation 5(1) of the EIR a public authority that holds environmental information shall make it available on request, if it is not exempt information.
13. DfT has released a small amount of information – one email – and the complainant considers that it holds further relevant information. In his correspondence to the Commissioner, the complainant says that in his oral evidence to the Transport Select Committee the Secretary of State (SoS) for Transport said “... *I think the biggest issue for us was that the promoters of that scheme could not secure from Heathrow a written guarantee that it [sic] we picked if [sic] they would do it.*” The complainant notes from the SoS’s evidence that it appears to him that discussions have taken place between the SoS and/or officials of the DfT and/or Heathrow Airport Ltd (HAL) and the complainant suggests that DfT should therefore hold recorded information about those discussions. He notes that the request should be interpreted as including information associated with not only discussions that took place between the SoS and/or DfT and HAL, but also drafts, emails, notes and recordings of telephone conversations.
14. The Commissioner has also considered the submission DfT has provided to her. In its submission, DfT has first provided a background to this request. DfT has explained that Heathrow Hub Ltd (HHL) is the promoter of the ENR scheme. This was one of three schemes shortlisted by the independent Airports Commission, to meet the need the Commission identified for one new runway in the South East of England by 2030. The other shortlisted schemes were the Northwest Runway (NWR) scheme, promoted by HAL and the Gatwick Second Runway scheme, promoted by Gatwick Airport Ltd (GAL).

15. In October 2016 the Government announced that its preferred scheme for expansion in the South East was the NWR scheme (ie not the ENR scheme that HHL promotes). Following two periods of public consultation on the proposed policy during 2017 (contained in the draft Airports National Policy Statement (ANPS), and the conclusion of Parliamentary scrutiny of the ANPS, the Secretary of State for Transport formally designated the ANPS in June 2018. The ANPS is the policy framework for expansion at Heathrow Airport via the NWR scheme.
16. HHL has lodged a judicial review of the designation of the ANPS. DfT says that the issue around any written confirmation is part of HHL's judicial review challenge and this will be considered by the Court as part of the judicial review. DfT goes on to say that, as part of the judicial review process, it has recently undertaken a substantial voluntary disclosure exercise to all claimants, including HHL. As one of the claimants, DfT says that it has voluntarily released c.1,000 documents to HHL, which includes communications between DfT and HAL from July 2015 to June 2018, when the ANPS was designated.
17. DfT's submission then addresses the questions the Commissioner put to it regarding its position that it holds no further information. First, the searches for relevant information that DfT carried out. DfT says that in 2012 the government set up the independent Airports Commission. This was tasked with identifying, and recommending to government, options for maintaining the UK's status as an international hub for aviation. It reported in 2015 and was subsequently decommissioned. A policy decision was made at the time that the Airport Expansion Directorate (as it was named at the time of the request) would not be given access to the Airports Commission's files and therefore the files were kept behind a 'Chinese wall'. The separate Aviation Directorate (AD) acts as custodian of these files. This means that when an information request is received, the AD is tasked with searching for any material in the Airports Commission's files. Members of the Airport Expansion Directorate cannot access these files.
18. With regard to this specific request, DfT says a colleague in the AD was therefore asked to review the former Airports Commission's files for relevant material. The AD came back with a nil return.
19. Relevant colleagues in the Airport Expansion Directorate, and especially the Directorate's Commercial team, were asked to undertake a search for any material captured by the request. The Commercial team was the team that dealt directly with HAL. The Commercial team explained that there had been a policy decision not to engage with HAL on the HHL scheme (ie the ENR scheme). DfT says there was a nil return.

20. The Commercial team asked DLA Piper (which is a legal firm acting for DfT) to look through the minutes of meetings between DfT and HAL; DLA Piper was present at, and minuted, these meetings. DfT says there was a nil return.
21. A search was made of the relevant areas in the Airport Expansion Directorate's shared drive. DfT says there were a number of internal notes stating that HHL would need to engage with HAL or HAL would need to purchase the HHL scheme if that one was chosen. In DfT's view, these items were clearly not caught by the information request as it had interpreted the request; namely as being for any requests or discussions with HAL regarding any form of commitment or undertaking that HAL would not object to implementing the ENR scheme if that was chosen by Government. The Commissioner agrees.
22. In addition to searches of AD's filing systems (for the Airports Commission's files) and relevant areas of the Airport Expansion Directorate's shared filing system, DfT says that individuals were also asked to search their email inboxes.
23. As a result of its searches, DfT says that one item was found that was captured by the second part of the information request. It was the email that it released to the complainant. This email contained a note of a media/communications meeting between DfT and HAL. The note explained that DfT was "*holding these meetings with each of the promoters [of the shortlisted runway schemes] for communications planning purposes only.*" Therefore, there were similar meetings with GAL and HHL too.
24. DfT's submission goes on to provide the Commissioner with further detail on the searches it carried out. It says it used two search terms: 'Hub' and 'HHL'. In DfT's view these terms would pick up all references to the promoter of the specific scheme (the ENR scheme). 'Hub' would include everything that mentions 'Heathrow Hub' and 'HHL' would cover everything that abbreviated the name of the company 'Heathrow Hub Limited'. Two areas of the Airport Expansion Directorate's shared filing system were searched: 'Commercial' and 'Policy and Strategy'. DfT says that this is where any material held relating to the request would be filed.
25. When the searches were performed no notes were made of how many items these search terms identified. However, DfT says that a recent search for material in the correct date range picked up:
  - In 'Commercial' – 1019 documents containing 'Hub' and 857 containing 'HHL'

- In 'Policy and Strategy' – 712 documents containing 'Hub' and 304 containing 'HHL'

All of the documents in the original search were, according to DfT, checked to confirm whether or not they were relevant to the information request.

26. In addition, DfT has told the Commissioner that a colleague in the AD discussed the request with senior colleagues, who were former members of the Airports Commission. For the first part of the request, these individuals confirmed that the Commission had never formally or informally requested HAL to review and appraise the ENR scheme. It was therefore concluded that no documents within scope of this part of the request would exist. For the second part, a search of correspondence and meeting minutes resulted in several documents relating to data and information sharing between scheme promoters being found. All these documents were, however, found to be out of scope of the request. The colleague in the AD does not recall using any specific search terms but, as he recalls, he looked through all the Commission minutes, and looked for all possible correspondence between the Commission and HAL that might be in scope.
27. DfT has explained to the Commissioner that, with regard to any business purpose for which the requested information should be held, the Airport Expansion Directorate was clear from the outset that any decision to designate the ANPS advocating an additional runway in the South East of England would be very likely to face judicial review. It accordingly had (and continues to have) a clear policy, supported by guidance for all staff, on the retention of material that might be subject to disclosure under the Duty of Candour. DfT says that particular care was taken to ensure that all engagement with the shortlisted scheme promoters was placed on record.
28. Finally, the Commissioner had asked DfT to address the complainant's point about the SoS for Transport's oral evidence to the Select Committee.
29. DfT says, by way of background, that, after he became SoS for Transport, the SoS met with each of the three shortlisted scheme promoters in August 2016. During his meeting with HHL, the SoS requested that HHL obtain written support from HAL that if HHL's scheme were preferred by government, that HAL would be prepared to deliver it. HHL acceded to this and took steps to take this forward with HAL, although HHL was ultimately unable to secure written support from HAL.

30. DfT says that this was something to which the SoS referred during the Committee session in February 2018. The SoS said (in Q480) "*... I have to say that the extended runway proposal is a very innovative one. At the end of the day, as I have said before, I think the biggest issue for us was that the promoters of that scheme could not secure from Heathrow a written guarantee that if we picked it they would do it. That seemed to be a fairly fundamental problem for us. There were a number of other issues related to it; that was not the only one, but there was no guarantee that that would be something the owners of Heathrow would be willing to pursue. No guarantee could be secured on that front.*"
31. The SoS later said (in Q487) "*...I explained why we had taken the view on the extended northern runway scheme. It did not deliver as much capacity, and it also had the simple complication that we did not have certainty that we could do it because Heathrow would not sign up to it...*"
32. DfT has noted that in his remark that "*... the promoters of that scheme (HHL) could not secure from Heathrow (HAL) a written guarantee that if we picked it they would do it*" the SoS was saying that HHL could not secure a guarantee from HAL. DfT has argued that it does not follow that there were any discussions between DfT and HAL about this matter; which DfT says it had always been clear was a commercial matter between the two parties, rather than a matter for the DfT.
33. The Commissioner has considered the complainant's and DfT's submissions and all the circumstances of this case. The complainant's request can be summarised as being for information on whether DfT and/or the SoS for Transport asked HAL to review and appraise the ENR scheme and for information on any discussion of any undertaking that HAL would not object to implementing the ENR scheme if it was chosen by the Government.
34. DfT has told the Commissioner that relevant senior officials have confirmed that the Airports Commission had never formally or informally requested HAL to review and appraise the ENR scheme. DfT has also told her that its Airport Expansion Directorate's Commercial team has explained that there had been a policy decision not to engage with HAL on the ENR scheme. On this basis, the Commissioner accepts that DfT would not hold information within the scope of either part of the complainant's request; DfT had not asked HAL to appraise the ENR scheme and had made a policy decision not to engage with HAL on that scheme.
35. From the information provided to her, the Commissioner notes that it was for HHR to obtain confirmation from HAL that, if the ENR scheme was chosen, HAL would implement it. The Commissioner accepts DfT's argument that it does not follow from the SoS's Select Committee

evidence that DfT had discussions with HAL about that matter; the SoS was simply explaining that HHL could not guarantee the necessary undertaking from HAL with regards to the ENR scheme.

36. The Commissioner notes the DfT's commitment to retain all information relating to the third runway at Heathrow, because it anticipated that this matter would be subject to judicial review. She considers DfT's searches for relevant information to have been thorough and appropriate; if any further information relevant to the complainant's request had been held, the Commissioner considers those searches would have identified it. She is therefore satisfied, on the balance of probabilities, that DfT holds no further information within the scope of the complainant's request.



## **Right of appeal**

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37. 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)

38. 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.
39. 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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