

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 20 June 2019

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 relating to the Airports National Policy Statement and Heathrow Airport Limited.
2. The Commissioner's decision is that Department for Transport (DfT) is entitled to rely on regulation 12(4)(e) to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 14 October 2018, the complainant wrote to DfT and requested information in the following terms:

Request 1 - E0016566

"Under the Freedom of Information Act 2000 I would like to make a request for the following information:

*The advice to Ministers provided on
15 December, 2016 (draft ANPS);
20 October 2017 (revised ANPS);
22 May 2018 (then proposed ANPS),*

in relation to the draft, revised and ultimately proposed Airports National Policy Statement respectively.

I would also request a copy of the briefing notes and analysis associated with that advice."

Request 2

"I would like to make the following information request under the Freedom of Information Act 2000 and Environmental Information Regulations 2004:

- copies of the papers and minutes in relation to the twelve Airport Capacity Programme Boards that have been held since June 2017, per the Departmental Written Parliamentary Question answer 160152 on 6 July 2018;*
- copies of the papers and minutes in relation to any Airport Capacity Programme Boards since July 2018"*

Request 3 - E0016568

"Under the Freedom of Information Act 2000 and Environmental Regulations 2004 I would like to request:

- copies and minutes of all papers relating to meetings by Ministers, special advisers or officials with Heathrow Airport Limited and its owners since April 2018."*

Request 4 - E0016565

"Under the Freedom of Information Act 2000 I would like to make the following request:

- To have copies of the papers and minutes of the cross government steering group and its meetings on 4 September, 2017; 14 September 2017; 10 April 2018; 30 May 2018, referred to in the departmental answer to Parliamentary Question 160720 in 9 July 2018*
- To have copies of the papers and minutes of any subsequent meetings of this group subsequent to 30 May 2018."*

- 5. DfT responded on 1 November 2018 and refused to provide the requested information. It cited regulation 12(4)(b) – manifestly unreasonable, of the EIR as its basis for doing so.*
- 6. Following an internal review DfT wrote to the complainant on 4 December 2018 and maintained its position.*

Scope of the case

7. The complainant contacted the Commissioner on 11 December 2018 to complain about the way her request for information had been handled.
8. At the outset of her investigation the Commissioner contacted DfT with a view to reconsidering the circumstances and requests in this case.
9. DfT responded and stated that having done so and in the spirit of compromise and its commitment to transparency, it offered to make the minutes of both the Cross Government Steering Group and Airport Capacity Programme Board available to the complainant, subject to redactions covered by relevant exceptions and a public interest test. However, it confirmed it would not be releasing i) wider papers related to those boards and ii) the submissions requested.

Background

10. By way of background DfT explained that the complainant has taken a close interest in successive proposals to expand Heathrow through the construction of a third runway and associated development. The government's policy position is to support expansion through the Northwest Runway scheme, subject to acceptable mitigation of environmental and community impacts being demonstrated at the development consent stage. This policy is set out in the Airports National Policy Statement (ANPS), which was designated by the Secretary of State for Transport in June 2018. The material requested relates to government consideration of Heathrow expansion, both prior to and since the designation of the ANPS.
11. The process that led to the designation of the ANPS has taken over six years. This involved the Airports Commission¹, the government's review of the Airport Commission's work and the consultation and parliamentary scrutiny of the government's draft ANPS. Both the work of the Airports Commission and the government in its preparation of the ANPS was undertaken transparently – with a considerable volume of documentation made available online:

¹ The Airports Commission was an independent commission set up by government to examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub. It completed its work with the publication of its final report in July 2015.

<https://www.gov.uk/government/organisations/airports-commission>

<https://www.gov.uk/government/publications/airport-expansion-dft-review-of-the-airports-commissions-final-report>

<https://www.gov.uk/government/publications/airports-national-policy-statement>

Reasons for decision

Regulation 12(4)(e) – internal communications

12. Having reconsidered this request DfT also wished to apply regulations 12(4)(e) and 12(4)(d). The Commissioner has first considered the application of regulation 12(4)(e) as DfT consider it applies to all the withheld information.
13. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, so long as the requested information constitutes an internal communication then it will be exempt from disclosure. A wide range of internal documents are caught by the exception, although in practice the application of the exception is limited by the public interest test.
14. The EIR do not provide a definition of what constitutes an internal communication, but the underlying rationale behind the exception is that public authorities should have the necessary space to think in private. Although the exception has no direct equivalent in the Freedom of Information Act 2000, many arguments about protecting a private thinking space are similar to those made under section 35 (formulation of government policy) and section 36 (prejudice to effective conduct of government affairs).
15. Regulation 12(8) of the EIR states that for the purposes of regulation 12(4)(e), internal communications includes communications between government departments.

DfT's position

16. DfT explained that it had concluded that all the withheld information falls within the scope of this exception as all the information requested comprises internal communications. At the time of the request and during the internal review, it was still a live policy area and DfT were

responding to applications for judicial review. This exception still applies as this is still a very active and live ongoing policy area. This is evidenced by the recent judicial reviews of the designation of the Airports National Policy Statement and DfT are now actively responding to applications for permission to appeal against the judgments.

17. Furthermore, officials and Ministers need a safe space to consider policy development and releasing this category of internal communication material would have a chilling effect and lead to civil servants being less frank in expressing their opinions in writing in future. This is likely to have a detrimental effect on the policy formulation process and on the quality of policy derived from it. Further, the exception under regulation 12(4)(e) is intended to protect internal decision-making processes in order for an authority to discuss the merits of proposals and the implications of decisions internally without outside interference.
18. In addition, a very considerable amount of information has already been published by DfT, including many of the finalised versions of the associated documents, and releasing this material would not help the public to further their understanding of the policy decision making process. As explained in the internal review response: "... policy papers, consultation documents, research and statistics, FOI responses, guidance and other communications published at <https://www.gov.uk/transport/airport-capacity-and-expansion> represent a very significant body of information in this respect. It gives any person or body with an interest in this issue the tools to understand how the decision was arrived at, and to judge whether the Government has acted in the national interest".

Complainant's position

19. The complainant argued that it is clear regulation 12(4)(e) is still to be judged in the context of the public interest test. It is the complainant's opinion it goes to the heart of why the requests were submitted. The complainant believes transparency is in the public interest if looked at in the context of the magnitude of the decision (quantity of people affected) and the longevity of the decision (it is a one-off, permanent infrastructure decision affecting quality of life and a strategic transport asset). Fundamentally, the community also believes this decision goes against the evidence and analysis, so only transparency can help give accountability for how and why this decision was reached by Ministers and its comparability in relation to that assessment of officials.
20. Specifically the decisions taken were essentially irrational when compared to the information that is in the public domain. Ministers chose an option that was more expensive, more risky, delivered fewer connections (a stated aim), more polluting (going against other Defra air

quality departmental objectives) and harmed growth of regional airports (against another stated aim).

21. The latter point demonstrates that as a national project this does actually affect the whole country. However, above all, the decision has a huge impact on the local community and many others, in terms of noise pollution. At one point, Heathrow was planning to directly leaflet 5 million households and communicate with 13 million people about the noise impact. That's a lot of people who were ultimately mostly not communicated with, but have a right to know about the background to this decision. On that basis alone there is huge public interest.
22. If there is weak transparency it is bad for the democratic process and the sustainability of decision making as the impact does eventually crystallise. For example, in the case of Sydney Airport, when its new runway was built in the 1990s, residents in previously undisturbed areas suddenly and unexpectedly found themselves overflowed with aircraft noise. It caused so much public concern that the entire airport capacity had to be remodelled and reduced compared to plan. Earlier transparency would have been hugely beneficial to better decision making. For the UK, the impact might be even more dramatic. If a similar circumstance happens with Heathrow, the exorbitant cost of the airport expansion will render an £18bn cost used less than planned, with catastrophic economic viability consequences for the airport. Again, there is a clear public interest here also.

Public interest test

23. As regulation 12(1) of the EIR states, the exceptions at the sub-sections of regulation 12(4) are subject to the public interest test. That is, a public authority may only refuse to disclose information under a 12(4) exception if *"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information"*.
24. Therefore, as the Commissioner notes in her guidance, although the term *"internal communications"* is normally interpreted in a broad sense, in practice, the application of the exception may be limited by the public interest test.

Arguments in favour of disclosing the withheld information

- Dft acknowledge that a new runway is a very serious undertaking and so there is a public interest in releasing as much relevant material as possible; and
- This material would give transparency to decisions that have a material impact on the lives of many, especially near Heathrow. It is

right that the Government should be open about how the decisions were arrived at.

Arguments in favour of maintaining the exemption

- DfT consider officials and Ministers need a safe space to consider policy development and releasing this material would have a chilling effect and lead to civil servants being less frank in expressing their opinions in writing in future. This is likely to have a detrimental effect on the policy formulation process and on the quality of policy derived from it;
- A very considerable amount of information has already been published by the Department and releasing this material would not help the public to further their understanding of the process; and
- Some of the information in this material was still in draft form and therefore not the final version, and includes documents that were in any event subsequently published in their final form.

The Commissioner's decision

25. As the Commissioner notes in her guidance² on the application of regulation 12(4)(e), the term "*internal communications*" is not defined in the EIR and is normally interpreted in a broad sense. She has considered the meaning of "*internal*" and "*communications*" separately.
26. Considering the meaning of "*communications*" first, the guidance notes that "the concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file... It will therefore include not only letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others".
27. With regard to the term "internal", the Commissioner notes in her guidance that "an 'internal' communication is a communication within one public authority".
28. As set out in the guidance, regulation 12(8) of the EIR states that, for the purposes of this exception, "internal communications" includes communications between government departments. That is,

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https://ico.org.uk/media/fororganisations/documents/1634/eir_internal_communications.pdf

departments of central government are deemed to be one public authority for the purposes of regulation 12(4)(e).

29. The Commissioner has reviewed the withheld information. It comprises of a variety of draft documents that are clearly intended for departmental circulation, correspondence to, and from, the Secretary of State and project reports to be considered within the DfT.
30. The Commissioner is satisfied that the communications are, therefore, "internal" for the purposes of regulation 12(4)(e) and that the exception is engaged, she has considered the public interest arguments presented by both parties.
31. The Commissioner's guidance on regulation 12(4)(e) advises that public interest arguments for maintaining the exception should always relate to the content and sensitivity of the particular information in question and the circumstances of the request.
32. As in the current case, arguments about protecting internal deliberation and decision making processes will often relate to preserving a 'safe space' to debate issues away from external scrutiny, and preventing a 'chilling effect' on free and frank views in future. The weight of these factors will vary from case to case, depending on the timing of the request and the content and context of the particular information in question.
33. It appears to the Commissioner that DfT's public interest arguments in support of maintaining the regulation 12(4)(e) exception are more relevant to preserving a 'safe space', rather than on preventing a 'chilling effect' in the future.
34. She accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight. The timing of the request will therefore be an important factor.
35. The Commissioner notes that at the time of the request, the discussions around a third runway were very much a live issue. The Commissioner notes that Parliament formally backed the Heathrow expansion on 25 June 2018, supporting the Government's ANPS. This is an important 'milestone' and now allows Heathrow to apply for planning consent. The Commissioner further notes that since the requests were considered there has also been a judicial review challenging the government's

decision. Those judgements were delivered on 1 May 2019 and all of the claims were dismissed.

36. Despite the passage of time, it still remains a live issue. She therefore considers that the argument for a safe space carries significant weight in this case.
37. The Commissioner is further reassured that the amount of information published already goes some way to meet the public interest. The Commissioner's decision is that the balance of the public interest favours the exception being maintained, and that DfT has correctly withheld the information in this case. She has therefore not considered any other exceptions which DfT considered would apply to these documents.

Other matters

Aggregation of requests

38. In its initial response to the complainant, DfT had aggregated the requests and as a result considered the requests to be manifestly unreasonable. The Commissioner asked DfT for additional arguments in support of its position with regard to the aggregation of the four requests.
39. It explained that for all four requests the complainant provided only her name as the requestor. It therefore considered the information requests as being submitted by her in person. It was only after its initial response that the complainant indicated that the requests had been made on behalf of other people. There is no provision in the legislation for requests to be made on behalf of another person.
40. DfT further clarified that, by aggregating them, it was not arguing that the requests were vexatious, rather that the volume of material sought was significant, therefore its focus was on the grounds of costs and unreasonable diversion of resources. On this point DfT maintain that it acted correctly in the light of the information before it at the time.
41. DfT further explained that as the requests were made by the same person, on the same day, and were all concerned with the same subject area, it decided to aggregate them. The subsequent internal review upheld this approach. DfT believe this is consistent with ICO guidance³

³ <https://ico.org.uk/media/1615/manifestly-unreasonable-requests.pdf>

on regulation 12(4)(b) at paragraph 24, with reference to aggregation on cost grounds.

42. The Commissioner pointed out that a public authority cannot include the staff time taken, or likely to be taken, in considering whether any exceptions apply in the costs estimate as this activity does not fall within the list of permitted activities.
43. Also, the staff time taken, or likely to be taken, in redacting any exempt or irrelevant information in order to leave the information that is to be disclosed, cannot be included as part of the costs of extracting the requested information.
44. It is the Commissioner's view that aggregation of the requests due to the manner in which they were submitted was acceptable. However, she considers that DfT erred when determining the applicable costs to the aggregated requests.
45. She does note however, DfT expended a significant amount of time, overall substantially above the prescribed costs, when preparing the additional information for disclosure to the complainant.

Right of appeal

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@Justice.gov.uk

Website: 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

Pamela Clements
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