

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 17 October 2022

**Public Authority:** Civil Aviation Authority  
**Address:** 11 Westferry Circus  
Canary Wharf  
London  
E14 4HD

### **Decision (including any steps ordered)**

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1. The complainant has requested details of noise modelling carried out on behalf of Stansted Airport. The above public authority's final position was that it did not hold the requested information, but that, if it did, the information would be exempt from disclosure under regulation 12(5)(b) – course of justice – regulation 12(5)(e) – commercial confidentiality – and regulation 12(5)(f) of the EIR – interests of the provider.
2. The Commissioner's decision is that the public authority does hold the requested information, but that regulation 12(5)(b) of the EIR is engaged and the balance of the public interest favours withholding this exception. As the Commissioner considers that the withheld information is information on emissions, neither of the other two cited exceptions can apply. The public authority breached regulation 14 of the EIR as it failed to issue a correct refusal notice within 20 working days.
3. The Commissioner does not require further steps.

### **Request and response**

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4. On 30 April 2021 the complainant requested information of the following description:  
  
"We understand that Cole Jarman acting on behalf of [Stansted Airport Ltd] provided the Environmental Research and Consultancy Division of the CAA with information to be inputted into the ANCON model to allow a noise assessment to be carried out..."

"...Please therefore provide us with the inputs into this model that Cole Jarman and their client STAL provided to the CAA. In particular we require the number of aircraft movements per hour throughout the day in each of the three assessment conditions referred to in the Cole Jarman analysis ie. no scheme, switched on and intensified switched on. Please also provide the L night figures and the N70 contour map after the works."

5. The public authority claimed that it did not receive the request until 7 June 2021. It issued a formal response on 5 July 2021. It refused to provide the requested information, relying on regulation 12(5)(e) and regulation 12(5)(f) to withhold it.
6. The complainant requested an internal review on 9 July 2021. They were sceptical that the information the public authority had identified was the correct information. The public authority sent the outcome of its internal review on 30 September 2021. It accepted that the original information it had identified did not fall within the scope of the request, but it had now identified the correct information. However, it relied on the same EIR exceptions to withhold this information.
7. The complainant requested a further internal review on 15 October 2021. The public authority completed a further review and responded on 22 November 2021. It upheld its original position.

## **Reasons for decision**

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### **Is the requested information environmental?**

8. The Commissioner accepts that the information is environmental because it is information on a "factor" (ie. noise) that effects the elements of the environment.
9. Moreover, because noise is an "emission", the Commissioner considers that this information is information on emissions. Therefore regulation 12(9) of the EIR prevents the public authority from relying on either regulation 12(5)(e) or regulation 12(5)(f) of the EIR to withhold the information – as it has sought to do.

### **Does the information fall within the scope of the request?**

10. The public authority has argued that it holds information relevant to work carried out in 2016/17, but this is not the information originally sought by the request. It has stated that it does not hold information relating to 2018/19 – which is what was requested.

11. The Commissioner agrees with the public authority that the original request of 30 April 2021 sought details of work carried out in 2018 or 2019 – and the complainant emphasised in their correspondence of 9 July 2021 that this was the information the request was seeking, not work carried out in 2016/17. However, the public authority did not assist its case by identifying the incorrect information initially and accidentally informing the complainant that a particular document **was** within the scope of the request when it was **not**.
12. The public authority has stated that it holds no information relating to 2018/19 and, in the absence of evidence to the contrary, the Commissioner is satisfied that, on the balance of probabilities, this information is not held.
13. However, the Commissioner also notes that, in their correspondence of 15 October 2021, the complainant changes the focus of their request from 2018/19 to 2016/17. Whilst it would have been helpful to all concerned if the complainant had been more specific about submitting a fresh request, the Commissioner nevertheless considers that this is what they have in fact done.
14. In submitting a fresh request, the complainant has placed a fresh set of obligations upon the public authority – to consider whether it holds any information in relation to 2016/17. It is clear that the public authority **does** hold this information and it falls clearly within the scope of the request of 15 October 2021.

### **Regulation 12(5)(b) – legal professional privilege**

15. In its submission to the Commissioner, the public authority now introduced a further exception on which it wished to rely – regulation 12(5)(b) of the EIR.
16. The public authority explained that the document referred to in paragraph 10 formed part of a piece of work done in preparation for litigation and was therefore covered by litigation privilege. Whilst the public authority itself is not and will not be part of any proceedings, it considered that it was nevertheless obliged to respect the privilege.
17. The public authority also provided copies of correspondence it had had with one of the parties to the litigation. In this correspondence, the third party confirmed that the withheld information formed part of a piece of work done in anticipation of litigation.
18. The public authority argued that disclosing this information would have an adverse effect on the course of justice as it would breach the fundamental principle of legal professional privilege – on which the English justice system is based. It also argued that disclosure would

insert unfairness into proceedings by forcing one of the parties to hand over information that formed an important part of its case.

19. The Commissioner accepts that the withheld information does engage legal professional privilege as the evidence suggests that it was produced with the intent of being used in litigation.
20. The Commissioner notes that there are certain rules to be followed in litigation which allow the various parties access to some of each other's information – but with certain conditions attached. Disclosing the information under EIR would ride roughshod over those carefully calibrated rules and inject an unfairness into proceedings. The EIR should not be used as a "back door" to access information that parties in litigation have a right to keep private.
21. The Commissioner is therefore satisfied that disclosure of the withheld information would adversely affect the course of justice and therefore regulation 12(5)(b) is engaged.
22. The Commissioner is also satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exception. There is a considerable body of case law which emphasises the very strong public interest in preserving legal professional privilege in particular and fairness in the justice system generally.
23. The Commissioner notes that the complainant may well be entitled to receive this information via the usual court disclosure rules in the future and sees no compelling reason why the legal privilege should be overridden.
24. Whilst the Commissioner has also considered the presumption in favour of disclosure, he considers that, such is the importance of protecting legal privilege, this is insufficient to tip the balance in favour of disclosure.
25. The Commissioner finds a breach of regulation 14 of the EIR as the public authority failed to issue a refusal notice relying on regulation 12(5)(b) – the exception on which it came to rely – in order to withhold information.

## Right of appeal

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26. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**