

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

Decision notice

Date: 4 February 2013

Public Authority: Luton Borough Council
Address: Town Hall
George Street
Luton
Bedfordshire
LU1 2BQ

Decision (including any steps ordered)

1. The complainant requested information relating to the possible development of Luton Airport, the construction of the Luton/Dunstable bus way and a Joint Core Strategy. Luton Borough Council confirmed it held some of the relevant information about the airport but refused this request on the basis that it was manifestly unreasonable, regulation 12(4)(b) of the EIR. It provided the complainant with information about the bus way, some of which was in the form of a summary table of invoices rather than copies of actual invoices. It also confirmed that it did not hold any information about the Joint Core Strategy because this information was held by its partner in the Joint Core Strategy, Central Bedfordshire Council.
2. The Information Commissioner's decision is that Luton Borough Council properly applied the provisions of regulation 12(4)(b) to the request for information about Luton Airport. He has decided that in providing a summary table of invoices rather than copies of actual invoices the Council did not provide the complainant with the information she had requested in point 7 of her request about the bus way. He also finds that the Council was incorrect to find that the information about the Joint Core Strategy was only held by Central Bedfordshire Council and not by itself.
3. The Information Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:

- To issue a fresh response to the part of the request that concerns the Joint Core Strategy, which does not rely on its previous argument that it does not hold the information because any such information is held only by Central Bedfordshire Council.
 - To either provide copies of the invoices requested by the complainant at point 7 of her request about the bus way, or issue a refusal notice in accordance with the requirements of regulation 14 of the EIR refusing to do so.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 October 2011, the complainant wrote to Luton Borough Council (the 'Council') to request information about the Council's contractual arrangements and involvement with the Luton/Dunstable bus way, the development of London Luton Airport, and the Luton and the Southern Central Bedfordshire Joint Core Strategy. There were a number of questions under each of these three areas. The complete version of the request is set out at Annex A attached to this decision notice.
6. The Council responded on 24 November 2011 confirming that there would not be any contract between the Council and the bus operators. The Council advised that to provide a copy of the contract with BAM Nuttall itself would cost in excess of £1000 due to its size, and asked the complainant to identify the specific parts of the contract she was interested in. It also said that the contract is "*commercially confidential*". It addressed the other questions about the bus way, but provided a summary of invoices in a table.
7. In relation to the airport the Council said:
- "I regret that we are unable to provide this information on the grounds that it is commercially sensitive and legally privileged as well as being voluminous."*
8. It did not specify which exemptions it was applying to withhold the information about the airport, nor did it offer any explanation as to why this information was too "*voluminous*" or "*commercially sensitive and legally privileged*". In addition, the Council advised that it did not hold the information requested about the Joint Core Strategy.

9. The complainant wrote to the Council on 9 December 2011 expressing her disappointment with the response and requested an internal review. She stated that she wanted to see the specific contract for the bus way, queried why the Council had referred to costs for copying when the material was environmental information and clarified that the parts of the contract in which she was most interested were:

- *"Those which specify or explain any fees or costs payable by the Council and for what services and*
- *Provisions relating to duration of the contract and termination or cancellation."*

10. She also expressed her view in relation to the Council's response to the other parts of her request, including that 'commercially sensitive' could not be applied to all parts of her request. She also asked an additional question in relation to the bus way, specifically:

"Please confirm if there will be a contract between BAM Nuttall and the operators."

11. Following an internal review the Council wrote to the complainant on 20 February 2012. It advised there was no contract between BAM Nuttall and the bus operators. It provided relevant documents to the contractual issues identified by the complainant. The Council maintained its position that the information requested about the airport was subject to legal privilege and was commercially sensitive. In relation to the Core Strategy expenditure information, the Council explained that at the conception of the Joint Technical Unit it had been determined that the Council would deal with IT and office matters, whereas financial matters would be dealt with Central Bedfordshire. It provided the complainant with a link to budget details reported to the Joint Committee, and attached a table of known costs which it had researched from the publicly available yearly budget reports.

12. The complete version of the request can be found at Annex A attached to this decision notice.

Scope of the case

13. The complainant contacted the Information Commissioner to complain about the way her request for information had been handled. She specifically asked the Information Commissioner to consider:

- Whilst the requested information about the bus way had been provided, the Council had answered point 7 of this request with

"a summary narrative and data that it had pulled together but I had asked for copies of existing documents. Luton Borough Council did not confirm or deny the existence of the documents that I requested and they did not provide copies. However, they did not say that any of these documents were exempt."

- That little of the information requested about the airport would fall into the category of 'legal professional privilege', nor 'prejudice to commercial interests' and that the Council had not approached her request systematically.
 - That the Council had not approached the Joint Core Strategy part of her request systematically in that it had not looked at each class of information requested and confirmed whether it was held and if so, whether it should be disclosed.
14. In this case the Council advised it would not be able to provide the Information Commissioner with a copy of the withheld information about Luton Airport on the basis of cost. On 13 June 2012 the Information Commissioner therefore asked the Council to describe the information it was withholding.
 15. Much of the information relates to the "*possible future development*" of the airport and includes contracts engaged directly or indirectly with by the Council or the airport over the past three years concerning the possible future development of the airport. Having received the Council's description the Information Commissioner has concluded that any information held is likely to be environmental.
 16. The Council's main reason for not providing the requested information about the airport was on the basis of cost. As the Information Commissioner's view is that the withheld information is likely to be environmental, he has considered whether the Council was entitled to apply regulation 12(4)(b) (manifestly unreasonable) to this part of the request. There is no direct equivalent of the cost limit in the EIR; however the Information Commissioner's approach is to consider a public authority's arguments in relation to regulation 12(4)(b).
 17. He has also determined whether the Council has answered point 7 of the request for information about the bus way by providing the complainant with a summary table of invoices rather than copies of the invoices themselves.
 18. In addition, the Information Commissioner has considered whether the Council is correct to find that it does not hold any of the requested information about the Joint Core Strategy, because any such information is held only by Central Bedfordshire Council.

19. He has noted the Council wrote to the complainant on more than one occasion asking her to telephone so that it could discuss her request in an effort to help narrow down various aspects, but that the complainant has not made contact to date.

Reasons for decision

Joint Core Strategy – is information held by Central Bedfordshire Council held on behalf of Luton Borough Council?

20. The Information Commissioner made some enquiries about the Joint Core Strategy. In reply, the Council explained that the Joint Technical Unit ('JTU') was set up in 2008 in response to a need for a combined team of planning officers from both Central Bedfordshire and Luton Councils to progress a Joint Core Strategy for the Luton, Dunstable and Houghton Regis Growth Area; the Growth Area was established by regional planning policy.
21. The Council advised that a Joint Committee known as the Luton and Southern Bedfordshire Joint Committee was also set up between the two local authorities such that the Joint Committee was the planning authority for the designated area. It said that the JTU reported to the Joint Committee and that the two parent authorities shared resourcing responsibility for the JTU, with Luton providing equipment and some administrative support (IT, photocopying and printing) and Central Bedfordshire dealing with financial matters and providing the commissioning of studies (eg consultancy and advice work), that included the budget monitoring for the Joint Committee which was signed off each spring.
22. The Council stated that with the withdrawal of the Joint Core Strategy in September 2011, the Joint Committee and JTU wound up at the end of March 2012, with each authority assuming planning powers again. It said that the assets were split according to each authority's contribution. For these reasons it said that any records on consultancy expenditure are held by Central Bedfordshire.
23. He asked the Council on two occasions to explain what searches it had undertaken for the requested information, initially on 14 May 2012, which the Council did not address as part of its response, and again on 7 November 2012. The Council contacted the Information Commissioner to say it had not conducted any searches because it knew that it did not hold the requested information about the Joint Core Strategy.

24. The Information Commissioner has considered his guidance (*Information held by a public authority for the purposes of FOIA*), specifically paragraphs 27 and 28 which state:

“Information held on behalf of a public authority as a result of partnership or consortia arrangements – when public authorities work in partnership or in a consortium (ie those arrangements which do not have the legal status of a body or organisation separate to the individual partners), they need to be certain what information is held on behalf of each partner or member. This will arise in the public sector when the partners, who are otherwise independent bodies, agree to co-operate to achieve a common goal, create an organisational structure and agreed programme and share information, risks and rewards.

Examples include:

- *local strategic partnerships*
- *road safety partnerships*
- *local environment partnerships*
- *economic partnerships*

In general terms, information that is brought to the partnership by one of the partners is regarded as being held by or on behalf of all partners. As there is a variety of partnership arrangements it is not possible to provide guidance that will cover all of them. Much will depend on the individual arrangements of the partnership as to whether or not all information is held by all the partners or whether some is held by the partners solely on behalf of one of them. ”

25. In this case, having considered the set-up and division of responsibilities in relation to the Joint Core Strategy and the Council’s explanation, the Information Commissioner has reached the following conclusion. Although the requested information may be physically located at Central Bedfordshire Council rather than at Luton Borough Council, it is held on behalf of all the partners to the Luton and Southern Bedfordshire Joint Committee and is therefore held by Central Bedfordshire Council on behalf of Luton Borough Council. This means that for the purposes of FOIA and the EIR the information is held by Luton Borough Council.

Bus way – is it sufficient for the Council to provide a summary table of invoices and accompanying narrative, rather than copies of actual invoices?

26. In relation to point 7 of the complainants request for information about the construction of the Luton/Dunstable bus way, the Council believes

that it has answered this part of the request by providing the complainant with a summary table of invoices and an accompanying narrative.

27. The complainant maintains that this does not answer the request that she made and that she should have been provided with copies of the actual invoices concerned.
28. The Information Commissioner has noted that that part 7 of the complainant's request about the bus way asked for the following information:

"Invoices issued by all such consultants and providers, as well as BAM Nuttall, in relation to the bus way in the course of the past three years and any consolidated record of expenditure on such consultants and providers during that period."

29. Having investigated, the Information Commissioner has determined that the Council did not provide the complainant with copies of "invoices" as she had requested; instead it provided summary tables, advising that *"it would have taken a considerable amount of officer time to identify and copy all the invoices."*
30. The Information Commissioner has concluded that as the request was for "invoices" providing a summary table and accompanying narrative did not give the complainant the information she had asked for.

Airport - Regulation 12(4)(b) – is the request for information manifestly unreasonable?

31. Regulation 12(4)(b) of EIR states:

"(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-

(b) the request for information is manifestly unreasonable."

32. The Information Commissioner is clear that the inclusion of "manifestly" in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under this exception, the information request must meet a more stringent test than being simply "unreasonable". "Manifestly" means that there must be an obvious or clear quality to the unreasonableness referred to.
33. The Information Commissioner is of the view that this regulation provides an exception to the duty to comply with a request for environmental information in two circumstances:

- where it is vexatious, or
 - where it would incur unreasonable costs for the public authority or an unreasonable diversion of resources.
34. However, that is not to say that the exception is limited to these two circumstances. It clearly is not possible to identify all situations in which a request will be manifestly unreasonable and there may well be other situations where regulation 12(4)(b) can apply.
35. In this case, the request for information about the Airport was wide ranging and asked for specific information over the past three years relating to the possible future development of the airport, to include contracts, invoices, advice, meeting notes, emails and memoranda, all correspondence about the possible future development, and any information about budgeted future expenditure.
36. The Information Commissioner asked the Council to provide him with a sample of the information it was withholding due to the cost of complying with this part of the request. He also asked the Council to describe how the withheld information is held and for what purpose. He sought an explanation as to a detailed estimate of the time the Council would need to spend on determining whether the information is held, locating the information, retrieving the information and extracting the information from a document containing it, together with the public interest arguments it had considered in withholding the information.
37. The Council explained that it had calculated it holds in the region of 100 paper files, each containing around 300 documents, totalling 3000 documents, all of which would need to be checked to establish whether any exemptions or exceptions apply. It stated that it would take about 5 minutes to check each document (some would run into tens if not hundreds of pages) totalling around 250 hours.
38. The Council also stated that it had tried to contact the complainant on more than one occasion to discuss the request with her and see if they could help her to narrow it, but the complainant had not responded to these efforts.
39. In addition to the paper files the Council estimated it holds around 2-3TB of electronic data which it would also need to check. On this basis it said that this request was manifestly unreasonable.
40. On 24 September 2012 the Information Commissioner wrote to the Council asking it to clarify why it believed there is excepted information amongst the withheld information. He also asked it whether any potentially excepted information could be readily identified, such as a

particular schedule, contract or chapter, such that it would not be essential for the Council to read all the documents in detail.

41. The Council stated that, as the concession has just been granted at the airport, it knows there is highly sensitive exempt information which it holds, that the information is mainly electronic but in different formats which makes searching harder, and that a dedicated team is now in place to deal with airport issues.
42. The Information Commissioner has some sympathy with the argument that where extremely large volumes of information have been requested, and there are obvious and substantiated concerns about potentially excepted information, which cannot be easily isolated because it is likely to be scattered throughout the whole of the requested information, then a request could potentially be deemed to be manifestly unreasonable because of the disproportionate time and effort that would be needed to review and remove the excepted information.
43. The First Tier Tribunal (Information Rights) in the case of *The Independent Police Complaints Commission vs The Information Commissioner EA/2011/0222* stated in relation to section 14 FOIA that *"A request may be so grossly oppressive in terms of the resources and time demanded by compliance as to be vexatious, regardless of the intentions or bona fides of the requester."*
44. In this case the Commissioner is satisfied that the volume of information concerned is very substantial. He considers the Council's estimates of the time needed to consider the exemptions, at 5 minutes per document, to be reasonable. He also notes that even if the estimate were cut down to a very conservative 2 minutes per document the time involved would still amount to around 100 hours of staff time, without taking into account any time for collating the information.
45. The Commissioner further notes that the Council has attempted to assist the complainant in narrowing her request without any success.
46. In light of the above the Commissioner accepts that the request is grossly oppressive in terms of the resources and time demanded by compliance and that it is therefore manifestly unreasonable.
47. Having found that the exception is engaged the Commissioner has gone on to consider the public interest. The Commissioner accepts that there is a general public interest in transparency and accountability in relation to the Council's actions and the spending of public money.
48. He also considers that the public interest in the disclosure of information about the possible development of Luton Airport is considerable as this is a matter with the potential to affect a large number of people and the

environment in which they live. Part of the purpose behind the EIR is to provide access to information about matters which affect the environment so that the public can contribute to the debate in a meaningful manner at a stage where their comments can make a difference to the outcome.

49. However, the Commissioner accepts that there is a public interest in protecting public authorities from having to absorb disproportionate costs and diversion of resources in dealing with requests for information that are grossly oppressive. He also considers that there is a public interest in not bringing information rights legislation into disrepute by requiring public authorities to respond to manifestly unreasonable requests.
50. In this particular case, although there is a clear public interest in transparency in relation to the possible Airport Development, the Commissioner notes that the complainant has chosen to submit a very broad request, rather than focusing on particular issues of concern, and that inevitably this means that the burden imposed on the public authority is very considerable.
51. In light of all of the above the Commissioner has concluded that the public interest in maintaining the exception in this case exceeds the public interest in disclosure.
52. The Information Commissioner's decision is therefore that the Council has correctly applied the provisions of regulation 12(4)(b) to the complainant's request.

Internal review

53. Under the EIR, the internal review is a statutory requirement under regulation 11 whereby public authorities are required to respond within 40 working days of receipt of the request for review. In this case the public authority took 49 working days to provide the result of its internal review.

Right of appeal

54. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

55. 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.
56. 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

Lisa Adshead
Group Manager Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A

The complainant's complete request made on 26 October 2011 is detailed below:

"Luton/Dunstable Bus Way

We note that Luton Borough Council (the "Council") has entered into agreements with BAM Nuttall (in respect of construction of the Luton/Dunstable bus way). We are also mindful of the delay and cost associated with the Cambridgeshire Guided Bus Way.

Please provide the following information under the 2000 Act or the 2004 Regulations to the extent that such information is held by the Council or other entities in its ownership, control and influence or its agents and consultants:

- *The contracts between the Council and (a) BAM Nuttall, (b) Arriva and (c) Centrebus, redacted if necessary to remove any commercially confidential information.*
- *The terms of any termination or cancellation by the Council under each of these contracts.*
- *Any record of the costs associated with the operation of the bus way (whether in contracts, correspondence, meeting notes, emails or memoranda).*
- *Any record of how the annual costs associated with the operation of the bus way will be paid for and by whom (whether in contracts, correspondence, meeting notes, emails or memoranda).*
- *The contracts and/or appointments of any consultants (other than BAM Nuttall) or other service providers engaged either directly or indirectly through sub-contracting arrangements by the Council in connection with development and implementation of the bus way and any consolidated lists of such consultants and service providers.*
- *Invoices issued by all such consultants and providers, as well as BAM Nuttall, in relation to the bus way in the course of the past three years and any consolidated record of expenditure on such consultants and providers during that period.*
- *Any budgeted future expenditure by the Council on the construction and operation of the bus way.*

London Luton Airport

We note that on 19 September 2011 London Luton Airport Limited ("LLAL")/the Council placed a contract notice for planning advisory services in connection with the possible development of London Luton Airport (the "Airport") to 18 million passengers per annum and then subsequently 30 million passengers per annum.

Please provide the following information under the 2000 Act or the 2004 Regulations to the extent that such information is held by the Council or other entities in its ownership, control and influence or its agents and consultants:

- Contracts and/or appointments of any consultants or other service providers engaged either directly or indirectly through sub-contracting arrangements by the Council or LLAL in the course of the past three years in connection with the possible future development of the Airport (including to 18 million passengers per annum and to 30 million passengers per annum) and any consolidated lists of such consultants and service providers.*
- Invoices issued by all such consultants and providers in the course of the past three years in connection with the possible future development of the Airport (including to 18 million passengers per annum and to 30 million passengers per annum) and any consolidated lists of such consultants and service providers.*
- Any advice received by the Council or LLAL in the course of the last three years from such consultants and providers in relation to the feasibility of or the prospects of success for the possible future development of the Airport (including to 18 million passengers per annum and to 30 million passengers per annum).*
- All meeting notes, emails and memoranda internal to the Council or LLAL which originate from the last three years which include commentaries on or assessments or statements relating to the possible future development of the Airport (including to 18 million passengers per annum and to 30 million passengers per annum).*
- Details and copies of all correspondence relating to the possible future development of the Airport (including to 18 million passengers per annum and to 30 million passengers per annum) over the past three years with any organisation or individual external to the Council and LLAL including any other local authority, highways agency, any Government department, any Minister and any Member of Parliament.*

- *Any budgeted future expenditure by the Council and LLAL in connection with the possible future development of the Airport (including to 18 million passengers per annum and to 30 million passengers per annum).*

Luton and Southern Central Bedfordshire Joint Core Strategy

We note the draft Core Strategy was recently withdrawn from the examination process.

Please provide the following information under the 2000 Act or the 2004 Regulations to the extent that such information is held by the Council or other entities in its ownership, control and influence or its agents and consultants:

- *Contracts and/or appointments of any consultants or service providers engaged either directly or indirectly through sub-contracting arrangements by the Council in connection with the development and submission of the draft Core Strategy and any consolidated lists of such consultants and service providers.*
- *Invoices issued by all such consultants and providers in the course of their work on the draft Core Strategy and any consolidated record of expenditure on such consultants and service providers during that period.*
- *To the extent not covered by the preceding requests and your answers to them, contracts and/or appointments of any consultants or other service providers engaged either directly or indirectly through sub-contracting arrangements by the Council in connection with specifically housing demand, housing supply and housing site allocations as part of the draft Core Strategy and any consolidated lists of such consultants and service providers.*
- *To the extent not covered by the preceding requests and your answers to them, invoices issued by all such consultants and providers in the course of their work on the housing demand, housing supply and housing site allocations aspects of the draft Core Strategy and any consolidated record of expenditure on such consultants and service providers during that period.*
- *Any budgeted future expenditure by the Council on a further joint or Luton-specific core strategy.*

In each case, it will be acceptable to receive the relevant information on CD Rom, as opposed to paper copies, if that is more convenient."