

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 April 2016

Public Authority: Department for Transport
Address: Zone D/04
Ashdown House
Sedlescombe Road North
Hastings
East Sussex
TN37 7GA

Decision (including any steps ordered)

1. The complainant has requested information relating to the selection of members of the Airports Commission. The DfT provided some information to the complainant but withheld some information under sections 35(1)(a), 36(2)(a)(i), 36(2)(b)(i), 36(2)(b)(ii), 40(2) and 41 FOIA. It confirmed that it does not consider the information requested to be environmental, but in the alternative, if the Commissioner does consider the information to be environmental, it applied regulations 12(4)(d), 12(4)(e), 12(5)(d) 12(5)(f) and 13 EIR.
2. The Commissioner's decision is that the DfT was correct to deal with the request under FOIA. He also considers that section 36(2)(b)(ii) FOIA was applied correctly to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 10 June 2015 the complainant requested information of the following description:

"I would like all information regarding the selection of members of the Airports Commission between 2 September 2012 and 2 November 2012 (inclusive), including discussions, suggestions and comments from within the DfT, between the DfT and other departments, and

between the DfT and Sir Howard Davies.

To include, without prejudice to the generality of the above:

- > all iterations of the long and short lists of possible members;
- > an unredacted copy of the email sent from the permanent secretary's office to Sam Laidlaw at 10.51 on 6 September 2012;
- > an unredacted copy of Sam Laidlaw's email (reply) sent to the permanent secretary's office at 17.10 on 7 September 2012;
- > any record of the relevant discussions with Sir Howard Davies on 10 September 2012."

5. On 2 September 2015 the DfT responded. It provided the complainant with some of the requested information but made redactions under section 40(2) FOIA. It also withheld some information under section 35(1)(a), section 40(2) and section 41 FOIA.
6. The complainant requested an internal review on 2 September 2015. The DfT sent the outcome of its internal review on 30 September 2015. The DfT confirmed that no further information was held and it upheld the application of all of the exemptions cited. It said that if section 35(1)(a) was not found to be engaged, section 36 FOIA would apply in the alternative.

Scope of the case

7. The complainant contacted the Commissioner on 1 October 2015 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation the DfT confirmed that it does not consider the information requested to be environmental, but in the alternative, if the Commissioner does consider the information to be environmental, it applied regulations 12(4)(d), 12(4)(e), 12(5)(d) 12(5)(f) and 13 EIR.
9. The Commissioner has considered whether the DfT was correct to deal with the request under FOIA and whether it was correct to apply the exemptions cited.

Reasons for decision

10. Upon viewing the withheld information, it relates only to the selection of members for the Airports Commission. Whilst much of the work undertaken by the Airports Commission will have a direct impact upon the environment, he does not consider that selection of members

would have an effect upon any of the elements or factors set out in regulation 2 EIR. The Commissioner is therefore satisfied that the DfT was correct to respond to this request under FOIA.

Section 36(2)

11. Section 36 FOIA provides that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(b) would, or would be likely to, inhibit-

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation, or

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

12. The DfT has applied section 36(2)(b)(i) and (ii) FOIA to all of the withheld information. It has applied section 36(2)(a)(i) to some of the withheld information.

13. In determining whether the exemptions were correctly engaged by the DfT, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was reasonable.

14. The DfT explained that a section 36 submission was put to one of the DfT Ministers, Lord Ahmad, on 25 September 2015. It said that on 29 September 2015, the Minister gave his reasonable opinion that the Section 36(2)(b)(i) and (ii) exemptions were engaged. An email sent from his Private Office to the Policy Team on 30 September 2015 confirmed that the Minister also considered that Section 36(2)(a)(i) applied in respect of specific information within the scope of the request.

15. In addition, it said that a further section 36 submission was put to Robert Goodwill, Minister of State for Transport with responsibility for Aviation, on 10 December 2015. It said that Robert Goodwill confirmed on 17 December 2015 that it was also his reasonable opinion that the in-scope information was exempt under the section 36 exemptions applied.
16. It explained that the first submission provided the qualified person with a sample of the withheld information. The second submission provided the qualified person with the majority of the withheld information.
17. The DfT did not provide a copy of the qualified person's opinion in each case, but set out what those opinions were and the dates provided.
18. The Commissioner has considered the application of section 36(2)(b)(ii) in the first instance.
19. The opinions of the qualified person in each case was that section 36(2)(b)(ii) was engaged in relation to all of the disputed information because disclosure would be likely to prejudice the free and frank exchange of views for the purposes of deliberation. This is because the disputed information comprises a free and frank exchange of views on the suitability of persons who were at the time being considered as potential members of the Airports Commission. It includes free and frank views, for example from Sir Howard Davies (who had at that stage already been appointed as the Airports Commission's chair) on the merits of individuals.
20. Although the DfT has not provided a copy of the opinions of the qualified persons, it has explained in detail what those opinions were. Based upon this the Commissioner does consider that the opinions of the qualified persons are reasonable.
21. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweigh the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.

¹ EA/2006/0011; EA/2006/0013

22. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

23. The DfT has explained that it believes the following public interest arguments favour disclosure:
- There is a public interest in knowing how people are selected to serve on independent panels which are established to consider and advise the Government on specific issues. Disclosure of information on the selection process would not only contribute to the government's wider transparency agenda but would also help to contribute to the public's greater understanding.
 - There is a more specific public interest in the process by which members of the Airports Commission were selected. Disclosure of this information might provide reassurance to the public that the process was carried out fairly and could increase trust and integrity in the Airports Commission.

Public interest arguments in favour of maintaining the exemption

24. The DfT has explained that it believes the following public interest arguments favour maintaining the exemption:
- The importance of officials being able to exchange views freely and frankly with other officials and Ministers on matters of such importance without fear that their advice will be routinely disclosed;
 - Officials would be likely to be reluctant to put their thoughts about the skills and experience of individuals in writing if they thought there was a probability that their comments would become public knowledge. This would be likely to lead to decisions being taken without the best advice available which may result in the most suitable people not being

selected for the positions. This would not be in the public interest and this is particularly important when the matters are as serious as setting up an important high profile Commission to look at airport capacity in the south east;

- At worst, members of independent Commissions or similar bodies appointed in future might (between them) lack the full range of skills and experience needed to provide the best possible advice to Government. Alternatively, people might be appointed to roles without what could be viewed as potential conflicts of interest being identified, leaving the work of the body on which they served more open to challenge;
- Ministers and their officials need to be able to think through all the implications of particular options for the membership of the independent Airports Commission. In particular, they need to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects;
- At the time of the original request, the Airports Commission was still deliberating. While it has now submitted its conclusions, final decisions on the matters on which the Commission advised the Government have still to be made. Related policy questions are therefore still 'live';
- The Airports Commission has placed a considerable amount of information concerning its work into the public domain. Information which has not been placed in the public domain will not be seen by Ministers who will make the final decision on future airport capacity;
- Two Ministers have given their reasonable opinion that release of the information would be likely to cause harm and that the information should therefore be withheld. The fact that Ministers reached this view should be given some weight.

Balance of the public interest arguments

25. The Commissioner considers there is a strong public interest in openness and transparency, particularly in relation to decisions around selection of members for such a high profile Commission. This is because it would provide the public with a greater understanding and reassurance of how decisions relating to selection were taken and whether this was done fairly.
26. The Commissioner does however consider that there is a requirement for Ministers and officials to be able to exchange views freely and

frankly relating to potential members, to ensure that the most appropriate individuals for the role are ultimately selected.

27. The Commissioner notes that at the time of the request panel members had already been selected. However the DfT has confirmed that the panel members that were selected were still deliberating recommendations. Their commitments to the work of the Airports Commissioner were therefore ongoing. This however only lends limited weight to the public interest arguments in favour of maintaining section 36(2)(b)(ii) as this relates more to the free and frank discussion of selected members in their roles on the Commission rather than the actual selection process.
28. However the Commissioner also notes that disclosure could have a chilling affect on discussions for the selection of individuals for future government commissions. Disclosure of free and frank discussions relating to the merits of particular individuals could have a chilling affect on the frankness and candour of similar discussions in the future. Ministers and officials may be more guarded in relation to the sharing of perceived strengths and weaknesses of particular individuals if there was a chance that such views and discussions could be shared into the public domain.
29. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) FOIA was therefore correctly applied in this case.

Right of appeal

30. 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

31. 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.
32. 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

Gemma Garvey
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