

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

Date: 3 February 2020

Public authority: Heathrow Airport Ltd
Address: The Compass Centre
Nelson Road
Hounslow
Middlesex
TW6 2GW

Decision (including any steps ordered)

1. The complainant has requested information relating to the proposed development of the Western Hub and associated infrastructure at Heathrow Airport.
2. Heathrow Airport Ltd (HAL) (the owner/operator of Heathrow Airport) explained that it is not a public authority for the purposes of the EIR. It therefore refused to respond to this request under the EIR.
3. The Commissioner considers that HAL is a public authority for the purposes of the EIR.

The Commissioner therefore requires HAL to respond to this information request in accordance with its obligations under the EIR.

4. The public authority must take this step 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 21 December 2018, the complainant wrote to HAL and requested information in the following terms:

“To continue our assessment of HAL’s proposals and to assist in the preparation of Arora’s Environmental Statement, the following information is requested from yourselves:

- Transport Basement database as used in the “Our Approach to Developing a Surface Access Strategy”, Heathrow Expansion Consultation, dated January 2018;
- The Jacobs developed surface areas transport model for the “Surface Access: Heathrow Airport North West Runway”, Appraisal Framework Module 4, Airports Commission, dated November 2014;
- Heathrow Surface Access Model (HSAM) computer files and associated report; and
- Model output files from the “Dynamic Modelling Appraisal Report” prepared for surface access assessment of Heathrow Airport North West Runway, Jacobs/Airports Commission, dated May 2015.

Where possible, this information should be provided in electronic form.”

6. HAL responded on 23 January 2019. It declined to provide the information on the basis that it was not a public authority for the purposes of the EIR.
7. Following a review HAL wrote to the complainant on 8 May 2019 stating that it maintained its position that it was not a public authority for the purposes of the EIR.

Scope of the case

8. The complainant contacted the Commissioner on 22 May 2019 to complain about the way his request for information had been handled. The complainant argued that the information they had requested was clearly environmental information, that HAL had not sought to rely on any of the exceptions provided by the EIR to withhold the information, but had instead argued that it was not a public authority under the EIR. The complainant stated their opinion that HAL was a public authority for the purposes of the EIR and provided grounds in support of their position.

9. The Commissioner considers the scope of this case to be concerned with the question of whether HAL is a public authority for the purposes of the FOIA/EIR.
10. In the recent case of *Fish Legal v Information Commissioner & Others* (GIA/0979/2011 & GIA/0980/2011) ("Fish Legal"), the Upper Tribunal Administrative Appeals Chamber (the "UT") ruled that the Commissioner has jurisdiction to both investigate and decide whether a body is a public authority.
11. The Commissioner therefore has jurisdiction to decide this question. The First Tier Tribunal (the "FTT") may also hear appeals against the Commissioner's decisions and the UT may hear appeals against the decisions of the FTT.
12. The Commissioner notes that the complainant has argued that the Commissioner's investigation should extend to determining whether the requested information should be released. However the question of whether the requested information is environmental information and, if it is, whether any exceptions would apply, only arises if HAL is a public authority, the Commissioner must first make a decision on whether HAL is a public authority.

Reasons for decision

13. The EIR gives members of the public the right to access environmental information held by the vast majority of public authorities and places a duty on public authorities to respond to requests for environmental information.
14. If a public authority receives a request for environmental information they are legally obliged to provide it, usually within 20 working days, unless any of the exceptions contained within the EIR apply. If a public authority believes an exception does apply to the information that has been requested, then the public authority must explain why the exception applies.
15. The definition of public authority is given in Regulation 2(2) of the EIR. In particular it states that a "public authority" means the vast majority of public authorities as defined in Section 3 of the EIR and:
 - (c) any other body or other person, that carries out functions of public administration; and
 - (d) any other body or other person that is under the control of a public authority and:

- (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.
16. In considering the question of whether HAL is a public authority for the purposes of the EIR, it must therefore be established whether HAL has functions of public administration or is under the control of a public authority.
17. The Fish Legal case is relevant here. This considered the issue of whether water companies are public authorities for the purposes of regulation 2(2)(c) or (d) of the EIR.
18. The Upper Tribunal in the Fish Legal case therefore considered whether the relevant bodies are entrusted by law with the performance of services in the public interest and whether they are vested with special powers. It also considered control of the companies and their autonomy.
19. In this case the Commissioner will start by looking at whether HAL is a public authority by virtue of Regulation 2(2)(c), i.e. whether it has functions of public administration. In the Fish Legal case the Upper Tribunal explained that persons 'performing public administrative functions' are:
- "entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law"*.
20. The Commissioner interprets the reference to bodies having to have been entrusted with services 'under the legal regime applicable to them' as meaning that the body in question must be empowered with a relevant function under statute. Therefore the Commissioner has looked at the history of Heathrow Airport in order to determine whether the current owner/operator, HAL, derived any of its functions from statute.
21. HAL explained that the Airport Act 1986 (AA 1986) facilitated the privatisation of what was then the government owned British Airport Authority and allowed the transfer of powers from the British Airport Authority to the private sector. BAA plc was established in 1986 to own the airports (Heathrow, Gatwick, Stansted etc) and that same year, Heathrow Airport Limited (HAL) was incorporated and became the company responsible for the operation of Heathrow Airport. In 2006 BAA plc was purchased by an international investment consortium and

subsequently re-registered as a private company, changing its name to BAA Limited. In 2008 there was another name change, to BAA Airports Limited, and then to LHR Airports in 2012. During the period 2009 to 2014 BAA/LHR sold a number of its airports, but retained HAL which was the largest airport within the group.

22. Therefore, based on HAL's explanation, there appears to be a direct and continuing link between the original transfer of functions, powers and responsibilities from the British Airport Authority in 1986 to HAL.
23. The Commissioner is therefore satisfied that HAL's main function to operate Heathrow Airport was entrusted to it via the AA 1986. Heathrow is the busiest airport in Europe, based on passenger traffic, and the second busiest in the world based on international passenger traffic. The Commissioner is satisfied that Heathrow Airport is part of the UK's national transport infrastructure. The Commissioner considers that given the importance of the efficient provision of services at Heathrow Airport to the economy and citizens of the UK, the operation of the airport is a service of public interest.
24. However it has been established by the Upper Tribunal in *Cross v Information Commissioner and the Cabinet Office* [2016] UKUT 0153 (ACC), that in order for a body to be a public authority under the EIR, at least some, but not all, of the services or functions it has been entrusted with have to relate to the environment (see paragraph 86 of that decision). HAL argues that its functions and responsibilities do not lie in the environmental field. The Commissioner though, considers that for a function to relate to the environment it is only necessary that the delivery of the service or function has to have an impact on the environment. The function or service does not have to be one which is granted specifically to manage the environment.
25. The operation of an airport, particularly a major international airport such as Heathrow, undoubtedly has an impact on the environment. Such impacts will include climate change emissions from aircraft and noise emissions from aircraft. The Commissioner notes that HAL has responsibilities to draw up a Noise Action Plan every 5 years, which sets out how it plans to manage and where possible reduce the impact of noise at the airport which is then adopted and approved by the Secretary of State. It also has the power to charge aircraft operators based on noise and other emissions. There will also be environmental issues generated by congestion on local roads.
26. Having established that HAL has been entrusted with the performance of a service of public interest, which relates to the environment to the extent that it has an impact on the environment, the Commissioner will now consider whether HAL has been granted 'special powers' in order to deliver that service.

27. As explained earlier, 'special powers' are powers beyond those which result from normal rules applicable to relations between individuals under private law.
28. It is possible that a body has been entrusted with the performance of a number of services of public interest, not all of which are in the environmental field. In such cases, when considering what special powers the body has, it is not necessary to just consider whether the body enjoys special powers in respect of those services that do impact on the environment. So long as the special powers relate to any of its services of public interest, the body will be deemed a public authority under the EIR (subject to a cross-check that will be discussed in more detail later). The Tribunal's decision in Poplar Housing Association v the Information Commissioner and Peoples Information Centre EA/2018/0119 supports this approach (see paragraph 128).
29. However in this case the Commissioner considers that the main function of HAL is the operation of an airport and that this itself is a function relating to the environment due to the environmental impact of that activity.
30. By virtue of being an 'airport operator' and 'statutory undertaker' under the Civil Aviation Act 2012 (CAA 2012) HAL enjoys a number of powers.
31. These include the following powers in relation to land:
 - It has the power to acquire land compulsorily for any purpose connected with the performance of its functions as an airport operator, under section 59(1) of the AA 1986.
 - It has the power to enter private property in connection with a proposed compulsory purchase under section 50 of the Civil Aviation Act 1982 (CAA 1982) and section 172 of the Housing and Planning Act 2016.
 - HAL has specific roles in relation to the control of land as an airport operator under sections 44, 45, 46, 48, 50, 52 and Schedule 7 to 10 of the CAA 1982.
 - Under Paragraph 2 of Schedule 2 of the AA 1986 and section 330 of the Public Health Act 1936 it may alter sewers which interfere with the improvement and alteration of the airport.
32. HAL also has a range of other powers:
 - Under section 63 and Schedule 3 of the AA 1986 HAL has the power to make byelaws. These have to be confirmed by the Secretary of State.

- It has the power to exercise certain permitted development rights to undertake some classes of development without the requirement to obtain planning permission, under the Town and Country Planning (General Permitted Development) Order 2015.
 - HAL has the power to charge for use of the airport, including to charge aircraft operators based on noise and other emissions under section 38 of the CAA 1982.
 - It may levy financial penalties on aircraft operators who breach noise abatement requirements imposed by the Secretary of State under section 78A of the CAA 1982.
 - HAL has the right to be notified by local planning authorities about any relevant planning application in the area under the Town and Country Planning (Safeguarded aerodromes, technical sites and military explosives storage areas) Direction 2002, and to comment on the safety of the proposed development.
33. In light of the above the Commissioner is satisfied that HAL has been afforded special powers to enable it to carry out its function, entrusted by statute, as an airport operator. Furthermore the Commissioner is satisfied that the operation of the airport is the performance of a service of public interest. Therefore HAL would appear to meet the tests established for it be considered a public authority for the purposes of the EIR. However before making her decision the Commissioner will carry out a cross-check as undertaken by the Upper Tribunal in *Cross v Information Commissioner and the Cabinet Office* [2016] UKUT 0153 (ACC)
34. In *Cross* the Upper Tribunal applied the tests established in the *Fish Legal* case. Having done so, the Upper Tribunal went on to consider whether the resulting conclusion gave effect to the underlying objectives and purpose of the EU Directive which the EIR implemented. It explained, at paragraph 100, that this 'cross-check' involved standing back and looking at whether having conducted all the tests above, there is sufficient connection between the functions of the body under examination and those which entities that organically are part of the administration or executive of the state do. This approach was later adopted by the First Tier Tribunal in *Poplar Housing Association v the Information Commissioner and Peoples Information Centre* EA/2018/0119.
35. When considering whether HAL's function as an airport operator was the performance of a service of public interest the Commissioner took account of the importance the efficient provision of operation of Heathrow Airport had to the economy and citizens of the UK. It is also notable that up until 1986 the operation of the airport was directly under

the state control of the British Airport Authority. The Commissioner therefore considers that given the continuing significance of Heathrow airport to the UK's transport network, there is a sufficient connection between its operation and the functions performed by the state.

36. Having found that HAL satisfies the tests established by the Fish Legal case and having carried out the 'cross-check', the Commissioner finds that HAL is performing functions of public administration and therefore is a public authority for the purposes of the EIR under regulation 2(2)(c).
37. Since the Commissioner has found that HAL is a public authority under regulation 2(2)(c), she has not gone on to consider the application of regulation 2(2)(d).

Right of appeal

38. 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

39. 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.
40. 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

Rob Mechan
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