

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

Decision notice

Date: 28 January 2015

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 expansion of Lydd Airport. The Department for Transport (DfT) provided the complainant with the information requested but made redactions to the information provided under regulation 12(4)(e), 12(5)(b) and 13 of the Environmental Information Regulations 2004 (EIR).
2. The Commissioner's decision is that the DfT has correctly applied regulation 12(4)(e), 12(5)(b) and 13 EIR.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 9 March 2014, the complainant wrote to the DfT and requested information in the following terms:

"Under the Freedom of Information Act I would like a copy of all correspondence since September 1st 2012 related to London Ashford Airport's (Lydd Airport's) Airport's proposal to lengthen its runway and build a new terminal to cater for 500,000 passengers per annum (ppa). The relevant planning references for this development are given below.

*Planning applications: Y06/1647/SH & Y06/1648/SH,
Planning Inspectorate reference: APP/L2250/V/10/2131934 &
APP/L2250/V/10/2131936*

Section 288 Appeal reference: CO/6180/2013

All correspondence means all communication - letters, reports, emails and meeting notes/minutes."

5. On 8 August 2014 the DfT responded. It provided some of the requested information but withheld some information under regulation 12(4)(e) and 12(5)(b) EIR.
6. The complainant requested an internal review on 1 September 2014. The DfT sent the outcome of its internal review on 29 September 2014. It revised its original position. It provided the complainant with some of the information originally withheld. It did however uphold the application of regulation 12(5)(b) EIR to legal advice and regulation 12(4)(e) EIR to internal communications revealing the views of individual ministers. In addition, it applied regulation 13 to the names of junior officials.

Scope of the case

7. The complainant contacted the Commissioner on 23 October 2014 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the DfT was correct to make redactions under regulation 12(4)(e), 12(5)(b) and 13 EIR to the information provided.

Reasons for decision

9. Regulation 12(4)(e) EIR states that "a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications". In addition, Regulation 12(8), states that "...internal communications includes communications between government departments".
10. The DfT explained that the withheld information is contained within submissions to Ministers. It said that all of the in-scope communications were 'internal' and they confirmed that they were not shared beyond the DfT and/or the Department for Communities and Local Government (DCLG).
11. Upon viewing the requested information, the Commissioner is satisfied that it does fall within the class of internal communications.

12. The DfT went on that although the whole of the Ministerial submissions (and associated emails) are internal communications, and so potentially fall within the regulation 12(4)(e) EIR exception, that exception is subject to a public interest test. It said that in carrying out the public interest test, the DfT took account of the fact that the decision to approve expansion of Lydd airport had already been taken when the complainant made her request. It explained that at the internal review stage, the DfT determined that the public interest in releasing much of the information did outweigh the public interest in withholding it under the internal communications exception. However, it explained that the DfT took the view that the public interest in withholding (a) legal advice summarised in the submission and (b) information which reveals the views of individual Ministers contained within the internal communications, outweighed the public interest in withholding that specific information. The public interest analysis in relation to regulation 12(4)(e) EIR is considered later in the Notice alongside regulation 12(5)(b) EIR.

Regulation 12(5)(b)

13. The DfT is of the view that Reg. 12(5)(b) applies to legal advice attached to the internal communications. Reg. 12(5)(b) provides that "a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice...".
14. The DfT argued that disclosure of legal advice attached to submissions would adversely affect the course of justice. It said the withheld information includes legal advice and attracts legal professional privilege (LPP).
15. It said at the time the information was created, there was a genuine likelihood of litigation taking place. The Aviation Policy submission of 24 May 2013 was put to the Minister to inform him "that the RSPB and the Lydd Airport Action Group have submitted applications, under section 288 of the Town and Country Planning Act 1990, to challenge the decision of the Secretary of State for Communities and Local Government and the Secretary of State for Transport, to grant permission for the development of a runway extension and new terminal building at Lydd Airport" (paragraph 1 of the submission). It notes that, "Following the issue of the decision letter, parties had six weeks to challenge the decision by making an application to the High Court" (paragraph 6).
16. The DfT explained that the applications to challenge the decision were not unexpected. They were considered to be likely when the earlier submissions were put to DfT and DCLG Ministers seeking their decision on whether to grant planning permission. It said that Counsel's advice

being withheld under Reg. 12(5)(b) was prepared in anticipation of a legal challenge. It therefore considers that litigation privilege applies.

17. It argued that to the extent that ICO may determine that litigation privilege does not attach to the withheld information, it would argue that advice privilege applies. It said that the submissions have attached communications from lawyer to client (DfT and DCLG officials and, ultimately, DfT and DCLG Ministers) which were made for the sole or dominant purpose of providing legal advice. They were sent in the legal adviser's professional capacity.
18. The DfT acknowledged that regulation 12(5)(b) will only apply where disclosure of information "would adversely affect the course of justice..." The DfT considers that this threshold of adverse effect is met. It argued disclosure would adversely affect the course of justice if material covered by LPP were disclosed, thereby putting parties that are subject to EIR legislation at a distinct disadvantage in legal proceedings compared with parties not subject to the regulations. In this case, disclosure at the time of the request would have involved public access to privileged information when a legal case was still 'live'. Disclosure of the advice would have provided an indication of the arguments, strengths or weaknesses which the government might have, unbalancing the level playing field under which adversarial proceedings are meant to be carried out.
19. Moreover, it argued that the Upper Tribunal has stated that an adverse effect upon the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. In the case of *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), the Upper Tribunal (UT) considered the significance of Legal Professional Privilege (LPP) under the EIRs. The UT said it was relevant to take into account any adverse effect upon LPP (such as the confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on the particular case. Although the Tribunal accepted that it was not a foregone conclusion that the disclosure of privileged information would adversely affect the course of justice, it suggested that there would need to be special or unusual factors in play for this not to be the case. The DfT does not consider that such special or unusual factors are in play in this case. It confirmed that privilege attached to the withheld information has not been waived.
20. The Commissioner considers that as the legal challenge was contemplated/pending and was the basis of the withheld legal advice, litigation privilege attaches to the information withheld under regulation 12(5)(b) EIR. He also considers that disclosure, whilst legal proceedings were live would adversely affect the course of justice. The Commissioner

is satisfied that regulation 12(5)(b) is engaged in relation to the legal advice attached to the requested internal communications.

21. The Commissioner has therefore gone on to consider the public interest test in relation to regulation 12(4)(e) and regulation 12(5)(b) EIR.

Public Interest Test

Public interest arguments in favour of disclosure

22. The Complainant has provided the Commissioner with significant public interest arguments in favour of disclosure, in particular highlighting the strong and well publicised opposition to the expansion, the sensitive location of the site and the significant change in usage.
23. The complainant has also argued that the government's decision was flawed as it did not investigate the Office for Nuclear Regulation's decision not to oppose the plans.
24. The Commissioner considers that there is a strong public interest in disclosure of information relating to the decision to allow the Lydd Airport expansion in the interests of openness, transparency and accountability in decision making. He also acknowledges that the public interest is strengthened due to the widespread and significant opposition to the expansion.

Public interest arguments in maintaining the exception

25. The DfT argued, in relation to information which reveals the views of individual Ministers, that the decision to follow the Planning Inspector's recommendation to grant planning permission for proposals to expand London Ashford Airport at Lydd was taken jointly by Ministers from the DCLG and the DfT. As a result (and irrespective of what the views of the Ministers in question might have been) public interest arguments relating to maintaining collective ministerial responsibility are relevant in this case.
26. It said that collective responsibility arguments carry significant weight in the public interest test. This is because of the fundamental importance of the general constitutional principle, enshrined in the Ministerial Code, that ministers should be able to express their views freely in private while maintaining a united front when decisions have been reached. Collective responsibility arguments for withholding information apply irrespective of whether Ministers agreed or disagreed on any particular issue. It acknowledged that although the timing of a request may be a consideration when looking at safe space or chilling effect arguments,

ICO guidance acknowledges that “whether or not the issue is still ‘live’ will not reduce the public interest in maintaining collective responsibility”. It concluded that in its view, the public interest in maintaining collective ministerial responsibility outweighs the public interest in disclosing individual Minister’s views in this particular case. The Government’s decision, alongside the reasons for that decision, are already in the public domain.

27. It provided the Commissioner with further submissions in support of this public interest argument, contained within the confidential annex to this Notice.
28. In relation to parts of the redacted internal communications which reiterated legal advice received from Counsel, and where Counsel’s direct advice has been redacted, it argued that there is a strong public interest in government being able to seek and receive legal advice without the concerns that this information may be disclosed into the public domain. Furthermore it argued that Ministers, officials and their lawyers must be able to share and consider legal advice frankly and in confidence to enable the minister and officials to consider and assess legal risks.
29. The DfT did also explain that whilst the decision had been made at the time the request was made, the appeals process was still live and further legal challenge remained a possibility. It argued that this strengthens the public interest arguments in favour of maintaining the exception.

Balance of the public interest

30. The Commissioner considers that due to the strong public interest in the sensitive subject matter of this case there is significant weight to the public interest arguments in favour of disclosure. The expansion is significant to a vast number of individuals local to the site and more widely environmental campaign groups.
31. However the Commissioner has also taken into account the fact the DfT has disclosed a significant proportion of the requested information to the complainant. The redactions have been applied to very specific parts of the information for very specific reasons. The Commissioner does consider that there is a strong public interest in protecting collective cabinet responsibility, and upon considering the DfT’s arguments, has attributed equally significant weight here.
32. The Commissioner also considers that there is a strong public interest in officials and Ministers being able to share and discuss legal advice

received, without fear that repeating legal advice within an internal communication, will lead to disclosure of that advice.

33. Whilst the Commissioner is aware that the decision had been taken to allow the expansion to go ahead at the time the request was made, there was still the possibility of the decision being appealed, therefore the Commissioner does consider that this increases the public interest in favour of maintaining the exception.
34. Whilst the Commissioner appreciates the significant concerns with the decision to expand Lydd Airport and has therefore attributed significant weight to the public interest in disclosure, he considers that there are equally strong counter veiling arguments in favour of maintaining the exception. The Commissioner therefore attributes significant weight to the concept of collective cabinet responsibility and also in the government being able to share legal advice received between officials and Ministers to assist in decision making. The Commissioner also considers the fact that at the time of the request as there was still scope to appeal this also increases the weight given to the public interest in favour of maintaining the exception.
35. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception in this case.

Regulation 13

36. The DfT explained that throughout the information that has been released, the names of junior officials below the Senior Civil Service have been withheld under regulation 13.
37. Regulation 13(1) EIR states that, "To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data." Regulation 13(2) states that, The first condition is – (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene – (i) any of the data protection principles".
38. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

"data which relate to a living individual who can be identified –

(i) from those data, or

- (ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”
39. The two main elements of personal data are that the information must ‘relate’ to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
40. The Commissioner has viewed the information redacted under regulation 13 and the DfT has explained that it is the names and contact details of junior officials. The Commissioner considers that this is information which relates to living individuals and therefore does fall within the class of personal data.
41. Personal data is exempt if either of the conditions set out in sections regulation 13(2) EIR are met. The relevant condition in this case is at regulation 13(2)(i), where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that “Personal data shall be processed fairly and lawfully”. Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.

Likely expectation of the data subject

42. The DfT argued that the redacted staff names are not in public-facing roles and would not have an expectation for their names disclosed to the world at large. Additionally they are not responsible or accountable for the submissions to Ministers.

The legitimate public interest

43. The DfT acknowledged that under the first data protection principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public. In this case, it is important to note that the decision to approve the planning application was taken at Ministerial level. With the exception of legal advice and information revealing the views of individual Ministers the information contained within Ministerial submissions has been disclosed. There is a legitimate public interest in releasing advice put to Ministers, as this

would enable the public to gauge the quality of that advice. However there is less public interest in the identity of specific junior officials who may have been involved in drafting submissions or who may simply have been copied in on internal communications relating to the handling of those submissions. Those officials are not accountable for the decision which was made and to release their names in connection with the decision would not be fair.

44. The Commissioner is satisfied that junior officials, who are not public facing, would not expect their names or contact details to be disclosed. He considers that whilst there is a legitimate public interest in disclosure of the contents of the submissions, the DfT has disclosed much of the substance of the requested information. The Commissioner does not consider that disclosure of the names of junior officials would further meet the legitimate public interest in any substantial way.
45. The Commissioner is therefore satisfied that regulation 13 was correctly applied in this case.

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@hmcts.gsi.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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