



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2015/0229

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50581962
Dated: 16 September 2015**

Appellant:	NATIONAL ALLIANCE AGAINST TOLLS (NAAT)
1st Respondent:	INFORMATION COMMISSIONER
2nd Respondent:	HALTON BOROUGH COUNCIL
On the papers:	18 MAY 2016
Date of decision:	4 JULY 2016
Date of Promulgation	6 July 2016

Before

ROBIN CALLENDER SMITH
Judge

and

ROGER CREEDON and NARENDRA MAKANJI
Tribunal Members

Written Representations:

For the Appellant: Mr J McGoldrick on behalf of the National Alliance Against Tolls (NAAT).

For the Respondent: Mr P Lockley, Counsel Instructed on behalf of the Information Commissioner

For the 2nd Respondent: Mr M Fearnhead on behalf of Mersey Gateway Crossings Board

Subject matter: Environmental Information Regulations 2004

Request for Information, Reg 5

Advice and Assistance, Reg 9

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 16 September 2015 and dismisses the appeal.

REASONS FOR DECISION

Background

1. The Mersey Gateway Crossings Board Ltd (the Board) was established by Halton Borough Council (the second Respondent) as a special purpose vehicle (SPV) with delegated authority to deliver the Mersey Gateway Bridge project.
2. The aim of the project is the construction of a new bridge over the River Mersey between the towns of Runcorn and Widnes. Traffic crossing the bridge will be subject to a toll and a toll will also be levied to traffic on the existing Silver Jubilee Bridge nearby.
3. The Board has let a 30-year Private Finance Initiative (PFI) contract to a consortium called “Merseylink” to build the new bridge and operate the tolls.
4. Elements of the Project’s financing in respect of this appeal relate to the annual figures of the following:
 - (1) The Unitary Charge: this is a fee paid by the Board to the consortium in respect of construction and operating costs.
 - (2) The Support Grant: this is an incentive paid to the Board by the Department for Transport (DfT).

- (3) The Toll income: Toll revenue.
 - (4) The (Local) User Discount: “LUDS”, a reduction in the amount of the toll for local residents.
 - (5) The Service Subsidy: an item of expenditure incurred by the Board.
5. The Chancellor of the Exchequer announced on 25 July 2014 that residents in the Council’s area – including Widnes and Runcorn – would be wholly exempt from the proposed tolls.
 6. The National Alliance Against Tolls (NAAT), which is the Appellant in this appeal, is an alliance of groups campaigning against road tolls in all their forms and manifestations.
 7. Its main current focus is campaigning against the tolls proposed as part of the Project and it has made over 40 requests for information in respect of the Project.
 8. The Tribunal has been assisted by the concise history and chronology of the request set out by Counsel for the Information Commissioner in his response to NAAT’s appeal.

The request for information

9. On 22 December 2014 the Appellant wrote to the Board requesting “an overall summary of the scheme finances year by year.” He wanted the information to be consistent with information that he had previously been given.

More specifically the information we want year by year for the life of the contract is the amount of the Unitary charge, the amount of Government grant, the amount of tolls income (net of any discount to residents), and the balance i.e. the surplus that will go to the Council. You have of course already given us the figures to the Unitary charge and for the grant, but I mentioned these as we obviously need all of the four figures for each year to be consistent.

In case the above is not clear, I have shown below what you have already given us and what we are after, the information that we now need – the Toll Income and Surplus to the Council i.e. the Unitary charge less the Support Grant and less the toll income.

10. The Appellant's reference to what was "shown below" was to a table for all the contract years in which the Appellant had populated two columns with values for the Unitary Charge and the Support Grant.
11. The two columns headed "Toll Income" and "Surplus to Council" were left unpopulated. The information he requested was the information to populate those two columns. He also asked to what, if anything, the projected surplus had been allocated.
12. The Board responded on 13 January 2015 supplying figures to populate the two columns of "Toll Income" and "Surplus to Council".
13. The Surplus was stated to be nil for years 1 – 16 of the operation of the Project, with the figure increasing thereafter. The Board stated that the Surplus had not been allocated.
14. In closing, the Board referred to an earlier email which had been sent in relation to a different information request and reiterated its request for the Appellant "to help us understand your objectives in order to help conclude the ongoing nature of your requests".
15. The Appellant asked for clarification on 19 January 2015. He pointed out that the figures did not balance.
16. On 12 February 2015 the Board wrote to the Appellant and noted that its answers to his earlier requests had only generated further requests. It invited him to a face-to-face meeting with the Board Director to assist in resolving outstanding matters of which this Information request was one.
17. The Appellant declined this offer on 16 February 2015.

18. On 6 March 2015 the Board replied to the Appellant's email of 19 January 2015. It stated that the "balance is made up of the cost of the discount scheme (which you confirmed in your request was information you did not require), other project costs and service subsidy".
19. On 24 March 2015 the Appellant requested an internal review on the basis that the Board's explanation of the difference was inadequate and he requested more detail. He speculated about the nature of the Service Subsidy.
20. On 21 April 2015 the Board confirmed that the Service Subsidy was an item of expenditure. The Board reiterated its willingness to meet the Appellant to discuss his requests face-to-face.

The complaint to the Information Commissioner

21. The Appellant complained to the Information Commissioner 12 May 2015.
22. The Board provided to the Commissioner – and to the Appellant on 13 July 2015 – a "revised response" to the Request. That included a more complex version of the table, giving figures for:
 - (1) Toll Income (after discounts)
 - (2) "Net DfT support"
 - (3) Total Net Sources (1 + 2 above)
 - (4) Total of Unitary Charge, Service Subsidy and other costs
 - (5) "Remaining project headroom/(shortfall)" which was 3 minus 4 (above)
 - (6) "Council Share (15%)" which was 15% of 5 above.
23. While the Commissioner considered that was an attempt by the Board to achieve an informal resolution of the Appellant's complaint, the Appellant himself wrote to the Commissioner on 30 July 2015 making it clear that he remained dissatisfied with the response provided to him.

The appeal to the Tribunal

24. In the Appellant's Notice of Appeal dated 12 October 2015 he made it clear that he did not consider that he had been provided with the information he requested.
25. He elaborated on this further in his written nine-page submission dated 11 January 2016.
26. He pointed out that both the format and the substance of the information provided on 13 July 2015 differed from that provided on 13 January 2015.
27. He characterised the Board's offers to meet him as delaying tactics, pointing out that he had offered to clarify any aspect of his request in writing.

Evidence

28. The Tribunal was supplied with a Closed, confidential bundle of information in relation to the requests.
29. The Tribunal adopted the guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure set out immediately below.
30. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:
 - i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
 - ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
 - iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in

the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.

iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

31. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

32. It was necessary for the Tribunal to see the Closed, confidential bundle and consider the redacted elements and withheld elements of it when set against the Open material before reaching its conclusions.

33. The Tribunal has considered carefully and rigorously the material in the light of the Appellant's points and concerns already expressed in the notice of appeal and in his other representations and submissions.

34. Because the Tribunal agrees with the Information Commissioner's assessment in relation to the closed material and the operation of the Regulations and their exceptions, it is not been necessary to attach a Closed annexe in respect of this appeal.

Conclusion and remedy

35. The Tribunal agrees with the Commissioner's assessment that the requested information is environmental information. Nothing turns on this because the FOIA regime is, in a sense, identical in terms of its requirements.

36. In respect of Regulation 5 (1) EIR, the Appellant had asked the Board to populate two columns of data. The Tribunal finds as a matter of fact that it did just that when it provided him with the information that it held within the scope of his request.

37. It is clear that the Appellant expected the figures in the four columns to balance and, as a matter of fact, they did not.

38. That is because the four columns requested by the Appellant did not give a complete picture of the finances of the Project. These were significantly more complex and could not be reduced to those for headings alone.

39. There were expenditures other than the Unitary Charge. These accounted for the fact that there was no Surplus to the Council, something the Appellant clearly expected there to be.

40. The amount of the Support Grant paid by the DfT was frontloaded so that the Project could break even in its early years and that was why the Surplus to the Council was forecast as being nil for the first 15 years of operations.

41. At all times the Board has been prepared to sit down with the Appellant and explain its position in more detail. That is not the attitude of a Public Authority wishing to conceal information.
42. The figures given for Toll Income and Surplus to the Council on 13 July 2015 do not match those given on 13 January 2015 and the figures given for “Net DfT Support” do not exactly match what was provided to the Appellant for Support Grant as part of the Request.
43. The figures are broadly similar and this would appear to be because they have been updated between January and July.
44. In respect of Regulation 9 (1) EIR – the duty to assist any applicant in formulating and clarifying the request – the Request at issue in the appeal is entirely clear.
45. The Board explained that there were other items of expenditure which meant that certain figures it had already supplied did not balance. It explained what those other items were.
46. The Board remained open to discussing further detail with the Appellant if he wished to meet the Board face-to-face.
47. For all these reasons the Tribunal is satisfied that, on the balance of probabilities, the Board has complied with its duties under both Regulations 5 and 9 and the Appellant’s appeal must fail.
48. Our decision is unanimous.
49. There is no order as to costs.

Judge Robin Callender Smith

4 July 2016