



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0183 and 0184

Heard at Fleetbank House on 25 February 2019

Before
Judge Stephen Cragg Q.C.

Tribunal Members

Pieter de Waal
Michael Jones

Between

Iain Orr

Appellant

and

The Information Commissioner

1st Respondent

and

Department for International Development

2nd Respondent

The Appellant represented himself

The Information Commissioner was unrepresented

The Department for International Development (DFID) was represented by Ms Galina Ward

DECISION AND REASONS

Introduction

1. These two appeals relate to the Appellant's requests to DFID for information about (i) the terms of reference for work in relation to the St Helena Air Access Project to be undertaken by an external expert appointed by DFID; and (ii) information about flight tests undertaken to measure turbulence and wind shear before agreeing the location, design and runway alignment of the airport. The Commissioner explained the background in both the decisions under challenge as follows:-
 2. St Helena is a small self-governing UK overseas territory in the South Atlantic, previously only accessible by sea. DFID provides financial and technical assistance to St Helena as one of three Overseas Territories which are eligible for official development assistance.
 3. DFID's aims for the UK's financially dependent Overseas Territories are to ensure the provision of basic services and to help them become economically self-sufficient, with the aim of reducing and eventually removing the need for subsidies from the UK government.
 4. In 2004, DFID commissioned a feasibility study into building an airport on St Helena, with the rationale that improved access would help reverse economic decline by opening the island to increased revenues from tourism. In 2010, DFID commissioned a report from consultants looking at options for access to improve St Helena's economic and social sustainability. In 2011, the St Helena Government signed a design, build and operate fixed price contract with Basil Read, a South African construction company to build an airport on St Helena. The total budget for the project was set at £285.5 million.
 5. The airport had planned to start operating in May 2016. However, test flights in April 2016 revealed dangerous wind conditions on the airport approach, an effect known as 'wind shear'. Although the airport subsequently handled a small number of flights, the wind conditions precluded the operation of the planned commercial service. These began

in October 2017 following further testing of the wind conditions on the island.

6. The House of Commons Committee of Public Accounts published a report in December 2016 about the St Helena Airport project. The report was critical of DFID's management of the project, in particular its failure to foresee and address the impact of difficult wind conditions on landing commercial aircraft safely.

Preliminary

2. DFID made an application at the start of the hearing, pursuant to rule 14(6) of the Tribunal rules, that certain parts of the witness statement of Mr John Gordon (discussed in detail below) and other documents (not those within the scope of the requests) should be withheld on the basis that they explain how release of the disputed material at the time the requests were made would have adversely affected the course of justice. We accept DFID's submission that 'Releasing details of the dispute now would undermine the ...process which has rightly existed for this extended period in order to ensure that the Department could achieve the best outcome possible'. The nature of the dispute referred to is described in the body of the decision below. In those circumstances that application was granted.

The requests and response

3. The Appellant submitted the following request to DFID on 22 October 2017:

'This is a request, under the Freedom of Information Act and the Environmental Regulations for full information of the terms of reference and any subsequent instructions - including the allocation of supporting financial, legal and human resources - for work in relation to the St Helena Air Access Project to be undertaken by [name redacted], as indicated by the DFID Secretary of State when she told the International Development Committee on 19 December 2016:

'I have appointed an external individual expert to undertake a detailed review of the project and programme. I think that is right. That, to me, speaks to transparency and value for money.'

"Please also provide information on when [name redacted] work was completed; or, if not yet completed, whether there is a date by which he has been asked or is expected to complete and present this review."

4. DFID's initial response on 20 November 2017 was to refuse to confirm or deny whether it held any information on the basis of regulations 12(3) and 13(2)(a) (personal data exceptions) of the Environmental Information Regulations (EIR). The Appellant contacted DFID on 1 December 2017 and asked for an internal review of this response. His email also asked:

'Would it help if the question were rephrased? Eg:

"This is a request, under the Freedom of Information Act, for full information of the terms of reference and any subsequent instructions for work in relation to the St Helena Air Access Project to be undertaken by an external individual expert appointed by the DFID Secretary of State, as she informed the International Development Select Committee on 19 December 2016. Please also provide information on whether this detailed review has been completed or, if not, whether there is a date by which the external expert has been asked - or is expected - to complete it."

5. The Appellant then included some clarifications of his new formulation, which in fact appear to refer to matters upon which he was hoping for disclosure which go beyond that which was included in either of the formulations of the request set out above. The Appellant said:

That formulation is shorter, purely to avoid further misinterpretations. Let me make explicit that I do not expect 'full information' to include any sums to be paid into any individual's personal bank account. It would, however, be helpful to know if the expert was given a budget for this 'detailed review', including, for example, provision for supporting staff or for any visit to St Helena; as well as other expenses to facilitate access to UK and St Helena officials and commercial companies who have at any stage been involved in the project. I would, of course, understand if names of individuals or companies were redacted - for good reasons, such as protecting personal data - from the terms of reference and subsequent instructions given to the reviewer. Given earlier delays and misinterpretations, I would be grateful if DFID's review of this further refusal could be completed as speedily as

possible; and if you could also confirm now (before starting your review) that you understand from my suggested rewording that I am not seeking any personal data whose disclosure is not permitted under the FOIA.'

6. After a number of further contacts DFID provided a substantive response on 1 February 2018 when it said:-

- (a) The request fell under the Environmental Information Regulations.
- (b) DFID confirmed that it held a copy of the Terms of Reference (ToR) and that the review had been completed.
- (c) DFID confirmed that the overall budget allocated to the expert was £29,750 of which £19,663 was paid inclusive of VAT and all travel expenses.
- (d) However, DFID considered the actual ToR to be exempt from disclosure on the basis of regulations 12(5)(a) EIR (adverse effect on international relations), 12(5)(b) EIR (course of justice) and 12(5)(e) EIR (confidentiality of commercial and industrial information).

7. The Appellant also submitted the following request to DFID on 22 October 2017:

'This is a request, under the Freedom of Information Act and the Environmental Information Regulations, for information about: [i.] test flights undertaken to measure turbulence and wind shear, as recommended by Atkins in Section 7.57 of their report on the St Helena airport and [ii.] about the decision to discontinue such flights after the first one had been completed.'

8. In relation to this request, DFID responded on 20 November 2017. In relation to (i), DFID explained that it held information falling within the scope of this request but considered it to be exempt from disclosure on the basis of regulations 12(5)(b) and 12(5)(e) EIR.

9. In relation to (ii), DFID explained that it did not hold any information falling within the scope of this request. This was on the basis that ‘the original plan only intended for one test flight to be undertaken. Therefore, no “decision” was ever made to “discontinue such flights after the first one had been completed”.

10. Following a request by the Appellant for DFID to carry out an internal review of the decision, DFID informed him of the outcome of the internal review on 12 January 2018 as follows:-
 - (a) With regard to request (i), DFID remained of the view that the entirety of the information falling within the scope of this request, namely a document entitled ‘Flight Trials Report’ dated May 2007, was exempt from disclosure on the basis of regulations 12(5)(b) and 12(5)(e) EIR.

 - (b) DFID concluded that this document was also exempt on the basis of regulations 12(5)(a) (international relations) and 12(3) and 13(2)(a) EIR.

 - (c) Additional searches had been carried out in relation to (ii), including searches to see if there was information as to why there was only one day of flight-trialling completed at the pre-design stage of developing the St Helena Air Access project, and no information had been located. Therefore ref 12 (4)(a) EIR was relied upon.

11. The Appellant complained to the Commissioner about the way his requests had been dealt with. The Commissioner dealt with the complaint primarily by considering the exception in regulation 12(5)(b) EIR which relates materially to a situation where disclosure would adversely affect ‘the course of justice or the ability of a person to receive a fair trial...’.

Relevant legislation

12. The relevant parts of regulation 12 EIR reads as follows:-

12.— Exceptions to the duty to disclose environmental information

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if-

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

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

(a) it does not hold that information when an applicant's request is received

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(a) international relations, defence, national security or public safety

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

....

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

Decision notices

13. We adopt what the Commissioner said about reg 12(5)(b) EIR in the relevant decision notices as follows:-

The threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.

The course of justice element of this exception is very wide in coverage, and can encompass, amongst other types of information, material covered by legal professional privilege (LPP).

14. In the first request case (the ToR request) the Commissioner concluded as follows:-

(a) The ToR attracted legal professional privilege (LPP), specifically litigation privilege, and therefore disclosure of the privileged material would have an adverse effect on the course of justice for the purposes of reg 12(5)(b) EIR.

(b) That although there was a significant public interest in the disclosure of the information, given the criticisms of the airport project, the public interest in maintaining the exemption was greater because of the need to maintain the principles of LPP, and the acute impact on the course of justice where the disputed information related to live legal proceedings.

13. The Commissioner reached a slightly different conclusion in the second case (the Flight Trials request) and found that although the information did not attract LPP:-

Nevertheless, the Commissioner is satisfied that disclosure of this information still risks undermining DFID's position in the ongoing legal case. Moreover, the Commissioner is satisfied that such a risk could be categorised as harming the course of justice given the broad way in which this concept is interpreted when applying this

exception. Furthermore, the Commissioner is satisfied that the likelihood of harm occurring if the withheld information was disclosed is one that meets the threshold of more probable than not. She is therefore satisfied that regulation 12(5)(b) is engaged. The Commissioner has elaborated on her reasons for reaching this conclusion in a confidential annex, a copy of which will be provided to DFID only.

14. Much the same analysis was carried out by the Commissioner as in the ToR request decision, in deciding that the public interest favoured non-disclosure.

15. In relation to the Appellant's argument that there must be further information about the decision to discontinue the test flights after the first such flight, the Commissioner accepted DFID's response that it had carried out relevant searches and there was no further information held, and that therefore regulation 12(4)(a) EIR was correctly relied upon by DFID.

The appeals

16. The Appellant appealed both these decisions.

17. In essence, in relation to the ToR request, the Appellant argued that the balance of the public interest had been wrongly struck in favour of non-disclosure, and that it was unfair that there was closed material in the case that he was unable to see.

18. In relation to the Flight Trials request, the Appellant argued that reg 12(5)(b) EIR had been wrongly applied, and that disclosure would not lead to an adverse effect on the course of justice. He argued that it was implausible that DFID did not hold further information in relation to ceasing of the flight trials, and criticised the lack of breadth of the searches that had been carried out by DFID.

Subsequent developments

19. Matters have now moved on. The first thing that happened was that DFID prepared a statement dated 11 January 2019 from Mr John Gordon, who is Head of the Overseas Territories Department at DFID. That statement is heavily redacted in places, but the open part of the statement explained that DFID no longer relied on litigation privilege for withholding the ToR and therefore did not support the Commissioner's finding on this issue. This was as a result of '[h]aving considered all the contemporaneous documents surrounding the creation of the ToR'. Mr Gordon explained that:-

It is certainly the case that a primary purpose of the ToR was to help identify any negligence by DFID's third party advisors and provide critical insights for consideration of possible legal action... But this was not the only purpose: other purposes included assisting in identifying a solution to the problems faced, and considering whether DFID's internal processes had been sufficiently robust in dealing with the matter. I am not now able, based on my review of the documents, to say that any of these was the dominant purpose of the ToR.

20. However, Mr Gordon goes on to explain that DFID continued with its reliance on reg 12(5)(b) EIR on the basis that disclosure would adversely affect the course of justice. The full reasons for this have been redacted and are only available in a closed version of the statement.

21. There have been further developments. DFID now says that all the information requested has, in fact, been disclosed. In its skeleton argument for the hearing it says, in relation to the ToR request, that the ToR itself was provided to the Appellant on 30 January 2019.

22. In relation to the Flight Trials request, DFID reaffirmed that it does not hold any information in relation to the decision to discontinue test flights after the first one had been completed as only one test flight was recommended. The information about the test flight that was carried out is contained in the Flight

Trials Report (FTR) which has now also been provided to the Appellant on 30 January 2019.

23. DFID supports the initial decisions made in relation to the requests as, at that time, it was engaged in a live dispute in which Government Legal Division commercial litigation section had been instructed and it was concerned that disclosure of the FTR and ToR would prejudice the effective conduct of that dispute. That position was time sensitive and was kept under review, with the result that it was concluded that the information should be released on 30 January 2019.

24. It is argued that this disclosure decision does not undermine DFID's previous position, 'but rather underlines the careful consideration that was given to the relevant issues at all times'.

The hearing

25. At the hearing, DFID applied to have the appeal struck out on the basis that it was 'academic' now that the information had been disclosed. That application was refused and there is a separate judgment which deals with that point.

26. The main point that the Appellant wanted to make was that, in his view, there must be more information within the scope of the requests that DFID should disclose, especially in relation to 'further instructions' following the ToR, and further information about discontinuance of the flight trials.

27. He also submitted that the exemption in reg 12(5)(b) EIR had been wrongly applied in relation to both requests.

28. Although DFID had served the statement of Mr John Gordon, Mr Gordon did not attend to give oral evidence. We explained to the Appellant that in these circumstances the Tribunal would consider the weight to be given to

the statement, in the light of submissions made by the Appellant. We should also note that much of the witness statement was redacted and so it could only be considered at the hearing by the Tribunal in a closed session with DFID's representative.

29. That closed session took place and at the end of it a gist was provided to the Appellant to the effect that the Tribunal had been taken to passages in Mr Gordon's statement that explained the nature of the confidential dispute resolution procedure that DFID was engaged in, and the reasons why DFID was concerned that disclosure of the requested information would have had an adverse impact on that process. The gist stated that the Tribunal had asked questions to test the substance of DFID's concerns. The Tribunal also looked at the material that had been subject to a s14(6) FOIA order, to see whether it assisted in identifying the extent of the searches carried out by DFID.

Discussion

The ToR appeal

30. In relation to the ToR appeal it was not strictly a point in issue as to whether DFID held further information that it had not disclosed. This is because the appeal relates to the Commissioner's decision as to whether DFID can rely on the exemption in reg 12(5)(b) EIR or not in relation to the information requested. DFID says that it has now disclosed the information in scope. However, we do note that DFID says that there were no further 'instructions' issued in relation to the ToR, and we have no reason to doubt that. We note that that does not mean that there is necessarily no further information at all which relates to the ToR, simply that there is nothing that can be described as 'instructions' so as to be within the scope of the request

31. In relation to the ToR request, DFID initially claimed the protection of regulation 12(5)(b) EIR on the basis that the ToR were covered by LPP. LPP constitutes the rules which seek to protect the confidentiality of legal communications. There are two types of LPP – legal advice privilege and litigation privilege – and DFID claimed that the latter applied to the ToR. For litigation privilege to apply there must be confidential communications or documents which were created for the dominant purpose of litigation. The Commissioner explained DFID’s initial position as follows at paragraph 16 of the decision notice:-

DFID explained that the withheld information attracted LPP and was relevant to a live and ongoing legal case. It argued that disclosure of the withheld information would provide an indication of arguments relevant to this case, the strength or weaknesses which DFID might have, thus unbalancing the level playing field under which adversarial proceedings are meant to be carried out. DFID was of the opinion that disclosure of the withheld information would therefore harm the course of justice.

32. With reference to the withheld information in this case, the Commissioner was of the view that DFID’s claim to LPP was made out. On the basis of Mr Gordon’s statement (as described above) it seems to us that that conclusion can no longer be maintained. However, it also seems to us that all Mr Gordon is saying in his statement is that there was more than one primary purpose for creating the ToR, which necessarily rules out the reliance on LPP. But given the wording of regulation 12(5)(b) EIR (which means that the exemption applies where disclosure would ‘adversely affect... the course of justice’) DFID, in our view, is still able to rely on the factors as summarised by the Commissioner in paragraph 16 of the decision notice, for the purposes of withholding the ToR at the time the request was made.

33. We have had the benefit of considering the withheld material in this case, reading the unredacted witness statement of Mr Gordon, and receiving closed oral submissions, and we are satisfied that the regulation 12(5)(b) EIR exemption applies, notwithstanding that litigation privilege is now accepted

to have been wrongly claimed. It seems clear to us that the ToR were contained in a confidential document which was produced for a primary purpose (albeit not *the* primary purpose) of litigation, and that disclosure at the time of the request would have adversely affected the course of justice (that is, that there was a greater than 50% chance that the adverse effect would occur) while resolution of the dispute was at issue.

34. Although we have considered closed documentation and submissions, there is now a fair amount of information available to the Appellant to explain DFID's position (and our conclusion) and the Appellant is now able to read the contents of the ToR document itself. Thus:-

(a) As mentioned in the open 'gist' (see above), DFID have explained that they were engaged in a confidential dispute resolution process.

(b) Mr Gordon, in the open part of his statement, explains the context of possible legal action for negligence against third party advisors.

(c) Paragraph 16 of the decision notice summarises further the position as to why disclosure would have harmed the course of justice.

35. In these circumstances it does not seem to us that we need to expand on our conclusion in a closed annex to this decision.

36. However, that is not the end of the matter, as the exemption in reg 12(1)(b) EIR requires that, where it is engaged, a test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. As the Commissioner notes in the decision notice, the provisions of regulation 12(2) EIR state that a public authority shall apply a presumption in favour of disclosure, and as a Tribunal, we must do the same.

37. As emphasised by the Appellant, there is an obvious public interest in disclosing as much information as possible about public expenditure where it appears that there is a strong argument that something went seriously wrong with the commissioning and planning of the airport at St Helena, and the need to understand exactly what happened. The Appellant argues that the Public Accounts Committee's report into the planning of St Helena Airport project contained a damning assessment of the project. We agree with the Commissioner that disclosure of the ToR 'would provide the public with an insight into the steps DFID has taken to investigate how the project was managed'.
38. In the decision notice the Commissioner was able to rely on the 'clear and significant public interest in upholding the long-established principle of legal professional privilege' when deciding where the public interest balance should be struck. Now that the claim for LPP is not being relied upon by DFID, the Tribunal cannot take exactly the same route. However, we do still give significant weight to the public interest in avoiding an adverse effect on the course of justice, having found that disclosure would have had that effect.
39. In particular, as noted, a primary purpose of the ToR was to provide a basis for possible legal action against third party advisors and at the time of the request there was an ongoing confidential dispute resolution procedure in which DFID was engaged. It seems to us that at the time of the request, there was a greater public interest in enabling the course of justice to continue, rather than in disclosing the ToR. Of course, there came a time when the position changed and the information was disclosed, but that post-dated the relevant decision-making which we have to consider.
40. On that basis we do not allow the appeal in relation to the ToR.

The Flight Trials request

41. We have come to a different conclusion in relation to the Flight Trials request. As Mr Gordon sets out in his open statement, and as we can now see from the disclosed report, the report relates to flight trials carried out in May 2006. It has never been argued that LPP attached to this document. It cannot be argued that the purpose of the FTR was in any way related to possible litigation. We cannot find that disclosure of the FTR at the time of the request would have adversely affected the course of litigation (that is, that there was a greater than 50% chance that this would occur), and therefore the exception in reg 12(5)(b) EIR does not apply. There is nothing in the withheld material that leads us to a different conclusion.
42. Having reached this conclusion, in our view it is unnecessary for us to consider the public interest test.
43. Other than an issue about personal data (which we address below), we do not understand that any other exception is now relied upon by DFID.
44. In relation to the Appellant's argument that DFID had not carried out sufficient searches in relation to the discontinuation of the flight trials, we accept the evidence from Mr Gordon in his statement as to the searches that were carried out, and that these searches contained the appropriate search terms for the information. It also makes sense to us that, as has been explained, as only one test flight was planned, there would not be information available about the discontinuance of the flight tests.

Personal data in the Flight Trials request

45. Having reached the conclusion that the FTR should have been disclosed at the time of the request, it is necessary for us to consider information which remains redacted on the FTR which was eventually disclosed in January 2019, on the basis that the redacted parts constitute personal data. DFID explains

that it is relying on reg 12(3) and reg 13(2) EIR to withhold the personal data of three 'observers' on aircraft during the flight trials. DFID says:-

'The information is personal data because it consists of names and details of the individuals' flying experience and employment and so identifies the data subjects'.

46. Having considered the relevant material it seems to us that if names, years of experience, and specific employment details are redacted, then it ceases to be possible to identify individuals from it, and in which case the information disclosed ceases to be personal data which qualifies for possible exemption.

47. Thus, the relevant bullet points, under the heading 'Observers' would read:-

There were three observers on the aircraft as follows:-

- [Redacted] an ex RAF Sqn Ldr with [redacted] years experience in aviation and an expert in airport design [redacted].
- [Redacted] and ex RAF Wg Cdr with [redacted] years experience flying Hercules and other aircraft [redacted].
- [Redacted] from Air Safety Support International (ASSI), an experienced pilot [redacted].

48. In conclusion, therefore, we allow the Appellant's appeal in relation to the FTR, on the basis that reg 12(5)(b) EIR does not apply, and to the extent that the FTR is redacted as indicated above it does not include personal data for the purposes of reg 12(3) EIR.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 7 April 2019

Promulgated: 17 April 2019

