



Tribunals Service

Information Tribunal

FREEDOM OF INFORMATION ACT 2000

Heard at The Court House, Derry, N.Ireland
On 17 and 18 October 2006

Decision Promulgated

11th December 2006

Before

Chris Ryan – Deputy Chairman
Jenni Thomson – Lay Member
Steve Shaw – Lay Member

Between

DERRY CITY COUNCIL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Confidential Schedule

- 1 In the main body of the decision in this Appeal we have referred to the need to maintain confidentiality in respect of the Ryanair Financial Information until the question of whether or not it should be disclosed has been finally resolved. This Confidential Schedule, which refers to the content of the Ryanair Financial Information, does not therefore form part of the publicly available decision, although it may subsequently be appended to it in the circumstances mentioned in the Decision.
- 2 The first part of the Ryanair Financial Information, as it appears in the Ryanair Agreement under the headings "Airport charges" and "Ground handling charges", is as follows:

"Airport charges

Free landing, navigation, parking, passenger fees (pls), security, 100% hbs and baggage reconciliation, local ATC fees, etc for a period of 10 years, regardless of whether services operated by Boeing 737-200 or 737 -800 equipment.

Ground handling charges

A fee of GBP100 per turnaround in respect of Ground Handling to include all land and air side handling for a period of 10 years, regardless of whether operation by Boeing 737-200 or 737-800 equipment. Ryanair's ground handling, ticketing and other requirements are attached in appendices 1, 2 and 3."

- 3 In summary, therefore, Ryanair was to be charged nothing for airport services and £100 per turnaround in respect of ground handling services. The arrangement was to last for 10 years. This may be compared with the published charges which, by July 2005 (the only data on the issue we were given) would have been five pounds per passenger for services approximately the same as those covered by the heading "Airport charges".
- 4 As we have explained in paragraph 22 of the main body of the decision, the Charleroi decision disclosed a 50% reduction against normal airport charges and a 90% reduction against normal ground handling charges. It is clear from the reasons given by the Complainant in support of his original request (set out in paragraph 26 (c) of the main body of the decision), that there was, at the very least, a suspicion among members of the public at the relevant time that similar discounts may have been granted by the Airport.
- 5 The Ryanair Financial Information on "Marketing Support", as it appears in the Ryanair Agreement is as follows:

"Marketing Support

The City of Derry will guarantee payment of GBP 250,000 per annum for purposes of promotion and operations consultancy to be paid half yearly in advance for a five-year period."

- 6 We have referred, in paragraph 21 of the main decision, to the local government auditor's report for the 1999/2000 financial year, which evidently led him to conclude, on the basis of legal advice and the PWC

business appraisal, that he need not pursue further at that time his concern that the Ryanair Agreement might have involved State aid. The relevant part of his report is as follows:

"City of Derry Airport

7. ..

8. The previous local government auditor had concerns about aspects of the special arrangements entered into with Ryanair, to secure their commitment to using the airport, and matters such as the total funding arrangements and their impact on European Union Competition Law and State Aid were raised with the Council.

9. The Council took Senior Counsel opinion and also commissioned (in January 2001) a retrospective business appraisal (of limited scope) of the arrangements entered into with Ryanair in March 1999. The business appraisal concluded that "... on a commercial basis, a private investor would have reasonably entered into such an arrangement with Ryanair at that time, based on the assumption that the Ryanair marketing support costs would be financed externally through the North West Air Access Consortium.."

10. During the year the Council contributed £50K to the North West Air Access Consortium (NWAAC), which provided a range of marketing activities to promote the development of air access to the North West, including £250K of marketing support to Ryanair.

11. A commercially sensitive project such as the airport is not easily managed within local authority arrangements and consequently the Council commissioned a Comprehensive Strategic Review and received the report in March 2001 that will assist the Council in considering appropriate financial control and the medium to longer term management of the airport.

12. This matter will be kept under review in subsequent audits and reported on."

- 7 In the business appraisal, on which the auditor relied, PWC had referred to the marketing support and recorded its understanding that the Council's guarantee had been given on the basis that the £250,000 annual cost was to be funded by the North West Air Access Consortium ("the Consortium"). The consortium is a body, made up of various public bodies under the control of either the European Union or the governments of the UK or Republic of Ireland. The appraisal recorded that the proposed marketing support for Ryanair had been part of a wider programme of marketing and promotional activities which the Consortium undertook. The appraisal went on to record that no formal offer of funding had been made by the Consortium at the time and Mr McGurk confirmed during the hearing that the Council had accepted the risk of having to find the funds itself, had the Consortium not provided it and the guarantee had been called. PWC recorded its understanding that there was nevertheless a high expectation of securing the funding. On that basis it concluded that its private investor principle analysis did not need to take the marketing support provision into account, even as a contingent risk, although it expressed the view that "Given the level of uncertainty surrounding the extent and timing of third-party financing, we would ...consider the issue of external sources of funds for marketing support to be a high risk area."
- 8 In addition, during the course of the Information Commissioner's investigation the Council provided information, which indicated that the Council itself recognised that the guarantee in respect of marketing support may have been ultra vires.
- 9 It is fair to say that the Ryanair Agreement is not the same as the Charleroi Agreement but that there is a degree of similarity between some of the provisions in each of them. It certainly cannot be said, therefore, that the effect of the Charleroi decision is that, if the Commission had investigated the Ryanair Agreement, it would necessarily have concluded that it infringed State aid rules. Nevertheless, it was clear, once the decision had been published, that agreements between airports and low-cost airlines, incorporating terms favourable to the airline, were vulnerable to investigation by the

Commission, or attack by third parties, if the airport in question was in public ownership, direct or indirect.

- 10 More specifically, the Charleroi decision highlighted that long-term agreements were very unlikely to be accepted as providing genuine "one-shot incentives" to facilitate the launch of new routes and that, even over the, acceptably shorter, period of up to five years, the accumulated benefits should not exceed, in aggregate, 50% of the airline's actual start up costs, including marketing costs
- 11 We take from the information set out in this Confidential Schedule a number of points which we believe we should take into account in our decision. They are as follows:
- (a) the local government auditor's report was a public document and recorded the fact that:
 - (i) the Ryanair Agreement contained a provision for marketing support (a fact which was also disclosed when the redacted version of the Ryanair Agreement was made available to the Complainant with the heading "Marketing Support" unredacted);
 - (ii) the sum involved was £250,000; and
 - (iii) the sum was to be "financed externally" by the Consortium.
 - (b) It therefore placed into the public domain substantially all of the relevant information except that it did not expressly mention that the support took the form of a guarantee given by the Council.
 - (c) It cannot be said that this disclosure undermines the exemption claimed under section 41, as sufficient detail on the financial package as a whole remained secret and therefore capable of being protected by a claim for breach of confidence.
 - (d) Nevertheless, in considering the factors in favour of disclosure under the public interest test, we are entitled to take into account the fact that much of the information sought to be protected was in fact already in the public domain when the Complainant made his request
 - (e) We should also take into account a justifiable public interest in the fact that the Council's funding of the airport included a commitment

to pay £250,000 per annum for five years, (in the event this was not provided by the Consortium), that this contingent liability, (as Mr McGurk confirmed in evidence) was not covered by any counter indemnity or comfort letter of any kind and that the arrangement was thought to be ultra vires.

Chris Ryan
2006
Deputy Chairman

Date 11th December