

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

Date: 26 July 2018

Public Authority: Department for International Development
Address: 22 Whitehall
London
SW1A 2EG

Decision (including any steps ordered)

1. The complainant submitted two requests to the Department for International Development (DFID) seeking a range of information about the St Helena airport project. DFID provided some of the information but sought to withhold the remainder of the information on the basis of the following regulations of the EIR: 12(5)(a) (international relations), 12(5)(b) (course of justice), 12(5)(e) (commercial confidentiality) and regulation 12(3) (personal data). The Commissioner has concluded that the withheld information is exempt on the basis of either regulation 12(5)(a) or regulation 12(5)(b) and the public interest favours maintaining both exceptions.

Background

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 commencement of the operation of the planned commercial service. This began in October 2017.
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.¹

Request and response

7. The complainant submitted the following requests to DFID on 15 December 2016 regarding St Helena Airport:

i) What radio sonde and other atmospheric tests were carried out by consultants contracted by DFID, in the atmosphere above the airport site, to establish what cross winds exist and their frequency?

ii) What were the results of these tests and how were they factored into the design of the airport project by the consultants?

iii) What has been the cost of the project to date?

iv) Is there any solution to the problems that test flights have revealed, and what might be the cost of implementing such a solution?

v) What penalty clauses were included in the main contractor's contract?

¹ <https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/767/767.pdf>

- vi) What is the contractor's accountability in this "failed" and costly project?*
- vii) What is DFID's accountability in the apparent failure of this project?'*
8. Having failed to receive a response, the complainant re-sent his requests to DFID on 21 February 2017.
 9. DFID responded on 29 March 2017, under its reference F2017-083. In relation to requests i) and ii) DFID explained that it did not hold any information falling within the scope of these requests. In relation to request iii) DFID confirmed how much it had spent on the project to date. In relation to request iv), DFID explained that the St Helena Government had started a tender process to identify a provider for an air service but it explained that it did not hold any information relating to the cost of this tender. DFID confirmed that it held information falling within the scope of requests v) and vi) but it considered this information to be exempt from disclosure on the basis of sections 27(1)(a), (c) and (d) (international relations) and section 43(2) (commercial interests) of FOIA. Finally, DFID explained that it did not hold any information falling within the scope of request vii).
 10. The complainant contacted DFID on 23 April 2017 and explained why he was dissatisfied with its response. His letter also included a number of additional follow up requests to DFID, namely:

'[a] I should be grateful if you could tell me please who does hold the information on the radio sonde and other atmospheric tests (and their results) which were carried out before the St Helena airport project was approved?'

'[b] On your section 43 points, please can you advise who were the main project contractors?'

'[c] Finally, under FOIA 2000, please can you advise what are DFID's cost estimates for rectifying the project's problems, and what are the additional costs of maintaining in the interim the boat service.'
 11. DFID acknowledged receipt of this letter on 5 May 2017 and explained that it would respond to his further requests under its reference number F2017-163. It also explained that it would complete an internal review of its handling of his original set of requests, ie reference number F2017-083, and inform him of the outcome of the review in due course.
 12. DFID provided the complainant with a response to requests F2017-163 on 6 July 2017. In relation to the request labelled above as a), DFID explained that it held information relevant to his request relating to

atmospheric tests but it considered this to be exempt from disclosure on the basis of sections 27(1)(a), (c) and (d), 42(1) (legal professional privilege) and section 43(2) of FOIA. In relation to the request labelled b) above, DFID confirmed that the main contractor is Basil Read. Finally, in relation to the request labelled c) above, DFID explained that it held cost estimates for rectifying the project's problems but it considered these to be exempt from disclosure on the basis of sections 27(1)(a), (c) and (d), and 43(2) of FOIA. DFID's response also confirmed that it was in the process of completing its internal review in relation to requests F2017-083.

13. DFID informed the complainant of the outcome of the internal review on request F2017-083 on 12 June 2017. The review concluded that section 27 of FOIA had been correctly applied.
14. The complainant contacted DFID on 11 July 2017 in order to express his dissatisfaction with its response to request F2017-163. Having failed to receive a response, he re-sent this letter to DFID on 8 September 2017.
15. DFID responded on 10 October 2017 and confirmed that it was committed to transparency but it considered some of the information sought by requests F2017-163 to be exempt from disclosure.

Scope of the case

16. The complainant contacted the Commissioner on 24 October 2017 in order to complain about DFID's handling of his requests. The Commissioner agreed with the complainant that the scope of his complaint was as follows:
 - In terms of reference F2017-083 DFID's decision to withhold the information sought by parts v) and vi) of the request on the basis of sections 27(1) and 43(2) of FOIA;
 - In terms of reference F2017-163 its decision to withhold information sought by part a) of the request on the basis of sections 27(1), 42(1) and 43(2) of FOIA; and
 - Its decision to withhold the information sought by part c) of the request on the basis of sections 27(1) and 43(2) of FOIA.
17. In agreeing the scope of her investigation with the complainant, the Commissioner noted that in her view at least some of the requested information was likely to constitute 'environmental information' as defined by the EIR and therefore fell to be considered under that access regime rather than under FOIA.

18. During the course of the Commissioner's investigation, DFID amended its position in relation to the complainant's two requests.
19. In terms of request F2017-083, DFID has explained that in relation to parts (i) and (ii) it did not hold information relating to radio sonde. However, it did hold information relating to atmospheric tests. This consists of a 'Flights Trials Report'. DFID accepted that this document should be considered under the EIR rather than FOIA. However, it considered this document to be exempt from disclosure on the basis of the following exceptions within the EIR: regulation 12(5)(b) (course of justice), regulation 12 (5)(e) (commercial confidentiality) and regulation 12(3) (personal data). In terms of part (v) of the request, DFID has explained that it held relevant clauses from the contract between St Helena Government and Basil Read, the contractor who built the airport. However, it considered these clauses to be exempt from disclosure on the basis of regulations 12(5)(a) (international relations) and 12(5)(e) of the EIR. For part (vi), DFID explained that on reflection it should have stated that the contractors accountability was to build the airport to the required specification and that this had been achieved.

With regard to request F2017-163, in terms of part (a) DFID explained that it holds information about atmospheric tests but not radio sonde, ie the 'Flights Trials Report' which is also in the scope of part (i) of the previous request. In terms of part (b), DFID explained that it was seeking to withhold the cost estimate on the basis of regulations 12(5)(b) and 12(5)(e) of the EIR.

20. In light of DFID's amended position, the scope of the Commissioner's investigation of this complaint has been the following:
 - a. Whether the 'Flights Trials Report' is exempt from disclosure on the basis of regulations 12(5)(b), 12(5)(e) and/or 12(3) of the EIR;
 - b. Whether the penalty clauses were exempt from disclosure on the basis of the regulations 12(5)(a), 12(5)(b) and/or 12(5)(e); and
 - c. Whether the estimated cost of rectifying the project's problems is exempt from disclosure on the basis of regulations 12(5)(b) and/or 12(5)(e) of the EIR.

Reasons for decision

Complaint a) The Flight Trials Report and complaint c) Cost Estimates

Regulation 12(5)(b) – The course of justice

21. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect 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. 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.
22. 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).

DFID's position

23. DFID initially explained that the information withheld on the basis of this exception was highly pertinent 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 therefore argued that disclosure of the Flight Trials Report and cost estimates would harm the course of justice.
24. DFID provided the Commissioner with more detailed submissions to support its reliance on regulation 12(5)(b) to withhold the 'Flight Trials Report' and the cost estimates. As part of these submissions, and in response to further queries from the Commissioner, DFID conceded that LLP did not apply to the Flight Trials Report albeit that it remained of the view that the costs estimates continued to attract LPP. The Commissioner has not included these submissions in this notice as they contain detailed and extensive reference to the withheld information itself.

The Commissioner's position

25. Having considered DFID's submissions carefully, the Commissioner is not persuaded that the Flight Trials Report attracts LPP, a point as noted above, DFID accepts. Nevertheless, the Commissioner is satisfied that disclosure of this information still risks undermining DFID's position in the ongoing legal case referred to by DFID. 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 in respect of the Flight Trials Report. 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.

26. With regard to the cost estimates for rectifying the problems with the project, in the Commissioner's view litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. This type of privilege can only be relied upon in circumstances where the following criteria are met:

- Where litigation is underway or anticipated. Where litigation is anticipated there must be a real likelihood of litigation taking place; it is not sufficient that litigation is merely a possibility.
- The dominant purpose of the communications must be to obtain advice to assist in the litigation; and
- The communications must be made between a professional legal adviser and client although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.

27. Furthermore, in relation to enclosures or documents attached to communications with a lawyer, the Commissioner's guidance on section 42 of FOIA (the LPP exemption) contains the following qualifications:

'19. Any enclosures or attachments to a communication are usually only covered by LPP if they were created with the intention of seeking advice or for use in litigation. The authority must consider each document individually.

20. If an enclosure existed before litigation was contemplated or before it was considered possible that legal advice might be needed, LPP will not usually apply to it. There is however one important exception to this rule. When a lawyer uses their skill and judgement to select pre-existing documents that weren't already held by the client, for the purposes of advising their client or preparing for litigation, then LPP can apply.²

² https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

28. The Commissioner is satisfied that cost estimates can be said to meet the various criteria set out above, including the qualification described by her guidance on section 42 of FOIA. She is therefore satisfied that the costs estimates attract litigation privilege. The Commissioner has elaborated on why she has reached this finding, with reference to the withheld information itself, in the confidential annex.
29. The Commissioner is of the view that disclosure of information which is subject to LPP would have an adverse effect on the course of justice. This is because the principle of LPP would be weakened if information subject to privilege were to be disclosed under the EIR. She considers the likelihood of this happening to be more probable than not especially given that in the circumstances of this request, the case is still ongoing and the legal advice is live. Regulation 12(5)(b) is therefore engaged in respect of the costs estimates, albeit on a different basis than for the Flight Trials Report.

The public interest test

30. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosing the withheld information

31. The complainant emphasised the public criticism DFID had received regarding its management of the St Helena airport project. He argued that its failure to be open and transparent, ie by withholding information in response to his requests, about its role and apparent failure in managing the project undermines the public's confidence in how DFID designs and manages other less high profile projects. The complainant argued that DFID appeared to refuse to admit any accountability for the project's failings, including its role in drawing up the terms of reference for the design and implementation of the project and in overseeing the project's implementation. In particular, the complainant highlighted the apparent failure to carry out pre-project design atmospheric test on cross winds etc which he considered to be baffling. More broadly, the complainant argued that greater openness from DFID on this topic, including the lessons learned, would arguably strengthen future policy development and that a lack of transparency merely feeds into public suspicion about DFID's competence and mis-spending of aid money.

Public interest in favour of maintaining the exception

32. DFID argued that there is clear public interest in protecting the course of justice and in the particular circumstances of this case there was a compelling public interest in maintaining the exception given that the information related to a live and ongoing issue.

Balance of the public interest arguments

33. As the complainant suggests, the Public Accounts Committee's report into the planning of St Helena Airport project was damning and in respect of the particular focus of this request concluded that *'It is staggering that the Department commissioned and completed the St Helena airport before ascertaining the effect of prevailing wind conditions on landing commercial aircraft safely at St Helena.'* The Commissioner agrees with the complainant that the findings of this report clearly point towards the significant public interest in disclosure of information by DFID about the nature and extent of the pre-construction flight testing undertaken. Disclosure of the withheld Flight Trials Report would provide the public with a direct insight in to the extent of the testing commissioned by DFID in 2006. Furthermore, disclosure of the cost estimates for rectifying the problems with the project would allow the public to understand the financial implications, and thus potential cost to tax payers, of the project's failings. Given the initial operational problems of the airport, allied to the alleged failure of DFID to test the wind conditions on the island, and the amount of public money spent on the project, the Commissioner agrees that there is a very strong case for the public interest favouring disclosure of both pieces information in order to increase the transparency around DFID's decision making in terms of the impact of wind shear.
34. Nevertheless, in relation to the Flight Trials Report, and by a very narrow margin, the Commissioner has concluded that the public interest favours maintaining the exception contained at regulation 12(5)(b). The Commissioner has reached this conclusion because in her view there is a very strong, and ultimately compelling, public interest in DFID being able to conclude the ongoing legal case without interference in this process. For the reasons discussed in the confidential annex, the Commissioner is satisfied that the disclosure of the Flight Trials Report would interfere with the proceedings in that case, and thus negatively impact on on the course of justice, in a number of different ways. In reaching this conclusion the Commissioner would emphasise that she is clearly not underestimating or attempting to negate the public interest in disclosure of the information. However, at the point that this request was submitted the Commissioner is persuaded that there is a stronger interest in protecting's DFID efforts to conclude the legal case in the best interests of taxpayers than the public interest

interest in transparency in respect of DFID's decision making at the point of planning the airport.

35. With regard to the balance of the public interest in relation to the cost estimate, whilst the Commissioner again recognises the considerable public interest in disclosure of this information, she has concluded that the public interest favours withholding this information, and by greater margin than is the case with the Flight Trials Report. The Commissioner has reached this decision given the significant public interest in maintaining LPP due to the importance in safeguarding openness in all communications between client and lawyer to ensure access to full and frank advice, which in turn is fundamental to the administration of justice. In the particular circumstances of this case she agrees with DFID that these arguments attract additional, and ultimately compelling, weight given that the cost estimates relate to an ongoing legal case.
36. DFID is therefore entitled to withhold both the Flight Trials Report and the cost estimates for rectifying the problems with the project on the basis of regulation 12(5)(b). In light of this finding the Commissioner has not considered whether this information is also exempt from disclosure on the basis of the other exceptions cited by DFID.
37. In light of this finding the Commissioner has not considered whether the Flight Trials Report and cost estimates are exempt from disclosure on the basis of the other exceptions by DFID.

Complaint b) Penalty Clauses

Regulation 12(5)(a) – international relations

38. Regulation 12(5)(a) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety. In this case DFID applied the exception on the basis that disclosure would adversely affect the UK's relations primarily with the Government of St Helena (SHG) but also with other states. Its rationale was as follows:
39. DFID explained that the penalty clauses requested by the complainant were contained in a contract between the SHG and Basil Read, the main contractor who built the airport. DFID explained that it was not party to this contract, did not own this information, and most importantly it did not have the permission of the SHG to disclose this information. Indeed, DFID provided the Commissioner with a copy of correspondence between it and SHG, in which the latter explained that it considered this information to be sensitive and explicitly asked DFID not to disclose this information.

40. In light of this DFID argued that disclosure of the penalty clauses would harm its relations with SHG. More broadly, DFID argued that it was also conscious of the consequences of the impact on its relations with other states if it disclosed information in defiance of the express wishes of another government. DFID argued that disclosure of this information would be viewed by other governments as a lack of discretion and so lead to distrust, or at the very least a lack of confidence in the UK's ability to conduct international relations in an appropriate way.
41. In the Commissioner's view, given the SHG's express request that DFID does not disclose the penalty clause information, she has no hesitation in accepting DFID's argument that disclosure of this information would harm the UK's relations with SHG. Moreover, given the express request of the SHG in relation to this information, the Commissioner is also persuaded that there is a real and significant risk that if this information was disclosed under the EIR other states would question DFID's, and thus the UK's ability, to treat information it had shared on a confidential basis. Consequently the Commissioner also accepts that disclosure risks having a wider, but also harmful, impact on the UK's relations with other states.
42. For these reasons, the Commissioner is satisfied that the penalty clause information is exempt from disclosure on the basis of regulation 12(5)(a).
43. In reaching this conclusion the Commissioner notes that when DFID sought to originally withhold this information under section 27 of FOIA the complainant queried why the UK's relations with the SHG were considered to constitute 'international' relations given that St Helena is an Overseas Territory of the UK.
44. In response, DFID noted that section 27(5) of FOIA provides the following definition of a 'State':

*"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to **any territory outside the United Kingdom.**'
(emphasis added)*

45. DFID noted that this point was clarified further in the Commissioner's guidance on section 27 which explains that:

*"States and organs of States: the government of any state and any organ of its government and will include for example, states with a government structure; **the overseas territories of the UK** and of other countries; and Crown Dependencies such as the Channel Islands. Under section 27(5), 'state' also includes 'any territory', outside the UK*

which would include territories which are not recognised as states in international law but which may be the subject of international law or international agreements. An example is Antarctica. In addition, the exemption includes the 'organs' of any government, for example, a state's legislature and executive.' (emphasis added)

46. In contrast, the EIR does not include a definition of 'state' in the context of international relations. However, for the avoidance of any doubt the Commissioner considers the definition provided by FOIA to be a reasonable one to use when interpreting and applying regulation 12(5)(a) of the EIR. Therefore, for the purposes of this regulation, as with section 27, St Helena is considered to be a separate state to the UK.

Public interest test

Public interest in favour of disclosing the withheld information

47. The complainant's arguments in relation to the public interest in disclosure are set out above at paragraph 31.
48. In the context of this regulation, DFID acknowledged that there is a general public interest in transparency and accountability and in raising the public's understanding of how the UK Government works in overseas countries and how we spend what are considerable amounts of public money in promoting international development. It acknowledged that the St Helena Airport project has been the subject of much media and Parliamentary attention and there is already a good deal of publicly available information.

Public interest in maintaining the exception

49. However, DFID argued there is a very strong public interest in preserving good international relations with the SHG. It explained that the UK Government has invested a great deal in the St Helena airport and in promoting trade, tourism and the commercial viability of the project. DFID argued that the SHG's trust and confidence in the UK Government to protect sensitive information is critical to maintaining good international relations; this trust and confidence would be undermined if the requested information was disclosed. Consequently, DFID argued that disclosure in this case would have a damaging effect on the UK's ability to pursue the full range of its international relations with the SHG, which would be very much against the public interest.
50. DFID also emphasised that the impact on the UK's relations with other overseas partners, in particular the undermining of the trust of these partners if this information was disclosed, would also be against the

public interest. DFID suggested that this could mean that they and other development partners might in future be inhibited in working with the UK Government. This would harm the UK Government's ability to promote international development and protect UK interests abroad, which would not be in the public interest. DFID argued that it would also reduce the likelihood of open and effective dialogue in the future and, would significantly undermine the UK's ability to respond to international development needs. DFID also argued that the public interest would be harmed by any negative impact on the exchange of information between the UK and its international partners. This could be either through information no longer being provided in future or by a failure by our partners to respect the confidentiality of the information that they received from the UK government. DFID argued that such an outcome would reduce the likelihood of open and effective dialogue in future and would significantly undermine the UK's ability to respond to international development needs.

Balance of the public interest arguments

51. For the reasons discussed above, the Commissioner accepts that there is considerable public interest in disclosure of information about the St Helena project. In relation to the information about the penalty clauses the Commissioner acknowledges DFID's point that it was not party to this contract. However, as it was ultimately responsible for contributing to financial costs of it, the Commissioner considers that there is strong public interest in DFID disclosing this information. Nevertheless, the Commissioner agrees with DFID that there is clear public interest in the UK being able to maintain effective relations with the SHG, not least to ensure the success of the St Helena airport project. In light of this, and given the public interest in the UK maintaining effective relations with other international partners, the Commissioner has concluded that the public interest in maintaining the exception outweighs the public interest in disclosing the penalty clauses.
52. In light of this finding the Commissioner has not considered whether the penalty clauses are also exempt from disclosure on the basis of the other exceptions cited by DFID.

Right of appeal

53. 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

54. 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.
55. 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

Jonathan Slee
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