

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

**Decision notice**

**Date:** 22 July 2015

**Public Authority:** Stockton-on-Tees Borough Council  
**Address:** Municipal Buildings  
Church Road  
Stockton-on-Tees  
TS19 1LD

**Decision (including any steps ordered)**

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1. The complainant submitted a request to the public authority for information in relation to the future plans for Durham Tees Valley Airport. The public authority confirmed that it held a number of financial reports prepared by independent financial advisors to assist the authority along with five other local authorities in making a decision regarding their own involvement as minority shareholders in the airport.
2. The Commissioner's decision is that the public authority was entitled to withhold the financial reports in reliance on the exemption at section 36(2)(c) FOIA and the exception at regulation 12(5)(e) EIR.
3. No steps are required.

**Request and response**

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4. On 18 December 2014 the complainant wrote to the public authority in relation to the future of Durham Tees Valley Airport and included a request for information which was phrased in the following terms:

*'George Garlick, 20/11/07: To appoint McInnes Corporate Finance LLP, in conjunction with Dickinson Dees, Solicitors, to undertake a corporate financial review regarding the Local Authorities' shareholding in Durham Tees Valley Airport, particularly the question whether the Councils should maintain that shareholding or allow it to be diluted, including a*

*review of the pros and cons of investing further in the Airport. To appoint Dickinson Dees to provide legal advice and support to McInnes Corporate Finance, and to provide a view on the South Side documentation in the context of the Subscription and Shareholders' Agreement. Can the McInnes review and Dickenson Dees advice be made public?*

*George Garlick, 07: 1. the report of the Directors and audited accounts for year ended 31/3/07 be adopted; 2. no dividend be declared for 2006/07. Can these accounts be made public including written resolutions that were accepted by Stockton BC?*

*03 October 2013 Engaging Cavu Corporate Finance Limited to provide expert advice and 10 May 2013 To engage Dickinson Dees - DTVA. Can review and advice be made public?'*

5. The public authority provided its response on 21 January 2015. The authority confirmed that it held financial reports within the scope of the first and third parts of the request. The reports were produced by McInnes Corporate Finance LLP, Cavu Corporate Finance Limited and Bond Dickinson LLP (formerly Dickinson Dees). The public authority however withheld the reports in reliance on the exemptions at sections 36(2)(b)(i) and (ii), section 36(2)(c), section 41, section 42, section 43(2) FOIA and the exceptions at regulations 12(5)(e) and (f) of the EIR.
6. The public authority also explained that it did not hold any information within the second part of the request relating to the request for the accounts of Durham Tees Valley Airport (the airport). The authority advised the complainant that the information sought could be obtained from Companies House on payment of a fee.
7. On 9 February 2015 the complainant requested an internal review challenging the decision to withhold the financial reports.
8. On 23 March 2015 the public authority wrote back to the complainant with details of the outcome of the review. It upheld the original decision.

## **Scope of the case**

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9. The complainant initially contacted the Commissioner on 22 January 2015 to complain about the public authority's handling of his request without completing the next stage of the authority's complaints process. This required him to give the authority an opportunity to review its

decision before complaining to the Commissioner in the event he was dissatisfied with the authority's response.

10. Therefore, the Commissioner did not accept the complainant's initial complaint on 22 January. He was advised to submit an internal review request to the public authority. On 23 March 2015, the same day that the public authority had communicated the outcome of the internal review to him, the complainant re-submitted his complaint to the Commissioner disagreeing with the outcome of the review.
11. During the course of the Commissioner's investigation, the public authority clarified that it had withheld the majority of the information in the reports in reliance on sections 36(2) (b) and (c) FOIA, and the remainder in reliance on regulations 12(5) (e) and (f) of the EIR. It maintained its reliance on the remaining exemptions.
12. The substantive scope of the investigation therefore was to consider whether the public authority was entitled to withhold the financial reports produced by McInnes Corporate Finance LLP, Cavu Corporate Finance Limited and Bond Dickinson LLP (formerly Dickinson Dees) in reliance on the exemptions at sections 36(2) (b) and (c), 41, 42, 43(2) FOIA and the exceptions at regulations 12(5) (e) and (f) of the EIR.

## **Reasons for decision**

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### **Background**

13. The following is a very brief summary of the background to the request and the relevance of the withheld financial reports in that context.
14. Durham Tees Valley Airport – formerly Teesside Airport until 2004 – (the airport) is part of Peel Airports which is itself part of the Peel Group.<sup>1</sup> The six local authorities of Stockton-On-Tees Borough Council (the public authority in this case), Darlington Borough Council, Redcar and Cleveland Borough Council, Durham County Council, Hartlepool Borough Council and Middlesbrough Borough Council hold an 11% shareholding in the airport.
15. The public authority and the five other local authorities are in negotiations with the Peel Group in relation to the future of the airport.

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<sup>1</sup> <http://www.peel.co.uk/aboutus/default.aspx>

There is a very significant possibility that, without further financial investment, the airport would have to close. The financial reports were prepared by independent financial advisors between 2008 and 2014 for the six minority local authority shareholders and set out various possible options for them to consider in their negotiations with the Peel Group regarding the future of the airport.

### **Section 36(2)(c)**

16. The Commissioner first considered whether the public authority was entitled to rely on section 36(2)(c) to withhold the majority of the information in the financial reports.

17. Section 36(2) FOIA states:

*'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-.....*

*...(b) would, or would be likely to, inhibit-*

*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of deliberation, or*

*(c) would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.'*

18. The Commissioner is satisfied that the public authority's monitoring officer who is also the Director of Law and Democracy at the authority is its qualified person for the purposes of section 36(2) FOIA.

19. The exemptions at section 36(2) can only be engaged on the basis of a qualified person's opinion. In order for the Commissioner to determine whether the exemption at section 36(2) was engaged, he must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on

which there needs to be a free and frank exchange of views or provision of advice.

- The qualified person's knowledge of, or involvement in, the issue.
20. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
  21. In his opinion which was issued in January 2015 the qualified person explained that disclosure of the financial reports would, or would be likely to be detrimental to the development and implementation of the future plans for the airport, and thereby to the economic prosperity and prospects of the sub-region. This is because, in the qualified person's opinion, disclosure would, or would likely to inhibit discussions and communications and this would be damaging to the local authorities' interests as shareholders, would undermine relations between the local authorities, between the local authorities and their advisors and with the Peel Group.
  22. The qualified person noted that financial reports contain free and frank advice provided by independent financial advisors for the benefit of the local authorities to assist them in their decision-making in negotiations with the Peel Group in their capacity as minority shareholders.
  23. The Commissioner initially considered whether the lower threshold of prejudice (ie would be likely) has been met. In the Commissioner's opinion, this means that there must be a real and significant possibility of prejudice.
  24. Having carefully considered the financial reports, the Commissioner is satisfied that they contain detailed advice including various options for the local authorities to consider in relation to their negotiations with the Peel Group and their role or extent of their role as minority shareholders in the airport.

25. Although some of the reports date back to 2008 and 2009, given that negotiations remain ongoing between the local authorities and the Peel Group and a decision regarding the future of the airport has yet to be taken, it was not unreasonable in the Commissioner's view for the qualified person to hold the opinion that he did at the time of the request. He is therefore persuaded that there was a real and significant possibility that disclosure of the financial reports would be detrimental to the development and implementation of the future plans for the airport. In reaching this conclusion, the Commissioner was strongly of the view that the development and implementation of future plans for the airport are relevant to the interests which section 36(2)(c) is designed to protect.
26. The Commissioner therefore finds that the exemption at section 36(2)(c) was correctly engaged by the public authority in relation to the non-environmental information in the financial reports.<sup>2</sup>

### **Public interest test**

27. The exemption at section 36(2)(c) is subject to a public interest test. Therefore, the Commissioner has to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the non-environmental information in the financial reports.

### *Complainant's arguments*

28. The thrust of the complainant's arguments as to why the financial reports should be disclosed in the public interest is that the public authority and indeed the other five local authorities need to be fully open and transparent in relation to their plans for the future of the airport. He suggested that there have been inconsistencies in what the public have been led to believe in relation to plans for the airport and disclosure would provide needed clarity on the subject.

### *Public authority's arguments*

29. The public authority's public interest arguments are summarised below.

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<sup>2</sup> Although the rationale for engaging section 36(2)(c) applies to the reports in full, environmental information cannot be withheld under the FOIA and must be handled under the terms of the EIR.

30. The public authority acknowledged that disclosure of the financial reports would serve the public interest in openness and transparency in relation to negotiations to do with the future of the airport.
31. Nevertheless, the public authority considered that, in the circumstances, where negotiations are ongoing, there was a significant public interest in not disclosing information which could inhibit free and frank communications to the detriment of the development and implementation of future plans for the airport.
32. The public authority was keen to stress that the final decision regarding the local authorities' position as minority shareholders rests with elected Council Members.

*Balance of the public interest*

33. Although the Commissioner has chosen to summarise both parties' arguments, it is important to mention that he has considered all of their submissions when reaching his decision, even where he has not considered it necessary to address a particular argument further in the body of this notice.
34. The development and implementation of future plans for the airport is clearly a matter of considerable importance which could have significant implications for the sub-region. The Commissioner accepts therefore that there is a public interest in the public authority (as indeed the other local authorities who are also minority shareholders) being fully open and transparent as to the options they have considered and how these might affect the people of Stockton.
35. However, that public interest must be balanced in the circumstances of this case against the public interest in ensuring that the public authority and the five local authority minority shareholders have the necessary safe space to consider all of the options presented to them free from the distraction of having to routinely explain why an option(s) might have been considered. The Commissioner has attached significant weight to this public interest because in order for the local authorities to be able to consider their position thoroughly in relation to such an important issue, it is vital that they are given the private thinking space to consider all options including those that might be unpalatable to some.
36. Closely aligned to the safe argument is also the public interest in ensuring that those involved in the discussions are able to consider all options without fear that their views might provoke adverse public reaction. The Commissioner considers that there is a strong public interest in ensuring that whilst negotiations are ongoing, those acting on



behalf of the public authority do not feel constrained from providing frank advice on the possible options available to them as minority shareholders in relation to the future of the airport. If those providing advice feel inhibited from being as free and frank as possible, there is a real risk that the advice they provide might be lacking and consequently limit the range of the public authority's consideration. This would clearly have a detrimental effect on the development and implementation of future plans for the airport and that would not be in the public interest.

37. The Commissioner has also attached significant weight to the public interest in not undermining the public authority's (and consequently the other local authorities) negotiations with the Peel Group to secure the best possible deal. Disclosure of the financial reports would clearly reveal details of the options they might consider and that would place the local authorities at considerable disadvantage to the detriment of the communities they represent in particular and tax payers in general.
38. While it is not in itself a substitute for public scrutiny, the Commissioner considers that in the circumstances of this case, the fact that the final decision regarding the public authority's position as minority shareholder in the airport rests with elected Council Members, does to some extent strike a reasonable balance in the public interest. With the final decision resting with Council members, unelected officers cannot be said to be acting unilaterally without taking the views of the people of Stockton into account. Equally, the integrity of ongoing negotiations and the provision of frank advice are not compromised.
39. In view of the above, the Commissioner finds that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the non-environmental information in the financial reports.
40. In light of his decision, the Commissioner did not consider the applicability of the remaining exemptions.

### **Regulation 12(5)(e)**

41. As mentioned, a small part of the financial reports was withheld by the public authority in reliance on the exceptions at regulations 12(5) (e) and (f) of the EIR. The Commissioner initially considered the applicability of regulation 12(5)(e).
42. Information may be withheld by a public authority in reliance on regulation 12(5)(e) if its disclosure would adversely affect the confidentiality of commercial or industrial information where such



confidentiality is provided by law to protect a legitimate economic interest.<sup>3</sup>

43. From the above, it is clear that four criteria have to be met in order to engage the exception at regulation 12(5)(e).
44. First, the withheld information has to be commercial or industrial in nature. The relevant information withheld from the financial reports relates to the development and implementation of the future plans for the airport and thereby the economic prospects of the sub-region. It is therefore clearly commercial in nature.
45. Second, the withheld information has to be subject to a duty of confidence provided by law. The relevant information was also clearly communicated in circumstances importing an obligation of confidence to among other things assist the minority shareholders in their negotiations with the Peel Group regarding the future of the airport.
46. Third, the confidentiality has to be required to protect an economic interest. As mentioned, the relevant information relates to the development and implementation of future plans for the airport which has a direct link to the economic interests of the sub-region.
47. Finally, that economic interest, and thereby its confidentiality has to be adversely affected by disclosure of the withheld information. The Commissioner has already found that there is a real and significant possibility that disclosure would be detrimental to the development and implementation of future plans for the airport because it would be likely to undermine negotiations between the public authority and the five local authorities' minority shareholders and the Peel Group. He is therefore satisfied that disclosure of the relevant information would adversely affect the economic interests of the sub-region.

### **Public interest test**

48. In common with all EIR exceptions, the exception at regulation 12(5)(e) is subject to a public interest test. Therefore, the Commissioner has to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the environmental information in the financial reports.

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<sup>3</sup> The full text of the exception at regulation 12(5)(e) is available here: <http://www.legislation.gov.uk/uksi/2004/3391/regulation/12/made>

49. In the circumstances of this case, the Commissioner considers that the public interest factors identified in relation to the exemption at section 36(2)(c) are also relevant to regulation 12(5)(e). However, with regard to the public interest in maintaining regulation 12(5)(e), the Commissioner gave particular weight to the strong public interest in not undermining the public authority's negotiating position with the Peel Group. To do otherwise could lead to the public authority and the other minority shareholders not obtaining the best possible commercial and economic outcomes for the airport.
50. The Commissioner therefore finds that in all the circumstances of the case, there is a strong public interest in maintaining the exception at regulation 12(5)(e). Consequently, on balance the Commissioner has concluded that the public interest favours maintaining the exception in respect of the environmental information in the financial reports
51. In view of his decision, he has not considered the applicability of regulation 12(5)(f).

## Right of appeal

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52. 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

53. 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.
54. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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