

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 September 2016

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Department for Transport (DfT) for information about the use of the airport at Manston Kent during Channel Tunnel and Ferry disruptions. The DfT refused the request under the exemption in section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the requested information is exempt under section 43(2) and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner does not require any steps to be taken.

Request and response

3. On 16 December 2015 the complainant made a request to the DfT for information regarding the airport at Manston Kent. The request read as follows:

"Mid 2015, the owners of the Airport at Manston Kent, which at present is closed offered the use of the site to FoT for use during periods of Ferry and Tunnel disruptions.

I would like to know how much (if anything) was paid by the department of transport, (either directly to the owners, or indirectly via another government department or local council, for the set up (facilities and signage) and also usage of the site.

This should include all fess charged whether used or not i.e. a rental fee

or pay as used. As of Dec 2015 we have been told by PM and government Operation Stack has not happened."

4. The DfT responded to the request on 15 January 2016 when it confirmed that the requested information was held but explained that this was exempt from disclosure under section 43(2) (commercial interests) of FOIA.
5. The complainant asked the DfT to carry out an internal review of its handling of the request and it presented its findings on 15 February 2016. The review upheld the initial response to the request.

Scope of the case

6. On 16 February 2016 the complainant contacted the Commissioner to complain about the DfT's decision to refuse to disclose the requested information under the section 43(2) exemption.

Background

7. The DfT provided the following background information to explain the history of Operation Stack and the decision to use the Manston Airport as well as the long term options it was considering in response to the problems caused by disruption to cross channel travel.

Operation Stack is the co-ordinated multi-agency response to increases in demand being placed on the road networks of Kent, caused by a restriction in the capacity for vehicles to leave the UK by sea ferry from the ports of Dover or by rail through the Channel Tunnel.

Historically, Operation Stack has been used in response to occasional major disruption, typically for a few days a year and only for a day at a time; accommodating about 2,000 lorries.

From 1987, Operation Stack was used around ten times a year, but only four times during the period 2010-2014 (twice for severe weather, once for a tunnel fire and once due to strike action)

However, in 2015 Operation Stack was implemented on a record 32 days. This included three implementations each lasting five days; and on two occasions, both carriageways of the M20 were closed to general traffic and used to accommodate over 5,000 lorries.

In summer 2015, Operation Stack was implemented six times over a period of six weeks on the following occasions: 23-25 June, 29 June – 4 July, 7-11 July, 15-19 July, 22-26 July, 28 July – 1 August.

Following the repeated implementation of Operation Stack during summer 2015, the Prime Minister instigated Cabinet Office Briefing Room (COBR) meetings. DfT was tasked with delivering short and long-term solutions to Operation Stack.

Short-term measure

Working closely with key parties DfT found a viable short-term solution (in Manston Airfield) to take some of the pressure off the M20 corridor from Dover to Maidstone during Operation Stack. The original contract was agreed between DfT and Manston site owners on 5 August 2015. The use of Manston is kept under continual review and is an interim arrangement to help provide relief to those living around the M20.

Manston will continue to work alongside the existing Operation Stack to help reduce disruption on the M20 while the Government develops a long-term solution; the priority being to keep traffic and goods moving and ensure people on both sides of the Channel can go about their lives as normally as possible.

Long-term measure

On behalf of Government, Highways England (HE) were tasked with identifying solutions to Operation Stack. HE is a government-owned company with responsibility for managing the motorways and major 'A' roads in England. Formerly the Highways Agency, they became a government company in April 2015.

The Chancellor announced in his Spending Review and Autumn Statement in November 2015 that Government would be:

"...providing up to £250 million for a major new permanent lorry park to increase resilience in Kent, by taking pressure off the roads in the event of Operation Stack."

HE launched their consultation on the long-term solutions to Operation Stack on 11 December 2015. This consultation closed on 26 January 2016. HE also held a series of local public exhibitions / events, explaining the proposals to local residents.

Reasons for decision

Section 43(2) – Commercial interests

8. Section 43(2) provides that information is exempt if disclosure would or would be likely to prejudice the commercial interests of any person. In response to the Commissioner the DfT clarified that disclosure would prejudice the commercial interests of Highways England (HE) who were responsible for leading the negotiations for a long term solution to Operation Stack on behalf of the Government. However, the Commissioner would also accept that the interests of HE and the DfT are very much intertwined in this case given that the DfT has overall responsibility for delivering a long term solution to operation stack.
9. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
10. Furthermore, in relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns. In this case the DfT consulted with the HE over its decision to apply the section

43(2) exemption and provided the Commissioner with a copy of a letter from HE outlining their concerns.

11. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case the withheld information relates to the price paid for the use of Manston Airport. The information is clearly commercial and the Commissioner accepts that the prejudice envisaged by the DfT falls within the scope of the exemption. The Commissioner is satisfied that this first element of the test is met.
12. As regards the nature of the prejudice the DfT explained that along with HE it was currently involved in negotiations with a view to obtaining options for a longer term site to be used as part of Operation Stack. It said that in looking to secure the use of a longer term site its objective was to do so on the best possible commercial terms. It argues that disclosure would prejudice HE's commercial interests in agreeing a long term solution to Operation Stack.
13. The DfT explained that Highways England (HE) was currently negotiating with landowners to obtain a long-term site as a solution to Operation Stack. Both HE and the DfT consider that disclosure of the information would undermine HE's ability to secure a value for money outcome from the negotiation. In particular, the DfT argues that disclosure would weaken HE's negotiating position because it would provide other parties with information on what the government is currently spending on the interim solution to Operation Stack which those parties would use to inform their negotiating strategy, to the detriment of HE. In particular, it would disclose information on the daily rental fee the government is paying for availability of the site for operation stack if it is needed, plus the costs and fee the government is paying to cover the site running costs associated with its availability.
14. Given that at the time of the request the HE was actively engaged in negotiations to obtain a site as a long term solution to Operation Stack, the Commissioner is satisfied that there is a causal link between disclosure and the prejudice envisaged by the DfT. That is to say, it is at least possible that the prejudice claimed could arise. There is a logical connection between disclosure of information about the price paid for the use of Manston Airport and damaging the ongoing negotiations for obtaining a similar long term site elsewhere.
15. In considering the likelihood of prejudice the DfT confirmed that in its view the higher threshold of 'would prejudice' applied. This means that the likelihood of prejudice occurring is more probable than not. To support this the DfT provided the Commissioner with details about the

current state of the negotiations. The DfT has provided this information in confidence and so the Commissioner is unable to reproduce the arguments in this decision notice. However, the Commissioner would say that on the basis of what she has seen she is satisfied that the negotiations are being conducted in challenging circumstances and that disclosure of the information would make it more difficult for the DfT to maintain a strong negotiating position.

16. The complainant has said that he disagrees with the DfT's position because in his view it is not a true comparison to compare the use of Manston Airport and the intended long-term solution. The Commissioner has considered the complainant's arguments but on the basis of what she has seen she is satisfied that the use of Manston Airport is the nearest current equivalent to the long term solution which HE is in the process of negotiating. As such, the requested information would be very useful to the parties negotiating with HE as it would reveal what the government is currently spending on Operation Stack. This would give the landowners HE is negotiating with more of an idea about what kind of prices the government might be willing to pay when negotiating the long term solution. This would allow them to alter their negotiating position accordingly. For these reasons the Commissioner has decided that section 43(2) is engaged and she has now gone on to consider the public interest, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosure

17. The complainant has argued that the public interest favours disclosure because it would reveal how much taxpayers' money has been paid to the Owners of Manston Airport given that this has yet to be used as part of Operation Stack.
18. For its part the DfT acknowledged that releasing the information would allow the taxpayer to view the Government's spend on Manston Airfield in support of Operation Stack. It agreed that there is a public interest in ensuring scrutiny of Government expenditure and reassuring the public that taxpayers' money is spent effectively.
19. It said that it also understood the public interest in the transparency of procurement exercises undertaken by the Government. It accepted that it is important to demonstrate that the best value for money is achieved when negotiating commercial solutions.

20. The DfT also took into account the widespread interest in Operation Stack, how it is managed and how it will work in the future. It said that this has a substantial impact on the Kent economy and it recognised there is public interest in demonstrating Government is handling it as efficiently as possible.

Public interest arguments in favour of maintaining the exemption

21. In favour of maintaining the exemption the DfT said that there was a real likelihood of tangible harm to the commercial interests of HE. It emphasised that the procurement exercise for the long term solution to Operation Stack was live when the complainant made his request and that the main argument for non-disclosure was to ensure best value for money was obtained in its negotiations.
22. The DfT explained that the budget from which to deliver the long term solution was provided by HM Treasury from funds collected through the UK taxpayer, and that extra expenditure on the long-term solution would be likely to diminish the funds available for investment in England's strategic roads. Therefore, it argued that it was important to support HE to ensure best value for money. It went on to say it was in the public interest that the best price was agreed on the long-term site as this was public money which could be reinvested in other public assets. It argued that disclosure of the requested information would "increase the land price and increase pressure on delivery inside the budget envelope".
23. The DfT further argued that disclosure of the requested information would harm the commercial interests of HE because it would give the landowners it was negotiating with knowledge of current Government spend on Operation Stack. This would, it said, provide owners with details on the daily rental fee and site running costs which the Government was currently paying for availability of the Manston site for Operation Stack, if it is needed. This would make it harder to achieve the best value for money and the DfT referred the Commissioner to the document 'Managing Public Money' which set out the Government's expectations with respect to achieving value for money.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454191/Managing_Public_Money_AA_v2_-jan15.pdf

Balance of the public interest arguments

24. The Commissioner has considered the competing arguments and accepts that disclosure would serve the public interest in terms of promoting transparency and accountability in the spending of public money. The

government have paid the owners of Manston Airport to have it made available for use during Operation Stack. However, it has yet to be used since the agreement was announced in August 2015. In the circumstances it is understandable that there is a public interest in scrutinising this decision and ensuring that public money is spent effectively.

25. However, the importance of ensuring that public money is spent effectively also reinforces the arguments for maintaining the exemption. In the Commissioner's view it is very strongly in the public interest that government is able to achieve the best deal for the taxpayer in its commercial negotiations. The Commissioner has already accepted that disclosure would prejudice the commercial interests of the HE and this weighs strongly in favour of maintaining the exemption because this impacts on the ability of the HE to negotiate the best deal and reduces the amount of money that can be spent on transport infrastructure elsewhere.
26. The Commissioner has accepted that disclosure 'would' rather than 'would be likely to' prejudice the commercial interests of HE, and therefore the arguments for maintaining the exemption carry greater weight when balancing the public interest. Furthermore, this is a very large and important project and so any prejudice caused to the negotiating position of HE is likely to be significant.
27. The crucial issue in this case is the timing of the request. When the complainant made his request HE was still in the process of negotiating the long term solution and disclosure at this point would be very damaging. Therefore whilst the Commissioner accepts that there is a public interest in transparency and accountability, at the same time it can't be in the public interest to disclose information if this would make it harder to achieve value for money for the taxpayer. For these reasons the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Right of appeal

28. 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

29. 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.
30. 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

Paul Warbrick
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