

FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

21 February 2006

Public authority: Derry City Council

Address: The Council Offices
98 Strand Road
Derry
County Londonderry
BT48 7 NN

Summary decision and action required

The Information Commissioner's decision in this matter is that Derry City Council (the 'Council') has not dealt with the request made in accordance with Part 1 of the Freedom of Information Act 2000 (the "Act") in relation to the requirements of Section 1(1) (b) of the Act.

The Commissioner requires the Council to communicate to the Complainant the information requested (to the extent that such information has not been disclosed to the Complainant since the date of the complaint to the Commissioner) within 30 days after the date of service of this Decision Notice.

1.0 Application for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the Council has been dealt with in accordance with the requirements of Part 1 of the Act.

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2.0 The Complaint

2.1 The Complainant requested the following information from the Council on 5 January 2005 in accordance with section 1 of the Act.

‘...details about Derry City Councils agreement with Ryanair, regarding the use of Derry City Airport’

‘...how much Ryanair pay Derry City Council for the use of the facility’

The Council issued the Complainant with a refusal notice on 2 February 2005 stating that the information he had requested was exempt under Sections 29, 41 and 43 of the Act.

The Complainant wrote to the Council on 2 February 2005 asking the Council to review its decision. The Council issued the Complainant with the internal review decision on 23 February 2005 stating that the application of the exemptions in Sections 29, 41 and 43 had been upheld as a result of the internal review.

On 7 March 2005, the Complainant wrote to the Commissioner by email seeking a review of the decision of the Council to refuse the requested information.

3.0 Relevant Statutory Obligations under the Act

3.1 Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

4.0 Review of the case

4.1 Scope of the review

The Commissioner considered whether or not the Council had complied with the requirements of Section 1(1) (b) of the Act and in

particular whether it had properly applied the exemptions cited. Furthermore, the Commissioner considered whether or not the Council had complied with the requirements of Section 17 of the Act.

4.2 The Commissioner's Investigation

On 13 June 2005, the Commissioner wrote to the Council and requested a copy of the information which formed the subject matter of the Complainant's request.

The Council relied upon the exemptions contained in s29, s41 and s43 of the Act in withholding the requested information from the Complainant:

In addition, the Commissioner asked for additional information to assist in understanding how the Council had reached the decision to withhold the information in the form of a series of questions with particular reference to the exemptions cited by the Council.

The Commissioner, in investigating the complaint, considered whether the refusal notice provided by the Council on 2 February 2005 met the requirements of section 17 of the Act. This was not a matter raised by the Complainant but the Commissioner took the view that it was appropriate to raise this issue with the Council which it did on 13 June 2005 when Ms Radford of the Commissioner's office wrote to the Council and gave an explanation as to why the refusal notice did not meet the requirements of s17 of the Act.

In her letter to the Council of 13 June 2005, Ms Radford asked the Council for an explanation as to how the s29 (1) (a) exemption is engaged with regard to the requested information and, in particular, for an explanation as to how the disclosure of the information would, or would be likely to, prejudice the economic interests of a part of the United Kingdom and how the Council had assessed the likelihood of this harm occurring. Ms Radford also explained that s29 is a qualified exemption and so the Commissioner would also need to be satisfied that the public interest in withholding the information requested outweighed the public interest in its disclosure.

In its response of 13 July 2005, the Council confirmed that it would take into account the advice given by Ms Radford regarding refusal notices when dealing with future requests. The Council also provided a copy of the information which was the subject matter of the request. This comprises the Heads of Agreement letter dated 25 March 1999 between Ryanair and the Council ("Heads of Agreement").

In its letter of 13 July 2005 in response to Ms Radford's letter the Council put forward the following arguments;

(i) The Council's public position is that the Derry City Airport ("The Airport") is a valuable infrastructural asset for the region;

(ii) The development plan in existence outlines expansion opportunities for the Airport supported by documents that establish the context for the development of the Airport in terms of the economic wellbeing of the region;

(iii) The Council holds an exclusive position in Northern Ireland being the only Council to own and manage a commercial regional airport. The investment by the Council in the Airport is managed through its rates process. The Council controls its public spending through this process supported by the Council's committee system for advising and implementing decisions. In addition, expenditure by the Council on the Airport is subject to intense scrutiny and accountability through Local Government audit, the Department for the Environment, the Department for Regional Development and the supervisory jurisdiction of the High Court;

(iv) To enable the Airport to expand, the Council requires the flexibility to make commercial arrangements with a range of operators and the potential for these arrangements to bring in revenue and maintain employment are core to the financial performance of the Airport and its ability to continue as an economic driver for the region;

(v) Passenger numbers are growing and it has retained airlines but its commercial position still needs to be protected in a competitive environment.

The Council also put forward its arguments as to the basis on which the public interest in withholding the information requested outweighs the public interest its disclosure as follows;

(vi) The Council holds the view that disclosure of the Heads of Agreement would reduce the commercial value of the Airport and its importance as an economic driver for the region;

(vii) The Council has produced a series of business plans and economic appraisals that show the economic contribution the airport makes to the region. These reports also assess the potential changes to business scenarios if the Council is unable to attract or retain business for the Airport and the adverse economic impact which would result in loss of business;

(viii) The Council's decision in deciding not to disclose the requested information is based on the Council's experience of the way in which other airports elsewhere in the UK operate in that they do not publicly

disclose their business interests or their partnership arrangements with airlines.

The Commissioner was also provided with an explanation of the Council's reliance on the section 41 and section 43 exemptions as outlined below. Some of the information contained in the Heads of Agreement has been disclosed to the Complainant since the Complainant asked the Commissioner to consider his complaint. The information disclosed to the complainant is in the form of a redacted copy of the Heads of Agreement letter. The Commissioner's decision in this instance is based on the non-disclosure by the Council of the Heads of Agreement in its refusal notice of 2 February 2005 as re-affirmed by the Council in its letter to the Complainant of 23 February 2005.

5.0 The Commissioner's Decision

5.1 Section 29 of the Act.

Section 29 provides that:

“(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(a) the economic interests of the United Kingdom or any part of the United Kingdom, or

(b) the financial interests of any administration in the United Kingdom, as defined by Section 28(2)”

The Commissioner is not satisfied that the exemption in s29 of the Act is engaged in the light of the information contained in the Heads of Agreement for the following reasons;

(a) The test in s29 (1)(a) of the Act is whether release of the information in respect of which the exemption is claimed “*would, or would be likely to, prejudice*” the economic interests of any part of the United Kingdom. The Commissioner's interpretation of “*likely to prejudice*” is that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. The Commissioner draws support for this view from the words of Mr Justice Munby in R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin). The Commissioner is of the view that this threshold for prejudice referred to above was not achieved in relation to the information requested as outlined below.

(b) At the time of the request the Heads of Agreement was almost six years old and some of the information contained therein was in the public domain; for example, the flight schedule, the operational requirements detailing the extension to the runway and the obligation on the Council to keep the service private and confidential until announced publicly by Ryanair. Despite the fact that elements of the Heads of Agreement were in the public domain at the time of the request, the Council did not supply a redacted version of the Heads of Agreement to the Complainant in response to his request and this was only provided subsequently after the Complainant had complained to the Commissioner.

(c) The Commissioner is of the view that the Council was motivated by factors designed to encourage investment in the region in negotiating the Heads of Agreement with Ryanair. The Commissioner is not satisfied that the Council has demonstrated the prejudice, or likely prejudice, to those interests as a result of the release of the Heads of Agreement to the Complainant at the date of the request, the airport having become an established feature of the region.

(d) Since the date of the Heads of Agreement, the Council has entered into arrangements with other carriers to use the Airport and so the Council is not reliant upon Ryanair as the only carrier using the Airport. In the view of the Commissioner, at the date of the request, the economic considerations were not the same as those at the date that the Heads of Agreement was entered into by the Council.

(e) Since the date of the Heads of Agreement, arrangements between Ryanair and a regionally based public airport has been the subject of a European Commission decision. The 'Charleroi decision' [Commission decision of the 12 February 2004, notified in number C (2004)516] concerned the advantages granted by the Walloon region and Brussels South Charleroi Airport to Ryanair. The Charleroi decision concerned advantages granted to Ryanair for the operation of services at Charleroi and the question as to whether they amounted to State Aid. The Charleroi Decision concerned a summary of the agreement entered into by the Walloon Region, the owner of the Charleroi Airport infrastructure and Ryanair. In the Charleroi decision there is reference to the fact that it is normal operational practice for airports to be able to provide marketing support and reductions on airport charges according to volumes of passengers. State aid is available especially in the case of airports that are not well established (start-up aid) provided that such advantages remain proportional, realistic and limited in duration (e.g. paragraph 3.2.1(19) and 5.3.1 (266) Having regard to the fact that the terms of the arrangement entered into between Walloon Region and Ryanair were in the public domain at the time of the complainant's request. The Commissioner is mindful of the fact that the Walloon Region and the Council are public authorities that own airports in regions which were underdeveloped. As a result of the Charleroi

decision there is public awareness of the fact that carriers are offered incentives by airports in certain circumstances.

The Commissioner is satisfied that the exemption in section 29 (1)(a) of the Act is not engaged, therefore the Commissioner has not considered the public interest arguments put forward by the Council in this decision.

5.2 Section 41 exemption

Section 41 provides that:

“(1) Information is exempt information if -

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1) (a) would (apart from this Act) constitute an actionable breach of confidence.”

The Commissioner is of the view that s41 is not engaged for the following reasons;

(a) To support its position that the s41 exemption applies to the Heads of Agreement, the Council provided the Commissioner with a copy of an email dated 2 February 2005 from Ryanair stating that:

“Our contract with Derry Airport is confidential and contains commercially sensitive information .The information should therefore not be disclosed under the FOI Act”

The Council relies on the email of 2 February 2005 and an extract from the transcript of proceedings of the Northern Ireland Affairs Committee, as a basis for supporting its claim that an express duty of confidence is owed to Ryanair and as one of the grounds for non-disclosure of the Heads of Agreement.

The Commissioner is of the view that there is no express duty of confidence owed by the Council to Ryanair in respect of information provided by Ryanair to the Council under the terms of the Heads of Agreement because the Heads of Agreement do not contain any reference to, or an express undertaking for non-disclosure on the part of the Council or Ryanair of confidential information comprised in the

Heads of Agreement. The Disclosure provision referred to above no longer applies given that the fact that Ryanair is flying out of the Airport is now in the public domain and has been since 1999. The Commissioner is of the view that the email of 2 January 2005 is helpful in clarifying the view of Ryanair as at that date as to the confidentiality of the arrangements between the Council and Ryanair, and of assistance to the Council in assessing the extent to which s 41 of the Act may apply to any information relating to Ryanair under the Heads of Agreement. However, the Commissioner is of the view that the email does not create an express duty of confidence to Ryanair, nor does it provide a basis for the Council to withhold the Heads of Agreement in its entirety.

The Commissioner is also of the view that whilst the extract of evidence of 30th November 2004 states the general position that arrangements between the Airport Authority and any airline are commercially confidential, it does not refer to the specifics of the Heads of Agreement. The Council has also provided the Commissioner with copies of the correspondence referred to in the Heads of Agreement between Ryanair and the Council. This correspondence exchange occurred several days prior to the date upon which the Heads of Agreement was entered into and makes no reference to the information contained in the Heads of Agreement being confidential or to an obligation on the part of the Council not to disclose the detail of the Heads of Agreement.

(b) The Commissioner's interpretation of s 41 (1) (a) is that for the exemption to be engaged the information has to have been obtained by the Council "from any other person". The Commissioner has not been able to identify information obtained from Ryanair to which this exemption can relate. The Council in its response to Ms Radford's letter of 13 June states that:

"The application of this exemption reflects the fact that information was provided by a third party to the Council and that disclosure of the information may give rise to an actionable breach of confidence."

As the Heads of Agreement do not comprise any specific information received from Ryanair, the Commissioner is of the view that this exemption is not engaged.

Commissioner is therefore satisfied that Section 41 of the Act is not engaged.

5.3 Section 43(2) exemption.

Section 43(2) provides that;

“ Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

The Commissioner considered whether the disclosure of the information requested would or would have been likely to prejudice the commercial interests of the Council and Ryanair at the time of the request.

The Council

In her letter of 13 June 2005, Ms Radford asked the Council to clarify how the disclosure of information would, or would be likely to prejudice the commercial interests of the Council, and how the likelihood of this prejudice occurring had been assessed.

The response received from the Council in their letter of 13 July 2005 stated that:-

- (i) The commercial interests of the Council relates to the Council's ability to successfully participate in the highly commercial activity which is the operation of a regional civil airport;
- (ii) High levels of competition exist within the airline and airport sector to retain and attract new airlines and to expand routes;
- (iii) In applying the exemption the Council is able to protect its competitive position within this sector which in turn helps to bring more business into the region, improve the value of the Airport which in turn has the effect of reducing the cost of the Airport for local ratepayers;
- (iv) The release of the information would prejudice the reputation of the Airport in the Airline/business sector which would discourage other investors and airline business relations with the Airport;
- (v) The release of commercial agreements between airlines may impact on the Airport's ability to negotiate effectively and achieve the most competitive and commercially beneficial arrangements for the Airport;

The Commissioner is not satisfied that the Council has demonstrated that in this case how the disclosure of the particular information would, or would have been likely to cause prejudice to the Council's ability to participate in the commercial activity which is the running of a regional airport. The Commissioner is satisfied that the operation of a regional airport by a public authority is a commercial activity. However the Commissioner is not satisfied that the Council has demonstrated in this case how the disclosure of the information would or would be likely to cause prejudice to the Council's ability to run an airport.

The Commissioner in arriving at this decision, on the Council's application of the exemption in this case has applied the test of 'likely to prejudice' as referred to above paragraph 5.1(a) above and applied by the Information Tribunal in the case of John Connor Press Association vs The Information Commissioner (Appeal no. EA/2005/0005). The Commissioner is not satisfied that the test of prejudice has not been met for the following reasons:-

(a) The arrangement was entered into at a time when the Council was seeking to attract airlines and operators to a newly established Airport. However at the time of the request the Airport was well established and the commercial interests of the Council would differ greatly from the situation in March 1999 when the arrangements were first agreed.

(b) Some of the information contained in the Heads of Agreement was in the public domain at the time that the Complainant made his request. For example, the flight schedule, the operational requirements detailing the extension to the runway and the obligation on the Council to keep the service private and confidential until announced publicly by Ryanair.

(c) The Commissioner is not satisfied that the Council considered the release of the information in relation to the Council's commercial interests as identified by it to the Commissioner at the time of the request. Whilst the Council may have been motivated by factors designed to encourage investment in the region in negotiating the Heads of Agreement with Ryanair in 1998 and the importance of the Airport to the regeneration of the region, the Commissioner is not satisfied that the Council has demonstrated the prejudice, or likely prejudice, to those interests as a result of the release of the Heads of Agreement to the Complainant at the date of the request.

(d) The Commissioner accepts that in certain circumstances there may be prejudice to the commercial interests of a public authority where there is damage to their business reputation. In this case, the Council has failed to demonstrate to the Commissioner that any damage would have occurred to their business reputation in the event that the Heads of agreement had been disclosed. The Commissioner considers that the risk of prejudice must be established at the time of the making of the request. The Commissioner is not satisfied that the Council has provided sufficient evidence of such prejudice occurring in all the circumstances of this case.

(e) It is also the Commissioner's view that at the time of the request, the Council failed to have regard to the impact of the Charleroi decision in 2004 and to the Manchester decision (Case T-395/04 2004/C 300/95) as regards expectations of openness and transparency in relation to start up arrangements between airline carriers and publicly funded airports. The Commissioner draws support for the view that no prejudice would or would have been likely to occur in this case by the

fact that details of such similar arrangements are currently in the public domain.

Ryanair

In her letter of 13 June 2005, Ms Radford asked the Council to explain how the disclosure of the information would prejudice the commercial interests of Ryanair, the likelihood of this prejudice occurring and how the Council had assessed the risk.

The response received from the Council in their letter of 13 July 2005 stated that:

(i) Ryanair is a low cost airline that enters into a range of contracts and agreements with airport authorities throughout Europe. As the low cost airline sector is highly competitive such airlines preserve their positions by closely guarding the arrangements they have with airport authorities

(ii) Disclosure of information would undermine Ryanair's competitive position in Northern Ireland as a provider of low-cost services from City of Derry Airport

No further information was provided by the Council in support of this argument.

The Commissioner's view is that, given the facts outlined in the Charleroi decision and the lack of any evidence to support the Council's arguments of likely prejudice to the Ryanair's commercial interests, the exemption in s43(2) of the Act is not engaged in relation to the commercial interests of Ryanair.

The Commissioner's view therefore is that s.43 (2) was not engaged in relation to the information requested at the time of the request. For this reason, the Commissioner has not considered the public interest arguments in respect of this exemption.

6.0 The Commissioner's Decision

6.1 The Commissioner's decision in this matter is that the Public Authority has not dealt with the Complainant's request in accordance with the requirements of s1(1)(b) of the Act in that it failed to provide the information requested to the Complainant for the reasons set out above.

7.0 Action Required

In view of the matters referred to above the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires that:

The Council shall, within 30 *days* after the date of service of this Decision Notice, provide to the complainant the information sought by him in his request dated 5 January 2005.

8.0 Failure to comply

Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

9.0 Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Information Tribunal Tel: 0116 249 4326/4320/4295
Arnhem House Support Centre Fax: 0116 249 4131
PO Box 6987 Email: informationtribunal@dca.gsi.gov.uk
Leicester
LE1 6ZX

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 21st day of February 2006

Signed:

Richard Thomas
Information Commissioner
Information Commissioner
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