

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 May 2018

Public Authority: Department for Transport (DfT)
Address: Great Minister House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested the DfT to disclose the draft byelaws currently under discussion with Liverpool Airport. The DfT refused to disclose this information citing sections 22 and 41 of the FOIA.
2. The Commissioner's decision is that the DfT has correctly applied section 22 of the FOIA in this case and that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 12 June 2017, the complainant wrote to DfT and requested information in the following terms:
 - "A map of the area covered by the existing 1982 Liverpool Council's (LC) bylaws that relate to Liverpool Airport (LJLA) which are still in force.
 - The FoI response reference above indicates that the DfT is in discussion with LJLA about approval of their revised bylaws. In this context the only bylaws that exist are LC's bylaws. (1 above). As far as I'm aware LJLA don't have any statutory bylaws so what are the bylaws that are being revised and would you let me have a copy?

- Would you let me have a map that defines the area that will be covered by the revised bylaws?
 - Any correspondence in the last eight years with either LJLA, LC or any other parties, on the subject of any bylaws that relate to the airport, however that is or has been defined. "
5. The DfT responded on 11 July 2017. It disclosed some information but considered other information was exempt from disclosure under sections 40 and 41 of the FOIA. In relation to bullet points one and three above, it informed the complainant that the information is not held.
6. The complainant requested an internal review on 13 July 2017 but only in relation to the second bullet point:
- "The FoI response reference above indicates that the DfT is in discussion with LJLA about approval of their revised bylaws. In this context the only bylaws that exist are LC's bylaws. (1 above). As far as I'm aware LJLA don't have any statutory bylaws so what are the bylaws that are being revised and would you let me have a copy?"
7. The DfT carried out an internal review and notified the complainant of its findings on 23 August 2017. It upheld its previous application of section 41 of the FOIA but also advised the complainant that it now wished to rely on section 22 of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 31 August 2018 to complain about the way his request for information had been handled. His complaint was limited to the following element of the request and his dissatisfaction with the DfT's decision to withhold the requested information under sections 41 and 22 of the FOIA:
- "The FoI response reference above indicates that the DfT is in discussion with LJLA about approval of their revised bylaws. In this context the only bylaws that exist are LC's bylaws. (1 above). As far as I'm aware LJLA don't have any statutory bylaws so what are the bylaws that are being revised and would you let me have a copy?"
9. The Commissioner considers the scope of her investigation is to determine whether the DfT was correct to withhold the draft byelaws under the exemptions cited. She will first consider section 22 of the

FOIA. She will only go on to consider the application of section 41 of the FOIA if she decides that section 22 of the FOIA does not apply.

Reasons for decision

10. Section 22 of the FOIA states that information is exempt from disclosure if the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not) and in all the circumstances it is reasonable to withhold the information until its planned publication.
11. This exemption is also subject to the public interest test. So, in addition to demonstrating that section 22 of the FOIA is engaged, the public authority must consider the public interest arguments for and against disclosure and demonstrate in this case that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
12. The Commissioner is satisfied that the requested information was held at the time of the request by DfT with a settled expectation that it will be published at some future date. It explained that when an airport decides to update or have completely new byelaws, it will send them to the DfT. The DfT's lawyers will then consider what has been presented and enter into dialogue with the airport about any questions or comments they have. It confirmed that when the byelaws are ready, the airport will give notice in the local press. A period of at least one month is then allowed for members of the public to make any relevant representations regarding the byelaws to the Secretary of State. Once the consultation period has expired, the Secretary of State may then confirm with or without modification any of the submitted byelaws. The DfT confirmed in this case the draft byelaws have been reviewed and it awaits the airport's response on the most recent issues it has raised.
13. The Commissioner notes that the complainant does not agree this exemption can apply because the draft byelaws will not be the published information. He believes the published information will in fact be the final version which is not the same as the requested information.
14. The Commissioner has considered a number of cases concerning the application of section 22 of the FOIA to draft information. It has been the Commissioner's established viewpoint that documents can go through many drafts before they are finalised. However, if the intention or expectation in producing anyone of the drafts is to publish the information in it, the exemption can be considered. Therefore, if there is a settled intention to publish the information on which the requested information is a draft, at the time of the request, the exemption can

apply. It is the Commissioner's view that there was a settled intention at the time of the request to publish the byelaws on which the requested information is a draft.

15. There is no requirement in this exemption to have a determined publication date. The public authority only has to demonstrate that there was a settled intention to publish the requested information at the time of the request at "some future date". For the above reasons, the Commissioner is satisfied that the DfT has sufficiently demonstrated that this was indeed the case.
16. Turning now to whether it is reasonable to withhold the information until the date of intended publication, the DfT has said that there is a statutory consultation process in place for the amendment of existing byelaws or the implementation of new ones. This process allows all interested parties the same opportunity to comment on what is proposed at the same time. It considers withholding the information in advance of it being published for consultation is sensible and in line with accepted practices and fair to all concerned. DfT stated that it is reasonable in this case to follow the standard consultation process that is used as part of the development of byelaws. Consultation allows an authority to seek and collate the views of the public on its proposed plans and is a fair way of allowing interested parties to comment at the same time.
17. The complainant is of the opinion that it is not reasonable to withhold the information until the date of publication. He believes the new draft byelaws have been under discussion since 2010 and it is unacceptable to still be in discussion seven years later without any conclusion. He alleges (and has provided an email to support this) that Liverpool Council and the airport both regard the existing byelaws as obsolete yet he has separate correspondence from the Government Minister via his MP which confirms that the current 1981 byelaws are in force.
18. The complainant has said that the airport's agent (in full knowledge of the airport) is issuing invoices for breaches of what they claim is a contract not to stop on the airport roads. They are not claiming breach of the statutory byelaws since the airport denies they exist, instead they claim a breach of contract. He maintains that if a motorist stops on the airport roads the correct course of action would be a breach of the byelaws which should be prosecuted in a magistrate court. He stated that, of course, the airport and its agent prefer that not to be the case since any penalty or fine awarded by a magistrate would go to the national exchequer and not to a commercial organisation.
19. The Commissioner asked the DfT to provide its comments to this. It stated that it does not consider these arguments alter in anyway its

consideration of whether it is reasonable to withhold the requested information until the date of intended publication. It argued that the complainant's issue seems to be the legal basis upon which the airport has elected to regulate traffic within its boundaries (i.e. relying on breach of contract as opposed to breach of byelaw); the suggestion being that commercial reasons are behind this decision.

20. The DfT pointed out that it considers this is a private law matter between the airport's agent responsible for traffic management and any aggrieved individuals who have been issued with invoices. It maintains that it is reasonable for the draft byelaws to be withheld until the date of intended publication for the reasons it has already given; namely that this is in line with a statutory consultation process as set out in Schedule 3 to the Airports Act 1986 and allows all interested parties the same opportunity to comment on the proposed byelaws at the same time.
21. It argued that the draft byelaws set out the law as it is proposed to be, in relation to regulating the use and operation of the airport and the conduct of all persons while within the airport. Having sight of the draft byelaws will not address any of the arguments the complainant has raised and so in its view makes no material difference.
22. The Commissioner has considered all arguments presented and she is of the view that it is reasonable to withhold the information until its intended publication. There is a clear statutory process in place for the consideration of byelaws and it is reasonable and a sensible approach for this to be followed in this case. She notes that public consultation will be permitted for at least one month once the byelaws have been agreed and members of the public are able to make representations at this point. This allows the authority to seek and collate the views of the public on its proposed plans in line with the defined process in place and is a fair way of allowing interested parties to comment at the same time.
23. The Commissioner notes that the complainant has said that the airport and the DfT have been in discussions for several years but she imagines the drafting, agreement and ultimate settlement of new byelaws can be a lengthy and detailed process and she understands that the existing byelaws are still in place until they are superseded by any others. The Commissioner agrees with the DfT that the complainant's concerns over how the airport is currently dealing with traffic management is a private matter between the airport and the aggrieved individual and she struggles to see how the disclosure of the requested information (draft byelaws which are not enforceable and still subject to change) would address or assist with such concerns. It remains the case that if someone is in breach of a byelaw it can only be of those that are in place at that time; not any draft of a new byelaw or intended future revision of an existing one.

24. In terms of the public interest test, the DfT recognised the public interest in openness, transparency and accountability. It also said that it understood many people use the airport and may be affected by the byelaws. However, in this case it felt it was in the public interest to maintain the exemption and the statutory and consultation process that is firmly in place for such byelaws. It stated that it is in the public interest to follow the statutory process for the creation and approval of byelaws to ensure that a consistent approach is taken across government. It argued that the byelaws will be published once finalised by the airport for public consultation. At this point interested parties will have the opportunity to consider them and make any representations that they wish. It argued that disclosure of byelaws that have not been approved or are not legally binding would cause confusion.
25. The Commissioner acknowledges the public interest in transparency and accountability and in members of the public having access to information to enable them to understand more clearly what options are being considered and how these may affect them. In this case she also notes the complainant's concerns about the length of time already taken by the airport and the DfT in discussing the draft byelaws and the issues he and others have with the airport's current practices of dealing with traffic management issues.
26. However, in this case the Commissioner is satisfied that there are stronger public interest arguments in favour of maintaining the exemption. The revision and changes to existing byelaws or the implementation of new ones can be a lengthy process and involve various discussions between both parties before a final version is available for publication. There is a statutory process in place applicable to all and the Commissioner considers it is in the public interest to ensure that such processes are applied consistently and fairly in all cases. She notes that there will be a public consultation once they are published at which point all members of the public will have equal time to consider them and make any representations they wish.
27. The Commissioner also understands that the current byelaws are still in place until they are superseded by new byelaws. Disclosure of revisions or new byelaws prior to them being finalised and legally binding would cause confusion as the DfT has alleged. She notes that the complainant has genuine concerns about how the airport is currently dealing with alleged breaches of existing byelaws. But she does not consider the disclosure of the requested information, which is in draft and not legally binding, would assist with this issue and therefore outweigh the public interest arguments in favour of allowing the statutory process that is in place to continue.

28. As the Commissioner is satisfied that section 22 of the FOIA applies and that the public interest rests in maintaining this exemption, there is no need to go on to consider the DfT's application of section 41.

Procedural matters

29. Section 10 of the FOIA states that a public authority shall respond to requests for information promptly and in any event no later than 20 working days from receipt. It is noted in this case that the DfT responded on the 21st working day. The Commissioner therefore finds the DfT in breach of section 10 of the FOIA.

Other matters

30. The section 45 code of practice recommends that public authorities carry out requests for an internal review within 20 working days of receipt and certainly no later than 40 working days. An additional 20 working days should only be required if a particular request is complex or voluminous. In this case the request was neither. However, the DfT took just short of six weeks to carry out the complainant's internal review.
31. The Commissioner would like to remind the DfT of the requirements of the code and the need to complete internal reviews promptly. 20 working days should be sufficient for the majority of reviews; additional time should only be required in particularly complex or voluminous cases.

Right of appeal

32. 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

33. 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.
34. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF