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2 April 2015

The Information Commissioner's Office
FOI/EIR Complaints Resolution
Wycliffe House
Water Lane
Wilmslow, SK9 5AF

Dear Sir

Civil Aviation Authority (“CAA”)

1. Would you please treat this letter as an appeal on the part of Stop Stansted Expansion (“SSE”) against the refusal of the CAA to disclose a copy of a submission from National Air Traffic Services (“NATS”) and Stansted Airport Limited (the “NATS Proposal”) concerning an Airspace Change for departure routes at London Stansted.

Background and Why SSE Is Interested

2. SSE represents some 7500 members and registered online supporters including some 150 parish and town councils and local residents' groups and national and local environmental organisations. Our objective is to contain the development of Stansted Airport within tight limits that are sustainable and thus ensure both that the quality of life of residents is protected over areas of Cambridgeshire, Essex, Hertfordshire and Suffolk and that the heritage and natural environment in those areas are also protected.

3. NATS has held a consultation on a proposal to route more traffic departing from Stansted on a more northerly path to the east of the Airport (the Clacton route) with a corresponding reduction in the amount of traffic departing on a more southerly route to the east of the Airport (the Dover route). SSE has responded to that consultation opposing the proposal on several grounds including that the proposal would offer only negligible benefits. For instance, there was no evidence that the proposal would reduce emissions by more than a very small amount, and there was no evidence for a reduction of delay at Stansted and other airports. On the other hand the proposal would have adverse noise impacts overall on the local community living within 20 miles of Stansted Airport under flight paths below 7000 ft. Furthermore the proposal did not strike a fair balance of noise benefits for the local communities near Stansted Airport. NATS has received comments on the proposal from other interested parties and following the consultation has submitted the NATS Proposal to the CAA. It is the CAA which will decide whether or not to accept the NATS Proposal in whole or in part.

Request from SSE

4. On 9 February 2015 SSE emailed the CAA and asked to see a copy of the NATS Proposal. On 17 February 2015 the CAA responded and explained why it would not disclose a copy. SSE was not satisfied by the response and on 25 February 2015 asked the CAA to carry out an internal review of its initial decision. The CAA acknowledged this request on 25 February 2015 and wrote in detail on 23 March 2015 with the outcome of the formal review. This was to confirm the initial decision and therefore to continue to refuse to release a copy of the NATS Proposal.

Patron: Terry Waite CBE

Stop Stansted Expansion is a working group of the North West Essex and East Herts Preservation Association

5. We attach copies of:

- (a) SSE's email of 9 February;
- (b) The CAA's response of 17 February;
- (c) SSE's email of 25 February; and
- (d) The CAA's response of 23 March.

We have not attached a copy of the CAA's email of 25 February because it is a simple acknowledgement of SSE's email of 25 February.

The Issue

6. The issue whether the CAA should disclose the NATS Proposal depends upon the construction of the Environmental Information Regulations 2004 ("**EIR**").

General Comments on the EIR

7. The CAA has rightly accepted that the NATS Proposal contains "environmental information" as defined in Regulation 2(1). This is clearly correct because the NATS Proposal must deal with both noise and emissions.

8. Regulation 5(6) says that any enactment or rule of law that would prevent the disclosure of information in accordance with the EIR shall not apply. The CAA has referred to Regulation 5(6) in its letter of 17 February but not in its letter of 23 March.

9. Regulation 12(2), to which the CAA has not referred, provides that there is a presumption in favour of disclosure.

10. Regulation 12(9), to which the CAA has not referred, provides that "To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exemption referred to in paragraphs 5 (d) to (g)".

11. Regulation 12(1) imposes a double test before non-disclosure by a public authority, such as the CAA, is justified. The CAA would be entitled to refuse to disclose the NATS Proposal if (a) an exception to disclosure applies under paragraphs 12 (4) or (5) **and** if (b) in all the circumstances the public interest in maintaining the exception outweighs the public interest in disclosing the information. Both limbs of Regulation 12(1) must be satisfied before the CAA may properly refuse disclosure.

12. The CAA has relied on Regulations 12(4)(d) and 12(5)(c),(d) and (e) for its refusal to disclose the NATS Proposal.

Regulation 12(4)(d)

13. The CAA has admitted that the NATS Proposal has been completed – see the bottom of page 2 of the CAA's letter of 17 February – but the CAA has nonetheless relied on the fact that its own evaluation of the NATS Proposal is still in the course of completion as a reason for refusing disclosure. We are not seeking disclosure of any documents produced by the CAA while reviewing the NATS Proposal or any other material which the CAA will take into account in the course of making its decision. We are seeking disclosure of a

document that has been completed by NATS. The CAA and NATS are independent, and the NATS Proposal is a piece of independent evidence, which the CAA will consider. Furthermore, NATS has produced the NATS Proposal as part of its duties under its Licence issued by the CAA.

14. The CAA has confirmed that when it publishes its decision it will “include” information in the NATS Proposal. We cannot of course know until the CAA produces its decision - which may be in July 2015 - how much detail will then be given regarding the NATS Proposal, but we suspect that the NATS Proposal will be the principal, if not the sole, proposal regarding the redesign of the departure routes from Stansted Airport and that substantial information extracted from the NATS Proposal will therefore be published by the CAA with its decision. If so, what can be the objection to disclosing the NATS Proposal?

15. We do not consider that Regulation 12(4)(d) provides the CAA with grounds for refusing to disclose the NATS Proposal because it is a completed document. The “material” which is in the course of completion is the CAA's decision, not the NATS Proposal.

Regulations 12(5)(d) and (e)

16. The CAA has relied on Regulations 12(5)(d) and (e) without referring to Regulation 12(9). The NATS Proposal must contain information relating to aircraft emissions. We consider Regulation 12(9) makes it clear that the CAA therefore had no right to rely on Regulations 12(5)(d) and (e). In the circumstances they are irrelevant.

17. In its letter of 23 March the CAA has argued, relying on Section 102 (Schedule 9) of the Transport Act, that as NATS and Stansted Airport Limited have not given their consent to the disclosure of the NATS Proposal, Regulation 12(5)(d) is “engaged”. As we have pointed out, the CAA has not referred in this letter to Regulation 5(6). We consider that Regulation 5(6) effectively overrules the provisions of the Transport Act in this respect; this is in accordance with Council Directive 2003, following which the UK Government introduced the EIR. Furthermore, it is clear from the judgement of the Supreme Court in R (on the part of Evans) v Attorney General made on 26 March 2015 that both the Government and Prince Charles did not agree to the publication of Prince Charles's letters, but nonetheless the Upper Tribunal after a lengthy hearing did order their disclosure. The Upper Court's decision has effectively now been upheld because the Supreme Court has declared the Attorney General's certificate to be invalid.

Regulation 12(5)(c)

18. The CAA has argued that Regulation 12(5)(c) applies. The CAA has not been specific about the intellectual property rights which NATS is claimed to assert; all that the CAA has said in its letter of 17 February is that NATS has “processes for analysing and developing an airspace change proposal”. NATS no doubt has the copyright in the NATS Proposal, but if this is the intellectual property right referred to by the CAA, then if the maker of a document were able to prevent the disclosure of a document under the FOI and the EIR by asserting copyright, then the FOI and the EIR would be of no effect. We cannot judge without further information whether the “processes” referred to would constitute intellectual property rights and those “processes” have presumably already been disclosed to the CAA in the NATS Proposal, with an implied licence that they may be referred to in the information published by the CAA when it makes its decision. We do not therefore accept that Regulation 12(5)(c) justifies the non-disclosure of the NATS Proposal.

Public Interest

19. Even if Regulations 12(4)(d) and 12(5)(c),(d) and (e) were to provide the CAA with a justification for a refusal to disclose the NATS Proposal, we do not consider that the CAA is justified in arguing that the public interest test is satisfied. The decision of the Supreme Court involving Prince Charles's letters to Ministers was made on 26 March 2015 under the FOI and the EIR. The issues before the Supreme Court concerned the validity of a certificate from the Attorney General purporting to invalidate a decision of the Upper Tribunal. The majority judgements declared the Attorney's General certificate to be invalid. The Upper Tribunal's decision therefore stands and is good law.

20. The Upper Tribunal's decision demonstrates the stress laid by the courts on the presumption in favour of disclosure – see Regulation 12(2). Prince Charles's letters represent his own personal views. They were sent voluntarily to Ministers. Prince Charles had no obligation to send them, and unless accepted and acted on by Ministers, the letters would have no effect on the lives of people living in the UK. NATS, on the other hand, has produced the NATS Proposal acting under its Licence. The NATS Proposal, if accepted, will have a material effect on the lives of many residents living under the Clacton departure route from Stansted, who will find their lives and their sleep disrupted more severely than they could have anticipated when they moved into their present residences.

21. The Supreme Court's decision was made after the CAA had written its letters of 17 February and 23 March. We consider that in the light of the effective upholding of the Upper Tribunal's decision it is clear that if the issue of the disclosure of the NATS Proposal were to come before the court, the court would hold that the public interest in disclosing the NATS Proposal outweighs the public interest in keeping it confidential. The second limb of Regulation 12(1) would not therefore be satisfied, and in the light of the double test required under Regulation 12(1) to justify non-disclosure, Regulations 12(4) and (5) would not apply to prevent disclosure.

Summary

22. We trust that in the light of the points we have made in this letter, you will agree that the NATS Proposal should be disclosed and that you will accordingly require the CAA to disclose it.

Yours faithfully



Peter Sanders
Chairman of Stop Stansted Expansion

cc Ms Caroline Chalk
Head of External Information Services
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cc NATS, Stansted SID Airspace Consultation, Box 25A, 4000 Parkway,
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cc Rt Hon Sir Alan Haselhurst MP