

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 5 September 2007**

**Public Authority:** Civil Aviation Authority  
**Address:** Aviation House  
Gatwick Airport South  
West Sussex  
RH6 0YR

### Summary

---

The complainant requested a copy of the final report by an operator to the CAA of the Mandatory Occurrence Report (MOR) of an incident which occurred on 29 August 2004. The Public Authority relied on section 44 of the Freedom of Information Act 2000 (FOIA) to withhold the information. The Public Authority cited section 23 of the Civil Aviation Act 1982 as the relevant statutory bar on disclosure which informed their reliance on section 44 of the Act. After considering the case the Commissioner upheld the Public Authority's decision to withhold the information under section 44 of the Act. The Commissioner does not require the Public Authority to take any further steps in relation to the complainant's request.

### The Commissioner's Role

---

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

---

2. The complainant in a letter to the Public Authority dated 30 August 2006 made a request in accordance with section 1 of the FOIA for;  
  
"a copy of the final report by the operator to the CAA of the 29<sup>th</sup> August 2004 MOR incident....."
3. The Public Authority issued a refusal notice to the complainant in a letter dated 14 September 2006. It stated that it was withholding the requested information under

section 44 of the Act by virtue of the statutory bar contained in section 23 of the Civil Aviation Act 1982.

4. The Complainant asked the Public Authority to review its decision not disclose the information in a letter dated 1 October 2006.
5. The Public Authority concluded its internal review and responded to the complainant in a letter dated 27 October 2006. The review upheld the decision stated in the refusal notice. It added that though the information requested does not in itself form part of the MOR, it was issued pursuant to Article 142(7) of the Air Navigation Order 2005 which automatically bars its disclosure under section 23 of the Civil Aviation Act 1982.

## The Investigation

---

### Scope of the case

6. On 23 January 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Public Authority's refusal to disclose the information was appropriate.

### Chronology

7. The Commissioner contacted the complainant on 12 July 2007. He explained to the complainant that a Decision Notice (DN) had recently been issued in a case involving the public authority related to section 44 and also containing similar principles relied on by the public authority to deny his information request.
8. The Commissioner referred the complainant to the case; FS50141902 and added that due to the similarity in the principles which informed the Commissioner's decision to uphold the public authority's refusal to disclose the information in that case the complainant may wish to re-consider his complaint. However he invited the complainant to provide any further comments he wished to make to support his complaint.
9. The Commissioner further advised the complainant that he would have a right of appeal to the Information Tribunal if a DN was issued to reflect the Commissioner's position in the present case.
10. The complainant contacted the Commissioner on 18 July 2007 advising that he would like to appeal the Commissioner's decision. The complainant also drew the Commissioner's attention to an alleged statement made by the public authority at the House of Lords inquiry into Health and Aviation.
11. The complainant alleged that the public authority had informed the inquiry about the openness and integrity of its reporting system. However the complainant took

the view that the public authority's refusal to disclose the requested information contradicts the position it appeared to adopt before the House of Lords Committee.

12. The Commissioner wrote to the public authority on 23 July 2007 asking it to further clarify the reasons behind its reliance on section 44 of the FOIA to withhold the requested information. He also asked the public authority to comment on the alleged statement especially in light of the discretionary powers of disclosure granted by virtue of section 23 of the Civil Aviation Act 1982.
13. In the same letter the Commissioner sought to confirm that none of the exceptions under section 23 were applicable to the complainant's information request.
14. Furthermore the Commissioner also sought to know if the public authority had in the past exercised its discretionary powers under section 23 to disclose information.
15. Finally the Commissioner also requested a copy of any guidance or criteria the public authority may have recourse to in exercising its discretionary power under section 23.
16. In its response dated 21 August 2007 the public authority informed the Commissioner that the statement referred to by the complainant was taken out of context and mis-interpreted. According to the public authority the statement was made in reference to the willingness of members of the industry to report safety incidents to it and not in reference to the public authority's willingness to make such information open to all.
17. The public authority also confirmed that none of the exceptions under section 23 of the Civil Aviation Act are applicable to the complainant's information request and added it had not made a determination that the information requested could be disclosed.
18. It also informed the Commissioner that it could not recall an occasion where it had exercised its power of discretion to disclose information over the objection of the 'person' who provided it pursuant to the Civil Aviation Act.
19. With regard to the provision of any guidance or criteria used by the public authority in relation to the exercise of its power of discretion it informed the Commissioner that it does not have a written or documented policy in this regard. Instead as a general rule the public authority would only consider releasing information over the objection of any 'persons' where it believes it is in the interest of safety to do so

## Analysis

---

### Exemption

#### Section 44

20. Section 44(1) (a) of the FOIA exempts from disclosure any information that is prohibited from disclosure by or under any enactment. In this case the public authority relied on section 23 of the Civil Aviation Act 1982 as the statutory bar on disclosure.
21. Section 23(1) of the Civil Aviation Act 1982 prohibits the disclosure of information by the public authority or any of its employees, if that information, “relates to a particular person and has been furnished to the CAA in pursuance of any provision of this Act to which this section applies or of any Air Navigation Order.” This prohibition is subject to the exceptions set out in section 23(1) (a)-(d) and section 23(4).
22. The term ‘person’ may include companies as well as living individuals. Therefore this section would relate not just to the identity of the person reporting the occurrence but also to the company operating the aircraft.
23. The full text of section 23(1), section 23(4) and Article 142 can be found in the Legal Annex at the end of this Notice.
24. The Commissioner has first considered whether the information in question falls under one of the categories of information to which this prohibition applies. In correspondence with the Commissioner the public authority has confirmed that in this instance it believes the information in question was provided to it in pursuance of Article 142 of the Air Navigation Order 2005 (ANO 2005)
25. Article 142(7) of the Air Navigation Order 2005 (ANO) requires a person upon notification by the CAA to ‘make a report (of) information which is in his possession or control and which relates to an occurrence which has been reported by him or another person to the CAA in accordance with this article.’
26. The Commissioner is satisfied that the information in question was provided to the public authority in line with Article 142 of the ANO 2005. Therefore the Commissioner is satisfied that it falls under one of the categories of information referred to in section 23(1) of the Civil Aviation Act 1982, and as such falls under the prohibition from disclosure.
27. The Commissioner has gone on to consider the particular circumstances set out in section 23(1)(a) to (d) and section 23(4), and whether any of these circumstances apply in this case.
28. Having considered the exceptions laid out in section 23(1)(a)-(d) the Commissioner has noted that they do not impose a duty on the public authority to seek consent to disclose, or to release the information without consent. The conditions leave it within the discretion of the public authority as to whether to

disclose the information which falls under this section. From the information provided to the Commissioner it is clear that the public authority has decided not to use its discretion in this case.

29. The public authority has explained that as a general rule it would take into account aviation safety in exercising its discretionary power of disclosure under section 23.
30. What may or may not constitute aviation safety for the purposes of disclosure is therefore open to interpretation by the public authority. This flexible and open ended approach is reinforced by the fact that the public authority does not refer to a codified set of guidance or criteria in exercising its power of discretion.
31. In the circumstances of this case the Commissioner decided, that to question further the public authority's exercise of its power of discretion he would consider any codified form of guidance or criteria and/or a customary norm informed by practice adopted by the public authority, as a useful reference.
32. The public authority has stated it does not have a written policy or guidance and also does not recall any occasion where its discretionary power was exercised to disclose information over the objection of the 'person' involved. The Commissioner has therefore decided not to question the public authority's use of its discretion in this case.
33. Be that as it may the Commissioner has considered the exceptions provided under section 23(1) (a)-(d) and is satisfied that none of them apply in this case.
34. The Civil Aviation Act also provides more exceptional circumstances under section 23 (4) (a)-(b) and (d)-(f) where information provided pursuant to the Act may be disclosed.
35. The Commissioner is also satisfied that none of those circumstances apply in this case.
36. Section 23 (4) (c) provides that information may be disclosed 'to a person to whom the information in question is required to be disclosed by regulations made in pursuance of section 7 (2)'
37. One such Regulation is Regulation 9 of the Civil Aviation Authority Regulations 1991. This requires the public authority to make available reports of reportable occurrences or a summary of such reports to any person who is;
  - the operator or member of the flight crew of any aircraft;
  - engaged in the design, manufacture, repair, maintenance or overhaul of aircraft, or parts or equipment therefore;
  - the aeronautical authority of a country other than the United Kingdom, or the representative in the United Kingdom of such an authority,
  - engaged in writing about civil aviation for publication in any newspaper, periodical, book or pamphlet;

- engaged in preparing a programme about civil aviation for television or radio;
- engaged in the study of civil aviation for any academic purpose; or
- any other person whose functions include the furthering of the safety of civil aviation:

Provided that the Authority shall not be required to make available any report or summary thereof to any person if it is satisfied that to do so will not further the safety of civil aviation.

38. The Commissioner notes however that the exceptions provided under Regulation 9 are also subject to a discretionary power of disclosure by the public authority.

39. In considering the applicability or otherwise of the above exceptions the Commissioner would therefore have to take into account the public authority's discretion. However as noted above the Commissioner has decided not to question the public authority's use of its discretion.

40. The full text of Regulation 9 can be found in the Legal Annex at the end of this Notice.

41. Therefore after considering the provisions of section 23 of the Civil Aviation Act 1982 the Commissioner is satisfied that it does provide a statutory bar on the disclosure of the requested information.

42. The Commissioner upholds the public authority's decision to apply the exemption listed at section 44 of the FOIA.

## **The Decision**

---

43. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

---

44. The Commissioner requires no steps to be taken.

## Right of Appeal

---

45. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

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

**Dated the 5<sup>th</sup> day of September 2007**

**Signed .....**

**Jane Durkin  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Freedom of Information Act 2000- Section 44

#### Prohibitions on disclosure

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

### Civil Aviation Act 1982- Section 23 (1)

(1) Subject to subsection (4) below, no information which relates to a particular person and has been furnished to the CAA in pursuance of any provision of this Act to which this section applies or of an Air Navigation Order shall be disclosed by the CAA, or a member or employee of the CAA unless—

- (a) the person aforesaid has consented in writing to disclosure of the information; or
- (b) the CAA, after affording that person an opportunity to make representations about the information and considering any representation then made by that person about it, determines that the information may be disclosed; or
- (c) that person is an individual who is dead, or is a body corporate that has ceased to exist or, whether an individual or a body corporate, cannot be found after all reasonable inquiries have been made, and the CAA determines that the information may be disclosed; or
- (d) the CAA determines that the information is of the same kind as other information as respects which it has made a determination in pursuance of paragraph (b) or (c) above.



### **Civil Aviation Act 1982-Section 23 (4)**

(4) Nothing in subsection (1) above prohibits the disclosure of any information—

(a) by the CAA or a member or employee of the CAA to the Secretary of State or an officer of his or, with the consent of the Secretary of State, to an international organisation of which the United Kingdom is a member;

(b) by an officer of the Secretary of State to the CAA or a member or employee of the CAA or to such an organisation or, in accordance with directions given by the Secretary of State—

(i) to an officer of any government department; or

(ii) in connection with negotiations conducted by officers of the Secretary of State with representatives of the government of any country or territory outside the United Kingdom; or

(iii) in connection with the discharge of any obligation of the United Kingdom under international arrangements;

(c) to a person to whom the information in question is required to be disclosed by regulations made in pursuance of section 7(2) above;

(d) in pursuance of section 67(2) or (4) below;

(e) by the CAA for the purpose of complying with any duty imposed on it by section 85(1) below;

(f) with a view to the institution of, or otherwise for the purposes of, any criminal proceedings arising out of any enactment relating to civil aviation or for the purposes of any investigation undertaken in pursuance of regulations made by virtue of section 75 below.

### **Air Navigation Order 2005- Article 142**

(1) The objective of this article is to contribute to the improvement of air safety by ensuring that relevant information on safety is reported, collected, stored, protected and disseminated

- (2) The sole objective of occurrence reporting is the prevention of accidents and incidents and not to attribute blame or liability.
- (3) This article shall apply to occurrences which endanger or which, if not corrected, would endanger an aircraft, its occupants or any other person.
- (4) Without prejudice to the generality of paragraph (3), a list of examples of these occurrences is set out in Annexes I and II (and their Appendices) of Directive 2003/42 of the European Parliament and of the Council of 13th June 2003 on occurrence reporting in civil aviation .
- (5) Every person listed below shall report to the CAA any event which constitutes an occurrence for the purposes of paragraph (3) and which comes to his attention in the exercise of his functions—
  - (a) the operator and the commander of a turbine-powered aircraft which has a certificate of airworthiness issued by the CAA;
  - (b) the operator and the commander of an aircraft operated under an air operator's certificate granted by the CAA;
  - (c) a person who carries on the business of manufacturing a turbine-powered or a public transport aircraft, or any equipment or part thereof, in the United Kingdom;
  - (d) a person who carries on the business of maintaining or modifying a turbine-powered aircraft , which has a certificate of airworthiness issued by the CAA, and a person who carries on the business of maintaining or modifying any equipment or part of such an aircraft;
  - (e) a person who carries on the business of maintaining or modifying an aircraft, operated under an air operator's certificate granted by the CAA, and a person who carries on the business of maintaining or modifying any equipment or part of such an aircraft;
  - (f) a person who signs an airworthiness review certificate, or a certificate of release to service in respect of a turbine-powered aircraft, which has a certificate of airworthiness issued by the CAA, and a person who signs an airworthiness

- review certificate or a certificate of release to service in respect of any equipment or part of such an aircraft;
- (g) a person who signs an airworthiness review certificate, or a certificate of release to service in respect of an aircraft, operated under an air operator's certificate granted by the CAA, and a person who signs an airworthiness review certificate or a certificate of release to service in respect of any equipment or part of such an aircraft;
  - (h) a person who performs a function which requires him to be authorised by the CAA as an air traffic controller or as a flight information service officer;
  - (i) a licensee and a manager of a licensed aerodrome or a manager of an airport to which Council Regulation (EEC) No. 2408/92 of 23rd July 1992 on access for Community air carriers to intra-Community air routes applies;
  - (j) a person who performs a function in respect of the installation, modification, maintenance, repair, overhaul, flight-checking or inspection of air navigation facilities which are utilized by a person who provides an air traffic control service under an approval issued by the CAA;
  - (k) a person who performs a function in respect of the ground-handling of aircraft, including fuelling, servicing, loadsheet preparation, loading, de-icing and towing at an airport to which Council Regulation (EEC) No. 2408/92 of 23rd July 1992 on access for Community air carriers to intra-Community air routes applies.
- (6) Reports of occurrences shall be made within such time, by such means and containing such information as may be prescribed and shall be presented in such form as the CAA may in any particular case approve.
- (7) A person listed in paragraph (5) shall make a report to the CAA within such time, by such means, and containing such information as the CAA may specify in a notice in writing served upon him, being information which is in his possession or control and which relates to an occurrence which has been reported by him or another person to the CAA in accordance with this article.

(8) A person shall not make any report under this article if he knows or has reason to believe that the report is false in any particular.

(9) The CAA shall put in place a mechanism to collect, evaluate, process and store occurrences reported in accordance with paragraphs (5) to (7).

(10) The CAA shall store in its databases the reports which it has collected of occurrences, accidents and serious incidents.

(11) The CAA shall make all relevant safety-related information stored in the databases mentioned in paragraph (10) available to the competent authorities of the other Member States and the Commission.

(12) The CAA shall ensure that the databases referred to in paragraph (10) are compatible with the software developed by the European Commission for the purpose of implementing Directive 2003/42 of the European Parliament and of the Council of 13th June 2003 on occurrence reporting in civil aviation.

(13) The CAA, having received an occurrence report, shall enter it into its databases and notify, whenever necessary: the competent authority of the Member State where the occurrence took place; where the aircraft is registered; where the aircraft was manufactured, and where the operator's air operator's certificate was granted.

(14) The CAA shall provide any entity entrusted with regulating civil aviation safety or with investigating civil aviation accidents and incidents within the Community with access to information on occurrences collected and exchanged in accordance with paragraphs (9) to (13) to enable it to draw the safety lessons from the reported occurrences.

(15) The CAA and the Chief Inspector of Air Accidents shall use any information received in accordance with the terms of this article solely for the purposes set out in this article

(16) The names or addresses of individual persons shall not be recorded on the databases referred to in paragraph (10).

(17) Without prejudice to the rules of criminal law, no proceedings shall be instituted in respect of unpremeditated or inadvertent infringements of the law which come to the

attention of the relevant authorities only because they have been reported under this article as required by Article 4 of Directive 2003/42 of the European Parliament and of the Council of 13th June 2003 on occurrence reporting in civil aviation, except in cases of gross negligence.

(18) The provisions in paragraphs (15) to (17) shall apply without prejudice to the right of access to information by judicial authorities.

(19) The CAA shall put in place a system of voluntary reporting to collect and analyse information on observed deficiencies in aviation which are not required to be reported under the system of mandatory reporting, but which are perceived by the reporter as an actual or potential hazard.

(20) Voluntary reports presented to the CAA under paragraph (19) shall be subjected to a process of disidentification by it where the person making the report requests that his identity is not recorded on the databases.

(21) The CAA shall ensure that relevant safety information deriving from the analysis of reports, which have been subjected to disidentification, are stored and made available to all parties so that they can be used for improving safety in aviation.

### **Civil Aviation Authority Regulations 1991- Regulation 9**

(9) The Authority shall make available, upon payment to it of any applicable charge under section 11 of the Act, reports of reportable occurrences or a summary of such reports, to any person who is:

- (a) the operator or member of the flight crew of any aircraft;
- (b) engaged in the design, manufacture, repair, maintenance or overhaul of aircraft, or of parts or equipment therefor;
- (c) the aeronautical authority of a country other than the United Kingdom, or the representative in the United Kingdom of such an authority;
- (d) engaged in writing about civil aviation for publication in any newspaper, periodical, book or pamphlet;

- (e) engaged in preparing a programme about civil aviation for television or radio;
  - (f) engaged in the study of civil aviation for any academic purpose; or
  - (g) any other person whose functions include the furthering of the safety of civil aviation:
- Provided that the Authority shall not be required to make available any report or summary thereof to any person if it is satisfied that to do so will not further the safety of civil aviation.