

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 May 2008

Public Authority: Civil Aviation Authority
Address: CAA House
45-59 Kingsway
London
WC2B 6TE

Summary

The complainant made a request for the names of the carriers and details of the investigation the public authority conducted in ten specific cases, and names of other carriers it was currently investigating for non-compliance with Council Regulation (EC) No. 261/2004 which established common rules on compensation and assistance to air passengers. The public authority withheld the information requested by virtue of the exemption contained in section 30(1)(b) and also relied on the exemption contained in section 31(1)(g) if the Commissioner did not consider section 30(1)(b) engaged. After considering the case, the Commissioner concluded section 30(1)(b) is engaged. He has however ordered the disclosure of the names of the carriers and details of the investigation (subject to specific redactions) in the ten specific cases, because the public interest factors in favour of maintaining the exemption do not outweigh those in favour of disclosure.

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 dated 22 June 2006 made a request for information in accordance with section 1 of the Act for;
3. 'names of the carriers involved, against whom CAA has completed investigation (ten significant cases) for non-compliance with start and end dates of investigation in each case

'details of steps CAA has taken in each case of non-compliance, apart from the involvement of AUC.

'how many investigations for non-compliance are outstanding at the moment, with names of carriers.'

4. The public authority responded on 30 June 2006 and provided the number of carriers currently being investigated for non-compliance but withheld the remainder of the information by virtue of the exemption contained in section 31(1)(g) of the Act.
5. On 10 July 2006 the complainant requested a review of the public authority's decision not disclose the information requested.
6. On 14 August 2006 the public authority wrote to the complainant to advise that due to a shortage of key staff during the holiday season, the outcome of the review would be delayed.
7. The public authority wrote to the complainant on 29 August 2006 detailing the outcome of its internal review. It concluded that the information requested should be withheld by virtue of the exemption contained in section 30(1)(b). It did not clarify its position with regard section 31(1)(g).
8. The public authority therefore concluded that it considered the information was exempt under section 30(1)(b) by virtue of its powers granted under The Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 (Regulations 2005).
9. Section 30(1)(b) is a qualified exemption and therefore subject to the public interest test. The public authority stated that it worked firmly and cooperatively with carriers in all the cases of non-compliance it has investigated to date to achieve positive outcomes. It therefore argued that these outcomes would become more difficult to achieve if the carriers knew that details of the cases would be made public.
10. The public authority then weighed the public interest in its ability to resolve individual complaints and improve the application of the legislation for the travelling public, against the public interest in informing the general public about a current issue, and promoting the accountability of its decisions. It concluded on balance, the public interest was best served by non-disclosure.

The Investigation

Scope of the case

11. On 04 September 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 review the public authority's reliance on section 31(1)(g) of the Act to withhold the information requested. In support of his argument that the information requested should be disclosed he quoted a passage from the 'Air Transport User Council Annual Report (AUC) 2005/06 which states; "of the 6094 written complaints and enquiries, we took up 1889 with the airline and secured an improved outcome in 831 cases,...." '
12. He therefore concluded; *'Clearly majority of the cases has not been resolved in the manner anticipated by the regulation and only 10 cases were investigated by the CAA. No prosecution has taken place to date even though the numbers of complaints are very high. This indicates that there is a significant public interest in disclosing the information requested.'*

Chronology

13. The Commissioner contacted the public authority on 26 September 2007 to request clarification from the public authority as to which exemption it had relied on to withhold the requested information.
14. The Commissioner also asked the public authority to provide any further explanations and public interest arguments it may have to support its decision.
15. The public authority responded on 23 October 2007. It stated that it was relying on section 30(1)(b). However, if the Commissioner considers the information is not exempt by virtue of section 30(1)(b), it would instead rely on section 31(1)(g).
16. The public authority also added it was content to rely on the public interest arguments in its letter to the complainant of 29 August 2007. It however included some additional statements in support of its decision not to disclose the information requested.
17. According to the public authority, the introduction of Council Regulation (EC) No. 261/2004 (EC Regulation) on compensation and assistance for consumers in relation to denied boarding, cancelling and long delay, provided air passengers for the first time an entitlement to assistance. Assistance includes meals and accommodation in cases of disruption, and compensation in situations of cancellation and delay without the passenger having to prove damages in Court.
18. The public authority added that for the purpose of undertaking its enforcement role under the Regulations 2005, its aim is to seek an immediate remedy for the affected passenger rather than to initiate legal proceedings against the carrier.

19. According to the public authority, legal action may lead to the carrier being convicted and fined but does not directly benefit the consumer whose rights have been breached under the EC Regulation and therefore not necessarily in the consumer's best interests to prosecute immediately.
20. The public authority added that there are a significant number of interpretational difficulties with the EC Regulation which may also prevent a consumer from obtaining redress in circumstances where they do not receive assistance or compensation. Given the legal uncertainty surrounding the EC Regulation, the public authority argued that it is in the public interest to put pressure on airlines 'behind the scenes' to obtain redress for an affected passenger.
21. In order to better understand some of the interpretational difficulties within the EC Regulation, the Commissioner in a letter dated 07 November 2007 asked the public authority to provide a more detailed explanation about some of these uncertainties.
22. The public authority responded on 19 November 2007. It provided the Commissioner with a detailed explanation about some of the interpretational difficulties within the EC Regulation which has created some uncertainty with regard its practical application in areas which it believes '*could have the greatest effect on consumers.*'
23. The areas referred to by the public authority are the meaning of '*comparative Transport*', '*Safety*', and '*Extraordinary circumstances.*' The Commissioner has highlighted some of the interpretational difficulties relating to these areas as indicated by the public authority.
24. The public authority stated that the right to Comparative Transport under Article 8 of the EC Regulation is unclear as to whether this includes other modes of transport other than Air transportation. The ambit of the word Safety under Article 2(j) is also unclear as to whether this should cover actions a carrier has taken which compromises the consumer's safety. To further illustrate this point, the public authority provided the Commissioner with details of a case decided in a County Court in favour of the carrier concerned, but in which the consumer was subsequently compensated as a result of the public authority's intervention. Finally, the difficulties in interpreting the meaning of Extra-ordinary circumstances under Article 5.3.
25. These interpretational difficulties coupled with the criminal standard of proof required under the Regulation in order for the public authority to carry out its specific enforcement powers, could in the public authority's opinion undermine a successful prosecution.
26. The public authority therefore argued that whilst as a matter of policy it seeks to address an issue by means of positive engagement in the first instance, the above interpretational difficulties further emphasise the need to be able resolve a complaint informally where possible.

27. The public authority therefore concluded that naming a carrier with whom it had already agreed corrective action or a settlement resolution, could create a situation in the future whereby carriers are no longer prepared to engage with the public authority via this informal approach to the wider detriment of consumers as a whole.
28. The public authority however stated that these interpretational difficulties have also been recognised by the European Commission and other enforcement bodies, and to this end, a commission sponsored working group has been seeking to agree guidelines with industry aimed at addressing elements of the problem. It provided the Commissioner with a copy of the working group's latest draft guidelines.
29. In order to further understand the public authority's approach to complaints by consumers in the context of its role under the EC Regulation, the Commissioner asked the public authority in a letter dated 03 December 2007 to provide a detailed explanation of its complaints handling procedure.
30. The public authority responded on 17 December 2007. It explained its complaints handling procedure and brought to light the role of the AUC in this process. The AUC exists as an auxiliary group within the public authority's corporate structure and is not a statutory body in its own right. However, although it is funded by the public authority, it can hold an independent opinion from the public authority on issues that may have a significant impact on air passengers.
31. A Memorandum of Understanding (MOU) between the public authority and the Department of Transport sets out the relationship between the public authority and the AUC. According to the MOU, the AUC is the initial point of contact for dissatisfied air passengers and it will refer the matter to the public authority in the following situations; where it is unable to secure a satisfactory resolution, identifies a trend of non-compliance by a carrier with the EC Regulation, or where a carrier treated a passenger so badly that enforcement action is necessary, or in instances where a precedent on the application of the EC Regulation may be set. The passengers however have a right to personally pursue their complaint in a Small Claims Court. Where a referral has been made by the AUC to the public authority, the latter as a matter of policy will initially make reasonable efforts to secure compliance, however, where this does not prove possible, it will consider initiating legal proceedings against the carrier. The public authority may also take up a case through its own active monitoring programme.
32. According to the public authority, as at November 2007, it had received 31 complaints either via referral from the AUC or through its own active monitoring programme. It has undertaken no prosecutions and positive outcomes have been obtained through informal action in respect of 24 cases, with 7 cases still under investigation. Most of the complaints about non-compliance with the EC Regulation are therefore dealt with by the AUC. However, according to the public authority the term 'complaints' is loosely used in relation to the AUC as these statistics are compiled within the broad framework of the AUC's role which include providing advice and do not also distinguish between complaints that may

not have progressed further because the passenger loses interest and does not provide sufficient information to take the matter forward.

Analysis

Exemptions

Section 30

33. The Commissioner has first considered whether section 30(1)(b) is engaged in this instance.
34. Under section 30(1)(b) information is exempt from disclosure if it has at anytime been held by a public authority for the purpose of any investigation which is conducted by the public authority and may lead to a decision to bring criminal proceedings which the public authority has the power to conduct.
35. A full text of section 30(1)(b) is available in the Legal Annex of this Notice.
36. The public authority has confirmed that the information requested is held pursuant to its investigative powers granted by the Regulations 2005.
37. The explanatory notes to the Regulation 2005 states that '*These Regulations make provisions for the creation of offences for the purposes of enforcing the rights and entitlements set out in Council Regulation (EC) No. 261/2004.....*'
38. The EC Regulation establishes common rules on compensation and assistance to passengers in the event that they are denied boarding onto their flight or that the flight has been cancelled or subjected to length delays.
39. Section 5 of the Regulation 2005 designates the public authority as the body for the purposes of Article 16(1) of the EC Regulation.
40. Article 16(1) requires each Member State to designate a body responsible for the enforcement of the EC Regulation.
41. A full text of section 5 of the Regulations 2005 and Article 16 of the EC Regulation are available in the Legal Annex at the end of this Notice.
42. The Commissioner is satisfied that the combined effect of section 5 of the Regulations 2005 and Article 16(1) of the EC Regulation grants the public authority investigative powers within the contemplation of section 30(1)(b).
43. Having considered the requested information, the Commissioner has concluded it is held for the purposes envisaged under section 30(1)(b) and therefore exempt from disclosure.
44. The Commissioner notes however that the information provided on '*details of steps CAA has taken.....*' could also be held in the form described in section

30(2)(a)(i). He is however satisfied that section 30(1)(b) would suffice for the purposes of this case.

45. From the copies of the requested information provided to him, the Commissioner considers the public authority interpreted the request for '*details of steps...*' to include the details of the investigation conducted as opposed to only the outcome of each case. The public authority was however only able to provide the outcome in respect of three cases involving a carrier. This is because these cases which came to the attention of the public authority soon after the Regulations 2005, were referred to and dealt with at a meeting between the public authority and the carrier to generally discuss the EC Regulation. It was also unable to provide the start dates for each of these cases, as it could not find anything on its files to confirm exactly when these cases commenced.

Section 40

46. The Commissioner considers that the names and private addresses of the consumers who made complaints against the carriers are exempt under the exemption contained in section 40(2) of the Act by virtue of section 40(3)(a)(i).
47. Information is exempt from disclosure under section 40(2) if it constitutes third party personal data and one of the two conditions set out section 40(3) are satisfied. Section 40(2) is an absolute exemption and not subject to the public interest test. The disclosure of the names and private addresses of private consumers would breach the first data protection principle, as it would constitute unfair processing, in reaching this conclusion the Commissioner has considered the expectation of the private consumers that the information related to the complaints would not be disclosed to third parties. This therefore satisfies section 40(3)(a)(i) and section 40(2) is engaged.
48. A full text of section 40(2) is available in the Legal Annex at the end of this Notice.
49. Although the exemption contained in section 40 was not cited by the public authority, the Commissioner has nonetheless referred to it. In *Bowbrick v Information Commissioner & Nottingham City Council (EA/2005/0006)* at paragraphs 49-52, the Information Tribunal recognised that the Commissioner may identify appropriate exemptions in exceptional cases.

Public Interest Test

50. As noted above, section 30(1)(b) is a qualified exemption. The Commissioner has therefore gone on to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
51. The Commissioner considers the following as the generally recognised public interest factors in maintaining the exemption contained in section 30(1).
- There is an inherent public interest in the need to preserve the court as the sole forum for determining guilt.

- There is also a considerable public interest in the non-disclosure of information about an open investigation
- The age of the information may also be relevant factor in maintaining the exemption in order to avoid prejudicing future investigations.

52. In respect of the information requested, the Commissioner notes the public authority's argument that to disclose the names of the carriers concerned, as well as details of the investigation when they were not actually prosecuted or have not been prosecuted, may prejudice its informal approach to complaints handling to the wider detriment of air passengers.

53. The Commissioner considered the public authority's argument that disclosing the information requested would prejudice its ability to resolve complaints informally because carriers may be unwilling to engage in this process with the knowledge that the outcome could be made public. The Commissioner notes that the public authority as the body designated to enforce the EC regulation has the power to investigate complaints of non-compliance against a carrier, and initiate criminal proceedings where appropriate. The Commissioner is mindful that only the particular public interest inherent in the exemption should be considered, rather than all public interest considerations relevant to the subject. In the case of *Bellamy v the Information Commissioner and the DTI*, the Tribunal clarified that only relevant public interest considerations could be taken into account, stating that:

"As section 2(2)(b) makes clear, the relevant exercise is to weigh the public interest in maintaining the exemption which is manifested by the relevant provisions against the public interest in disclosing the information. If the weighing process is in favour of the maintenance of the exemption, then any duty to communicate or disclose is disapplied. It necessarily follows that not all public interest considerations which might otherwise appear to be relevant to the subject matter should be taken into account. What has to be concentrated upon is the particular public interest necessarily inherent in the exemption or exemptions relied upon." (para. 5)

54. The public interest inherent in the section 30 exemption relates to the need to protect confidential sources of information, the effects disclosure may have on the ability of the public authority to conduct a successful criminal investigation or future investigations and the fairness to those prosecuted or not prosecuted. Having carefully considered the evidence the Commissioner does not believe the public authority has convincingly explained how any impact on its ability to informally resolve cases will also effect the interests listed above or how interpretational difficulties in application of the EC regulation will effect these interests.

55. The Commissioner in any case believes that there is therefore an obligation for a carrier to cooperate with the public authority in the investigation of a complaint, and those carriers who choose to no longer engage informally with the public authority would have to accept the inevitability of formal action. The Commissioner considers that carriers would be generally more willing to engage informally with the public authority in order to demonstrate that they took swift

actions to address concerns made by the public authority as soon as these were highlighted to them.

56. The Commissioner is not persuaded that disclosing the names of the carriers and details of the steps taken in the completed investigations would undermine their ability to conduct criminal investigations. The Commissioner, however, recognises the public authority's concerns as to the fairness of disclosing information requested in respect of both the ongoing cases and those completed (at the time of the request). He accepts that disclosing the names of the carriers currently being investigated (at the time of request) could undermine the public authority's ability to thoroughly conduct investigations, possibly prejudice its enforcement functions, and would be unfair to the carriers involved. Weight given to fairness argument is stronger whilst the investigation is still being completed.
57. The Commissioner considers there is a significant public interest in disclosing this information, to hold the public authority to account for its conduct of the investigations process, and any decisions it makes. As an indication of general public interest in the issues related to the EC Regulation, the Commissioner has noted the fact that the AUC had received over 6000 complaints and enquiries during 2005/2006 (noted in paragraph 11).
58. In the Commissioner's view there is also a significant public interest in the public knowing what actions the public authority has taken in respect of non-compliance with the EC Regulation.
59. There is also a significant public interests in informing consumers about which carriers have had action taken against them as a result of not complying with the EC Regulation.
60. Disclosing the information may also dispel any public concerns about the actions of the public authority in the cases concerned.
61. The Commissioner has therefore concluded that in all the circumstances of this case:
 - The public interest factors in favour of maintaining the exemption do not outweigh those in favour of disclosing the information related to completed cases (at the time of the request). He believes the information requested could be disclosed with an explanation of the context within which the cases were investigated, and could also include caveats on how the public should view this information
 - He is however satisfied that in respect of the cases that were open at the time of request, the public interest in maintaining the exemption outweighs the public interest in disclosure.
62. The Commissioner has not gone on to consider the exemption contained in section 31(1)(g). Section 31(1) provides that: Information which is not exempt information by virtue of section 30 is exempt information. In his view, where section 30 is engaged, section 31 would not apply even where the public interest weighs in favour of disclosure. This is because the disputed information does not

cease to be exempt under section 30 simply because the public interest favours disclosure.

The Decision

63. The Commissioner's decision is that the public authority did not deal with request for information in accordance with section 1 of the Act in so far as the first two paragraphs of the information requested are concerned. It did not disclose some of the information requested (related to completed investigations) as it incorrectly relied on the exemption contained in section 30(1) (b), and could not rely on the exemption contained in section 31.
64. In respect of the investigations open at the time of the request was made, the public authority correctly applied the section 30(1) (b) exemption.

Steps Required

65. The public authority must take the steps required by this notice within 35 calendar days from the date of this notice.
- The public authority should disclose the names of the carriers involved the cases that were complete at the time of request.
 - The public authority should also disclose details of the steps taken in each of the completed cases with the names and private addresses of the complainants redacted.

Failure to comply

66. 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.

Right of Appeal

67. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 29th day of May 2007

Signed

Steve Wood
Assistant Commissioner

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

LEGAL ANNEX

Section 30(1) provides that –

‘Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or....’

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –
“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act

Section 5- Civil Aviation (Denied Boarding, Compensation and Assistance)Regulations 2005

Enforcement

5. — (1) The Civil Aviation Authority shall be the designated body for the purposes of Article 16(1).

(2) The Air Transport Users Council shall be the designated body for the purposes of Article 16(2).

Article 16- Regulation (EC) No 261/2004 of the European Parliament and of the Council

Infringements

1. Each Member State shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected. The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph