



**IN THE FIRST-TIER TRIBUNAL Appeal No: EA/2017/0069**  
**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50627910**  
**Dated: 16 March 2017**

**Appellant: Mark Pike**

**Respondent: The Information Commissioner**

**Considered on the papers**

**Date of Hearing: 1 February 2018**

**Before**

**Chris Hughes**

**Judge**

**Suzanne Cosgrave, Rosalind Tatam**

**Tribunal Members**

**Date of Decision: 6 February 2018**

**Date of Promulgation: 12 February 2018**

**Subject matter:**

**Section 43(2) Freedom of Information Act 2000**

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 16 March 2017 and dismisses the appeal.

## **REASONS FOR DECISION**

### **Introduction**

1. The Appellant has for some years been concerned about low flying helicopters near his home. He lives in an area used by the RAF for low flying exercises. He has complained about such incidents to the RAF which has investigated and, on occasion, upheld his complaints where there has been an error. One complaint to the Ministry of Defence about low flying craft received a reply on 23 March 2015 from the RAF Police Defence Flying Complaints Investigation Team (DFCIT):-

#### ***“LOW FLYING COMPLAINT INVESTIGATION – 15 AUG 12***

*I am writing to inform you that a review of the investigation into your initial complaint dated 30 July 2014 has now been completed. The original investigation concluded that the only military helicopter activity on the day in question, showing on radar, occurred in the vicinity of your property at approximately 7pm.*

*All information relating to this investigation has been re-examined. Following a review of all available data, including radar replay analysis (extended to include the period from 11am -8pm), no other aircraft have been identified as operating at, or near, your location during those times. The previously reported aircraft activity at 7pm remains the only aircraft track showing on radar.*

*As a result of this review no offence has been identified, therefore, no further action is required by [DFCIT] and all active enquiries have been completed.”*

2. The Appellant remained dissatisfied by the DFCIT investigations. On 6 October 2015 he wrote to the MoD seeking information:-

*“I would like to make the same request for any radar replay recordings as regards another incident that occurred on 19 August 2015...*

*I would also like to repeat my requests for the release of replay information concerning past incidents on 15 Aug 2012...and on 2 Jun 2015.”*

3. The MoD replied on 9 November confirming that it relied on the exemption from disclosure contained in s43 FOIA. A summary of the requested radar

information for Wednesday 19 August 2015 was provided to him, the summary was described as providing *"a summary of the radar information provided to.... (DFCIT) by ... Swanwick....for 19 August 2015"* the summary gave detail of times, location relative to his house and the height of a particular aircraft on that day. The letter confirmed that the summaries for the two other dates had been supplied but could be provided again if the Appellant wished.

4. S 43 of FOIA states:-

*"43 Commercial interests*

..

*(2) Information is exemption 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).*

..."

5. In December 2015 the RAF (outside of FOIA) showed him the relevant radar records for 15 August 2012 and performed a calculation to show the height at which the helicopter was flying. The Appellant was not satisfied; he believes that the flight was considerably closer to the ground. He requested a review; however in its review dated 12 April 2016 the MoD confirmed that it considered that the request for information had been properly handled and the reliance on s43(2) FOIA was justified.

#### The complaint to the Information Commissioner

6. On 3 May 2016 the Appellant complained to the Information Commissioner (ICO):-

*"I have been experiencing what I believe to have been harassment by low level flights over my property by military helicopters (instigated, I believe, by an individual with whom I have had a dispute). Over recent years I have made complaints that were investigated by the MOD Low Flying Complaints Investigation Team at RAF Henlow. Some of the complaints have been upheld but I am particularly interested in further examining two events in more detail.*

*One occurred on the 15<sup>th</sup> Aug 2012...*

*For many reasons, this 7.00pm event could not actually have been the real object of my complaint on this date (which was a very dramatic near miss of my property). For some reason this completely failed to show up on the radar....I find this extremely improbable... I believe that the fact of the glaring discrepancy in the reporting of the 15 Aug 2012 event makes this incident of particular importance in terms of public interest in ensuring that the military are properly conducting investigations into their own activities. If possible I would like an entirely independent investigator to verify and review the data.*

*The second event whose non disclosure I would like reviewed occurred on 19 Aug 2015... I suspect it may not have been accurately recounted to me... I have exhausted the same process of requesting release of this information by the military as with the first incident."*

#### The ICO's decision

7. Following an investigation the ICO issued her decision. She found that the radar recordings were owned by National Air Traffic Services (NATS), a private company which was not subject to FOIA although it was part owned by the Government. A contract between NATS and the MOD, the Future Military Area Radar Services Contract, provided that air traffic surveillance data such as the material requested was confidential information.
8. The disclosure of the information sought by the Appellant required the consent of NATS which had not been forthcoming. The information that had been supplied in response to the request was an interpretation of the radar information made by RAF police and not within the exemption. NATS could sell access to radar information and so it had a commercial value. Providing such information without charge could adversely affect NATS' commercial interest.
9. Disclosure of the information without consent raised the risk of restrictions being placed on future disclosure and it would be likely to prejudice the future working relations of NATS and MoD.
10. She noted the arguments advanced by the Appellant and his statements that he did not trust what the MoD told him and his conviction that people were

using military equipment to try and terrorise civilians. She concluded that the matters he raised related specifically to the appellant and did not hold significant weight in the balance of determining the public interest. She noted that the MoD had upheld some of his complaints:-

*“This appears to suggest that the MoD has previously conducted fair and appropriate investigations. The Commissioner has no reason to determine that other investigations would be less robust.”*

11. While recognising the public interest in transparency the outcome of the complaints was specific to the Appellant.
12. She concluded that the public interest in supporting commercial interests of NATS and MoD outweighed the limited public interest in releasing the information.

#### The appeal to the Tribunal

13. The Appellant focussed on the incident of 15 August 2012. First he argued that the exemption in s43(2) was not engaged as the information was trivial and any loss to NATS as a result of disclosure was hypothetical and at most insubstantial.
14. Secondly he gave his accounts of what had occurred and argued that the exemption was engaged. The balance of public interest lay in disclosure. Once the information was in the public domain he would be able to review it in detail to see if there was another flight on 15 August 2012 and he could verify the data and could engage an expert.
15. In resisting the appeal the ICO argued that in determining whether an exemption was engaged, provided the prejudice which is likely to occur is “real, actual or of substance” the extent of prejudice was relevant to the balance of public interest, not to the engagement of the exemption. The ICO had correctly identified the prejudice to the partnership arrangements between NATS and MoD in ensuring cost effective air navigation services which would arise from the disclosure as engaging the exemption.
16. In response to the second argument the ICO noted that it was in essence the Appellant’s case was that the information, both in summary form and when

shown to him, did not show him what he believed it should. Disclosure of the information would not change its content. She identified a typographical error in one MoD communication of 11 December 2015 which may have led the appellant to believe that there had been an incident on 19 August 2015, when it was referring to the incident at 1900 hours on August 15 2012.

#### The questions for the Tribunal

17. There are two questions, whether commercial interests of MoD and NATS are engaged and, if so, where the balance of interest between disclosure and non-disclosure lies.

#### Consideration

18. There is a significant set of contractual relations between NATS and MoD, the information under consideration in this case was supplied under one of those contracts. This contract explicitly permits the onward transmission of that information to specified organisations concerned with air safety and law enforcement and does not permit the transfer without consent. The consent has not been forthcoming. The disclosure would therefore be a deliberate breach of a significant commercial contract and would be a disclosure of information which is of commercial value to NATS. NATS is entitled to protect its commercial interests and the disclosure could cause difficulties in the future relations between the two parties and lead to a change in those relations with commercial consequences. The s43(2) exemption is engaged.

19. Although the Appellant is deeply exercised by the issue of overflying helicopters there is no significant evidence to show that there is a public interest in the disclosure. The information solely relates to his personal suspicions. The Appellant has not made the case in support of his suggestion that there has been a deliberate act by the MoD to mislead. Some of his previous complaints have resulted in an apology; in those cases he appears to have accepted their responses. In this instance they have gone so far as going outside of FOIA to assist him - visited him at home in order to let him see the information he seeks and provided some detailed information such as letter (bundle p21) which assist him in understanding the summary information they have supplied. This transparent behaviour seems

inconsistent with his assertion of bad faith/deception. He has been shown the information he seeks and has acknowledged that it does not appear to show what he claims. It is difficult to see any public benefit from disclosure to the world of information which only the Appellant is interested in, of which he already has the relevant summaries and which does not show what he claims.

20. The balance of public interest clearly lies in upholding the exemption. The appeal is dismissed.

21. Our decision is unanimous

Judge Hughes

Date: 6 February 2018