

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 July 2009

Public Authority: Department for Transport
Address: Zone D/04
Ashdown House
Sedlescombe Road North
ST LEONARDS – on – SEA
East Sussex
TN37 7GA
SW1E 6DT

Summary

The complainant requested information in relation to the public authority's investigation of a number of air incidents. The public authority identified 4 documents which it considered were captured by the complainant's request. It however withheld these documents by virtue of the exemptions contained in sections 41, 44(1)(a), and 31(1)(g) and by extension section 31(2)(e) of the Act. The Commissioner finds that three of the documents were correctly withheld under sections 41 and 44. He has however ordered the disclosure of the remaining document as it was incorrectly withheld under 31(1)(g). He also finds the public authority in breach of sections 1(1)(b), 10(1) for failing to disclose at the time of the request, the document he has ordered to be disclosed, and 17(1) (a), (b), and (c) for the late application of the exemption at section 31(1)(g).

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. On 05 December 2006 the complainant made a request for documents in relation to a number of incidents which were referred to in a report published in June 2006 by the Air Accidents Investigation Bureau (AAIB) (part of the Department for Transport). The report was produced pursuant to an

investigation it had conducted in relation to an incident which occurred on 20 February 2005 on a Boeing 747-436 G-BNLG flight from Los Angeles to London (Heathrow) airport.

3. The specific paragraph in the AAIB report which led to the complainant's request is reproduced below;

'Since April 2001 this operator has recorded 15 incidents with the B747 where an engine has been shutdown and the flight continued. Over the same period, two incidents involving an IFSD each resulted in a diversion. One of these involved a fuel leak and the other involved an engine reverser unlocked indication.'¹

4. The complainant's requests are produced below;

'.....complete copies of all documents held by the Air Accidents Investigation Branch relating to 17 incidents which have occurred since April 2001. I assume that these documents would describe the nature of these incidents and what discussions took place regarding the incidents.

.....complete copies of all correspondence between the Air Accidents Investigation Branch and British Airways regarding these 17 since April 2001. I assume that this would include letters, emails, faxes or any other form of communication.

.....copies of minutes of any meetings between the Air Accidents Investigation Branch and British Airways relating to the 17 incidents which have occurred since April 2001.

.....complete copies of all submissions or briefing documents which were sent to the Secretary of State for Transport or any other relevant minister regarding these 17 incidents since 2001.'

5. The complainant however acknowledged that the paragraph in question (i.e. in AAIB report) could also be read as referring to only 15 incidents.
6. The public authority responded on 08 January 2007. It is unclear whether the public authority only considered the incident of 20 February (referred to above) in response to the request rather than the 15 or 17 incidents mentioned above. In any event, it explained to the complainant that after completing its searches in relation to the above requests, it was able to locate the following documents:
1. '17 May 2005 – Email from British Airways to AAIB
 2. List of previous events from British Airways
 3. Copy of British Airways Incident Report
 4. Copy of CAA Occurrence Report.'
7. The public authority withheld documents 1, 2, and 3 by virtue of the exemption at section 41 of the Act. Document 4 was withheld under section 44.

¹ AAIB Bulletin 6/2006 G-BNLG; page 30. (AAIB Bulletin)

8. The complainant requested an internal review of the public authority's decision on 10 January 2007 but did not raise any queries in relation to the documents identified by the public authority as those containing the information requested or indeed whether the information withheld was in relation to the 15 or 17 incidents referred to in his request.
9. The public authority completed its review on 22 February 2007. The review was however clearly conducted in relation to information held regarding the incident of 20 February, and no explanation was provided as to why the request had been dealt with in this manner.
10. The public authority however explained that it had again reviewed all documentation held on the relevant files, and it was able to confirm that only the four documents referred to above were caught by the complainant's request.
11. It confirmed document 1 was correctly withheld by virtue of the exemption at section 41, and additionally applied the exemption at section 44.
12. It confirmed documents 2 and 3 were correctly withheld by virtue of the exemption at section 41, and document 4 was correctly withheld by virtue of the exemption at section 44.

The Investigation

Scope of the case

13. On 26 March 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 decision to withhold the information requested in relation to the incident of 20 February and '*the other 15 incidents.*'
14. According to the complainant, there is a public interest in full disclosure of information relating to the incidents in which the safety of British Airways passengers appeared to have been put in jeopardy. He explained that documents relating to the incident of 20 February had been disclosed under the United States' Freedom of Information Act, and provided the Commissioner with copies of articles from the Guardian (dated 25 September 2006) and the Wall Street Journal (dated 23 September 2006) which reported on that specific incident. He argued; '....passengers on all these flights have no chance of knowing the extent to which they were put in danger.....passengers who are supposed to be protected by the department in its role as safety watchdog should be told more about such incidents so that they can become more informed.'
15. The requests submitted by the complainant specified that he was interested in information about the incidents mentioned in the paragraph of the bulletin that he cited in his letter dated 5 December 2006. The Commissioner understands that

the information relevant to those incidents is held by the public authority on the file about the 20 February investigation. However the requests were not sufficiently broad to capture any further material about the 20 February incident. The Commissioner's investigation therefore only covered the above documents which were those identified and withheld by the public authority pursuant to the complainant's requests.

16. There was also some confusion about whether the paragraph cited in the complainant's request letter referred to 15 or 17 incidents. As explained below the Commissioner clarified this point with the public authority. He understands from the public authority's statement on this point that the report only referred to 15 incidents. Therefore, for the avoidance of doubt, the requests related to a total of 15 previous incidents recorded by the operator and the Commissioner has proceeded on this basis.
17. The complainant also confirmed that the names of individuals contained in document 3 should be excluded from the investigation. Therefore the remainder of this notice does not address the names contained in that document.
18. Document 2 is however now referred to throughout this Notice as an 'extract from BA's database' because according to the public authority, although the contents remain unchanged, 'this is a much more accurate title reflecting the actual contents of the documents.'

Chronology

19. The Commissioner initially wrote to the complainant on 20 May 2008 outlining the scope of the investigation and inviting him to comment if he disagreed with any aspects. The Commissioner specifically outlined the documents (as referred to above) which had been identified and withheld pursuant to his request, and explained that the investigation would review the public authority's decision to withhold the information in those documents.
20. In a telephone conversation with a member of the Commissioner's staff on 10 June 2008, the complainant explained that he was under the impression that the public authority's responses were in relation to the 17 incidents he had requested.
21. The Commissioner therefore wrote to the public authority on 12 June 2008 and requested clarification as to how the complainant's requests had been addressed.
22. The public authority responded on 04 July 2008. It confirmed that a total of 15 not 17 incidents were included in the initial handling of the case. Only one of the incidents had been notified to the AAIB independently 'but was deemed 'non-reportable' under the regulations governing the AAIB and no investigation was conducted. The remaining 14 incidents were not the subject of investigations conducted by the AAIB.'

23. It further confirmed that 'a search for information relating to the request revealed the.....documents' referred to above.
24. On 23 July 2008, the Commissioner wrote again to the public authority. He explained that the complaint was still being investigated in relation to the withheld documents above but the public authority needed to write directly to the complainant to clarify the number of incidents it had considered in responding to his requests to avoid any misapprehension about the scope of the Commissioner's investigation.
25. On 09 September 2008, the public authority wrote to the complainant (a copy of which was provided to the Commissioner) to clarify and explain its position as noted above.
26. The complainant did not contact the Commissioner's office again in relation to the scope of the investigation.
27. In the meantime the Commissioner wrote to the public authority on 25 July 2008 and requested copies of the withheld information reproduced below for ease of reference;
 1. '17 May 2005 – Email from British Airways to AAIB
 2. Extract from BA database
 3. Copy of British Airways Incident Report
 4. Copy of CAA Occurrence Report.'
28. The Commissioner also invited the public authority to make submissions in relation to the application of exemptions to the above information.
29. The public authority responded on 22 September 2008. It provided the Commissioner with copies of the withheld information as well as its reasoning for the application of exemptions. It also explained that it considered all the documents were additionally exempt from disclosure by virtue of the exemption at section 31(1)(g) and by extension section 31(2)(e).
30. On 03 October 2008, the Commissioner wrote back to the public authority seeking further clarification about the application of the exemptions. The public authority responded on 27 October 2008. It withdrew its application of section 41 to documents 1 and 3, and explained that it had decided to rely instead on the exemption at section 31(1)(g) and by extension section 31(2)(e) in relation to these specific documents. It however continued to rely on section 44 in relation to document 1.
31. The Commissioner sought further clarification from the public authority on 03 November 2008. The public authority responded on 02 December 2008. A number of further communications took place between the Commissioner and the public authority between March and June 2009.

Analysis

32. A full text of all the statutory provisions referred to in this section can be found in the Legal Annex.

Procedural matters

33. When refusing an applicant access to information a public authority is required under section 17(1) of the Act to specify the exemption it is relying on to withhold the requested information within 20 working days.
34. The Commissioner finds the public authority in breach of section 17(1)(a), (b) and (c) for failing to inform the complainant that it was relying on the exemption contained in section 31(1)(g) at the time of his request.
35. The Commissioner also finds the public authority in breach of section 17(1)(b) because it did not inform the complainant that it was relying on sub section (1)(a) of section 44 in its refusal notice and it did not remedy this in its internal review.

Exemptions

Section 44

Documents 1 and 4

36. As noted above the public authority withheld documents 1 and 4 by virtue of section 44.
37. Information is exempt under section 44 if disclosure 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.”
38. Section 44 is an absolute exemption and as such if it is deemed to apply there is no need to consider the public interest test.
39. The public authority failed to specify which subsection of section 44 was applied to documents 1 or 4. The Commissioner is however satisfied that based on its submissions below, section 44(1)(a) was the exemption relied on for both documents. The full extracts of the various relevant statutes and Regulations are reproduced in the legal annex to this Notice.

Document 1 - 17 May 2005 – Email from British Airways to AAIB

40. According to the public authority it is prohibited from disclosing document 1 by virtue of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 (No. 2798) (the Regulations). Regulation 18 states that no

relevant record should be disclosed to any person for purposes other than investigating an accident or incident, except in certain limited circumstances. The public authority considers document 1 to be a 'relevant record' as envisaged by Regulation 18.

41. To be satisfied that document 1 is subject to section 44(1)(a) the Commissioner must confirm that it fits the definition of a relevant record and that none of the exclusions to the prohibition apply. Provided that these criteria are met then the information will be exempt from section 1(1)(b) of the Act.
42. Regulation 18(3) specifically states that 'relevant records' for its purposes are those referred to in sub-paragraphs (a) to (e) of paragraph 5.12 of Annex 13 to the Convention on International Civil Aviation. The public authority explained that in its view document 1 fell within the definition given in 5.12(f) of the Annex.
43. The Commissioner understands that the Annex is regularly updated and at the time of the request the 9th edition was applicable. The 9th edition included amendment 11 to paragraph 5.12 which added an extra sub-paragraph and came into effect on 23rd November 2006. For ease of reference, the relevant part of paragraph 5.12 of the 9th edition of the Annex is reproduced below;

'Non-disclosure of records

5.12 The State conducting the investigation of an accident or incident shall not make the following records available for purposes other than accident or incident investigation, unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations:

- a) all statements taken from persons by the investigation authorities in the course of their investigation;
 - b) all communications between persons having been involved in the operation of the aircraft;
 - c) medical or private information regarding persons involved in the accident or incident;
 - d) cockpit voice recordings and transcripts from such recordings; and
 - e) recordings and transcriptions of recordings from air traffic control units; and
 - f) opinions expressed in the analysis of information, including flight recorder information.'
44. Document 1 is an email dated 17 May 2005 from British Airways to the AAIB in response to a telephone query from the latter regarding an incident involving a carrier operated by British Airways. It appears to contain factual information as well as an opinion. The opinion expressed was based on the analysis of the factual information, and both would therefore need to be read in conjunction. Whilst the email contains information about an earlier incident (one of the 15)

which the AAIB was not in fact required to investigate, it was nevertheless obtained by it as part of the investigation it was obliged to conduct into the 20 February 2005 flight. Therefore he is satisfied that it does fall within paragraph 5.12(f). Moreover he considers that the exception to the prohibition in section 18(2) is not relevant in this case as that provision is concerned with the release of information for the purposes of judicial proceedings.

45. The Commissioner therefore finds that the information contained in document 1 was correctly withheld by virtue of the exemption at section 44(1)(a). This is on the basis that it was prohibited from releasing the information by virtue of regulation 18(1) of the Regulations.

Document 4 - Copy of CAA Mandatory Occurrence Report (MOR)

46. According to the public authority the MOR was submitted to the Civil Aviation Authority (CAA) under the CAA's Mandatory Occurrence Reporting (MOR) scheme. It explained that the occurrence report was not produced pursuant to the incident of 20 February but was used to inform the public authority's investigation. The public authority also confirmed that the MOR was supplied to the public authority by the CAA. It further explained that the MOR was produced pursuant to an incident which occurred in September 2005 and consists of two reports, both of which the public authority described as separately generated occurrence reports regarding the same incident.
47. According to the public authority, it withheld the information contained in document 4 by virtue of section 44 of the Act because sections 23(1) and (2) of the Civil Aviation Act 1982 (the CAA Act) prohibit the disclosure of such information. In support of its position, the public authority referred the Commissioner to his previous decision in case reference FS50148261 where he ruled in favour of the CAA regarding a similar issue.
48. The public authority did not explicitly cite any of the subsections in section 44, however, based on its submissions above, the Commissioner is satisfied that the exemption at section 44(1)(a) is the relevant one in this case.
49. In light of the fact that the decision in case FS50148261 was in relation to a complaint against the CAA rather than the public authority, the Commissioner initially considered whether the public authority could also rely on the provisions of section 23 of the CAA Act.
50. Under section 16(1) of the CAA Act, the CAA has a duty to provide such assistance and advice as the Secretary of State may require in connection with any of the Secretary of State's functions relating to civil aviation.
51. Under section 17(1)(a), the CAA is required to provide the Secretary of State with such information as he may specify and which the CAA can reasonably be expected to obtain with respect to such matters relating to the CAA or in connection with civil aviation.

52. Section 23(1) of the (CAA Act) prohibits the disclosure of information by the CAA 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).
53. Section 23(2) states that the sub section referred to above shall also apply in relation to the disclosure by an officer of the Secretary of State where information is provided to the Secretary of State pursuant to any of the provisions of the CAA Act or an Air Navigation Order.
54. The Commissioner is satisfied that the requirements of section 23(2) are met in this case as the public authority’s staff constitute officers of the Secretary of State for the purposes of this provision. Furthermore the provision of the MOR to the public authority by the CAA under section 17(1)(a) of the CAA Act means that the information was supplied pursuant to the Act. Finally the term ‘person’ may include companies as well as living individuals. In this case the material in dispute relates not just to the person reporting the occurrence but also to the company operating the aircraft. .
55. The Commissioner therefore went on to consider whether any of the exceptions to the prohibition in section 23(1) applied in this case. He has considered a similar case previously (FS50148261), in which he determined that section 44(1)(a) of the Act was engaged by virtue of the provisions of section 23(1) of the CAA Act. The case was subsequently appealed to the Information Tribunal (Tribunal) and it upheld the Commissioner’s decision although it adopted a different approach in arriving at the same conclusion.² The Commissioner has noted the approach taken by the Tribunal but has interpreted the regulations relevant to section 23(4) of the CAA Act differently in this case when considering whether any of the exceptions to section 23(1) apply.

Does any exception to the prohibition on disclosure apply?

56. Section 23(1) prohibits disclosure unless one of the exceptions in section 23(1)(a – d) or section 23(4) applies. The Commissioner first considered the exceptions in section 23(1)(a-d).
57. The public authority informed the Commissioner that it did contact the relevant ‘person’ to ask whether the occurrence reports could be disclosed but consent was declined. Furthermore the company involved had not ceased to exist. Therefore paragraphs 23(1)(a) and (c) did not apply.
58. By virtue of section 23(2) sections 23(1)(b) and (d) give the public authority discretion to release information even if consent is denied. The Commissioner has to determine therefore whether the public authority exercised that discretion rationally and lawfully which according to the Tribunal in *Hoyte v Information Commissioner* [EA/2007/0101] is the only ground on which the Commissioner is

² *Hoyte v Information Commissioner & Civil Aviation Authority* (EA/2007/0101)

entitled to question a public authority's discretion not to disclose information.

In so far as any exception provided the public authority with discretion to disclose the occurrence reports, was the decision not to exercise that discretion Wednesbury irrational or otherwise unlawful?

59. The Commissioner has to determine therefore whether the decision not exercise its discretion to disclose the occurrence reports was a reasonable one which the public authority was entitled to make. According to the Tribunal in the aforementioned case [EA/2007/0101];

'The CAA has been appointed to regulate the aviation industry and is a specialist body with expertise in that industry, in particular with expertise in judging what factors are relevant to civil aviation safety and balancing competing aspects of that safety. While we are not bound to follow, without challenge, all decisions of such a body, we must acknowledge the expertise that such a body possesses that we, as a Tribunal, do not and cannot possess.' (Paragraph 68)

60. The CAA also pointed out in the same case that it takes into account a number of factors in exercising its power of discretion. These include;

- The Mandatory Occurrence Reporting (MOR) scheme's objectives (to ensure the CAA is informed of hazardous or potentially hazardous incidents and defects, to disseminate safety information and prevent further accidents/incidents);
- The fact that underreporting MORs was a significant problem;
- The importance of maintaining trust in the aviation industry which would be eroded if the CAA disclosed information without consent since its chairman had given an assurance to airlines that confidentiality would be respected in all cases except "where there is a dereliction of duty amounting to gross negligence";
- The fact that disclosure under section 23 of the CAA Act has been in operation for almost 20 years before the introduction of the Act and therefore the CAA is well practised in the exercise of the discretion contained therein.

61. The Commissioner understands that the public authority considered the same factors to be equally relevant to this case when it considered using its discretion to release the disputed information. This is on the basis that if it were to release the occurrence report it would result in the same detriment to the occurrence reporting scheme as has previously been identified by the CAA. It concluded that by virtue of the provisions of section 23(2) of the CAA Act, it was equally entitled to exercise its discretion not to release the occurrence report for the reasons given above. On the basis of the arguments above the Commissioner considers that the public authority was not irrational or otherwise unlawful in opting not to exercise its discretion to release the requested information. Therefore sections 23(1)(b) and (d) are not met in this case either.

62. The Commissioner has also considered whether section 23(4) provides an exception to section 23(1) in this case. Section 23(4) provides that information may be disclosed in accordance with directions given by the Secretary of State to 'a person to whom the information in question is required to be disclosed by regulations made in pursuance of section 7(2).'
63. The Civil Aviation Regulations 1991 were made in pursuance of section 7(2) of the CAA Act. Regulation 9 provides for the dissemination of reports of reportable occurrences.
64. Regulation 9 requires the public authority to make available 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 parts or equipment therefore;
 - 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.

65. In case EA/2007/0101, the Tribunal determined that the categories in Regulation 9 were widely defined and were designed to encompass all those with a legitimate interest in reports of reportable occurrences. It went on to find that the appellant satisfied three of the categories in Regulation 9 above and therefore section 23(4) potentially provided an exception to the prohibition on disclosure. Whilst the Commissioner notes the Tribunal's wide interpretation of the categories in Regulation 9, he is nevertheless of the view that they have the effect of limiting who can be provided with information about reportable occurrences.
66. Information that is disclosed under the Act must be suitable for release to any member of the public and not simply to the person who has made the request. This is because the Act operates on the principle that the right of access is applicant and motive blind. There are only limited circumstances in which the identity of the applicant is relevant, for example when deciding whether

information is exempt by virtue of section 40(1) because it constitutes the applicant's personal data. None of these circumstances arise in this case.

67. In view of the principle set out above the Commissioner does not consider it appropriate to assess the relevance of Regulation 9 on the basis of the complainant's identity and whether he alone falls within one of the categories. Instead he must consider whether any of the categories in Regulation 9 is sufficiently broad so as to encompass the general public because any material released under the Act would by implication have been deemed suitable for general dissemination. Whilst the public may have a legitimate interest in the requested information, the Commissioner does not consider that any of the categories in Regulation 9 can be interpreted so widely as to cover such a broad group. In view of this he has decided that the exception in section 23(4) does not apply.
68. The Commissioner is unable to comment on whether the complainant may have a separate right of access outside of the Act where consideration could be given to his identity and whether he alone falls within one of the categories in Regulation 9. He is however satisfied that the exception in 23(4) does not apply in this case.
69. In view of all of the above the Commissioner has concluded that section 23(1) was appropriately applied by the public authority and that therefore document 4 was correctly withheld by virtue of the exemption in section 44(1)(a).

Section 41

Document 2 – Extract from BA database

70. The information contained in document 2 was withheld by virtue of the above exemption. Information is exempt under section 41 if it was obtained by a public authority from another person and the disclosure of the information outside of the Act would constitute an actionable breach of confidence.
71. The document in question is essentially a list containing a number of previous incidents involving a number of British Airways carriers from April 2001 to February 2005 which the Commissioner understands was used to inform the investigation of the February 20 incident.
72. As mentioned above there are two components to section 41; the information must have been obtained by the public authority from another person, and its disclosure would have to give rise to an actionable breach of confidence. A person may be an individual, a company, a local authority, or any other legal entity. The exemption does not cover information generated by the public authority but may cover such information to the extent that it was generated from confidential information provided by a third party, and disclosing it would also reveal the confidential material provided by the third party.
73. The public authority explained that the document in question was provided to it by British Airways for the purpose of its investigation of the incident of 20 February 2005. It is not information which was generated by the public authority itself.

74. The Commissioner is therefore satisfied that information in document 4 was provided to the public authority by another person and consequently falls within the definition of information obtained by a public authority as contemplated by section 41.
75. When considering whether or not a breach of confidence is itself actionable in this case, the Commissioner has decided that it is appropriate to follow the test set out by Megarry J in *Coco v A N Clark (Engineers) Limited* (1968) FSR 415 (*Coco v Clark*) and cited by the Information Tribunal (Tribunal) in *Bluck v The Information Commissioner & Epsom St. Helier University NHS Trust* (EA/2006/0090). According to Megarry J:
- ‘...three elements are normally required, if apart from contract, a case of breach of confidence is to succeed. First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of the information to the detriment of the party communicating it...’ (See paragraph 7 of the Tribunal's decision).
76. The public authority explained that the document in question contains details of internal processes used by British Airways to rectify engine incidents. It is classified as confidential and special BA handling and transmission procedures apply. The material was provided on the general understanding, consistent with practice, that it would be used solely for the purposes of accident and incident investigation and that it would be protected against disclosure to third parties. The public authority also pointed to the fact that it operates in a culture centred on the non-apportionment of blame or liability for those who seek to assist it in its work and therefore expectations would be shaped by this.
77. According to the public authority, it is the Regulations combined with the international conventions under which it operates which inform airline operators that documents provided in the course of an investigation would be held in confidence.
78. The public authority also informed the Commissioner that it had contacted British Airways regarding the disclosure of this document but consent was declined.
79. In view of the above, the Commissioner is satisfied that document 2 was imparted to the public authority by British Airways in circumstances that imported an obligation of confidence.
80. The Commissioner therefore went on to consider whether the contents of document 2 possess the necessary quality of confidence to give rise to an actionable breach of confidence in the event of disclosure.
81. Information will have the necessary quality of confidence if it is not otherwise accessible. In other words, it is not already in the public domain. According to Megarry J in *Coco v Clark*, ‘however confidential the circumstances of

communication, there can be no breach of confidence in revealing something to others which is already common knowledge.'

82. In light of the nature of the information contained in document 2 as well as the context in which it was produced and provided to the public authority, the Commissioner is satisfied that the information possesses the necessary quality of confidence, as he is satisfied that it is not information which is already in the public domain nor is it trivial.

83. According to Lord Keith of Kinkel as referred to in the same case of *Coco v Clark* (referred to above);

'.....I would think it a sufficient detriment to the confider that information given in confidence is not to be disclosed to persons to whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way.'
(Cited at paragraph 8, *Bluck v Information Commissioner & Epsom St. Helier University NHS Trust*)

84. The Commissioner notes however that the above statement was made in the context of privacy rights rather than commercial confidence. In other words, disclosure leading to the loss of privacy is sufficient detriment without the need to prove that disclosure would result in a specific or tangible detriment to the confider.

85. In cases that do not involve the issue of privacy the Commissioner expects a public authority to be able to evidence some tangible detriment to the confider if the disputed information were disclosed. In this case, the Commissioner is satisfied that disclosing the information in document would have been likely to have a prejudicial impact on the reputation of British Airways and consequently its financial and/or commercial interests. This view is reached on the basis that BA's reputation, like any other airline operator, would likely be adversely affected by the disclosure of information detailing concerns about the reliability of its aircraft. As already noted, the document contains a number of previous incidents involving BA carriers. BA's reputation is key to its ability to compete in international commercial markets and it reasonable to accept therefore that public knowledge of incidents involving it or any airline operator would likely to be detrimental to them.

86. The Commissioner therefore finds that the public authority correctly claimed that document 2 contained information that possessed the necessary quality of confidence.

Would the public authority have a defence to a breach of confidence claim because the public interest in disclosure would outweigh the public interest in maintaining the duty of confidentiality?

87. Although section 41 is an absolute exemption, the law of confidence does contain its own inbuilt public interest in that one defence to an action for breach of confidence is that the disclosure is in the public interest. The Commissioner therefore also considered whether the public authority could rely on a public

interest defence so that a breach of confidence in the event of disclosure would not be actionable.

88. Although the public authority did not provide any public interest arguments specifically in relation to section 41, in the Commissioner's view, there is a huge public interest in preserving the flow of information to the public authority to enable it investigate air accidents and incidents. This allows a proper look at safety concerns and allows the public authority to put out guidance to avoid future incidents and accidents and consequently the loss of life. In the Commissioner's view, this is an even stronger argument in relation to an airline operator the size of BA.
89. From a general point of view, there is a public interest in preserving the principle of confidentiality which is essentially based on the trust between the confider and the confidant. Disclosing the requested information could therefore discourage people from confiding in public authorities as they would not be certain that confidential obligations would be respected.
90. As noted above, document 2 contains a list of previous incidents for the period April 2001 to February 2005 involving British Airways carriers. This included the incidents referred to in the AAIB bulletin and were used to aid the public authority's investigation of the incident of 20 February. Therefore, there is arguably a public interest in knowing the exact nature of these other incidents to further understand the findings, conclusions, and recommendations in relation to the incident of 20 February. A controversial point regarding that incident was whether it was safe for the flight crew to have continued the flight to the UK after what appeared to be the failure of one of the aircraft's engines immediately after take off. The Commissioner considers that there is significant weight to the argument that is in the public interest to know the full extent of similar incidents particularly given the potential impact on passenger safety.
91. Access to the information in document 2 is also likely to further public confidence in regulators such as the AAIB and improve understanding of the parameters of their investigations and the type of evidence gathered. However, in the Commissioner's view the weight of this argument is reduced because of the amount of information that is already placed in the public domain after an investigation is concluded. Notwithstanding the confidentiality obligations imposed on the public authority, it is required under the Regulations to publish reports of its investigations similar to the bulletin issued in relation to incident of 20 February.
92. Although the public authority's investigation in relation to the incident of 20 February found some deficiencies and made a number of recommendations, on the whole it concluded that; 'no evidence was found to show that the flight continuation posed a significant increase in risk, and the investigation established that the aircraft landed with more than the required minimum fuel reserves.'³
93. As noted above, the public authority acknowledged the similarity between 14 incidents identified in document 2 and the incident of 20 February, however, it still

³ AAIB Bulletin, page 36

concluded that continuing the flight of 20 February did not pose a significant risk. As already noted, the public authority explained that the other incidents were deemed non-reportable under the regulations governing the AAIB and as such were not investigated.

94. In light of the public authority's technical expertise and in the absence of any evidence to suggest that the incidents referred to in document 2 which were not investigated by the public authority should have been, and/or any malpractices in relation to those incidents (if any) which were investigated, the Commissioner is not persuaded that in the circumstances of this case, the public interest arguments in favour of releasing document 2 outweigh the public interest in maintaining the obligation of confidentiality imposed on the public authority.
95. The Commissioner therefore finds that disclosure of the information contained in document 2 would have constituted an actionable breach of confidence and the public interest in maintaining the confidence outweighs the public interest in disclosure.

Section 31(1)(g) and by extension Section 31(2)(e)

Document 3 – Copy of British Airways Incident Report

96. The Commissioner next considered whether document 3 was correctly withheld by virtue of the above exemption.
97. Information is exempt under section 31(1)(g) if it is disclosure under the Act would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection 2.
98. According to the public authority, the relevant purpose is that contained in section 31(2)(e); ascertaining the cause of an accident.
99. To engage the above exemption therefore, the test is whether or not, disclosing document 3 would, or would be likely to prejudice the public authority's ability to ascertain the cause of an air accident. It is clear from the wording of the exemption that it refers to the prejudice to an 'accident' rather than 'incident' investigation. Nonetheless, the Commissioner is satisfied that the exemption could also apply where the request relates to information regarding incidents if the public authority is able to demonstrate that disclosure would or would be likely to prejudice ongoing or future investigations into the cause of accidents. He considers that this is a possibility given that the public authority uses information that it has obtained whilst monitoring and investigating incidents when trying to determine the cause of accidents. However he would also wish to point out that in his view, if the public authority were to claim section 31(2)(e) solely on the basis that it would harm an ongoing investigation into an incident (as opposed to an accident) he would not accept that it could apply.
100. In the Commissioner's view, 'would prejudice' places a much stronger evidential burden on the public authority, and the possibility of prejudice must be at least more probable than not. In *Hogan v Oxford City Council & The Information*

Commissioner (EA/2005/0026 & EA/2005/0030), the Information Tribunal (Tribunal) noted that 'would prejudice' 'places a much stronger evidential burden on the public authority to discharge' (paragraph 36).

101. On the other hand, 'would be likely to prejudice' means that the possibility of prejudice should be real and significant, and certainly more than remote. On the likelihood of prejudice, the Tribunal also noted in *John Connor Press Associates Ltd v Information Commissioner (EA/2005/0005)* that the 'the chance of prejudice being suffered should be more than a hypothetical possibility, there must be real and significant risk.' (Paragraph 15).
102. According to the public authority, it can be reasonably expected that the disclosure of information collated and used as part of an accident or incident investigation process would be likely to disrupt and or prejudice that and future investigations.
103. The Commissioner understands that the public authority's primary role is the investigation and prevention of accidents and incidents to ensure as far as possible the safety of the travelling public. The provision of data and opinions from organisations such as British Airways therefore provides air safety investigators with the necessary information to better define the facts, conditions and circumstances of an accident or incident.
104. The public authority further explained that the accident investigation process enables safety experts to collect a large amount of factual and opinion evidence by tracing back an entire chain of actual or similar events which either contribute or shed light on an accident. According to the public authority, the willingness of carriers to contribute to an investigation in their capacity as expert sources is centred on the culture of non-apportionment of blame or liability in which the public authority conducts its investigations.
105. By way of example, the public authority referred the Commissioner to the British Airtours Boeing 737-236 accident in Manchester on 22 August 1985. The Commissioner understands that the aircraft caught fire after an aborted take off and flames quickly engulfed the area around the front passenger door filling the cabin with lethal, toxic fumes. A number of passengers and crew members died as a result, with most of them dying of [asphyxiation](#) after inhaling the toxic fumes. According to the public authority, the subsequent recommendation which led to the international requirement that floor lighting is provided in aircraft cabins to aid evacuation in an emergency was as a result of the close cooperation between the public authority and the airline in question.
106. The public authority therefore argued that disclosing information used to aid such investigations would adversely affect the relationship of trust that exists between it and airline operators. This would in turn undermine the culture of non-apportionment of blame in which it conducts investigations, as it is highly likely that airline operators will not provide such information in future investigations. The unwillingness of airline operators to provide information needed to conduct accident investigations would therefore be likely to prejudice the public authority's ability to conduct such investigations to the detriment of the travelling public.

Likelihood of Prejudice

107. In assessing the likelihood of prejudice, the Commissioner took into account the statutory framework in which the public authority operates, namely the Regulations considered in relation to document 1 previously. The Commissioner also recognises that when assessing the likelihood of prejudice in this case the wider impact of disclosure on ongoing and future accident investigations is key. However, the Commissioner wishes to emphasise that his determination is based solely on the merits of this particular case.
108. Regulation 4 of the Regulations states that the sole objective of the investigation of an accident or incident under the Regulations is prevention and not to apportion blame or liability.
109. A full text of regulation 4 of the Regulations is available in the Legal Annex at the end of this Notice.
110. Regulation 8 designates the AAIB as the 'inspector' for the purposes of the Regulation. In other words, the body charged with conducting investigations into air accidents or incidents.
111. Under regulation 9(1)(g), an inspector carrying out an investigation can have free access to any relevant information or records held by the owner, the operator or the manufacturer of the aircraft and by the authorities responsible for civil aviation or airport operation.
112. Regulation 9(2) further states that pursuant to the provisions of regulation 9(1), an investigating inspector shall have the power to examine any person they see fit as well as require them to produce books, papers, documents, and articles they consider relevant to an investigation.
113. In the Commissioner's view, the above provisions combine to not only grant the AAIB investigative powers but also grant it powers to access, request access, as well as compel (if necessary) airline operators to provide it with information it considers would assist in the investigation of an accident or incident.
114. As noted above, the public authority's central argument is that disclosing the information contained in document 3 would be likely to prejudice its ability to investigate accidents. Not only would operators be dissuaded from providing information about accidents but also about incidents, that the public authority is not in fact required to investigate. The data about those incidents is often used to help investigators determine the cause when an accident does occur because it provides details about similar circumstances.
115. The Commissioner therefore considered whether in light of the statutory framework in which the public authority operates, an argument could still be made in support of the likelihood of prejudice to its ability to conduct investigations into accidents.

116. The Commissioner notes the Tribunal's comments in *Financial Services Authority (FSA) v Information Commissioner (EA/2008/0061)* on the application of section 31. The Tribunal pointed out that the notwithstanding the ability of the FSA to rely on its statutory powers to request information during an investigation, its ability to conduct an investigation within the meaning of section 31 could still be prejudiced if the disclosure of information provided pursuant to an investigation could or has resulted in firms being less open with the FSA. (See Paragraphs 18 - 24).
117. The Commissioner was however also guided by the Tribunal's comments in case *EA/2005/0005* cited above which stated that a public authority must be able to demonstrate a real and significant risk of prejudice.
118. Document 3 is a copy of a British Airways incident report produced in October 2005. The report describes an incident which occurred on a British Airways carrier in September 2005 and includes a log of the events as well as the actions taken during the flight in question.
119. In the Commissioner's view, document 3 arguably contains information which, is reasonable to assume, British Airways would prefer not to be in the public domain. This in no way implies that the Commissioner is commenting on the seriousness or otherwise of the incident, he is merely drawing a reasonable assumption based on British Airways' position as a carrier operating in a commercially competitive environment. This is similar information to that which the Commissioner accepted was confidential under section 41. He would re-iterate that the public authority specifically withdrew its reliance upon that section in relation to document 3 as noted in the chronology section of this decision notice.
120. Nevertheless, as already noted, the Commissioner's assessment of the likelihood of prejudice in the context of the section 31(2)(e) exemption in this case has to be based on whether the disclosure of the information in document 3 would be likely to prejudice the public authority's ability to ascertain the cause of an air accident.
121. In the Commissioner's view, regulation 9 of the Regulations and in particular sub sections (1)(g) and (2) impose a duty on carriers under investigation by the AAIB to cooperate with, and provide the AAIB with the necessary information it requires to conduct the investigation. The Commissioner acknowledges as noted in the above Tribunal decision (*EA/2008/0061*) that there is a difference between the voluntary and mandatory provision of information. Therefore, the exemption could apply if he was persuaded that disclosing the information in document 3 would make the voluntary supply of information less likely. For the reasons explained below, as well as the fact that the the public authority has not provided any evidence to demonstrate that disclosure would result in the unwillingness of British Airways or other carriers to cooperate with it in future investigations, the Commissioner is not persuaded that this would be the case in this instance.
122. The Regulations do not include a specific sanction for non-compliance but it is reasonable to conclude that obstructing an investigation by the body statutorily responsible for investigating air incidents and accidents would be

detrimental to the carrier in question. For instance, as already noted, at the conclusion of an investigation, the AAIB is expected to produce a report or bulletin as appropriate detailing its findings and conclusions.⁴ A report or bulletin suggesting that an operator was obstructive or uncooperative would no doubt be detrimental to the interests of the operator in question.

123. The Commissioner therefore also considers the possibility that the public authority could publish an adverse report or bulletin against an airline operator should deter airline operators from not cooperating with an investigation. In the Commissioner's view, not cooperating with an investigation raises more questions for an airline operator and puts it in a position which could potentially affect its ability to continue as an operator. On the other hand, an investigation by the regulatory body (i.e. the AAIB) with the cooperation of the relevant airline operator would, in that respect, (i.e. the fact that it cooperated) do no harm to the reputation of the airline operator. The Commissioner therefore considers that even if disclosure of the information were detrimental to the operator, the damage to its reputation if it were shown to be unwilling to cooperate with the public authority is such that there is not sufficient likelihood of it being deterred from providing the material to engage the exemption.
124. In light of the above, the Commissioner is not satisfied that for the purposes of section 31(1)(g) by virtue of 31(2)(e) disclosing the information in document 3 would be likely to result in a real and significant risk of prejudice to the openness between the public authority and airline operators, and consequently the ability of the public authority to investigate air accidents.
125. The conclusion of the Commissioner therefore is that section 31(1)(g) and by extension section 31(2)(e) is not engaged. As noted above, for the exemption to be engaged on the basis that disclosure of the information would be likely to result in a real and significant risk of prejudice to the openness between the public authority and airline operators, the possibility of prejudice must be more probable than not. The test for prejudice being likely which is that the risk must be real and significant, and certainly more than hypothetical or remote would also not be satisfied here on the basis of the arguments advanced by the public authority. As the conclusion has been reached by the Commissioner that the exemption is not engaged he has not gone on to consider the balance of the public interest test.
126. The Commissioner therefore finds that document 3 was incorrectly withheld by virtue of the exemption at section 31(1)(g) and by extension section 31(2)(e).
127. He additionally finds the public authority in breach of sections 1(1)(b) and 10(1) of the Act for failing to disclose the above information to the complainant at the time of the request.

⁴ regulation 11 of the Regulations

The Decision

128. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- It correctly withheld the information contained in documents 1 and 4 by virtue of the exemption at section 44(1)(a) and document 2 by virtue of section 41.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority incorrectly withheld the information contained in document 3 by virtue of the exemption at section 31(1)(g) and by extension section 31(2)(e).
- The public authority breached sections 1(1)(b) and 10(1) by failing to disclose the information contained in document 3 within 20 working days.
- The public authority breached sections 17(1) (a), (b) and (c) for failing to inform the complainant that it was relying on the exemption contained in section 31(1)(g) at the time of his request.
- The public authority also breached section 17(1)(b) because it did not inform the complainant that it was relying on sub section (1)(a) of section 44.

Steps Required

129. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Disclose the information contained in document 3 omitting any names.

130. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

131. 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

132. 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 1st day of July 2009

Signed

**Jo Pedder
Senior FOI Policy Manager**

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

Legal Annex

Civil Aviation (Investigation of air accidents and incidents) Regulations 1996 (No. 2798)

'Purpose of the investigation of air accidents and incidents'

4. – 'The sole purpose of the investigation of an accident or incident under these Regulations shall be the prevention of accidents and incidents. It shall not be the purpose of such an investigation to apportion blame or liability.'

'Inspectors of Air Accidents'

8. — (1) For the purpose of carrying out investigations into accidents and incidents to which these Regulations apply, the Secretary of State shall, subject to paragraph (2) below, appoint persons as Inspectors of Air Accidents, one of whom shall be appointed by the Secretary of State as Chief Inspector of Air Accidents.
- (2) The body of Inspectors of Air Accidents shall continue to form that part of the Department of Transport known as the Air Accidents Investigation Branch.
- (3) Subject to paragraphs (5) and (6) below, the Chief Inspector shall carry out, or cause an Inspector to carry out, an investigation into—
- (a) accidents and serious incidents which occur in or over the United Kingdom;
 - (b) accidents and serious incidents which occur in or over any country or territory which is neither a member State nor a Contracting State to aircraft registered in the United Kingdom when such investigation is not carried out by another State;
 - (c) serious incidents which occur in or over any country or territory which is neither a member State nor Contracting State to aircraft which are registered elsewhere than in the United Kingdom but which are operated by an undertaking established in the United Kingdom when such investigation is not carried out by another State; and
 - (d) accidents and serious incidents to aircraft registered in the United Kingdom in the circumstances described in paragraph 5.3 of the Annex

(4) Subject to paragraphs (5) and (6) below, the Chief Inspector may, when he expects to draw air safety lessons from it, carry out, or cause an Inspector to carry out, an investigation into an incident, other than a serious incident, which occurs—

(a) in or over the United Kingdom; or

(b) otherwise than in or over the United Kingdom to an aircraft registered in the United Kingdom.

(5) The Chief Inspector may delegate the task of carrying out an investigation into an accident or an incident to another member State or, in accordance with paragraphs 5.1, 5.1.1 or 5.3 of the Annex, to another Contracting State.

(6) Where the Chief Inspector delegates the task of carrying out an investigation pursuant to paragraph (5) above, he shall so far as he is able facilitate inquiries by the investigator appointed by the relevant State.

(7) The Chief Inspector may carry out, or cause an Inspector to carry out, an investigation into an accident or incident where the task of carrying out the investigation has been delegated to the United Kingdom by another member State or, in accordance with paragraphs 5.1, 5.1.1 or 5.3 of the Annex, by another Contracting State.

(8) Without prejudice to the power of an Inspector to seek such advice or assistance as he may deem necessary in making an investigation, the Secretary of State may at the request of the Chief Inspector appoint persons to assist an Inspector in a particular investigation and such persons shall for the purpose of so doing have such of the powers of an Inspector under these Regulations as may be specified in their appointment.

(9) The Chief Inspector may arrange for any of his powers and obligations under these regulations to be performed on his behalf by an Inspector designated by him to be his deputy.

(10) In any case where the Chief Inspector causes more than one Inspector to carry out an investigation he shall nominate one of them to be in overall charge of the investigation.

Powers of Inspectors

9. — (1) For the purpose of enabling him to carry out an investigation into an accident or incident in the most efficient way and within the shortest time, an investigating Inspector is hereby authorised, where appropriate in cooperation with the authorities responsible for the judicial inquiry, to—

- (a) have free access to the site of the accident or incident as well as to the aircraft, its contents or its wreckage;
- (b) ensure an immediate listing of evidence and controlled removal of debris or components for examination or analysis purposes;
- (c) have immediate access to and use of the contents of the flight records and any other recordings;
- (d) have access to the results of examination of the bodies of victims or of tests made on samples taken from the bodies of victims;
- (e) have immediate access to the results of examinations of the people involved in the operation of the aircraft or of tests made on samples taken from such people;
- (f) examine witness; and
- (g) have free access to any relevant information or records held by the owner, the operator or the manufacturer of the aircraft and by the authorities responsible for civil aviation or airport operation.

(2) For the purpose of paragraph (1) above an investigating Inspector shall have power—

- (a) by summons under his hand to call before him and examine all such persons as he thinks fit, to require such persons to answer any question or furnish any information or produce any books, papers, documents and

articles which the investigating Inspector may consider relevant and to retain any such books, papers, documents and articles until the completion of the investigation;

(b) to take statements from all such persons as he thinks fit and to require any such person to make and sign a declaration of the truth of the statement made by him;

(c) on production if required of his credentials, to enter and inspect any place, building or aircraft the entry or inspection whereof appears to the investigating Inspector to be requisite for the purposes of the investigation;

(d) on production if required of his credentials, to remove, test, take measures for the preservation of or otherwise deal with any aircraft other than an aircraft involved in the accident or incident where it appears to the investigating Inspector requisite for the purposes of the investigation, and

(e) to take such measures for the preservation of evidence as he considers appropriate.

(3) Every person summoned by an investigating Inspector under paragraph (2)(a) above shall be allowed such expenses as the Secretary of State may determine.

(4) When requested to do so by the investigating body or entity of another member State, the Chief Inspector may provide assistance to that body or entity by supplying-

(a) installations, facilities and equipment for-

- the technical investigation of wreckage and aircraft equipment and other objects relevant to the investigation,

- the evaluation of information from flight recorders, and

- the computer storage and evaluation of air accident data, and

(b) accident investigation experts to undertake specific tasks but only when an investigation is opened following a major accident.

(5) In this regulation “operator” shall have the meaning given by Article 3 of the Directive and “in cooperation with the authorities responsible for the judicial inquiry” shall have the same meaning as in the Directive.

‘Disclosure of relevant records

18. — (1) Subject to paragraphs (2) and (4) to (6) below no relevant record shall be made available by the Secretary of State to any person for purposes other than accident or incident investigation.

(2) Nothing in paragraph (1) above shall preclude the Secretary of State making a relevant record available to any person where—

(a) in a case where that person is a party to or otherwise entitled to appear at judicial proceedings, the relevant court has ordered that the relevant record shall be made available to him for the purpose of those proceedings, or

(b) in any other circumstances, the relevant court has ordered that the relevant record shall be made available to him for the purpose of those circumstances.

(3) In this regulation—

“judicial proceedings” includes any proceedings before any court, tribunal or person having by law power to hear, receive and examine evidence on oath, “relevant court” in the case of judicial proceedings or an application for disclosure made in England and Wales means the High Court, in the case of judicial proceedings or an application for disclosure made in Scotland means the Court of Session and in the case of judicial proceedings or an application for disclosure made in Northern Ireland means the High Court,

“relevant record” means any item in the possession, custody or power of the Secretary of State which is of a kind referred to in sub-paragraphs (a) to (e) of paragraph 5.12 of the Annex; and

“Secretary of State” includes any officer of his.

(4) Subject to paragraph (6) below no order shall be made under paragraph (2) above unless the relevant court is satisfied that the interests of justice in the judicial proceedings or circumstances in question outweigh any adverse domestic and international impact which disclosure may have on the investigation into the accident or incident to which the record relates or any future accident or incident investigation undertaken in the United Kingdom.

(5) A relevant record or part thereof shall not be treated as having been made available contrary to paragraph (1) above in any case where that record or part is included in the final report (or the appendices to the final report) of the accident or incident.

(6) The provisions of this regulation shall be without prejudice to any rule of law which authorises or requires the withholding of any relevant record or part thereof on the ground that the disclosure of it would be injurious to the public interest.'

Civil Aviation Act 1982

16. Provision by CAA of assistance, etc. for Secretary of State and others.

— (1) Subject to subsection (3) below, it shall be the duty of the CAA to provide such assistance and advice as the Secretary of State may require it to provide for him or any other person in connection with any of the Secretary of State's functions relating to civil aviation.

(2) Without prejudice to subsection (1) above, it shall also be the duty of the CAA—

(a) to consider what aerodromes are in its opinion likely to be required from time to time in the United Kingdom in addition to, or in place of, or by way of alteration of, existing aerodromes; and

(b) to make recommendations to the Secretary of State arising out of its consideration of that matter;

and it shall be the duty of the Secretary of State to publish the recommendations (except any of them of which the publication appears to

him unnecessary) in such manner as he considers appropriate for bringing them to the notice of the public.

(3) Where in pursuance of subsection (1) above the Secretary of State requires the CAA to provide assistance or advice for a person other than the Secretary of State but does not undertake to pay the CAA the cost of doing so, the CAA shall be entitled to refuse to do so until the other person pays it—

(a) in so far as provision is made in pursuance of section 11 above for charges in respect of the assistance or advice, those charges; and

(b) in so far as provision is not made, such reasonable charges in respect of the assistance or advice as it may determine.

(4) The CAA shall be entitled to recover from the Secretary of State a sum equal to any expense reasonably incurred by it in providing him with assistance or advice in pursuance of subsection (1) above and in performing the duty imposed on it by subsection (2) above.

(5) Without prejudice to subsection (1) above, the CAA may provide for any person technical assistance and advice, including research services, with respect to any matter in which it has skill or experience.

17. Provision by CAA of information, etc. for Secretary of State.

— (1) It shall be the duty of the CAA—

(a) to furnish the Secretary of State with such information as he may specify and the CAA has or can reasonably be expected to obtain with respect to such matters relating to it or to civil aviation as the Secretary of State may specify;

(b) to permit the Secretary of State to have access to all documents which are under its control and relate to matters specified in pursuance of paragraph (a) above;

(c) if it comes to its notice that body which is the holder of air transport licence [^{F1}or operating licence granted in accordance with [^{F2}the [Community licensing Regulation](#)]] is proposing to merge or has merged

with another body, to give the Secretary of State notice in writing of the proposal or merger;

(d) if it appears to the CAA that any matter which it is dealing with, or has dealt with, is likely

(i) to affect the relations of the United Kingdom with any other country or territory or any international organisation, or

(ii) to be of special interest to the Secretary of State by reason of the fact that the matter involves or may involve noise, vibration, pollution or other disturbance attributable to aircraft used for the purpose of civil aviation,

to give notice in writing of the matter to the Secretary of State.

(2) Nothing in subsection (1) above shall be construed as prejudicing the generality of section 16(1) above, and nothing in subsection (1)(c) or (d) above shall be construed as prejudicing the generality of subsection (1)(a) above.

(3) The CAA shall be entitled to recover from the Secretary of State a sum equal to any expense reasonably incurred by it in furnishing information in pursuance of subsection (1) above.

Annotations:

Amendments (Textual)

F1Words in s. 17(1)(c) inserted (1.1.1993) by S.I. 1992/2992, reg. 23, Sch. 2 para. 4.

F2Words in s. 17(1)(c) substituted (1.1.1994) by S.I. 1993/3039, reg. 3(a)

23. Disclosure of information.

— (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

(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.

(2) Subsection (1) above shall apply in relation to the disclosure by an officer of the Secretary of State of information furnished to the Secretary of State in pursuance of any provision of this Act to which this section applies or of an Air Navigation Order as it applies in relation to disclosure by the CAA or a member or employee of the CAA of information so furnished to the CAA, but with the substitution for references to the CAA in paragraphs (b) to (d) of references to the Secretary of State.

(3) For the purposes of subsection (1) above, all reasonable inquiries to find a body corporate shall be deemed to have been made if—

(a) in the case of a company within the meaning of the [Companies Act 1985] or the [Companies (Northern Ireland) Order 1986], inquiries have been made at its registered office; or

(b) in the case of a company incorporated outside the United Kingdom and having a place of business within the United Kingdom, inquiries have been [F1 made

(i) at every address registered in respect of that company for the purposes of section 691(1)(b)(ii) of the said Act of 1985 or, as the case may be, at every address for service registered in respect of a branch of that company under Schedule 21A to that Act, and

(ii) at every address registered in respect of that company for the purposes of Article 641(1)(b)(ii) of the said Order of 1986 or, as the case may be, at every address for service registered in respect of a branch of that company under Schedule 20A to that Order.]

(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 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, 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. (5) If the CAA or a member or employee of the CAA or an officer of the Secretary of State discloses any information in contravention of subsection (1) above, it or he shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; and

(b) on conviction on indictment, to a fine or, except in the case of the CAA, to imprisonment for a term not exceeding two years or to both.

(6) This section applies to the following provisions of this Act, that is to say, sections 16, 17, [F²and 28], section 36 (so far only as it relates to aerodromes owned or managed by the CAA) sections 64 to 72 (except section 69), sections 78 to 80 and sections 84 and 85.

Air Navigation Order 2005

Mandatory reporting of occurrences

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 ^{F1}.

(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 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 airwothiness

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 ^{F2} 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.

Annotations:

F1O.J. No. L167, 4.7.2003 p. 23.

F2O.J. No. L240, 24.8.1992, p. 8.

Freedom of Information Act 2000

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Law enforcement.

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Section 31(2) provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.”

Section 31(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

Prohibitions on disclosure.

Section 44(1) provides that –

“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.”

Section 44(2) provides that –

“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).”