

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 October 2009

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

Summary

The complainant requested copies of Mandatory Occurrence Reports (MOR) by XL Airways in the 12 months before they went out of business. The Public Authority relied on section 44 of the Freedom of Information Act 2000 (FOIA) to withhold the information. The Public Authority cited section 23 of the Civil Aviation Act 1982 as the relevant statutory bar on disclosure which informed their reliance on section 44 of the Act. After considering the case the Commissioner upholds the Public Authority's decision to withhold the information under section 44 of the Act. The Commissioner does not require the Public Authority to take any further steps in relation to the complainant's request.

The Commissioner's Role

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

The Request

2. On 29 May 2009 the complainant wrote to the Civil Aviation Authority (CAA):

"Please could you provide me with copies of all Mandatory Occurrence Report forms submitted by XL airlines in the 12 months before they went out of business. Please note that a Section 44 exemption does NOT apply to this information because of the exception allowed under S23(1)(c) of the Civil Aviation Act 1982. Please note I would prefer these documents to be provided in electronic form if possible and I am content for all personal information (eg the reporter's name) to be

redacted so as not to breach s.40 of the Freedom of Information Act.”

3. On 19 June 2009 the CAA responded to the complainant. The information was withheld under section 44 of the FOIA which relates to prohibitions on disclosure. In this case, section 23 of the Civil Aviation Act 1982 was cited as a statutory prohibition which meant that the CAA was not obliged to comply with the FOIA. At the time administrators for XL Airways confirmed that it remained in administration and that they did not consent to the information being released in redacted form.
4. The complainant made a formal appeal against this decision on 26 June 2009. In his appeal he stated that he believed it was disingenuous to suggest that XL Airlines existed as the airline was in administration at that time.
5. In the internal review, dated 14 July 2009, the CAA pointed out that the legal status of the airline was crucial in determining whether the statutory bar applied:

“Section 23 of the Civil Aviation Act prohibits the disclosure of information that relates to a particular person and has been furnished to the CAA in pursuance of any provision of the Act.

In this case:-

- *Mandatory Occurrence Reports clearly fall into this category of information*
- *XL Airways was, at the time of your request, in administration and as such still existed as a body corporate. In the original decision to withhold disclosure, you were advised the the (sic) Administrators for XL Airways did not consent to disclosure (even redacted disclosure).”*

The Investigation

Scope of the case

6. The investigation focused on the application of section 44 by the public authority and the withholding of the requested information.

Chronology

7. On 27 July 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the following points:
 - Whilst acknowledging that the information was covered by section 23 of the Civil Aviation Act, the complainant asked what was the legal status of XL Airlines?
 - He made the point that as the airline was “defunct” it could no longer

be classed as a 'body corporate' and the information could be released under section 23(1)(c) which allows the information to be disclosed when:

“...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 enquiries have been made, and the CAA determines that the information may be disclosed...”

- The complainant additionally argued that the information could be released under section 23(1)(b) of the Civil Aviation Act:

“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...”

8. On 15 August the Commissioner wrote to the CAA asking to see copies of the requested Mandatory Occurrence Reports and the public authority was asked to specify what exemption/s were being relied on.
9. The CAA responded, arguing that the information is exempt under section 44 of the FOIA for the reasons cited in their correspondence with the complainant – namely that any disclosure would be prohibited under section 23(1)(c) of the Civil Aviation Act 1982. Section 23(1)(c) doesn't strictly provide a prohibition on disclosure rather it provides an exception to the prohibition of disclosure provided by 21(1) They reiterated the refusal of the administrators, Zolfo Cooper, to give permission for the release of the information at the time of the request. Sample copies of the Mandatory Occurrence Reports were supplied to the Commissioner.
10. The Commissioner wrote to the complainant on 29 September 2009, seeking an informal resolution of the complaint on the basis that he was likely to conclude that the exemption at section 44 was engaged. He acknowledged the complainant's argument that XL Airways was not operating as a business but considered that although the company was in administration at the time of the request it still legally existed, and as such, was not subject to section 23(1)(c) of the Civil Aviation Act. The Commissioner gave his opinion that XL Airways is still a 'body corporate' and, even though it was in administration, section 23 would not provide an exception to a prohibition of disclosure for that reason. Therefore, any Decision Notice on this complaint was likely to uphold the CAA's refusal to disclose the requested information.
11. The complainant emailed the Commissioner on 30 September 2009 declining to withdraw his case and putting forward the argument that, as a journalist, the information could be disclosed to him. He cited Regulation 9(d) of the Civil Aviation Regulations 1991 (The full text of Regulation 9 can be found in the Legal Annex at the end of this Notice) in support of his claim:

“The Authority shall make available, upon payment to it of any applicable charge

under section 11 of the Act [the Civil Aviation Act 1982], reports of reportable occurrences or a summary of such reports, to any person who is:

(d) engaged in writing about civil aviation for publication in any newspaper, periodical, book or pamphlet.”

The complainant stated that this gave the CAA discretion to override the ban on disclosure.

Findings of fact

12. Section 23 provides that no information relating to a particular person which has been furnished to the Civil Aviation Authority (“CAA”) in pursuance of a provision under the Civil Aviation Act or an Air Navigation Order (see Legal Annex) shall be disclosed by the CAA, or a member or employee of the CAA, other than in particular circumstances as set out in section 23(1)(a)-(d) and in section 23(4). It should however be noted that this prohibition applies only to certain sections of the Civil Aviation Act as set out in section 23(6).
13. In the main, the sections of the Civil Aviation Act to which the statutory prohibition in section 23 applies relate to the provision of assistance or information by the CAA to the Secretary of State in connection with any of the Secretary of State’s functions, managing or licensing in relation to aerodromes, air carriage and transport or regulation of noise and vibration of aircraft and soundproofing. Only one section (section 84) would appear to relate to information but this is in the power of the CAA to require others to furnish information to it in relation to certain areas, mainly air licensing details.
14. None of these specified sections relate to air safety or investigation of accidents which would appear to be the primary purpose of the Mandatory Occurrence Report (“MOR”) as set out in the guidance from the CAA in “CAP 382 - The Mandatory Occurrence Reporting Scheme”. This states that “the objective of the scheme is to contribute to the improvement of air safety by ensuring that relevant information on safety is reported, collected, stored, protected and disseminated”.
15. Section 23 also applies where the information has been furnished in pursuance of an Air Navigation Order (“ANO”). Under Regulation 117 of the ANO 2000, there is responsibility on the operator or commander of an aircraft to report what is termed a “reportable occurrence”. Regulation 117(2)(a) defines a “reportable occurrence” as including any incident or default relating to an aircraft which if not corrected would endanger the aircraft, its occupants or any other person. If there is a specific duty to report an accident or serious incident under section 75 of the Act then there is no further obligation to report it as a “reportable occurrence”.
16. The statutory prohibition prevents the disclosure of information relating to a particular person. The term “person” may include companies as well as living individuals. It would therefore cover not just the identity of the person reporting the occurrence but also the aircraft operating company.

17. As stated above the statutory prohibition does not apply in particular stated circumstances which include where the person had consented to the disclosure or for example where the CAA “after affording that person an opportunity to make representations about the information and considering any representations... determines that the information may be disclosed”.
18. There does not appear to be a duty on the CAA in every case either to seek consent to disclosure or to consider following representations whether the information should be disclosed.
19. In this case consent was sought from Zolfo Cooper, the Administrators for XL Airways, who denied permission. The airline was in administration at the time of the request. Thus section 23 of the Civil Aviation Act was applicable. The Commissioner understands that the company went into liquidation on 8 September 2009 but from a legal point of view he is advised that the public authority would be classed as a ‘body corporate’ until dissolution is complete.

Analysis

Exemptions

Section 44

20. Section 44(1)(a) of the FOIA exempts from disclosure any information that is prohibited from disclosure by or under any enactment. In this case the public authority relied on section 23 of the Civil Aviation Act 1982 as the statutory bar on disclosure.
21. Section 23(1) of the Civil Aviation Act 1982 prohibits the disclosure of information by the public authority or any of its employees, if that information, “relates to a particular person and has been furnished to the CAA in pursuance of any provision of this Act to which this section applies or of any Air Navigation Order.” This prohibition is subject to the exceptions set out in section 23(1) (a)-(d) and section 23(4).
22. This section would relate not just to the identity of the person reporting the occurrence but also to the company operating the aircraft, as noted at section 17.
23. The full text of section 23(1), section 23(4) and Article 142 can be found in the Legal Annex at the end of this Notice.
24. The Commissioner is satisfied that the information in question was provided to the public authority in line with section 23(1) and as such falls under the prohibition from disclosure.
25. The Commissioner has first considered whether the information in question falls under one of the categories of information to which this prohibition applies. Article 142(7) of the Air Navigation Order 2005 (ANO) requires a person upon notification

by the CAA to 'make a report (of) information which is in his possession or control and which relates to an occurrence which has been reported by him or another person to the CAA in accordance with this article.'

26. The Commissioner is satisfied that the information in question was provided to the public authority in line with Article 142 of the ANO 2005. Therefore the Commissioner is satisfied that it falls under one of the categories of information referred to in section 23(1) of the Civil Aviation Act 1982, and as such falls under the prohibition from disclosure.
27. The Commissioner has gone on to consider the particular circumstances set out in section 23(1)(a) to (d) and section 23(4), and whether any of these circumstances apply in this case.
28. Having considered the exceptions laid out in section 23(1)(a)-(d) the Commissioner has noted that they do not impose a duty on the public authority to seek consent to disclose, or to release the information without consent. The conditions leave it within the discretion of the public authority as to whether to disclose the information which falls under this section. From the information provided to the Commissioner it is clear that the public authority has decided not to use its discretion in this case.
29. The CAA has explained that, as a general rule, it would take into account aviation safety in exercising its discretionary power of disclosure under section 23. On 12 September 2009 the CAA stated in a letter to the Commissioner that it believed that disclosure could have a "serious detrimental effect on the overall reporting culture that has been established over many years in the UK and could, thereby have a significant effect on the future impact of civil aviation."
30. What may or may not constitute aviation safety for the purposes of disclosure is therefore open to interpretation by the CAA. They do not refer to a codified set of guidance or criteria in exercising their power of discretion, but draw upon their experience and expertise in reaching a reasoned position. There is a rational basis for the open and flexible approach they take.
31. At paragraph 73 of *Hoyte versus IC and the CAA (EA/2007/0101)* the Information Tribunal stated that:

"The Information Commissioner is only entitled to question the exercise of discretion where it appeared to be Wednesbury irrational or otherwise unlawful."

In considering the responses provided by the CAA, the Commissioner does not consider the CAA's exercise of its discretion to be *Wednesbury* irrational or otherwise unlawful. He has therefore not questioned its use of its discretion in this case.

32. The Civil Aviation Act also provides more exceptional circumstances under section 23(4)(a)-(b) and (d)-(f) where information provided pursuant to the Act may be disclosed.

33. The Commissioner is also satisfied that none of those circumstances apply in this case.

34. Section 23(4)(c) provides that information may be disclosed 'to a person to whom the information in question is required to be disclosed by regulations made in pursuance of section 7 (2)'. One such Regulation is Regulation 9 of the Civil Aviation Authority Regulations 1991. This requires the public authority to make available reports of reportable occurrences or a summary of such reports to any person who is:

- *the operator or member of the flight crew of any aircraft;*
- *engaged in the design, manufacture, repair, maintenance or overhaul of aircraft, or parts or equipment therefore;*
- *the aeronautical authority of a country other than the United Kingdom, or the representative in the United Kingdom of such an authority,*
- *engaged in writing about civil aviation for publication in any newspaper, periodical, book or pamphlet; engaged in preparing a programme about civil aviation for television or radio;*
- *engaged in the study of civil aviation for any academic purpose; or*
- *any other person whose functions include the furthering of the safety of civil aviation:*

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

35. The complainant in this case has argued that as he is a person engaged in writing about civil aviation for publication in any newspaper the information he has requested could be disclosed to him under Regulation 9(d) of the CAA Regulations 1991. The Commissioner notes, however, that the exceptions provided under Regulation 9 are also subject to a discretionary power of disclosure by the public authority. In considering the applicability or otherwise of the above exceptions the Commissioner would therefore have to take into account the public authority's discretion. However as noted above the Commissioner has decided not to question the public authority's use of its discretion.

36. Furthermore at paragraphs 46-49 of the Hoyte Information Tribunal decision the Tribunal considered that the Civil Aviation Act 1982 applied. The Commissioner, however, considers that as a disclosure under FOIA is a disclosure to the world at large, not to an individual, the individual identity of the applicant should not have been taken into account and that the exception to the prohibition did not, in fact, apply.

37. The Commissioner also makes the following observation: the circumstances of the individual requesting the information would only be relevant if they cited regulation 9 of the CAAR (rather than FOIA) as the access regime they were invoking. The Commissioner does not have regulatory jurisdiction over this access regime and therefore this would be matter for the requester to pursue directly with CAA.
38. Therefore, after considering the provisions of section 23 of the Civil Aviation Act 1982, the Commissioner is satisfied that it does provide a statutory bar on the disclosure of the requested information.
39. The Commissioner upholds the public authority's decision to apply the exemption listed at section 44 of the FOIA.

The Decision

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

Steps Required

41. The Commissioner requires no steps to be taken.

Right of Appeal

42. 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 28th day of October 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000- Section 44

Prohibitions on disclosure

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

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

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

Civil Aviation Act 1982- Section 23 (1)

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

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

Civil Aviation Act 1982-Section 23 (4)

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

- (a) by the CAA or a member or employee of the CAA to the Secretary of State or an officer of his or, with the consent of the Secretary of State, to an international organisation of which the United Kingdom is a member;
- (b) by an officer of the Secretary of State to the CAA or a member or employee of the CAA or to such an organisation or, in accordance with directions given by the Secretary of State—
 - (i) to an officer of any government department; or
 - (ii) in connection with negotiations conducted by officers of the Secretary of State with representatives of the government of any country or territory outside the United Kingdom; or
 - (iii) in connection with the discharge of any obligation of the United Kingdom under international arrangements;
- (c) to a person to whom the information in question is required to be disclosed by regulations made in pursuance of section 7(2) above;

- (d) in pursuance of section 67(2) or (4) below;
- (e) by the CAA for the purpose of complying with any duty imposed on it by section 85(1) below;
- (f) with a view to the institution of, or otherwise for the purposes of, any criminal proceedings arising out of any enactment relating to civil aviation or for the purposes of any investigation undertaken in pursuance of regulations made by virtue of section 75 below.

Air Navigation Order 2005- Article 142

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

- (f) a person who signs an airworthiness review certificate, or a certificate of release to service in respect of a turbine-powered aircraft, which has a certificate of airworthiness issued by the CAA, and a person who signs an airworthiness review certificate or a certificate of release to service in respect of any equipment or part of such an aircraft;
- (g) a person who signs an airworthiness review certificate, or a certificate of release to service in respect of an aircraft, operated under an air operator's certificate granted by the CAA, and a person who signs an airworthiness review certificate or a certificate of release to service in respect of any equipment or part of such an aircraft;
- (h) a person who performs a function which requires him to be authorised by the CAA as an air traffic controller or as a flight information service officer;
- (i) a licensee and a manager of a licensed aerodrome or a manager of an airport to which Council Regulation (EEC) No. 2408/92 of 23rd July 1992 on access for Community air carriers to intra-Community air routes applies;
- (j) a person who performs a function in respect of the installation, modification, maintenance, repair, overhaul, flight-checking or inspection of air navigation facilities which are utilized by a person who provides an air traffic control service under an approval issued by the CAA;
- (k) a person who performs a function in respect of the ground-handling of aircraft, including fuelling, servicing, loadsheet preparation, loading, de-icing and towing at an airport to which Council Regulation (EEC) No. 2408/92 of 23rd July 1992 on access for Community air carriers to intra-Community air routes applies.
- (6) Reports of occurrences shall be made within such time, by such means and containing such information as may be prescribed and shall be presented in such form as the CAA may in any particular case approve.
- (7) A person listed in paragraph (5) shall make a report to the CAA within such time, by such means, and containing such information as the CAA may specify in a notice in writing served upon him, being information which is in his possession or control and which relates to an occurrence which has been reported by him or another person to the CAA in accordance with this article.
- (8) A person shall not make any report under this article if he knows or has reason to believe that the report is false in any particular.
- (9) The CAA shall put in place a mechanism to collect, evaluate, process and store occurrences reported in accordance with paragraphs (5) to (7).
- (10) The CAA shall store in its databases the reports which it has collected of occurrences, accidents and serious incidents.
- (11) The CAA shall make all relevant safety-related information stored in the Databases.

mentioned in paragraph (10) available to the competent authorities of the other Member States and the Commission.

- (12) The CAA shall ensure that the databases referred to in paragraph (10) are compatible with the software developed by the European Commission for the purpose of implementing Directive 2003/42 of the European Parliament and of the Council of 13th June 2003 on occurrence reporting in civil aviation.
- (13) The CAA, having received an occurrence report, shall enter it into its databases and notify, whenever necessary: the competent authority of the Member State where the occurrence took place; where the aircraft is registered; where the aircraft was manufactured, and where the operator's air operator's certificate was granted.
- (14) The CAA shall provide any entity entrusted with regulating civil aviation safety or with investigating civil aviation accidents and incidents within the Community with access to information on occurrences collected and exchanged in accordance with paragraphs (9) to (13) to enable it to draw the safety lessons from the reported occurrences.
- (15) The CAA and the Chief Inspector of Air Accidents shall use any information received in accordance with the terms of this article solely for the purposes set out in this article.
- (16) The names or addresses of individual persons shall not be recorded on the databases referred to in paragraph (10).
- (17) Without prejudice to the rules of criminal law, no proceedings shall be instituted in respect of unpremeditated or inadvertent infringements of the law which come to the attention of the relevant authorities only because they have been reported under this article as required by Article 4 of Directive 2003/42 of the European Parliament and of the Council of 13th June 2003 on occurrence reporting in civil aviation, except in cases of gross negligence.
- (18) The provisions in paragraphs (15) to (17) shall apply without prejudice to the right of access to information by judicial authorities.
- (19) The CAA shall put in place a system of voluntary reporting to collect and analyse information on observed deficiencies in aviation which are not required to be reported under the system of mandatory reporting, but which are perceived by the reporter as an actual or potential hazard.
- (20) Voluntary reports presented to the CAA under paragraph (19) shall be subjected to a process of disidentification by it where the person making the report requests that his identity is not recorded on the databases.
- (21) The CAA shall ensure that relevant safety information deriving from the analysis of reports, which have been subjected to disidentification, are stored and made available to all parties so that they can be used for improving safety in aviation.

Civil Aviation Authority Regulations 1991- Regulation 9

- (9) The Authority shall make available, upon payment to it of any applicable charge under section 11 of the Act, reports of reportable occurrences or a summary of such reports, to any person who is:
- (a) the operator or member of the flight crew of any aircraft;
 - (b) engaged in the design, manufacture, repair, maintenance or overhaul of aircraft, or of parts or equipment therefor;
 - (c) the aeronautical authority of a country other than the United Kingdom, or the representative in the United Kingdom of such an authority;
 - (d) engaged in writing about civil aviation for publication in any newspaper, periodical, book or pamphlet;
 - (e) engaged in preparing a programme about civil aviation for television or radio;
 - (f) engaged in the study of civil aviation for any academic purpose; or
 - (g) any other person whose functions include the furthering of the safety of civil aviation: provided that the Authority shall not be required to make available any report or summary thereof to any person if it is satisfied that to do so will not further the safety of civil aviation.