

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2012

Public Authority: Department for Transport
Address: Great Minster House
76 Marsham Street
London
SW1P 4DR

Decision

1. The complainant made a freedom of information request to the Department for Transport (DfT) for reports produced by National Air Traffic Services Ltd on its methodology for assessing third party risks at airports in the event of an aircraft crash. The DfT disclosed several reports falling within the scope of the request although some information was redacted under the section 43 (Commercial interests) and section 41 (Information provided in confidence) exemptions because it said that the information had been obtained under a commercial licence from a third party supplier. The Commissioner has investigated the complaint and found that neither exemption is engaged.
2. The Commissioner's decision is that the DfT has breached section 1 of FOIA by failing to disclose the information which it had redacted from the reports falling within the scope of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The DfT shall disclose to the complainant full copies of the reports falling within the scope of the request with the exception of individual's names and annex B of *R & D Report 0007* being removed.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 May 2012 the complainant wrote to the Department for Transport (DfT) and requested a number of reports produced by the National Air Traffic Services Ltd (NATS) concerning its methodology for assessing the risk to people living and working near airport runways. The request read as follows:

"Please provide all NATS reports detailing the development of the DfT risk model and constrained cost-benefit analysis since the publication of NATS R&D Report 9636 together with all reports by peer reviewers of the model.

I am aware of the following reports which are relevant to this request: NATS R&D Report 0007, NATS R&D 0101 and NATS R&D Report 0215."

6. The DfT provided a substantive response on 29 September 2011, having extended the deadline for responding to the request in order to consider the public interest test. At this point it disclosed copies of a number of reports falling within the scope of the request. However some information was redacted under the exemption in section 21 of FOIA as the DfT claimed that it was reasonably accessible by other means. The DfT explained that certain information was used under licence and was commercially available from a third party, Ascend Worldwide Ltd.
7. The DfT subsequently carried out an internal review of its handling of the request and presented its findings on 30 December 2011. At this point it said that rather than section 21, it now considered that section 41 (Information provided in confidence) and section 43 (Commercial interests) were the correct exemptions to apply. It concluded that for the redacted information the public interest in maintaining each exemption outweighed the public interest in disclosure.

Scope of the case

8. On 22 May 2012 the complainant contacted the Commissioner to complain about the decision to redact information from the reports under the exemptions in section 41 and section 43. The complainant confirmed that he did not wish to challenge the decision to withhold the names of authors of the reports or a particular section of one of the reports (Appendix B of *R&D Report 0007*) which he accepted would be likely to contain licenced information.

Reasons for decision

9. The DfT has disclosed a number of reports falling within the scope of the complainant's request. The reports detail the model used by National Air Traffic Services Ltd (NATS) and the DfT to determine the risk to people living near airport runways which underpin the DfT's policy on Public Safety Zones. Public Safety Zones are the areas at the end of runways where planning restrictions are in place due to the increased probability of death or injury in the event of an aircraft crash.
10. The DfT has redacted from 2 of the reports certain figures and calculations used in its methodology for estimating third party risk from aircraft accidents. Information has been redacted under the section 43 and section 41 exemptions where they relate to the one of the following 3 different components which make up the methodology.
 - aircraft crash rates
 - a crash location model
 - a crash consequence model

Section 43(2) – Commercial interests

11. The Commissioner has first considered the DfT's application of section 43(2) which provides that information is exempt if disclosure would or would be likely to prejudice the commercial interests of any person. In this case the DfT has argued that the withheld information was licenced from a third party, Ascend Ltd, and disclosure would prejudice its commercial interests because it would otherwise be able to provide the information for a fee.
12. As explained above the DfT has redacted from the report information which relates to aircraft crash rates, i.e. the number of crashes for a particular type of aircraft per million aircraft movements. This information was calculated in part from the list of aircraft accidents which includes details of the type of aircraft and which was obtained from Ascend Ltd. However, the crash rates could only be calculated by also combining this information with details of aircraft movements; the number of take offs and landings for each of the different types of aircraft. It is apparent that this information was obtained from sources other than Ascend Ltd, some of which would appear to be publicly available. Therefore disclosure would not actually reveal information

obtained from a third party but rather information that is derived in part from that information.

13. The DfT had claimed that the information would prejudice Ascend's commercial interests as it was obtained under a licence which restricts the disclosure of information outside of the contract. However, the fact that the parties have entered into a contractual agreement which restricts disclosure of information is not in itself grounds for refusing a request under the commercial interests exemption. The DfT stated that in response to enquiries at the internal review stage Ascend Ltd had said that in their opinion the information *"is commercially valuable and should not be released. The raw data itself is readily available as open source data, but the collecting and collation of that data has involved Ascend Worldwide (previously Airclaims) in a considerable amount of time and effort."* The Commissioner would agree that the 'raw data', i.e. the list of aircraft accidents compiled by Ascend would be commercially valuable (and which the complainant has not challenged the redaction of) but he does not consider that the crash rate information is commercially sensitive in the same way. The information is not commercially available because it would not be possible for the complainant or anyone else to have obtained the information from Ascend Ltd.
14. In this case the Commissioner's view is that the DfT has not sufficiently demonstrated how disclosure of this crash rate information would prejudice the commercial interests of Ascend Ltd. As noted above disclosure would not reveal the information which the DfT/NATS licenced from Ascend Ltd and so they would not be disadvantaged by releasing information which they might otherwise have been able to charge a fee for.
15. In its submission to the Commissioner the DfT had said that apart from the names of officials (which the complainant has not challenged the redaction of), the only information which was withheld related to crash rate data and that all the information had been obtained by NATS from Ascend Ltd. However, as noted above, certain figures and calculations have been removed from two mathematical models which together with the crash rate data are used to estimate the risk to individuals in the event of an aircraft crash for UK airports. These are the crash location model which calculates the probability of a crash occurring at a particular location, and the crash consequence model which calculates the area over which aircraft debris is spread in the event of an accident as well as the area of damage in which all occupants would be killed. Where information has been redacted from these models the Commissioner is of the view that section 43 is not engaged. This is because it is clear from reading the reports that the information was not

obtained from Ascend but rather from other sources which NATS itself compiled in the process of calculating these models. Indeed one of the reports explains that the information from Ascend does not include enough detail to allow crash location and crash consequence models to be formulated. Instead the information was taken from crash investigation reports and other sources. One of the redacted reports clearly states:

“Accident databases do not contain sufficient information to allow numerical values for crash locations to be determined. Therefore it was decided that accident investigation reports should be used to provide this information...In order to obtain information on as many accidents as possible, information from official reports was supplemented with that from other sources, such as accident reports produced for aircraft insurers. Information on more recent accidents is also available on the internet. The sites with the most useful information were often those belonging to the official accident investigation organisations.”¹

16. Similarly, the figures used in the crash consequence model also appear to have been taken from the same sources. Therefore, the Commissioner does not accept that the information redacted in relation to the crash location and crash consequence models would prejudice the commercial interests of Ascend as it would appear to be a collection of information obtained from a variety of sources rather than taken directly from the information licenced by Ascend Ltd.
17. Finally, the DfT had also sought to argue that disclosure may prejudice its own commercial interests because releasing the information would damage its relationship with Ascend Ltd which could potentially make it more expensive to buy similar information in future. The Commissioner has already said that he does not consider that the commercial interests of Ascend would be prejudiced and therefore he does not accept that disclosure would damage the relationship between NATS and its supplier. In any event, the DfT has not offered any details of future contracts that might be affected and in the absence of this the Commissioner does not accept the DfT's vague assertions that its commercial interests might be affected at some unspecified point in the future.

¹ R&D Report 0007: A Methodology for calculating individual risk due to aircraft accidents near airports, p. 9.

18. For the reasons given above the Commissioner has decided that section 43(2) is not engaged.

Section 41 – Information provided in confidence

19. The DfT has also withheld the redacted information under the section 41 exemption which provides that information is exempt if it was obtained from any other person and disclosure would give rise to an actionable breach of confidence. When deciding whether the exemption is engaged it is necessary to first look at whether the information was obtained from any other person before going on to consider whether disclosure of the information would constitute an actionable breach of confidence.
20. The Commissioner has already said in relation to section 43 that in his view the DfT's application of the exemption fails largely because the information that has been redacted is not the actual information licenced by Ascend Ltd but rather it is information derived from that material having been combined with information from other sources. Information related to the crash location and crash consequence models do not seem to even be derived from information obtained from Ascend Ltd but rather are the product of data gathered from accident investigation reports. In light of this the Commissioner must conclude that as the redacted information has not been obtained from Ascend Ltd the section 41 exemption is not engaged.

Other matters

21. The Commissioner also wishes to record what he considers to be the unacceptable delay by the DfT in dealing with the complainant's request.
22. The complainant submitted his request on 26 May 2011 but a substantive response was not received until over 4 months later on 29 September 2011.
23. The DfT had initially explained to the complainant that it was extending the normal 20 working day deadline for responding to a request in order to consider the public interest test. Where a qualified exemption applies and further time is needed to consider the public interest test section 10(3) of FOIA allows a public authority to extend the deadline for responding to the request until such time as is reasonable in the circumstances. However, the Commissioner's view is that any extension beyond an additional 20 working days will not be 'reasonable'. Clearly this was exceeded in this case. However, it appears that in this case the actual reason for the delay was due to the difficulties in retrieving the

requested information as the DfT's response of 29 September 2011 explains.

"When we came to assess the reports it transpired that we did not hold all the reports here as we originally thought. It has been necessary for us to look to our past papers to locate copies of the reports. I should explain that nowadays the Department hold few paper records within its premises, most records being held in outside archives. Obtaining these files and searching through the papers has regrettably taken longer than anticipated."

24. The Commissioner wishes to remind public authorities that the extension for responding to a request which section 10(3) provides is only to allow further time to consider the public interest test where a qualified exemption applies. It should not be relied on for any difficulties or procedural delays that may be experienced in administering the request.

Right of appeal

25. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. 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.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF