

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2023

Public Authority: Civil Aviation Authority

Address: Aviation House
Beehive Ring Road
Crawley
West Sussex
RH6 0YR

Decision (including any steps ordered)

1. The complainant has requested information from the Civil Aviation Authority (CAA) about the Emiliano Sala case. The CAA provided some information, stated that it did not hold some information, and cited the exemption at section 40(2) of FOIA (personal information) to part of the request. It refused to confirm or deny whether it held some of the requested information, relying on section 44(2) of FOIA (prohibitions on disclosure) and section 31(3) of FOIA (law enforcement).
2. The Commissioner's decision is that the CAA has correctly cited sections 31(3) and 44(2) of FOIA to neither confirm nor deny (NCND) whether it holds some of the requested information and that the public interest favours maintaining the NCND response in relation to section 31. He has also decided that the CAA has appropriately cited section 40(2) of FOIA. However, the Commissioner has recorded a breach of section 17 of FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 16 May 2022, the complainant wrote to the CAA and made a request for information which, due to its length, is reproduced in an annex at the end of this decision notice.
5. On 15 June 2022 the CAA wrote to the complainant explaining that it needed extra time to consider the public interest test regarding section 31.
6. The CAA responded on 28 July 2022. It stated the following:
 - Questions 1-12 – exempt information (section 40(2) – personal information).
 - Questions 13-15 – information not held.
 - Questions 16-21 – section 44 NCND (prohibitions on disclosure).
 - Questions 22-34 – section 31 NCND (law enforcement).
 - Question 35 – The CAA stated that that it could only provide information regarding convictions and provided a link to its website. It explained that the CAA does not issue penalty notices, consequently the information is not held. It cited section 44 (NCND) regarding Mandatory Occurrence Reporting.
 - Question 36 – information provided.
7. Following an internal review, the CAA wrote to the complainant on 13 September 2023 and maintained its position regarding questions 16-21, 22-34 and part of question 35. The review did not consider questions 13-15, part of question 35, or question 36 because they were not challenged by the complainant. The internal review also referred to section 21 of FOIA for any information that was already available by other means but was unable to specify what information this applied to only stating that the requested information went beyond what was already publicly known.

Scope of the case

8. The complainant contacted the Commissioner on 13 December 2022 to complain about the way their request for information had been handled.
9. The Commissioner will consider the CAA's citing of section 40(2) to withhold information. He will also consider whether the CAA was entitled to issue a "NCND" response regarding section 44 and section 31 of FOIA.

Reasons for decision

Section 44: Prohibitions on disclosure (NCND)

10. Section 44(1)(a) provides an exemption from disclosure under FOIA for information which is prohibited from disclosure under any other law or enactment. Section 44(2) further provides that a public authority is not required to confirm or deny whether some of the requested information is held if such confirmation or denial would itself reveal information that would fall within the scope of section 44(1)(a).

The CAA's position

11. The CAA cited section 44(2) NCND for questions 16-21. Its contention is that, if the information was held, it would be exempt by virtue of the following:

"It is a requirement under the terms of the Civil Aviation Act 1982, by way of Regulation (EU) No. 376/2014 [¹], for the aviation industry to lodge Mandatory Occurrence Reports with the CAA. A release, if indeed such information was held, would therefore breach the prohibitions placed upon the CAA by the requirements of the Civil Aviation Act 1982."

In its internal review the CAA explained that the Regulation required that

"appropriate measures were put in place to ensure that information

¹ [REGULATION \(EU\) No 376/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL - of 3 April 2014 - on the reporting, analysis and follow-up of occurrences in civil aviation, amending Regulation \(EU\) No 996/2010 of the European Parliament and of the Council and repealing Directive 2003/42/EC of the European Parliament and of the Council and Commission Regulations \(EC\) No 1321/2007 and \(EC\) No 1330/2007 - \(europa.eu\)](#)

collected through occurrence reporting schemes is kept confidential, and that such information is not made available or used for any purpose other than for the maintenance or improvement of aviation safety”.

12. The section of the Civil Aviation Act 1982 referred to is as follows:

“23 Disclosure of information

1) ...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.”

13. The CAA concedes that there may be “some high level contextual information...within the public domain” but it is not in a position to confirm or deny whether it holds the requested information as there is a legislative bar to disclosure if any information was held. To confirm or deny would be disclosing information in itself.

The complainant’s position

14. Regarding questions 18-21, the complainant argues that these questions “relate to aircraft either involved in this case, or owned and/or operated by individuals closely connected with this case”. The complainant has been told by “reliable sources” that “concerns were raised with the CAA and AAIB [Air Accidents Investigations Branch] about the alleged use of some of these aircraft for illegal charter”. The complainant considers

that -

“given the concerns and illegality uncovered following this tragedy, and the CAA’s stated intention to crack down on illegal charter activity, there is a strong public interest argument for disclosing the requested information”.

The Commissioner’s position

15. If there is a statutory prohibition on disclosure and the authority has decided that it is not disapplied by a gateway, then the Commissioner will accept that it applies.² In other words, the CAA “has discretion about applying a gateway to disclosure” and “the Commissioner will not question or examine the reasonableness of that decision”.
16. The Commissioner is satisfied that confirming or denying whether the requested information is held is prohibited and that if the CAA was to confirm or deny whether it held this information, it would be disclosing something which, in itself, would be prohibited by the Civil Aviation Act 1982. The CAA has correctly applied section 44 NCND. As section 44 is an absolute exemption there is no requirement to consider the public interest test.

Section 31 (NCND) – law enforcement

17. Section 31(1)(a) of FOIA states:

“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 -

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),”

18. The CAA cited the following purposes:

“(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,

² [Prohibitions on disclosure \(section 44\) - FOIA guidance - version 1.1 31122020 \(ico.org.uk\)](https://ico.org.uk/for-the-public/foia/guidance/prohibitions-on-disclosure-section-44-foia-guidance-version-1.1-31122020)

(c)the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,”

19. Section 31(3) states:

“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).”

20. Section 31(3) of FOIA allows a public authority to NCND whether it holds particular information if the mere act of confirming or denying that the information was held would, in itself, prejudice the ability of law enforcement bodies to carry out their functions effectively.

The CAA's position

21. The CAA cited this exemption regarding questions 22-34 and the MOR element of question 35.

22. The CAA has stated to the Commissioner that the “leading nature” of the request required it to NCND whether it held this information. The request sought “the CAA to either confirm or deny safety concerns raised with regards to particular aircraft”. It has provided its reasons for not doing so. It argued that, if it had it confirmed or denied whether the CAA held the information, this would harm its ability to have free and frank engagement with the aviation industry regarding safety.

The Commissioner's position

23. The Commissioner agrees with the CAA that to either confirm or deny whether it holds information falling under this exemption would be likely to compromise its function as a regulator for the purposes listed in paragraph 18. The exemption is engaged at the lower level of prejudice.

Public interest test

24. Section 31 is a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has considered whether, in all the circumstances of this case, the public interest lies in NCND whether it holds the requested information.

Public interest arguments in favour of disclosure

25. The complainant raised the same arguments in favour of disclosure as set out in paragraph 14 of this decision notice.

26. The CAA acknowledges the -

“general principle of transparency and open government; the public right of access to information held; and reinforcing public confidence in aviation safety and the way the CAA regulates”.

Public interest arguments in favour of maintaining the exemption

27. However, the CAA contends that it is “vital” that it is able to engage with the aviation industry in order that it can have a full and open discussion with those it regulates about safety matters. The free flow of essential information relies on the industry’s confidence that matters “can be discussed without fear that the pressures of the public arena might delay action or distort the safety focus”.

28. The CAA relies on information being provided confidentially in order to discover any “illegal or improper conduct, assess the need for regulatory action and judge the fitness and competence of the organisation concerned”. As a regulator the CAA needs “to ascertain any potential infringements”. Confirmation or denial would undermine “its abilities to undertake audit and regulatory activities” and undermine aviation safety.

Balance of the public interest

29. This request concerns a highly publicised incident involving a well-known footballer. There is clearly much information already in the public domain and significant media interest. The CAA has considered the repercussions that might result in confirming or denying whether it holds the requested information in this instance. Aviation safety is the paramount consideration for the CAA and the Commissioner accepts that the balance of the public interest lies in favour of NCND.

Section 40 – personal information

30. The CAA has cited this exemption regarding questions 1-12 of the request.

31. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

32. In this case the relevant condition is contained in section 40(3A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
33. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
34. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

35. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

36. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
37. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
38. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
39. It is the CAA's position that the personal data relates to an identifiable individual named in the original request. The information also concerns "contextual personal data" which can be linked to an "identifiable individual". The twelve questions cannot be responded to without being linked to an individual, both directly and indirectly.

³ As amended by Schedule 19 Paragraph 58(3) DPA.

40. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a named individual. He is satisfied that this information both relates to and identifies the individual concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
41. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
42. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

43. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

44. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
45. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Is the information criminal offence data?

46. Information relating to criminal convictions and offences is given special status in the UK GDPR.
47. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
 - (a) The alleged commission of offences by the data subject; or
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.
48. It is the CAA's position that the withheld information does not constitute criminal offence data but it does state that,

“the identifiable individual, to our knowledge, has neither consented

to the release of the contextual information nor has it been made manifestly public by the individual themselves”.

49. The complainant argues that -

“...the questions we asked of the CAA are legitimate and squarely in the public interest following the deaths of Emiliano Sala and David Ibbotson when Piper Malibu N264DB crashed into the Channel in January 2019”.

Their view is that there are “substantial legitimate interests in the disclosure of the information” requested in questions 1-12. The complainant outlined to the Commissioner further details in support of their view which he has taken into account but cannot reproduce here.

50. The complainant’s view is that the CAA had confirmed in an interview in August 2022 that “around a decade ago” the individual in question had been investigated “based on information received”. This was a month or so after the CAA responded to the request. The complainant queries why then the CAA is not legally permitted to release the information.
51. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis that ‘criminal offence data’ should be interpreted broadly and the requested information relates to allegations and investigations concerning possible criminal offences.
52. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
53. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
54. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public themselves.
55. As none of the conditions required for processing criminal offence data are satisfied, there is no legal basis for its disclosure. Processing this

criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Procedural matters

56. Although a public authority is allowed to extend the 20 working day timeframe up to a 'reasonable time' to determine the balance of the public interest test when citing a qualified exemption, the Commissioner considers that, in this case, the CAA significantly exceeded what he considers 'reasonable' and accordingly has breached section 17(3) FOIA.

Right of appeal

57. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

58. 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.
59. 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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

60. The request to the CAA on 16 May 2022 is as follows:

[personal data redacted]:

(these questions relate to the previous CAA investigation into [personal data redacted], which was referenced in evidence given at the inquest into Mr Sala's death at Dorset Coroner's Court earlier this year).

- 1) When did the CAA's previous investigation into [personal data redacted] begin and how long did it go on for?
- 2) What prompted this investigation? Eg – reports received or ramp checks or something else?
- 3) What was the focus of the investigation?
- 4) Was this an investigation into illegal public transport flights?
- 5) Did the investigation relate to any or all of the following aircraft: N264DB / G-FAVS / G EEJE / N509MV?
- 6) Did the previous investigation into [personal data redacted] relate to activity at a particular airfield(s) and if so which one(s)?
- 7) What type of flight(s) were being investigated? Did they involve people from the world of football/racing/business/something else?
- 8) Did the investigation result in a file being prepared for a potential prosecution?
- 9) Was a file of evidence considered by CAA lawyers and if so why didn't it progress to a prosecution?
- 10) Was any other action taken by the CAA, short of a prosecution, following this investigation?
- 11) Has [personal data redacted] been the focus of any other inquiries or investigations by the CAA previously?
- 12) If so what was the outcome of these?

DAVID IBBOTSON:

- 13) Has the CAA ever investigated David Ibbotson?
- 14) Has the CAA ever received reports of concerns or complaints about David Ibbotson's flying activities?
- 15) Was enforcement action of any kind ever taken by the CAA against David Ibbotson?
- 16) Were any other MORs issued relating to David Ibbotson's flying, apart from those which have been revealed in the course of the trial and inquest?
- 17) Please outline the MORs David Ibbotson incurred flying G-BKPC and/or N208AJ for the Black Knights Parachute Club in Cockerham? We understand he was sacked from there for various aviation transgressions.

AIRCRAFT:

- 18) Has the CAA issued any other MORs relating to N264DB aside from those referenced during the trial and inquest? If so please provide detail of these?
- 19) Has the CAA issued any MORs relating to G-FAVS? If so please provide detail of these.
- 20) Has the CAA issued any other MORs relating to G-EEJE or N509MV and if so please provide details of these?
- 21) Has the CAA issued any MORs in respect of any other planes managed by [personal data redacted]?

G-EEJE:

- 22) We understand that the CAA was contacted by a third party with concerns about use of G-EEJE for illegal charter flying after this January 2016 incident involving the aircraft at Fadmoor airfield: [Piper PA-31-310 Navajo G-EEJE 04-16.pdf \(publishing.service.gov.uk\)](#)
- 23) Can you confirm that this is correct?
- 24) What was the nature of those concerns?
- 25) Can you confirm that you received allegations that this plane was

being used to fly jockeys and others between racecourses in the UK and Europe?

- 26) Can you confirm that the aircraft had no valid certificate of airworthiness at the time of the incident, due to required maintenance not being carried out within the required timeframe?
- 27) Did these reports/concerns prompt an investigation by the CAA?
- 28) Did the CAA take any action against anyone in relation to this incident and/or any investigation into the use of G-EEJE?
- 29) We understand that [personal data redacted] was the pilot of the plane at the time. Was any action taken against him in relation to this incident?
- 30) Prior to the accident in 2106 (sic), was G-EEJE subject to any CAA attention or feature in any investigative work around illegal charter?
- 31) Has the CAA received any other reports / had any concerns of any sort raised about either G-EEJE or N509MV?
- 32) If so how many and when were these received?
- 33) What were the nature of the concerns raised or reports received about these aircraft?
- 34) Was any action taken by the CAA as a result?
- 35) Please supply full details of all convictions / penalty notices / MORs / any other action taken by the CAA against [personal data redacted].
- 36) Are the CAA engaged in any new or ongoing investigations in respect of the Emiliano Sala case?"