



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0101
Information Commissioner's Ref: FS50148261

Heard at Field House, London, EC4
On 11th and 12th February 2008

Decision Promulgated
05 March 2008

BEFORE

CHAIRMAN

ANNABEL PILLING

and

LAY MEMBERS

JENNI THOMSON

ANDREW WHETNALL

Between

JOHN HOYTE

Appellant

And

INFORMATION COMMISSIONER

Respondent

And

THE CIVIL AVIATION AUTHORITY

Additional Party

Representation:

For the Appellant: John Hoyte
For the Respondent: James Boddy
For the Additional Party: Sarah Wilkinson

Decision

The Tribunal upholds the decision notice dated 5th September 2007 and dismisses the appeal.

Reasons for Decision

Introduction

1. This is an appeal by Mr. John Hoyte against a Decision Notice issued by the Information Commissioner dated 5th September 2007. The Decision Notice relates to a request for information made by Mr. Hoyte to the Civil Aviation Authority (the 'CAA') under the Freedom of Information Act 2000 ('FOIA').

Background

2. Mr. Hoyte is a pilot with very considerable experience who is at present retired from flying on medical grounds. He considers, and has some medical evidence in support of this, that he suffered from exposure to contaminated air while flying. On 29th August 2004, Mr. Hoyte decided not to operate as First Officer on a flight. He submitted an Air Safety Report ('ASR') to his airline operator (the 'operator') setting out the factors that had led him to make that decision (these factors are set out at paragraph 63 below). Mr. Hoyte also later reported the incident to the CAA, the UK's independent aviation regulator. The CAA operate a Mandatory Occurrence Reporting ('MOR') Scheme, to ensure the CAA is advised of hazardous or potentially hazardous incidents and defects, to ensure that knowledge of these occurrences is disseminated so that lessons can be learnt from them and to enable an assessment to be made by those concerned of the safety implications of each and similar occurrences so that they may take any necessary action. Although the

operator did not report the matter to the CAA as an MOR, the incident was treated as an MOR by the CAA after Mr. Hoyte reported it.

3. The CAA instigated an investigation into the MOR and a Closure Report was provided by the operator. It is this Closure Report that is the subject of a request for information under the FOIA (the 'disputed information')
4. The CAA completed its investigation and notified Mr. Hoyte of the outcome in some detail in a letter dated 10th January 2005. Correspondence between the parties continued until August 2006 when the request for the disputed information was made.
5. The CAA did not supply the disputed information on the basis that it was exempt information under section 44 of the FOIA, as its disclosure was prohibited by section 23 of the Civil Aviation Act 1982 (the 'CAA 1982').
6. Although Mr. Hoyte received some further information directly from the operator in October 2006, he has not had sight of the disputed information. Mr. Hoyte believes that the disputed information contains information about the issue of contaminated air on aircraft either generally, or with specific reference to himself.

The request for information

7. By letter dated 30th August 2006, Mr. Hoyte made a request for information to the CAA:

I would be very grateful if you would provide me with a copy of the final report of the operator to the CAA of the 29th August 2004 MOR incident which you mentioned in the last paragraph of your letter [of 23rd August 2004]. This is important to me so that I can be made fully aware of any final conclusions drawn concerning the incident.

8. The CAA responded on 14th September 2006, declining to provide the disputed information and stating that the information was exempt from disclosure under section 44 of the FOIA, as it was prohibited by virtue of section 23 of the CAA 1982.
9. Mr. Hoyte requested an internal review on 1st October 2006. The internal review upheld the original decision to withhold the information on the grounds that it was exempt from disclosure under section 44 of the FOIA. The CAA confirmed that the disputed information had been obtained in accordance with Article 117(1)(ii) of the Air Navigation Order 2000 (the 'ANO 2000') and that section 23 of the CAA 1982 prohibited disclosure of such information. The outcome of the internal review was communicated to Mr. Hoyte on 27th October 2006.

The complaint to the Information Commissioner

10. Mr. Hoyte contacted the Information Commissioner on 23rd January 2007 to complain that the CAA had not made it possible for him or his MP to see the results of the MOR. In his complaint, Mr. Hoyte indicated that information possibly linked to Aerotoxic Syndrome, resulting from being exposed to contaminated air on aircraft, was being carefully kept from politicians charged with acting on such information.
11. The Information Commissioner assigned the case to a Complaints Officer. That Complaints Officer wrote to Mr. Hoyte on 12th July 2007 to indicate that a Decision Notice had been issued recently in a similar case involving the CAA which dealt with the same exemption under the FOIA and the same prohibition on disclosure contained in section 23 of the CAA 1982. Mr. Hoyte was told that the Complaints Officer would come to the same conclusion in the present case and any Decision Notice would reflect the Decision Notice in the other case. Mr. Hoyte requested a Decision Notice be issued, although he did not accept any similarity with the other case. He indicated that there was a conflict between the CAA and other groups as to whether contaminated air

from aircraft is capable of causing long-term ill health in crew and passengers. He added:

Ultimately the truth lies in reports such as the one I have been trying to secure for nearly a year now. The fact that they are unwilling to hand it over merely confirms that it contains very inconvenient information, which they would rather not admit to.

12. The Complaints Officer did then contact the CAA and investigated the matter further.
13. In the Decision Notice dated 5th September 2007, the Information Commissioner concluded that the CAA had dealt with the request for information in accordance with the FOIA and did not require any steps to be taken.

The appeal to the Tribunal

14. Mr. Hoyte appealed to the Tribunal on 14th September 2007.
15. The grounds of appeal can be summarised as follows:
 - 1) the disputed information may contain information which might be relevant to the debate surrounding the issue of contaminated air in aircraft;
 - 2) the CAA are deliberately preventing the flow of serious safety related information on the subject of contaminated air in aircraft.
16. The Tribunal joined the CAA as an additional party.
17. The appeal has been determined after a hearing at which some evidence was called and oral submissions, supplementing written submissions, were made. We were provided with an agreed bundle of documents, although, regrettably, some additional documents were added to the bundle at a very late stage, during the hearing.

18. In addition, the Tribunal was provided with a copy of the disputed information. This was not made available to Mr. Hoyte, as to disclose it to him would defeat the purpose of this appeal. It was necessary to refer to the disputed information on two occasions during the hearing and on each occasion this was dealt with in a private session at which Mr. Hoyte was not a party.

19. Although the Tribunal may not refer to every document in this Decision, we have considered all the material placed before us.

The Powers of the Tribunal

20. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

21. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence,

which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

22. The question of whether the exemption in section 44 of the FOIA is engaged, that is, whether disclosure is prohibited by section 23 of the CAA 1982, is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The questions for the Tribunal

23. The Tribunal has concluded that the relevant issues in this appeal are as follows:

- 1) What is the disputed information?
- 2) Is disclosure of that disputed information prohibited by any enactment so that the exemption provided by section 44 of the FOIA is engaged?
- 3) If so, are there any exceptions to that prohibition?
- 4) In so far as any exception provided the CAA with discretion to disclose the disputed information, was the decision not to exercise that discretion Wednesbury irrational or otherwise unlawful?
- 5) Would a decision not to disclose breach any of Mr. Hoyte's human rights as protected by the Human Rights Act 2000?

24. As a preliminary issue, it was necessary to clarify exactly what amounted to the disputed information. This was done in a private session in the absence of Mr. Hoyte. During the hearing, we also clarified with Mr. Hoyte what document he had sought initially and was still seeking now. We are satisfied that the disputed information is the Closure Report by the operator provided to the CAA between 7th and 10th January 2005. (It was not possible to put an exact date on when the Closure Report was made or provided.)

Legal submissions and analysis

25. A public authority need not comply with the duty to disclose under section 1 of the FOIA where any of the absolute exemptions provided for by FOIA apply. Section 44 of the FOIA is an absolute exemption. This means that the information is not disclosable regardless of any public interest there may be in disclosure.

26. Section 44 of the FOIA provides as follows:

(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).

Is disclosure of the disputed information prohibited by any enactment so that the exemption provided by section 44 of the FOIA is engaged?

27. Section 23 of the CAA 1982 contains a general prohibition on disclosure of information by the CAA:

23(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.

28. Section 23(5) of the CAA 1982 makes disclosure in contravention of section 23(1) a criminal offence with a maximum liability of a fine and/or imprisonment for a term not exceeding two years.

29. At the time when the MOR was made in August 2004, the ANO 2000 was in force. (It has now been revoked but is substantially reproduced in Article 142 of the ANO 2005.)

30. Article 117(1) of the ANO 2000 provided that certain persons closely connected to flying, manufacturing, maintenance or air traffic control of

aircraft operated in the UK must make a report to the CAA of any reportable occurrence as defined in Article 117(2) of the ANO 2000. That report is an MOR.

31. Reportable occurrences are defined in Article 117(2) of the ANO 2000 as follows:

(a)(i) any incident relating to such an aircraft or any defect in or malfunctioning of such an aircraft or any part or equipment of such an aircraft, being an incident, malfunctioning or defect endangering, or which if not corrected would endanger, the aircraft, its occupants or any other person; and

(ii) any defect in or malfunctioning of any facility on the ground used or intended to be used for purposes of or in connection with the operation of such aircraft, being a defect or malfunctioning endangering, or which if not corrected would endanger, such an aircraft or its occupants.

(b) any accident or serious incident notified to the Chief Inspector of Air Accidents in pursuance of regulations made under section 75 of the Civil Aviation Act 1982 shall not constitute a reportable occurrence for the purposes of this article.

32. Article 117(1)(ii) provided that any person identified in Article 117(1) should:

make a report for 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 a reportable occurrence which has been reported by him or by another person to the CAA in accordance with this article.

33. We heard evidence from Mr. Adrian Sayce, Head of the Safety Investigation and Data Department ('SIDDD') of the CAA's Safety Regulation Group. SIDDD operates the UK MOR Scheme. The CAA receives many voluntary reports from aviation sectors that are not required to report but do so and are treated as MORs.

34. Our attention was drawn to the ANO 2000, to Directive 2003/42/EC (the 'EC Directive') occurrence reporting in civil aviation, Regulation 14 of the Air Navigation (General) Regulations 2006 and the relevant provisions of JAR-OPS which further describe the way in which the MOR scheme works.

35. The ANO 2000 and the EC Directive emphasise the importance of both dissemination and confidentiality of data collected under the Scheme.

36. Article 7 of the EC Directive is titled "Dissemination of information" and the relevant part is as follows:

1. Any entity entrusted with regulating civil aviation safety or with investigating civil aviation accidents and incidents within the Community shall have access to information on occurrences collected and exchanged in accordance with Articles 5 and 6 to enable it to draw the safety lessons from the repeated occurrences.

37. Under Article 7, measures for the dissemination to interested parties shall be based on the need

- i) to provide persons and organisations with the information they need to improve civil aviation safety,
- ii) to limit the dissemination of information to what is strictly required for the purpose of its users, in order to ensure appropriate confidentiality of that information.

38. Article 8 of the EC Directive is titled “Protection of information” and the relevant part is as follows:

1. Member States shall, according to their national legislation, take necessary measures to ensure appropriate confidentiality of the information received by them pursuant to Articles 6(1) and 7(1). They shall use this information solely for the objective of this Directive¹.

39. Where necessary, safety information is disseminated to those involved in flight safety to assist in the prevention of future accidents and incidents. To establish what is commonly called a ‘no-blame’ culture, the CAA applies a principle of confidentiality whereby it does not disclose the name of a person submitting a report or of a person to whom it relates, unless required to do so by law or unless, in either case, the person concerned authorises disclosure.

40. Mr. Sayce’s evidence was to the effect that the disclosure of the name of an individual or organisation without prior consent and the subsequent use of that information for non-safety purposes can have a seriously damaging impact on the operation of the MOR scheme. The United Kingdom MOR scheme was the model for the EC Directive. Mr. Sayce said in his witness statement:

“Not only would it deter reporters from reporting occurrences, thereby denying the UK CAA and the UK public at large the safety benefits of such a mature reporting scheme, but it could also send out a very negative message to other States that are attempting to establish such a reporting scheme.”

41. As part of the duty to disseminate flight safety information, the CAA provides monthly listings. These are provided to all operators who provide reports to the CAA and are available, at a charge, to anyone with an involvement in flight safety. About 600-700 reports are listed

¹ The sole objective is set out in Article 1 of the EC Directive and is the prevention of accidents and incidents and not to attribute blame or liability.

each month and are dealt with by way of a very brief summary of the incident and results of the investigation when known. Often the monthly listings will be the only confirmation that an MOR was received and the only notification of the results of the investigation.

42. Although the operator did not report the ASR by Mr. Hoyte to the CAA as an MOR, it is accepted by all parties that it was an MOR and, once reported to the CAA by Mr. Hoyte himself, it was treated as an MOR. The disputed information was provided to the CAA by the operator as part of the investigation into the MOR.

43. We are satisfied that the disputed information was a report for the purposes of Article 117(1)(ii) of the ANO 2000 and was therefore provided to the CAA in pursuance of a provision of an Air Navigation Order. The disputed information therefore falls within the category of material prohibited from disclosure by section 23 of the CAA 1982.

Does any exception to the prohibition on disclosure apply?

44. Section 23(1) of the CAA 1982 prohibits disclosure of information unless one of the exceptions in section 23(1)(a)-(d) or section 23(4) applies. These exceptions do not impose a duty on the CAA to seek consent to disclose or to release the information without consent. The decision is left within the discretion of the CAA as to whether to disclose information which falls within this section. The discretion in section 23 of the CAA 1982 is not defined or fettered in any way, simply, if the CAA “determines the information may be disclosed.”

45. Section 23(1) is set out at paragraph 27 above. Section 23(4) provides as follows:

(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)

(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.

46. It was agreed between the parties that the only possibly relevant exceptions were those provided for in section 23(1)(b) and section 23(4)(c) of the CAA 1982.

47. In respect of section 23(4)(c) of the CAA 1982, the Civil Aviation Regulations 1991 were made in pursuance of section 7(2) of the CAA 1982. Regulation 9 provides for the dissemination of reports of reportable occurrences.

(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 therefore;

(bb) the provider of an air traffic control service;

(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.

48. Mr. Hoyte submits that he is a person falling within, at least, Regulation 9(d) and 9(g). The CAA disagrees and submits that he does not fall within any of the categories of person in Regulation 9.

49. We consider the categories in Regulation 9 are defined widely and are designed to encompass all those with a legitimate interest in reports of reportable occurrences. We are satisfied that because he was a member of the flight crew at the time of the MOR, Mr. Hoyte falls within the category defined in Regulation 9(a). We are also satisfied that because of his campaigning about the issue of contaminated air, Mr. Hoyte also falls within the category defined in Regulation 9(d) and (g). We are therefore satisfied that Mr. Hoyte is a person to whom the exception within section 23(4)(c) of the CAA 1982 to the prohibition of disclosure under section 23 (1) of the CAA 1982 applies.

50. The exception to the prohibition of disclosure under section 23(4)(c) and Regulation 9 of the Civil Aviation Regulations 1991 is also subject to a discretionary power of disclosure by the CAA: the CAA is not required to disclose information if it is satisfied that to do so will not further the safety of civil aviation.

51. Although, as indicated above, the discretion in relation to section 23(1) of the CAA 1982 is not defined, we heard evidence and accept that the CAA takes into account aviation safety in exercising its discretionary power of disclosure under section 23(1)(b) of the CAA 1982.

52. The “test” for exercising its discretionary power of disclosure is therefore the same for both section 23(1)(b) and section 23(4)(c) of the CAA 1982.

In so far as any exception provided the CAA with discretion to disclose the disputed information, was the decision not to exercise that discretion Wednesbury irrational or otherwise unlawful?

53. Having found that there is a statutory prohibition on disclosure, and that there are exceptions to that prohibition that are governed by an

exercise of discretion, the question for us is whether the CAA exercised its discretion not to disclose the disputed information unlawfully in the sense of Wednesbury unreasonableness, irrationality or perversity.

54. The CAA has no formal or written policy on how the exercise of discretion should be applied. We heard evidence from Mr. Barrie Pilcher, who has been one of the CAA's two Appeals Managers for the purposes of the FOIA since June 2005. He dealt with the internal review into the refusal to disclose the disputed information to Mr. Hoyte and also responded to questions from the Complaints Manager during the investigation by the Information Commissioner.

55. Although Mr. Pilcher did not contact the operator himself to ascertain whether the operator would consent to the disclosure of the disputed information, we are satisfied that the operator had been contacted in August 2006 and had indicated that it did not so consent. No reasons for withholding consent were given, however, there is no obligation for the operator to provide such reasons or for the CAA to seek them. The only obligation under section 23(1)(b) of the CAA 1982 is for the CAA to afford an opportunity to the relevant person (or body corporate) to make representations and to consider any representations made as a result.

56. Mr. Pilcher's evidence was that, as a general rule, the CAA would only consider releasing the information over the objection of the person who supplied it if the CAA believed that it would be in the interests of safety to do so. Mr. Hoyte submits that because he is either the person who supplied the MOR or is the subject of the MOR, it is his consent that is relevant. The CAA submits that the disputed information was supplied by the operator and it is that consent that is needed. We agree with that submission: although the MOR was reported to the CAA by Mr. Hoyte and although Mr. Hoyte is one of the subjects of the MOR, along with the operator and other flight crew mentioned, it is the operator who provided the disputed information and it is the consent of the person who supplied the information that is needed.

57. When considering the exercise of discretion, the CAA took a number of factors into account:

- (i) The 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).
- (ii) That to establish a "no blame" culture, the CAA applies a principle of confidentiality. This also encourages the making of voluntary reports from aviation sectors that are not required to make an MOR.
- (iii) That disclosure under section 23 of the CAA 1982 has been in operation for almost 20 years before the introduction of the FOIA and therefore the CAA are well practised in the exercise of the discretion contained therein.
- (iv) The importance of maintaining trust in the aviation industry which would be eroded if the CAA disclosed information without consent. The CAA chairman gave an assurance that confidentiality would be respected in all cases except "where there is dereliction of duty amounting to gross negligence".
- (v) Undermining confidentiality could send a negative message to other European Member States that are attempting to establish a similar scheme as required by the EC Directive.
- (vi) Underreporting of MORs is a significant problem. Mr. Hoyte did not dispute this, although in his view this was because operators chose to conceal matters that should be reported and individuals, as opposed to operators, had little faith in the CAA being an independent body.

58. Mr Hoyte submits that the decision not to exercise discretion to disclose was irrational or unlawful. He submits that the CAA should have taken into account the fact that he had been corresponding with the CAA about contaminated air and should have therefore, even though disputed information did not refer directly or indirectly to that topic, have considered that its disclosure was relevant to a debate that is intended to further safety of civil aviation. Mr. Pilcher, although he has worked for the CAA since 1976, did not know much about the issue of contaminated air in aircraft at the time he dealt with the internal review of the refusal to supply the disputed information. He told the Tribunal that he had learnt about the topic during the preparation for this Appeal.

59. As he was unaware of the issue of contaminated air, it was not something that he took into account when reviewing the exercise of discretion to disclose the disputed information. Although he accepted that the issue of contaminated air is part of aviation safety, he submitted that there was still nothing contained in the disputed information that has a positive or negative impact on air safety.

60. Mr. Hoyte submits that although he did not mention contaminated air himself in the ASR, it should have been apparent, to both the operator and the CAA, that it was a relevant issue because of

- (i) his correspondence from earlier in 2006 with the Group Director of Safety Regulation in the CAA;
- (ii) the way the decision on 29th August 2004 was made; and
- (iii) the language he used in the ASR to describe the events of 29th August 2004.

61. Mr. Hoyte himself was unaware of the issue of contaminated air until 2006 when a colleague mentioned “aerotoxic syndrome” and he received the results of tests on samples of his blood and fat.

62. We have seen the ASR and Mr. Hoyte was cross-examined on behalf of the CAA in some detail about the matters set out therein. It is necessary to go into some detail about the content of that ASR as it was this document that formed the MOR and the basis of the investigation by the CAA.

63. Mr. Hoyte had been rostered initially on standby duty on 29th August 2004. He was due to work until 1700. There were late changes to his roster which meant he would fly an extra sector and his working hours would therefore be extended to 2130. This extension interfered with personal arrangements. There was a late change of captain; the new captain was someone Mr. Hoyte had not flown with before and who had been involved in a “going off the runway incident”, which was not his fault, about six years ago. The new captain had not flown to the destination airfield previously; this was a Category B airfield which meant there would be additional challenges to landing the aircraft and Mr. Hoyte himself had experienced difficulties landing there. The weather at the destination airfield was predicted to be thunderstorms and Mr. Hoyte was concerned the new captain had altered, without seeming aware of that fact and without reference to himself, a decision with regard to the amount of fuel to be carried, which had been made by the previous captain and Mr. Hoyte. Mr. Hoyte was also concerned about changes to and the experience of other crew members. The flight was already late and the operator’s Dispatcher was on the aircraft, reminding them of the need for the flight to leave and that the passengers were already on their way to board the aircraft. As a result of all these factors, Mr. Hoyte felt stressed, agitated and resented the fact that he should regularly be put in this sort of avoidable position. He decided not to fly.

64. Mr. Hoyte accepted that he did not say that he was unable to concentrate, or that he felt light-headed, but submits that he described fatigue and did not know enough about the issue of contaminated air to identify the symptoms he was exhibiting at that time.

65. Although Mr. Hoyte did not raise the issue of contaminated air in the ASR, the Tribunal were shown a medical report dated 6th September 2004 prepared by the Senior Medical Officer (the 'SMO') at the CAA in which the issue of organo-phosphate poisoning is raised. Mr. Hoyte had told the SMO that he had been flying a lot at present which had resulted in him becoming fatigued and having a poor short term memory. According to the SMO's report, Mr. Hoyte wondered whether he had developed chronic organo-phosphate poisoning due to his crop spraying activities in the 1980s and operating the BAE 146. Mr. Hoyte told us that he did not mention the BAE 146 at this consultation. Although the operator and the CAA would have had access to this report around this time, the issue was not further addressed or referred to.

66. The CAA investigated the ASR as an MOR. By letter dated 10th January 2005, the CAA Flight Operations Inspector sets out, in some detail, the conclusions of the CAA's investigation into the MOR. The letter of 10th January 2005 does address all the matters raised by Mr. Hoyte in his ASR but Mr. Hoyte remains convinced that the disputed information refers to something else, namely the issue of contaminated air. He also believes that, even though the date the CAA received the disputed information from the operator was January 2005, the disputed information might contain a wider appraisal of contaminated air issues, even though he had himself first become aware of them only after the disputed information was created. Having seen the disputed information, we are able to say that the information provided in the letter of 10th January 2005 is considerably more detailed than the disputed information from the operator. We are also able to say that there is nothing in the disputed information that directly or indirectly refers to the issue of contaminated air or organo-phosphate poisoning.

67. The question for us therefore is whether the CAA exercised its discretion not to disclose the disputed information unlawfully in the sense of Wednesbury unreasonableness, irrationality or perversity.

That is, did the CAA exercise its discretion in a way so unreasonable that no reasonable public authority could have exercised it that way, did it take into account irrelevant considerations or fail to take into account relevant considerations, or was the decision otherwise unlawful or irrational?

68. 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.

69. Both those dealing with the initial request for the disputed information and Mr. Pilcher dealing with the internal review were apparently unaware of the correspondence between the CAA and Mr. Hoyte with regard to the issue of contaminated air. Although it is clear from the evidence and background information that there has been a wider awareness of the issue of contaminated air in aircraft since 2006, we are wary of attempting to put ourselves, in 2008, in the place of CAA making a decision in 2006.

70. In any event, that issue was not referred to directly or indirectly in the disputed information. It could not, therefore, be regarded as a relevant consideration that a reasonable public authority should have taken into account. The CAA was not acting unreasonably in the sense of Wednesbury unreasonableness, irrationality or perversity by failing to take it into account when exercising their discretion.

71. Mr. Hoyte submits that account should be taken of the fact that the operator published on its internal website a report of his ASR in which he was clearly identified. This understandably caused him considerable stress and anxiety. He argues that as his confidentiality was not protected and respected by the operators, the CAA should not

have given such weight to protecting and respecting the confidentiality of the operator with regard to the disclosure of the disputed information. We are satisfied that the CAA are not condoning that decision by considering the confidentiality argument, but have properly taken account of the wider concern of confidentiality in information provided under the MOR scheme as a whole.

72. The test for us is not whether we would exercise discretion in the same way nor whether we approve of the way in which the CAA exercised its discretion, but whether the discretion was properly exercised: was the decision a reasonable one which the CAA was entitled to make. We are satisfied that the CAA exercised its discretion in a way it was entitled to, taking into account all relevant considerations and weighing up the competing interests as far as confidentiality and the safety of civil aviation are concerned.

73. The Information Commissioner is only entitled to question the exercise of discretion where it appeared to be Wednesbury irrational or otherwise unlawful. We are satisfied that there is no basis on the evidence to suggest that is the case here. We would comment, however, that we would have expected the Information Commissioner to have sight of the disputed information during the investigation and were given no compelling explanation about why this did not happen.

74. Mr. Hoyte submits that because the public interest in the issue of contaminated air is so great, we should ignore the legislative prohibition and order disclosure. We cannot do that. We are bound to apply the legislation as enacted by Parliament. Mr. Hoyte's submission is predicated by a belief that the issue of contaminated air is raised in the disputed information and we can assure him, again, that it is not referred to, either directly or indirectly. Even if it was, we are still bound by the legislation. The public interest balancing exercise we would carry out in relation to a qualified exemption under the FOIA has no application in relation to an absolute exemption.

75. We note that under Regulation 9 of the Civil Aviation Regulations 1991, the CAA is obliged to make available “reports of reportable occurrences or a summary of such reports”. Although the CAA submits that Mr. Hoyte does not fall within one of the categories of person to whom such reports shall be made available without the CAA falling foul of the prohibition on disclosure under section 23 of the CAA 1982, it did submit that, in any event, the letter of 10th January 2005 amounts to a summary of a report of a reportable occurrence and that, therefore, the CAA has fulfilled any obligation to disclose in accordance with the legislation regardless of the decisions made by the CAA and the conclusion drawn by us as outlined above.

Would a decision not to disclose the disputed information breach any of Mr. Hoyte’s human rights as protected by the Human Rights Act 2000?

76. During the hearing, Mr. Hoyte provided a lengthy skeleton argument to the Tribunal. This was not in accordance with the Directions and the other parties objected to the Tribunal considering it. We decided that, as Mr. Hoyte was unrepresented and had, in the days immediately preceding the hearing, received some assistance from a legally trained acquaintance, it would be unfair to exclude it from our consideration. We gave the other parties some additional time to prepare their response as new issues concerning the Human Rights Act 2000 (the ‘HRA’) had been raised for the first time. We are particularly grateful for the detailed assistance given to us by Miss Wilkinson for the CAA.

77. Mr. Hoyte submits that he is a victim for the purposes of the HRA and that non-disclosure of the disputed information breaches:

- i) Article 2 – right to life;
- ii) Article 6(1) – right to a fair trial;
- iii) Article 8 – right to private and family life; and
- iv) Article 10 – right to freedom of expression.

78. Mr. Hoyte submits that his rights will be violated because he will not be able to use the disputed information by giving it as evidence before Parliament and because it may contain information relevant to the issue of contaminated air which affects his family, his health and, ultimately, his life.
79. Because this part of his submissions had been prepared by a legally trained acquaintance, Mr. Hoyte was unable to add to the submissions orally. It was clear the submissions had been written without a great deal of preparation and some thirteen decisions from the European Court of Human Rights were referred to but not copied and supplied to the Tribunal.
80. We accept that we must act in a way that is compatible with the rights protected by the HRA and must examine whether the refusal by the CAA to exercise its discretion in favour of disclosure violated Mr. Hoyte's rights.

Article 2 – right to life

81. Article 2 in its usual guise of protecting life is not engaged. Mr. Hoyte relies on a positive obligation that was imposed on the police in the case of Osman v UK (1999) EHRLR 228 to take steps to protect life despite them having previously had immunity from gross negligence under the Police Rules and that the CAA, by analogy, cannot rely on their 'immunity' not to disclose under section 23 of the CAA 1982.
82. Section 23 of the CAA 1982 is not an 'immunity' from prosecution comparable with that in the case of Osman. It is a statutory bar on disclosure, save in limited circumstances, which carries a criminal sanction. We agree with the CAA that the analogy put forward by Mr. Hoyte does not work.
83. Mr. Hoyte also submits that because he believes the disputed information contains relevant information about the issue of contaminated air and with particular reference to himself, there is a

breach of his right to life. We have already indicated, several times in the course of the hearing and in this Decision, that the disputed information does not refer to the issue of contaminated air directly or indirectly. We do not consider that non-disclosure of the disputed information would breach Mr. Hoyte's right to life.

Article 6(1) – right to a fair trial

84. At the time of his repeated requests to see the disputed information, Mr. Hoyte intended to give evidence on the issue of contaminated air, to the House of Lords Select Committee on Science and Technology and/or the independent Committee on Toxicity of Chemicals in Food Consumer Products and the Environment (COT). As mentioned above, he believes that the disputed information contains relevant information about this issue. He submits that non-disclosure of the disputed information breaches his right to a fair hearing.

85. The question of whether Mr. Hoyte's right to a fair trial is breached by such a hearing in the absence of the disputed information will be a matter for that body and is not within our jurisdiction.

86. In any event, the future presentation of evidence before a parliamentary committee is not the same as giving evidence before a civil court. A parliamentary committee receiving evidence from the public is not a court or a tribunal determining civil rights within the meaning of Article 6(1) and that article would not, in our opinion, be engaged.

87. We note that Mr. Hoyte appeared to be of the opinion that both the House of Lords Select Committee and COT had concluded their investigations into the issue of contaminated air on aircraft and any possible link with organo-phosphate poisoning and that any further evidence he might have been given through this appeal would have come too late to be of any benefit. While COT has concluded that the link is unproven, it also considered the matter worthy of further investigation. The House of Lords Select Committee published a

report in December 2007 on “Air Travel and Health”. In that report they indicate support of COT’s conclusion; however they make a number of recommendations for further research to be taken forward as a high priority. There is therefore further opportunity for evidence to be placed before both bodies.

Article 8 – right to private and family life

88. The CAA agrees with Mr. Hoyte who submits that the issue of contaminated air has had a significant impact on him and his family. While the broader issues relating to contaminated air may impact on this right, the decision as made by the CAA with regard to the exercise of discretion under section 23 of the CAA 1982 does not.

89. Article 8 is not engaged by the non-disclosure of the disputed information which Mr. Hoyte considers relates to the issue of contaminated air resulting in him not being able to present evidence to a parliamentary committee.

Article 10 – right to freedom of expression

90. Mr. Hoyte submits that his right under Article 10 has been violated because he is unable to present relevant evidence and address the issue of contaminated air in the absence of the disputed information.

91. Mr. Hoyte’s ability and right to give evidence to a House of Lords Committee is not curtailed by the statutory bar on disclosure and the exercise of the discretion under in section 23 of the CAA 1982.

92. Even if that is wrong, Parliament has chosen to restrict disclosure of information provided to the CAA in pursuance of an ANO by enacting section 23 of the CAA 1982 and giving the CAA a discretion to disclose in limited circumstances. The CAA has exercised its discretion reasonably and proportionately to the aims of furthering the safety of civil aviation, disseminating information about safety and protecting the confidentiality of reports submitted to it.

93. In a letter dated 10th January 2005, the CAA provided Mr. Hoyte with a detailed explanation of the findings of the operator's Safety Department's investigation into the circumstances reported in the MOR, which is in effect a summary of the shared conclusions of the CAA and the operator on the incident. Counsel for the CAA submits that this was the most it is required to do under Regulation 9 of the Civil Aviation Authority Regulations 1991.

94. Mr. Hoyte's analogy with the case of Weber v Switzerland (1990) 4 EHRR 149 does not work because Mr. Hoyte is not facing any criminal sanction and because the CAA has already permitted a summary of the disputed information to become public knowledge by disclosing it to Mr. Hoyte.

95. We do not consider that this right has been engaged or violated.

Conclusion and remedy

96. A number of points have been raised by Mr. Hoyte that have had no direct bearing on this appeal and are not within the jurisdiction of this Tribunal. In particular, we cannot comment on any of his substantive complaints about the handling of the issue of contaminated air by the operator, the CAA and Parliament or the CAA's operation of the MOR scheme generally.

97. The issue of contaminated air on aircraft has been mentioned throughout this appeal and we are aware it is an issue of wide public interest. Although Mr. Hoyte believes that the CAA, and others in the airline industry, are preventing information relating to this issue from coming into the public domain, this Tribunal can only consider the decision relating to the disputed information and not any other information that did not form part of Mr. Hoyte's request under the FOIA and that may, or may not, be held by the CAA.

98. For the reasons set out above, we have concluded that disclosure of the disputed information is prohibited by section 23 of the CAA 1982. The exemption in section 44 of the FOIA is therefore engaged and this is an absolute exemption from disclosure. This means that the information is not disclosable regardless of any public interest there may be in disclosure.

99. The Tribunal dismisses the appeal.

100. Our decision is unanimous.

Signed

Annabel Pilling

Deputy Chairman

Date 21st February 2008