



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2009/0033
Information Commissioner's Ref: FS50168527

Decided on the papers
On 6 January 2010

Decision Promulgated
22 January 2010

BEFORE

INFORMATION RIGHTS JUDGE

ROBIN CALLENDER SMITH

and

LAY MEMBERS

MICHAEL HAKE

MARION SAUNDERS

Between

CIVIL AVIATION AUTHORITY

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

MALCOLM KIRKALDIE

Additional Party

Subject matter:

Freedom of Information Act 2000

Absolute Exemptions

- Prohibitions on disclosure s.44

Qualified Exemptions

- Law Enforcement s.31

Civil Aviation Act 1982

- s.23

Cases:

Hoyte v ICO & CAA EA/2007/0101

Representation:

For the Appellant: Kate Gallafent, Counsel for Civil Aviation Authority
For the Respondent: Michele Voznick, Solicitor for the Information Commissioner
For the Additional Party: Malcom Kirkaldie represented himself

Decision

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 30 March 2009:

The disputed information is exempt under section 44 of the Freedom of Information Act 2000 by virtue of the statutory prohibition on disclosure contained in section 23 of the Civil Aviation Act 1982.

No action is required.

Information Tribunal

Appeal Number: EA/2009/0033

SUBSTITUTED DECISION NOTICE

Dated 10 January 2010

Public authority: Civil Aviation Authority

Address of Public authority: CAA House, 45 – 59 Kingsway, London WC2B 6TE

Name of Complainant: Civil Aviation Authority

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the disputed information is exempt under section 44 of the Freedom of Information Act 2000 by virtue of the statutory prohibition on disclosure contained in section 23 of the Civil Aviation Act 1982.

Action Required

None

Robin Callender Smith
Information Rights Judge

19 January 2010

Reasons for Decision

Introduction and Request for Information

1. Mr Malcolm Kirkaldie ("the Additional Party") is the Additional Party in this appeal by the Civil Aviation Authority ("the Appellant"). On 4 January 2007 the Additional Party asked the Civil Aviation Authority to disclose to him a copy of "the safety audit on MK Airlines by the CAA".
2. By a decision communicated on 19 January 2007 -- and confirmed on review on 19 February 2007 -- the Appellant decided to withhold the requested information on the grounds that it fell within the exemption provided for at section 31 (1) (g) of the Freedom of Information Act 2000 ("FOIA") and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
3. In doing so it explained that it had treated the Additional Party's request as a request for information in relation to recent safety audits in relation to MK Airlines' application for the grant of an Air Operator Certificate (AOC) made on 8 February 2005 and which was granted on 18 August 2006.

The complaint to the Information Commissioner

4. The Additional Party complained to the IC who, in a Decision Notice issued on 30 March 2009, held that the exemption at section 31 (1) (g) was not engaged. The IC accordingly directed that the information should be disclosed. At that stage he held that:
 - The Inspection Reports requested were subject to FOIA rather than EIR (as they did not contain any information falling within the description of regulation 2 (1) (a)-(f));
 - Section 31 (2) (d) of the Act was relevant to this case; and
 - The exemption at section 31 (1) (g) was not engaged as disclosing the withheld information would not be likely to prejudice the CAA's ability to

exercise its functions for the purpose detailed in subsection (2) (d), as the CAA had failed to demonstrate a real and significant risk of prejudice.

The appeal to the Tribunal

5. In its original Grounds of Appeal the Appellant contended that the IC had erred in holding that section 31 (1) (g) was not engaged because he had:
 - Failed to appreciate the significance of maintaining trust and openness between the CAA and those it regulates in the proper exercise of its regulatory functions;
 - Failed to take into account the evidence from MK Airlines that disclosure of the requested information would "strain the confidence" it otherwise had with the CAA; and
 - Failed to appreciate that the degree of likelihood of prejudice to the CAA's regulatory functions required in order for section 31 to be engaged should reflect the seriousness of the consequences of such prejudice occurring, such that no more than a real (rather than wholly speculative) likelihood of prejudice was required in this case.
6. The Appellant pointed out further -- at this stage -- that under Article 6 (2) of the Air Navigation Order 2005 the CAA was required to grant an AOC to an applicant if it is satisfied that the applicant is competent, having regard in particular to certain prescribed matters, namely, its previous conduct and experience together with its equipment, organisation, staffing, maintenance and other arrangements so that it could secure the safe operation of aircraft of the type specified in the certificate on flights of the description and for that purpose so specified.
7. In assessing an applicant's competence, the issue for the CAA was not limited to whether the applicant had complied with all the regulatory requirements (including, for example, the production of the Operations Manual required by Article 38 of the 2005 Order, and other statutory obligations. Evidence of compliance might not in itself be evidence of competence. Accordingly, the CAA, through extensive audits, inspections and discussions with applicants sought in addition to obtain the

maximum possible amount of information going to potentially relevant matters such as how compliance with the applicant statutory obligations was actually demonstrated in practice.

8. The Appellant took the view that such inspections and discussions were always more effective if applicants were prepared to share information voluntarily with the CAA rather than providing only what was specifically requested. Without the voluntary provision of information there would always be "unknown unknowns" (things that the CAA did not know that it did not know and, as a result, did not know to make enquiry about). Without such voluntary openness there was a real and significant risk that the CAA would not be provided with all information that was potentially relevant to its assessment of competence of applicants.
9. On 17 September 2009 -- the date the Appellant served its witness statements in the appeal -- it applied to the Tribunal to amend its Grounds of Appeal to add a further, alternative, ground of appeal. That was that the requested information was also exempted by virtue of section 44 (1) of FOIA which provided for an absolute exemption where information was prohibited by or under any enactment. A decision by the IC on 9 September 2009 (FS50205237) -- involving certain information of a similar type to that requested -- had been found by the IC to be exempted under section 44 (1).
10. The Tribunal had been aware from an early stage that the Additional Party might not be able to participate fully in the appeal process -- for reasons he had explained clearly and candidly to the Tribunal -- and the Tribunal had allowed him to remain as an Additional Party to permit him to keep abreast of developments without necessarily being expected or feeling he had to intervene or contribute at every stage.
11. The Tribunal took the view that his had been the original request and he was entitled as a matter of principle to watch, observe and monitor from the outside (without access to any of the closed and confidential material that might be received by the Tribunal in the appeal) so that he could, if appropriate, comment further as the appeal progressed.

12. On 1 October 2009 the Tribunal confirmed that permission had been granted to the Appellant to amend its Grounds of Appeal so that it could rely upon section 44.
13. On 7 October 2009 the IC informed the Appellant that he had reconsidered his position in the light of the Appellant's amended grounds and the witness evidence and accepted that the information in the appeal was exempt under section 44.
14. The IC proposed that the CAA and IC should invite the Tribunal to substitute the Decision Notice in this appeal for a notice that the disputed information was exempt under section 44 of FOIA and on 8 October 2009 there was a communication to that effect sent to the Tribunal (and copied to the Additional Party).
15. The Additional Party replied on 9 October 2009 indicating he did wish to make further representations and -- on 12 and 21 October 2009 -- set out the reasons why he objected to the course of action proposed by the IC and agreed by the Appellant.
16. He stated on 12 October 2009:

"The CAA has yet to argue effectively, consider and apply the public interest test set out at Regulation 12(1) (b). Further to this I understand that the Tribunal has to consider this and the matter of the Human Rights Act – I therefore argue that the Tribunal should consider the following case of: "Guerra and Others v. Italy (116/1996/735/932) 19 February 1998: "Right of public to receive information".

"The CAA goes to great lengths to justify its position in respect to the safety record of the UK, when it is very clear that MK does not have an enviable accident/safety record - and a trawl of the internet would substantiate this. The CAA failed to deal with MK in the appropriate manner in this period and is going to great lengths to protect them and others for no apparent reason - is it simply that the safety audit does not exist - or it is not a safety audit, as the public would recognise it as such? In fact I have enough information to prove that the CAA has significantly failed the local population in respect of the above case.

"Finally I would suggest that the CAA release how many ramp checks have been made on MK and the findings since the safety audit."

17. On 21 October 2009 he sent an email in which he argued that s. 44 FOIA applied to three distinct categories of information:
 1. *If there is an existing statutory bar to the disclosure of information by a public authority then that information will be exempt;*

2. *If disclosure would be incompatible with a European Community obligation then the information will be exempt; and*
3. *If disclosure would constitute or be punishable as a contempt of court at common law (for example because it would breach a court order) then it will be exempt.*

18. He asked, rhetorically, whether the Human Rights Act 1998 could be a statutory bar to the disclosure of information if to do so would breach one of the Convention Rights that have been incorporated into domestic law. He concluded: *“So in essence the CAA have failed to engage (1) above as we have a right to natural justice/law under the Human Rights Act, a right to life and know if a Safety Audit is conducted safely (without undue peer pressure as is the case with this appeal). A safety audit, by its very nature implies that something is safe and should be publicly known - not instigated in some darkened room at the back of an airfield? Given that I am not privy to the un-redacted copy I fail to see how I can actually say anything else? On 2 - disclosure is not incompatible with European Community obligations and as 3 cannot be engaged then I fail to see how section 44 applies in the appeal cited by the CAA and I therefore rely on section 31.”*

The Law

19. Section 44(1) provides that:

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

- (a) Is prohibited by or under any enactment, [...]

20. Section 23 of the Civil Aviation Act 1982 (‘the 1982 Act’) (insofar as is relevant) provides that:

“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 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.”

The questions for the Tribunal

21. Does s.44 of FOIA, taken together with s.23 of the Civil Aviation Act 1982, exempt the Appellant from providing any information in respect of the original request?
22. Can the Appellant rely on s.23 of the Civil Aviation Act at the stage in the proceedings in which reliance on that provision was claimed?
23. Does the Human Rights Act 1998 have any bearing on these issues in this appeal?

Conclusions and Decision

24. In order for information to be prohibited from disclosure under section 23 of the 1982 Act, the following criteria must be met:
- a. The information must relate to a particular person;
 - b. The information must be furnished to the CAA;
 - c. The information must be furnished in pursuance of an Air Navigation Order;
 - d. None of the exceptions contained in section 23(1) of the 1982 Act must apply.
25. The requested information concerned audit reports conducted on MK Airlines Ltd and, as such, related to a particular corporate person.
26. The majority of the information contained in the requested information was based solely on information furnished to the CAA, and the remaining information was based on the Flight Operations Inspector's observations stemming from information which was furnished to the CAA. So far as the latter type of information is concerned, this was so closely based on information furnished by MK Airlines that it could not be disclosed without disclosing or conveying the contents of the information furnished by it. As such, and in accordance with the IC's, approach and analysis in Case

Reference Number FS50205237, the entirety of the information is information which was furnished to the CAA.

27. The CAA is required to grant an Air Operator's Certificate pursuant to Article 6(3) of the Air Navigation Order 2005 ('the 2005 Order') where it is satisfied that the applicant is competent having regard in particular to, amongst other matters, "his equipment, organisation, staffing, maintenance and other arrangements to secure the safe operation of aircraft".
28. The safety audits undertaken by the CAA, which resulted in the creation of the requested information, were conducted by the CAA as a result of MK Airlines' application for an Air Operator's Certificate, in order to assess its competence in respect of such matters. As such, the requested information was furnished in pursuance of an Air Navigation Order.
29. Section 23(1)(a) is not applicable, as MK Airlines had previously refused consent to disclose the requested information.
30. Equally, section 23(1)(c) is not applicable, as MK Airlines continues to exist, nor is section 23(1)(d) applicable as the CAA has not made a determination in pursuance of section 23(1)(b) or (c) in respect of information of the same kind.
31. Accordingly, the only possible exception to the prohibition under section 23 that would otherwise apply is that provided for under section 23(1)(b), which gives the CAA a discretion to determine whether the information should be disclosed. In this case, the CAA concluded that it would not be appropriate to disclose the requested information. In reaching that decision the CAA took into account a number of relevant factors including the importance of maintaining trust in the aviation industry, which would be eroded if the CAA disclosed information without consent, as a result of which the UK's public transport safety record would suffer.
32. Where the CAA has decided not to exercise its discretion to disclose information, and therefore relies upon the statutory prohibition under section 23(1) to refuse a request for disclosure, the issue before the Tribunal (and, inevitably at an earlier stage, the

IC) is whether the CAA's decision not to exercise its discretion was *Wednesbury* unreasonable, that is, whether it was so unreasonable that no reasonable person or authority could have exercised it in that way (see *Hoyte v ICO & CAA* EA/2007/0101, paragraphs 67 and 72).

33. The Tribunal has decided that the CAA's decision not to exercise its discretion to disclose the requested information is plainly not *Wednesbury* unreasonable: it took account of all relevant considerations and weighed up the impact of disclosure on the safety of civil aviation.
34. Accordingly, as the requested information is prohibited from disclosure by virtue of section 23 of the 1982 Act, it follows that it is exempt from disclosure under FOIA pursuant to section 44 of the Act. The exemption at section 44 is an absolute exemption (see section 2(3)(h)), such that no issue arises as to whether the public interest in maintaining the exemption outweighs the public interest in its disclosure.
35. The IC agrees that the requested information in this case falls within the meaning of section 23 of the 1982 Act and is therefore exempt under section 44 of the Act.
36. Mr Kirkaldie has not disputed that the requested information (i) relates to a particular person and (ii) was furnished to the CAA (iii) in pursuance to an Air Navigation Order. Nor has he sought to challenge the reasonableness of the CAA's exercise of its discretion in determining not to release the information under section 23(1)(b) of the 1982 Act.
37. However, in his emails of 9, 12 and 21 October 2009, he has made the following points:
 - a. The CAA's late reliance on section 23 is 'sloppy' and gives cause for concern in how the CAA is conducting itself;
 - b. The CAA has yet to argue effectively, consider and apply the public interest test set out at Regulation 12(1)(b), and the Tribunal has yet to consider this issue;

- c. The Tribunal has yet to consider the effect of the Human Rights Act, and in particular (a) the non-engagement of section 44 due to the fact that the Human Rights Act is not a statutory bar to the disclosure of information, and (b) the decision of *Guerra and Others v. Italy* (116/1996/735/932) 19 February 1998;
 - d. The CAA failed to deal with MK in the appropriate manner in this period and are going to great lengths to protect them and others for no apparent reason;
 - e. The CAA should release how many ramp checks have been made on MK and the findings since the safety audit.
38. The CAA has explained in its letter of 17 September 2009 to the Tribunal why it did not previously rely on section 23 but it now wished to do so, in the light of the decision of the IC in Case Reference Number FS50205237 promulgated just a few days earlier on 9 September 2009.
39. The Tribunal notes that issues relating to the late claiming of exemptions are becoming increasingly commonplace and are of natural concern to the Tribunal. In this case, however, the exemption was not claimed on the first day of what would have been a three-day hearing – for which time had been booked and set aside – but at a much earlier stage.
40. The CAA acted to adjust its position in the light of the IC's decision in the matter quoted in the paragraph above but the issue – generally – had been at the root of the appeal from the start and should have been spotted and articulated in the grounds of appeal at an earlier stage because it had certainly been considered in terms of evidence to be offered by at least one of its witnesses.
41. The exemption claimed – and which has succeeded – has always been at the heart of the Appellant's primary operating legislation. The Tribunal (and perhaps the Additional Party) has been left with the impression that the Appellant needed to be reminded of something fairly obvious and fundamental in terms of its enabling and operating legislation which should have been brought into the appeal at the earliest possible opportunity.

42. Mr Kirkaldie's reference to the public interest test set out at Regulation 12(1)(b) appears to be a reference to the public interest test established by section 2(1)(b) of the Act, which provides:

“(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of that provision is that where either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.

43. As set out at paragraph 34 above, section 2(3)(g) provides that section 44 is to be regarded as conferring absolute exemption for the purposes of section 2. Accordingly, it is unnecessary for the Tribunal to consider the public interest test under section 2(1)(b) if section 44 is engaged.

44. The Additional Directions made it clear that the Tribunal would will only go on to consider the issue of section 31 (which issue does, of course, require the public interest test to be considered) if it found that section 44 was not engaged.

45. Mr Kirkaldie suggests in his email of 21 October 2009 that section 44(1) is not engaged because the Human Rights Act 1998 is not a statutory bar to the disclosure of the information, as there is a “a right to natural justice / law under the Human Rights Act, a right to life and know if a Safety Audit is conducted safely without undue peer pressure as is the case with this appeal”.

46. The point is that the CAA does not maintain that section 44 is engaged as a result of the Human Rights Act but by virtue of the 1982 Act.

47. In any event, the Human Rights Act does not assist. Under section 44 of the Act the only question is whether the disclosure of the requested information is prohibited by or under any enactment. Mr Kirkaldie has not sought to argue that the requested

information does not fall within the meaning of section 23 of the 1982 Act, nor that the CAA's decision not to disclose the information was *Wednesbury* unreasonable.

48. The Tribunal has not had to consider the decision of the European Court of Human Rights in *Guerra v Italy* (1998) 26 EHRR 357, because that case concerned the extent of the positive obligation on the state under Article 8 (right to respect for private and family life) to provide information on severe environmental pollution to inhabitants of a town close to a chemical factory. Any right to information under Article 8(1) would be subject to Article 8(2) which provides that interference with the right to respect for private and family life may be justified including on the grounds of public safety. The maintenance of confidence in safety audits such as those conducted on MK Airlines is crucial to maintaining the UK's transport safety record in aviation. Accordingly, even if Article 8 were to be engaged the CAA's decision not to exercise its discretion under section 23 to disclose the requested information could not constitute a breach of Mr Kirkaldie's rights.
49. Mr Kirkaldie seeks to criticise the way in which the CAA has dealt with MK Airlines and suggests that it is going to great lengths to protect them and others for no apparent reason.
50. The only issue the Tribunal in this appeal has to consider is whether or not it accepts the IC and CAA's position that the requested information is exempt under section 44. The Tribunal's role is not to review the CAA's dealings with MK Airlines more generally. The Tribunal has seen copies of the safety audits in confidence, and concluded that they *do* exist and *are* safety audits. The suggestion that the CAA should now disclose information on ramp checks on MK Airlines, is outside the scope of this appeal.
51. The Tribunal finds that the requested information is exempt under section 44 of the Act as its disclosure is prohibited pursuant to section 23 of the 1982 Act.

52. Our decision is unanimous.

53. There is no order as to costs.

Robin Callender Smith
Information Rights Judge

21 January 2010