

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 February 2014

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested recorded radar data held by National Air Traffic Services (NATS) and provided to the Air Accident Investigation Branch (AAIB) for a specific date, time and airport. The AAIB stated that the information was not held for the purposes of the FOIA under the provisions of sections 3(2)(a) and (b), a position that was upheld by the Department for Transport (DfT).
2. The Commissioner's decision is that the requested information is not held by the AAIB or held on its behalf by another person for the purposes of FOIA by virtue of section 3(2)(b). He requires no steps to be taken.

Request and response

3. On 18 June 2013 the complainant wrote to the AAIB and requested information in the following terms:

"This is a FOIA request for a sample of the type of recorded radar data held by NATS and provided to the AAIB in the event of an air accident. This FOIA is directed at the AAIB because it is one of the public authorities that has a direct relationship with NATS and can obtain such sample data from NATS. It is submitted on the presumption that NATS holds data on behalf of the AAIB.

The request is for recorded radar data: Primary or secondary returns (beacon, reinforced beacon & uncorrelated primary returns), in the vicinity of Bournemouth Airport. For 18 June 2013, 12:00 GMT to 13:00 GMT. To be provided in electronic, csv format (or RDIF), i.e. not paper."

4. The AAIB responded on 1 July 2013. It stated that it did not hold this information for the 18 June and any information would be owned by NATS. The AAIB stressed that NATS does not hold original recorded radar data on behalf of the AAIB.
5. Following an internal review, undertaken by the DfT as the AAIB is part of the DfT, the DfT wrote to the complainant on 30 July 2013. It stated that the information was not held by the AAIB but it had considered whether the information could be said to be held by another person on behalf of the AAIB. The DfT concluded the information was not held on behalf of the AAIB by another person.

Scope of the case

6. The complainant contacted the Commissioner on 17 August 2013 to complain about the way his request for information had been handled. In particular the complainant did not agree that the requested information was not held on behalf of the AAIB.
7. The complainant is aware that radar data is only required to be held by NATS for a period of 30 days and as such the specific requested information in this case may no longer exist. However, he has asked that the Commissioner consider the issue of whether the information would have been held on behalf of the AAIB.
8. The Commissioner considers the scope of his investigation to be to determine if the information is held either directly by the AAIB or on its behalf by another person (NATS).

Background

9. The AAIB's function is to establish the cause of air accidents or incidents for the purpose of preventing air accidents or incidents as set out in the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996¹, ("the CA Regulations") specifically Regulation 4. The AAIB has

¹ <http://www.legislation.gov.uk/ukxi/1996/2798/contents/made>

powers set out in Regulation 9 which allow it to have "free access to any relevant information or records held by the owner, the operator or the manufacturer of the aircraft and by the authorities responsible for civil aviation or airport operation", for the purpose of enabling the investigation of air accidents or incidents.

10. Both the complainant and the DfT have referenced a Civil Aviation Authority (CAA) regulation referred to as CAP 670². The relevant part of this regulation is Part C, Sect 3, SUR 10. SUR 10 identifies requirements within a typical surveillance system including recording and replay systems, data processing and display systems. The most significant parts of SUR 10 as pertains to this complaint are:

- SUR10.5: To provide data for use in accident and incident investigations either by the Air Accidents Investigation Branch (AAIB) or CAA, and to support search and rescue, air traffic control and surveillance systems evaluation and training (1716).
- SUR10.11: Surveillance data recorded either at the ATS Unit or by a third party provider (see paragraphs SUR10.16 to SUR10.20) shall be retained in secure storage for a minimum period of thirty days or longer if the recordings are pertinent to the investigation of an air accident or incident (see paragraphs SUR10.42 to SUR10.45).

Reasons for decision

Section 3(2) – information held by a public authority

11. Section 1 of the FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it.
12. Section 3(2) sets out the criteria for establishing if information is held for the purposes of the FOIA:

"For the purposes of this Act, information is held by a public authority if
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(a) it is held by the authority, otherwise than on behalf of another person, or

² <http://www.caa.co.uk/docs/33/CAP670ISs03Amdt01.pdf>

(b) it is held by another person on behalf of the authority."

13. In this case, the main issue is whether or not the information requested (recorded radar data held by NATS) is information held by NATS on behalf of the AAIB. There is clearly some dispute between the DfT and the complainant on this point and the issue for the Commissioner to consider is therefore whether the information is held by another person on behalf of the AAIB.
14. In explaining its position and its belief that the information in question is not held on behalf of the AAIB by NATS, the DfT has clarified that the AAIB can only require information held by NATS under certain specific circumstances.
15. An inspector investigating an air accident or incident has the power to request any information or produce any documents which the investigating inspector may consider relevant. This power is set out in Regulation 9(2)(a) of the CA Regulations. Regulation 9(2)(e) also allows for inspectors to take measures to preserve any evidence considered appropriate.
16. On this basis the AAIB can ask for copies of radar data held by NATS and can also make a formal request for any data to be preserved until an investigation has been completed. The AAIB and DfT have argued that if the information were held on its behalf by NATS then it would not be necessary for the AAIB to have to rely on a Regulation to ask for the data or for the data to be preserved.
17. For the specific data in question as there was no incident or accident that took place on 18 June between 12:00 and 13:00 around Bournemouth airport the AAIB has explained that it had no basis for requesting radar data from NATS.
18. The Commissioner notes that SUR10.11 of CAP 670 does require NATS to retain radar data for 30 days and therefore at the time of the request NATS would have held radar data for the period in question. The AAIB maintains it was not in a position to request this data as it is not held by NATS on its behalf and the information could only have been requested under the Regulations if there was an accident or incident requiring investigation.
19. The complainant has argued that the AAIB and DfT have implied that they cannot request data unless an accident or incident is being investigated. The complainant has disputed that this is stated in any of the legislation governing access to recorded radar data.
20. The Commissioner has reviewed the wording of the appropriate parts of the relevant legislation and notes that the CA Regulations, specifically

Regulation 9, are particular to the powers of inspectors. This in itself implies that any of the provisions of this Regulation are only relevant insofar that that an inspector is involved in an investigation of an incident or accident. Regulation 9(2)(a) allows an "*investigating inspector*" to require the furnishing of any information which may be relevant and to require the retention of such information until completion of the investigation. Similarly SUR10.5 is clear that there should be an investigation into an accident or incident in order for data to be provided. The DfT has also emphasised this position in its submissions to the Commissioner, clarifying that Regulation 9(1) of the CA Regulations sets out the powers of inspectors and limits them to the purposes of investigating accidents or incidents.

21. As such, the Commissioner accepts the DfT's explanation that it can only request recorded radar data from NATS where there is an investigation. He appreciates that neither the CA Regulation nor CAP 670 explicitly prohibit the AAIB or any other relevant body requesting recorded radar data in any other circumstances but the Commissioner is satisfied that the fact that it is stressed that the powers of access are for use by inspectors is sufficient to strongly imply that the information should not be accessible in other circumstances.
22. The DfT has also considered the business need for radar data and recorded data. In the internal review response the DfT explained that NATS uses radar data for its own purposes of providing an air traffic service. Recorded radar data is different in that it may be used for a number of purposes such as supporting air traffic control and surveillance, and for training. Recorded radar data is held for 30 days as set out in CAP 670, not as a result of any imposition by the AAIB or the DfT.
23. In addition the DfT has clarified that if any information which is recorded and held by NATS does not relate to an accident or investigation then the AAIB would have no interest in this data and therefore would have no reason to hold the data. The complainant has countered this argument by stating that NATS has to record all radar data for potential use and hold it for 30 days as it cannot predict when and where an incident will occur. The complainant considers that the fact that the AAIB may not access data does not mean it is not held.
24. Again the DfT has stressed that it is only able to access recorded radar data if it is relevant to an investigation. A position the Commissioner

accepts as CAP 670 states that the information can be requested by inspectors and the purpose of inspectors is set out in Regulation 9(1).

25. Both parties had debated the relevance of the Information Tribunal's decision in *Glen Marlow v The Information Commissioner*³. The DfT considers this case to be relevant as it concerned the extent to which information in an online legal library was held by a local authority that subscribed to it. The Tribunal's decision was that information selected, downloaded and saved to the local authority's own systems was held by the local authority but the remainder of the information in the online legal library was not. The DfT considered this to be analogous to the situation in this case as it accepts that information held by NATS which the AAIB has requested to use may be held by the AAIB but any other recorded radar data held by NATS is not held by the AAIB or held on its behalf.
26. The complainant disagrees with this position as he does not consider that the recorded radar data is the same as the information in the *Marlow* case. This is because NATS is required to retain recorded radar data by regulation and there is no licencing arrangement or commercial subscription that exists in relation to the data.
27. In considering this point, the Commissioner stresses that each case is different and should be considered on its own merits. Whilst there are some similarities between this case and the *Marlow* decision he has instead used his guidance on "Information held by a public authority for the purposes of the FOIA"⁴ as a reference point when determining if the information is held on behalf of the AAIB by NATS.
28. Based on this guidance the Commissioner considers that NATS would hold information on behalf of a public authority (in this case the AAIB) if:
 - NATS has no access to, use for, or interest in the information;
 - Access to the information is controlled by the AAIB;

³ EA/2005/0031

⁴

http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx

- NATS does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
 - NATS is merely providing storage facilities, whether physical or electronic.
29. Based on these criteria and the information supplied by both parties, the Commissioner is of the view that NATS does have an interest in the information it is required to keep for 30 days (even if the requirement to keep it is imposed on it) as it may use this information for its own purposes. Access to the information is not controlled by the AAIB although the AAIB does have the power to require access to it and NATS is not merely providing a storage facility for the information. This would suggest that NATS is not holding information on behalf of a public authority (in this case the AAIB) but the Commissioner is aware that these criteria only provide an indicator and are not the only consideration when determining if information is held by another person on behalf of a public authority.
30. The Commissioner is aware of a number of circumstances in which it is generally accepted that information is held by another person on behalf of a public authority. These include situations where there is a contractual arrangement and where public authorities are working in partnership arrangements. The Commissioner does not consider any of these situations to be the case here.
31. Having considered the factors in his guidance and the arguments presented by both parties the Commissioner is satisfied that, on the basis of the evidence presented, recorded radar data is not held by NATS on behalf of the AAIB.
32. This is because, the AAIB is not responsible for requiring NATS to retain recorded radar data for 30 days – this is specified in CAP 670. It is a matter of fact that the AAIB and its inspectors have the power to request recorded radar data from NATS but this is in the event that an investigation is underway. The AAIB does not have unrestricted access to the data held by NATS and does not have any control over or say in the data which NATS records and holds. NATS does use this information for its own purposes as well as holding it in the event it is required by another body for a specific purpose.
33. Therefore the Commissioner has concluded that, in line with his guidance, the AAIB does not hold the information requested and that recorded radar data is not held on its behalf by another person.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

35. 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.
36. 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

Pam Clements
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