



Tribunals Service

Information Rights

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. EA/2009/0085

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: **FS50205237**
Dated: 9 September 2009

Appellant: IAN PHILLIPS

Respondent: INFORMATION COMMISSIONER

On the papers

Date of decision: 10th February 2010

Before

**Chris Ryan (Judge)
Roger Creedon
and
David Wilkinson**

Subject matter: Prohibitions on disclosure s.44

Cases: *Hoyte v ICO and CAA (EA/2007/0101)*

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 9 September 2009 and dismisses the appeal.

Reasons for Decision

Introduction

1. Although this case started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2 and 3 and paragraph 2 of Schedule 5), the Tribunal which has decided it is now constituted as a First-tier Tribunal.
2. We have decided that the information requested was covered by the absolute exemption provided by section 44 of the Freedom of Information Act (FOIA) and that the Information Commissioner was therefore correct to conclude, as he did, that the public authority to whom the request had been addressed had been entitled to refuse it. We have also decided that other grounds of appeal put forward by the Appellant should be struck out on the grounds that they do not address any part of the decision recorded in the Decision Notice, or any issue that is relevant to an issue under FOIA that we have jurisdiction to consider.

The request for information

3. On 20 March 2008 the Appellant wrote to the Civil Aviation Authority ('the CAA') requesting *"...copies of CAA/SRG [Safety Regulation Group] Annual Reports on Rescue and Fire Service at Liverpool John Lennon Airport from 2001 to March 2008."*

4. The request was rejected by letter dated 31 March 2008 on the grounds that it fell within the exemption in section 31 of FOIA (law enforcement) and that the public interest favoured non-disclosure. The rejection was maintained on 6 June 2008 following an internal review requested by the Appellant.

The complaint to the Information Commissioner

5. On 18 June 2008 the Appellant complained to the Information Commissioner about the refusal. During the course of the Information Commissioner's investigation the CAA changed the basis of its objection and the Information Commissioner allowed it to do so. Thereafter, it relied on both sections 44 (prohibitions on disclosure) and 31 of the FOIA.
6. The Information Commissioner ultimately decided, in a Decision Notice dated 9 September 2009, that the section 44 exemption applied and that, in those circumstances, he did not need to proceed to consider the arguments under section 31.
7. The part of FOIA section 44 with which this Appeal is concerned provides that:

“(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,...”

The exemption under section 44 is an absolute one (FOIA section 2(3)(h)), which means that, once engaged, it is not necessary to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

8. The prohibition on which the CAA relied was the one contained in section 23 of the Civil Aviation Act 1982, which reads :

(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.

(2) Subsection (1) above shall apply in relation to the disclosure by an officer of the Secretary of State of information furnished to the Secretary of State in pursuance of any provision of this Act to which this section applies or of an Air Navigation Order as it applies in relation to disclosure by the CAA or a member or employee of the CAA of information so furnished to the CAA, but with the substitution for references to the CAA in paragraphs (b) to (d) of references to the Secretary of State.

(3) For the purposes of subsection (1) above, all reasonable inquiries to find a body corporate shall be deemed to have been made if-

(a) in the case of a company within the meaning of the [Companies Act 1985 or the Companies (Northern Ireland) Order 1986], inquiries have been made at its registered office; or

(b) in the case of a company incorporated outside the United Kingdom and having a place of business within the United Kingdom, inquiries have been made-

(i) at every address registered in respect of that company for the purposes of section 691(1)(b)(ii) of the said Act of 1985 or, as the case may be, at every address for service registered in respect of a branch of that company under Schedule 21A to that Act, and

(ii) at every address registered in respect of that company for the purposes of Article 641(1) (b) (ii) of the said Order of 1986 or, as the case may be, at every address for service registered in respect of a branch of that company under Schedule 20A to that Order.

(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.

(5) If the CAA or a member or employee of the CAA or an officer of the Secretary of State discloses any information in contravention of subsection (1) above; it or he shall be liable-

(a) on summary conviction, to a fine not exceeding the statutory maximum; and

(b) on conviction on indictment, to a fine or, except in the case of the CAA, to imprisonment for a term not exceeding two years or to both.

(6) This section applies to the following provisions of this Act, that is to say, sections 16, 17, and 28, section 36 (so far only as it relates to aerodromes owned or managed by the CAA) sections 64 to 72 (except section 69), sections 78 to 80 and section 84."

9. In his Decision Notice the Information Commissioner considered a number of questions. Each one, accompanied in each case by his conclusion, may be summarised as follows:

1. Did the information requested relate to a particular person ("...no information which relates to a particular person...shall be disclosed by the CAA...")? He decided that it did.
2. Had the information also been given to the CAA by a third party ("furnished to the CAA"), or had it been generated by the CAA itself? He decided that, although some of it may have been created by the CAA, it was so closely based on information provided by someone else that it could not be disclosed without also disclosing that information.
3. Had the information been provided to the CAA under an Air Navigation Order ("...furnished to the CAA in pursuance of ...an Air Navigation Order")? The Information Commissioner decided that the procedure under which the CAA obtains information to enable it to decide whether a particular site should be licensed under Article 92 of the Air Navigation Order 2005 justified the conclusion that the information in question had been obtained in pursuance of that Order.

Having decided, on the basis of 1 – 3 above, that the terms of section 23 were met the Commissioner went on to consider whether any of the exceptions to the prohibition set out in sub paragraphs (a) to (d) of subsection 1 applied. He determined that:

- 1.(a) did not apply: consent to disclosure had been sought but refused by the airport;
2. the CAA's decision on (b) ("...shall be disclosed...unless...the CAA...determines that the information may be disclosed...") had to be judged against a test of the determination not being unreasonable, irrational or perverse and that it was not any of those things.
3. (c) and (d) were not applicable

10. The Information Commissioner then decided that, as the section 23 prohibition did apply, section 44 of the Freedom of Information Act came into effect with the result that the information requested was subject to an absolute exemption. As mentioned in paragraph 9 above he also decided that, having ruled that the section 44 prohibition against disclosure applied, he need not consider the second line of argument put forward by the CAA, under section 31.

The appeal to the Tribunal

11. On 6 October 2009 the Appellant lodged an appeal to this Tribunal. It is appropriate to set out his grounds in full. They read as follows (with paragraph numbers added to assist cross referencing later in this decision):

[1]. CAA Audits asked for on 20.03.08 to be used in above tribunal re Protected Disclosures. As on numerous occasions (evidence in bundle) the subject of falsifying records for test and inspections and training was commonplace at Liverpool Airport and had been brought to the attention of senior management on the fire station and senior management on the airport whose reaction was to cover it up after promising investigations that never occurred. Using the words to myself on more than one occasion "you are not doing yourself any favours with this".

[2]. Obviously as some one who likes to operate professionally I was astounded at this attitude but Liverpool Airport's management were renowned for their bullying attitude so much so that all airport fire officers (not fire fighters, fire officers) including an ex chief fire officer and others qualified to the rank of chief fire officer put in a grievance against the senior managers and directors of the airport, minutes available in bundle, where the issue of health and safety and lack of training was raised on a number of occasions.

[3]. The cover up regarding, falsifying records went as far as [name and positioned removed] giving factually false statements to the employment tribunal on oath. It should be noted that [name removed] to my knowledge has covered up over half a dozen quite serious incidents at the airport promising investigations that never occurred. These incidents include falsifying of test and inspection records, firearms incidents, assaults and other issues of fraud. It is my understanding that recently two fire fighters have been paid off on condition that they sign no disclosure agreements regarding the above and it also should be noted that before my tribunal I was offered £ 5,000 then £20,000 to drop the case on condition of me signing a no disclosure agreement, which I refused as I have always said it is not about the money it is about the safety of the travelling public and the workforce at Liverpool Airport.

[4]. The CAA by their response and refusal to open their audits regarding Liverpool Airport can only be seen as assisting Liverpool Airport, break health and safety law which I believe the general public should be able to judge for themselves.

[5]. It should be noted that on 29th July 2008, an un-named airport director refused consent to disclose the information. Was this an airport director that had already been told about the fraud and was carrying on with the cover-up.

[6]. Regarding the 'inspections' it appears the CAA accept the words/documents of the airport management even though with a little more delving they could have uncovered the systematic falsifying of records. This therefore calls into question the purpose of the CAA Audits and the cosy relationship between the CAA and airports.

[7]. The first notification regarding problems are mentioned in a letter 08.02.20 1 (letter in bundle) regarding procedures and training for tests and inspections. Since that date on numerous occasions it has been raised both verbally and written to managers. Even though I tried to address the issue through the normal company procedures highlighting many problems with records of test and inspections, training etc only to be offered investigations (letters in bundle with offers of investigation) that were never carried out. In the end this attitude by management at Liverpool Airport brought about my stress and depressions leading to my sacking and it seems the CAA are quite happy to accept false records by Liverpool Airport as proof of the operational viability of said airport which I think the general public should be aware of so they can make their own judgment regarding flying to and from the Airport, hence the request under Freedom of Information Act”.

It seemed to the Tribunal, on reading the Grounds of Appeal, that they did not appear to criticise either the questions which the Information Commissioner had posed or the answer he reached on each of them. Paragraphs 1-3, as well as paragraphs 6 and 7 seem simply to set out background facts, as the appellant sees them. Paragraph 4 put forward an argument that the refusal to disclose had the effect of assisting the airport in question to break health and safety laws, without indicating how that assertion applied to either the questions the Information Commissioner posed to himself or any other question which he should have addressed. Paragraph 5 raised a question as to the bona fides of the

person who refused to consent to disclosure, without explaining its relevance to any part of the Decision Notice.

12. The Tribunal therefore wrote to the Appellant on 7 October 2009, before the time limit for the Information Commissioner to serve a Reply had expired, indicating its concern that the Grounds of Appeal did not disclose a legal basis on which the Appellant challenged the Information Commissioner's Decision Notice. The Tribunal said that it was concerned that the Information Commissioner would have difficulty preparing a Reply and that the Tribunal would struggle to understand the issues which the Appellant wished it to decide. The Tribunal accordingly directed that the Appellant should provide written clarification of the elements of the Decision Notice which he claimed represented an incorrect application of section 23 of the Civil Aviation Act and/or section 44 of the Freedom of Information Act. It also directed that his clarification should stand as part of the Grounds of Appeal and that the Information Commissioner was then to file a Reply within 21 days from the date when he received the clarification.

13. On 21 October 2009 the Respondent replied. His reply took the form of a short letter, the relevant parts of which read:

"I do not agree that the information requested related to a particular person. At no point is a particular person singled out, the request for information was/is referring to Liverpool Airport & the Fire and Rescue audits not about a single person.

"I am concerned that Liverpool Airport has broken Health and Safety law [as pointed out in my submission] regarding test and inspections; I believe this is a point off law. Liverpool Airport also withheld information in respect of protected disclosures which led to me not having a fair hearing at the employment tribunal"

The letter was transmitted to the Tribunal under cover of an email in which the Appellant said that he wished to "register in the strongest

possible terms the continued blocking of information that covers up the breaking of the law”.

14. In his Reply dated 12 November 2009 the Information Commissioner identified what he considered to be the following issues raised by the Appellant:

- (1) The information does not relate to a particular person.
- (2) He is concerned the Airport has broken health and safety law.
- (3) The Airport withheld information in respect of protected disclosures which led to (him) not having a fair hearing at the Employment Tribunal.

15. As to the first issue, the Information Commissioner pointed out that the information related to Liverpool Airport and maintained that he had been right to conclude that a “particular person”, as specified in section 23(1) of the 1982 Act, would include a company or an organisation which is a legal person rather than simply a named individual. He argued that, as the Appellant had not provided particulars or reasons why this aspect of the Decision Notice was incorrect, it did not amount to a reasonable ground of appeal. He asked that it be struck out pursuant to rule 9(1) of The Information Tribunal (Enforcement Appeals) Rules 2005 (“the Rules”). Rule 9, read with rule 25, provides that the Tribunal chair may, as a preliminary issue, strike out an appeal if he or she decides that *“an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal discloses no reasonable ground of appeal”*. The Information Commissioner asked, in the alternative, that the appeal should be dismissed summarily pursuant to rule 10 as the grounds of appeal had no real prospect of succeeding. Rule 10 provides that if *“the Tribunal is of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith it may ...so determine the appeal”*. However, in this case the Chair may not act alone and, before the Tribunal panel determines the matter the appellant must be notified of the dismissal

application and given the opportunity of an oral hearing (Rule 10(3) to (6) inclusive).

16. The Tribunal considered that the Grounds of Appeal, as supplemented by the letter referred to in paragraph 12 above, did raise an issue on the interpretation of section 23, which the Tribunal should consider, and that accordingly it should not be struck out.
17. The Information Commissioner argued that the second issue, simply complaining that the Airport had in the Appellant's view breached health and safety law, did not give rise to a challenge to any part of the Decision Notice that the Tribunal had jurisdiction to consider and it should also be struck out or summarily dismissed. It took the same approach to the third issue, arguing that an allegation regarding the Airport and its behaviour in other unrelated litigation did not touch on the Information Commissioner's decision regarding the CAA, as the public authority to which the request for information had originally been made, and was therefore outside the jurisdiction of this Tribunal. On these issues the Tribunal directed that, at the same time as it considered the substantive case on the first issue, it would also determine the Information Commissioner's application to strike out the other grounds of appeal under Rule 9. It made no direction at that stage under Rule 10 as it felt that the procedural requirements of paragraphs (2) — (6) inclusive of that rule would introduce unnecessary complexity and delay. Accordingly, it directed the parties to file written submissions covering both the substantive determination of the first issue and the question of whether or not issues 2 and 3 disclose a reasonable ground of appeal. The Appellant's submissions filed in response to that direction included a request that the matter be determined at a public hearing, and not on the papers. However, the Tribunal decided that the matter was one that could be determined on the papers and that it would not be a sensible or proportionate use of available resources to hold a hearing. As this decision is being

published on the Tribunal's website the matter will be given a public airing.

18. The Appellant's written submission was again quite short. The relevant parts read as follows:

"I am at a loss to understand what the "Freedom of Information Act" actually means. It appears that no matter what you request, it can be blocked by different interpretations, going as far as changing the English language i.e. 'person' means organisation. This is not the first time when dealing with people from the legal profession that they seem able, at will, to change the English language to interpret something the way they want to interpret it ('won't' means the same as 'can't' according to an appeal court judge, which contradicts the Oxford English dictionary).

"The case is simply about freedom of information held by a public body i.e the CAA about rescue and firefighting services at Liverpool Airport used by the general public. Surely the Freedom of Information Act was brought in to allow members of the public to make up their own minds after being furnished with the appropriate information. On reflection it seems the Freedom of Information Act is there purely and simply to give the impression that you are able to get this information.

"In the meantime to my knowledge no investigation has been carried out as regards falsifying of records at Liverpool Airport which I raised as far back as 2004. I have the necessary paperwork to back this up. It was not done in a fit of peak in 2006 when I was dismissed for saying I could not become the officer in charge of the equipment and test and inspections without the necessary training and the correct test and inspections regime. Throughout this I have been treated like some sort of crank by all the organisations whether they be legal or public bodies. It now appears that the CAA, the Information Commissioner and Liverpool Airport wish to

keep everything behind closed doors and deal with everything by paper, which to me contradicts the whole ethos of Freedom of Information and what have these bodies got to hide?

I have been assured by a number of former colleagues that the practices I have mentioned still carry on and they would be willing to talk to the appropriate people in a proper investigation without the heavy breath of senior management on their necks which is something I endured for a number of years on this and other quite serious matters. The first step to solving this would be for someone who is able, to inspect the fire and safety audits. These audits according to CAA documentation obtain their information from the word of management in a number of issues, so in effect a full inspection of the fire and safety service is not actually carried out and it seems the CAA with the compliance of other parties would like to keep this behind closed doors.”

19. We have sympathy for the Appellant's evident frustration at the way in which his request for information seems to him to be blocked by the common word "person" being given an unnatural meaning. Perhaps it is only lawyers who would interpret the word as including an organisation running an airport. But that is what lawyers, and particularly those of them who draft Acts of Parliament, habitually do. They do so in part because courts have regularly applied the word to corporations, as well as natural persons, for over a century. But they are also required to do so under the Interpretation Act 1978, which (mirroring the Interpretation Act 1889) specifically states that, for the purposes of statutory interpretation the word "person" should be interpreted as including "a body of persons corporate or unincorporated".

20. We also have sympathy for the Appellant more generally, since he clearly believes that he has been treated badly and that important information, which he believes would have supported his position, has been withheld. However, his written submission made no attempt to

address any of the issues which the Tribunal has directed should be addressed. In this connection we should record that, on the occasion when the Tribunal drew his attention to the fact that the original Grounds of Appeal did not appear to disclose a sustainable case for challenging the Decision Notice, it also suggested that he consider seeking pro bono assistance in presenting his case. That suggestion was repeated after the written submission had been received, in light of his reference to having difficulty understanding what the FOIA means.

The questions for the Tribunal

21. The first question we must consider is whether section 23 of the 1982 Act applied to the requested information. The Information Commissioner argued that it clearly did and that disclosure was therefore prohibited, with the result that the absolute exemption provided by FOIA section 44 was engaged. He pointed out that Section 23(1)(c) provided one of the exceptions to the general rule for prohibition of disclosure in the event that the person "is an individual who is dead or is a body corporate that has ceased to exist ...". Section 23(3) provides for reasonable inquiries to find a body corporate specifically referring to the Companies Act 1985 and other provisions made for companies located outside the United Kingdom. He argued that, as section 23 specifically refers to "body corporate" and provides details on what is reasonable when attempting to locate a body corporate, it was clear that "particular person" did not relate to an individual living person only. We agree that those provisions are consistent with the word "person" having the meaning given to it by the Interpretation Act 1978. We have not been pointed towards any material suggesting otherwise. In particular the interpretation rules incorporated within the 1982 Act itself do not provide any suggestion that we should depart from the generally applicable definition. We therefore conclude that information obtained by the CAA from the airport operator was information falling within the prohibition created by section 23 of the 1982 Act. The Appellant did not challenge the

Information Commissioner's conclusion that, (in the light of *Hoyte v ICO and CAA* (EA/2007/0101)) the prohibition is one to which FOIA section 44 applies, despite being qualified by a provision that entitles the public authority to relax it . We accordingly conclude that the information in dispute is covered by an absolute exemption and that the Information Commissioner was correct in concluding that the public authority had been entitled to refuse the original request for disclosure.

22. Having reached that conclusion it is not strictly necessary for us to consider the other issues that the Appellant has raised. However we add, for completeness, that we think that the Information Commissioner was also correct in submitting that both issue 2 (allegations of breach of health and safety laws) and issue 3 (complaint of incomplete disclosure in other proceedings) do not address any part of the decision recorded in the Decision Notice, or any issue that is relevant to an issue under FOIA that we have jurisdiction to consider. Issue 3, in particular, trespasses on the jurisdiction of the Employment Tribunal to regulate its own procedures. We conclude, therefore, that neither issue raises a "reasonable ground of appeal" for the purposes of Rule 9 and that they should therefore be struck out.

23. We add, finally, that as we have decided that the information in question is exempt from disclosure under FOIA section 44 we do not need to consider whether it would also be exempt under section 31.

Conclusion and remedy

24. For the reasons set out above the part of the Appeal that has not been struck out fails and the Decision Notice should stand.

25. Our decision is unanimous.

Chris Ryan
Tribunal Judge

10th February 2010