

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 March 2024

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

Decision (including any steps ordered)

1. The complainant has requested whether a manufacturer or plane owner made an application to reregister. The Civil Aviation Authority (CAA) refused to confirm or deny whether it held the requested information, citing section 44(2) of FOIA – prohibitions on disclosure.
2. The Commissioner's decision is that the CAA has correctly cited section 44(2) of FOIA to neither confirm nor deny (NCND) whether it holds the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 14 November 2023, the complainant wrote to the CAA and requested information in the following terms:

"Please find below details of an FOI request in relation to the issue of whether a re registration application has been made:

Can you please tell me whether a manufacturer or plane owner has made an application to re register [redacted aircraft registration number] which I believe to be engaged currently in cost sharing

flights from Bagby Airfield which may be in breach of FAA regulations?"

5. The CAA responded on 23 November 2023. It stated that it could NCND whether it held the requested information (section 44(2)).
6. The complainant requested an internal review on the same date.
7. Following an internal review, the CAA wrote to the complainant on 6 December 2023 and maintained its NCND position.

Scope of the case

8. The complainant contacted the Commissioner on 11 December 2023 to complain about the way their request for information had been handled. They queried the lack of transparency in not being provided with the requested information and that the CAA had not responded under the correct legislation.
9. The Commissioner considers that the scope of his investigation is to consider the CAA's citing of section 44 of FOIA and whether the requested information is environmental. The Commissioner has not gone back to the CAA for further argument for the reasons set out below and because there is precedence for his views in this matter.

Reasons for decision

Is the withheld information environmental?

10. If the requested information concerns the state of the elements of the environment (such as air, land, water); factors affecting those elements (such as noise, waste, emissions) and measures designed to protect those elements (such as policies, plans, programmes), it must be considered under the EIR rather than the FOIA.
11. Part of their complaint to the Commissioner included the complainant's view that the requested information should also have been considered under the EIR. The complainant contended that the requested information fell under the EIR but that the CAA had "chosen to rely" on an exemption that "is not available under the Environmental Information regulations". The complainant suggests that the CAA has exercised its "discretion...(firstly to ignore a way to be transparent and secondly to misconstrue the intimately environment [sic] nature of the request as not environmental without any reason being given)."

12. Although the Commissioner understands the complainant's viewpoint, the request is asking for a confirmation or denial response (effectively a "yes" or "no") from the CAA which he has decided is too far removed from the definition of what is environmental information as set out in regulation 2(1)(a)-(f)¹.

Section 44: Prohibitions on disclosure (NCND)

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

"Under section 23 of the Civil Aviation Act 1982, any information which relates to a particular person or organisation and has been furnished to the CAA in pursuance of any provision of the Civil Aviation Act 1982 to which section 23 applies, must not be disclosed by the CAA unless such disclosure is authorised by one of the exceptions contained in section 23 itself.

Section 23(6) of the Civil Aviation Act 1982 defines those provisions; in this case the provision relied upon is section 65 of the Civil Aviation Act 1982.

It is, therefore, the CAA's position that we are unable to either confirm nor deny whether information is held by way of Section 44 of the FOIA (prohibitions on disclosure) (by virtue of Section 23 (directed to section 65) of the Civil Aviation Act 1982)."

The Commissioner notes that section 65 of this Act concerns the granting and refusal of air transport licences.

16. The CAA cites the Civil Aviation Act 1982 as the statutory prohibition on the disclosure of information should it be held. The legislation is as follows:

"23 Disclosure of information

¹ [The Environmental Information Regulations 2004 \(legislation.gov.uk\)](http://legislation.gov.uk)

1) ...no information which relates to a particular person and has been furnished to the CAA in pursuance of any provision of this Act to which this section applies or of an Air Navigation Order shall be disclosed by the CAA, or a member or employee of the CAA unless—

(a) the person aforesaid has consented in writing to disclosure of the information; or

(b) the CAA, after affording that person an opportunity to make representations about the information and considering any representation then made by that person about it, determines that the information may be disclosed; or

(c) that person is an individual who is dead, or is a body corporate that has ceased to exist or, whether an individual or a body corporate, cannot be found after all reasonable inquiries have been made, and the CAA determines that the information may be disclosed; or

(d) the CAA determines that the information is of the same kind as other information as respects which it has made a determination in pursuance of paragraph (b) or (c) above."

The complainant's view

17. The complainant tells the Commissioner

"that the information requested relates to a breach of a planning condition which a local authority has decided to tolerate because an application to re register a noisy commercial aircraft has allegedly been made".

They argue that the information they have requested was supplied to North Yorkshire Planning Authority, was made "publicly available" to them, and which the complainant has "disclosed...widely". Their view is that section 21 of FOIA therefore applies (information accessible to the applicant by other means). The option to neither confirm nor deny "is not available" as it is in the public domain and therefore CAA should answer "yes" or "no".

The CAA's position

18. CAA stated that section 44(2) does "not require a public authority to confirm or deny whether it holds any information, if even in doing so would, in itself, reveal exempt information". Therefore it was unable to NCND as it would release information prohibited from release into the

public domain. The request would require the CAA to give a "yes" or "no" response:

"should the CAA confirm (a Yes) a registration application has been received this would release information validating this fact. Should the CAA deny (a No) a registration applicant [sic] has been received this would, in turn, release information proving the negative".

The CAA stressed that "no inference either way should, or indeed can, be taken from the CAA's position..."

19. As explained earlier, the CAA's position is that section 23 of the Civil Aviation Act 1982 is the statutory prohibition that, if the information was held, would exempt it from disclosure. It further explained that -

"any information which relates to a particular person or organisation and has been furnished to the CAA in pursuance of any provision of the Civil Aviation Act 1982 to which section 23 applies, must not be disclosed by the CAA unless such disclosure is authorised by one of the exceptions contained in section 23 itself."

Those exceptions are listed in paragraph 16 and "the provision relied upon is section 65 of the Civil Aviation Act 1982". Therefore it concluded that it was "unable to either confirm nor deny whether information is held by way of section 44..."

20. The CAA went on to address the complainant's contention that the requested information was publicly accessible as follows -

"If there is a question as to whether that same information may be available from other sources, the CAA must still recognise that any information it might hold was obtained in the course of its statutory activities and thus always remains protected from disclosure. There is no obligation on the CAA to recognise either in the positive or negative, purportedly similar information available from other sources, whether formally published or hearsay."

The Commissioner's position

21. "[I]f there is a statutory prohibition on disclosure and the authority has decided that it is not disapplied by a gateway, then the Commissioner will accept that section 44(1)(a) applies.² In other words, the CAA "has discretion about applying a gateway to disclosure" and "the

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

Commissioner will not question or examine the reasonableness of that decision”.

22. The Commissioner is satisfied that confirming or denying whether the requested information is held is prohibited and that if the CAA was to confirm or deny whether it held this information, it would be disclosing something which, in itself, would be prohibited by the Civil Aviation Act 1982. Therefore CAA has correctly cited section 44(2) NCND. As section 44 is an absolute exemption there is no requirement to consider the public interest test.

Right of appeal

23. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

24. 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.
25. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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