

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 January 2023

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

### **Decision (including any steps ordered)**

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1. The complainant has requested the content of certain emails about the use of drones at race courses as a follow-up from a previous request which had provided them with email dates and titles. The Civil Aviation Authority (the CAA) relied on sections 31(1)(a), (b), (c) and (g) of FOIA (law enforcement) to withhold the requested information.
2. The Commissioner's decision is that section 31 of FOIA is engaged and the balance of the public interest favours maintaining this exemption. However, the CAA did breach sections 1 and 10 of FOIA.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 2 February 2022, the complainant wrote to the CAA and requested information in the following terms:

"Please can I have copies of the following e-mails. Note this FOIA is a follow on to: [reference]

Date 16/03/21

[REDACTED] - 'official partners of the CAA'

Date 18/03/21

RE: False CAA claims – [REDACTED] (2x matching e-mails)

Date 26/03/21

Use of drones at race courses

Date 30/03/21

Re:20210330 Crowded Space/Race Courses/ [REDACTED] etc (3x matching e-mails)

Date 01/04/21

AINTREE 2021 (2x matching e-mails)

Date 09/04/21

Aintree Races

Aintree Grand National – Drone Activity – [OFFICIAL – SENSITIVE]

RE: Aintree Races (8x matching e-mails)

Date 10/04/21

Further Intelligence – [REDACTED]

RE: Aintree Races"

5. On 2 March 2022 the CAA cited section 31 of FOIA (law enforcement) but extended the timeframe for compliance with section 1 of FOIA to consider the public interest.
6. The CAA responded on 25 March 2022. It stated that it was withholding the requested information, citing section 31 (law enforcement), section 40 (personal data), and section 44 (prohibitions on disclosure) (by virtue of Section 23 of the Civil Aviation Act 1982).
7. On the same date the complainant requested an internal review. They accepted that personal data could be redacted.
8. Following an internal review, the CAA wrote to the complainant on 30 March 2022. It maintained its position.

## Scope of the case

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9. The complainant contacted the Commissioner on 31 March 2022 to complain about the way their request for information had been handled.
10. On 29 November 2022 the CAA revised its position, withdrawing its reliance on section 44 of FOIA and providing a table in order that the complainant could see which sections of section 31 had been applied to which emails. The CAA also reconsidered its position on some of the withheld information that it regarded as "transactional" and offered to release it to the complainant which it did on 5 January 2023.
11. The Commissioner considers that the scope of this case is the CAA's citing of section 31 of FOIA and any procedural matters that may have occurred.

## Reasons for decision

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12. The CAA is relying on sections 31(1)(a), (b) and (c) of FOIA in relation to part of the withheld information. It has also applied section 31(1)(g) to some of the same information covered by those sections but also cited this section on its own regarding part of the withheld information.
13. Section 31 of FOIA states that -
  - "(1)Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—
  - (a)the prevention or detection of crime,
  - (b)the apprehension or prosecution of offenders,
  - (c)the administration of justice...
  - (g)the exercise by any public authority of its functions for any of the purposes specified in subsection (2)..."
14. The purposes (section 31(2)) the CAA has identified regarding section 31(1)(g) are
  - "(a)the purpose of ascertaining whether any person has failed to comply with the law,

(b)the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c)the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,”

15. The Commissioner’s guidance<sup>1</sup> states that the -

“exemption also covers information held by public authorities without any specific law enforcement responsibilities. It could also be used to withhold information that would make anyone, including the public authority itself, more vulnerable to crime...”

16. To engage a prejudice based exemption such as section 31 there must be the likelihood that disclosure would, or would be likely to cause prejudice to the interest that the exemption protects. In the Commissioner’s view, three criteria must be met in order to do so:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice.

17. Consideration of the exemption at section 31 is a two-stage process, even if the exemption is engaged the Commissioner needs to consider where the public interest lies.

### **Sections 31(1)(a), (b) and (c)**

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<sup>1</sup> [law-enforcement-foi-section-31.pdf \(ico.org.uk\)](http://ico.org.uk/law-enforcement-foi-section-31.pdf)

18. As previously indicated, the CAA cited the above parts of section 31 to some of the requested information. This information "relates to how investigations are conducted and the techniques used by law enforcement agencies".

19. The CAA also refers to the "mosaic effect" where -

"incomplete or partial information can be used to supplement information already in the public domain and could be used to build a clearer picture of the relevant law enforcement or regulatory tactics used by enforcement agencies".

This has the potential to cause "harm even when only a limited amount of information is disclosed".

### **Section 31(1)(g)**

20. The CAA also cited section 31(1)(g) to some of the requested information explaining that, "Certain correspondence sent and received by the CAA are in relation to individuals we regulate and are part of our ongoing safety oversight of those organisation (sic)." The purpose of this correspondence it states is in order to "check the ongoing safety performance of these organisations and compliance with relevant legal requirements".

21. Oversight activities are part of the CAA's regulatory functions for the purposes identified in paragraph 14. The CAA argues that confidentiality is key in order for its oversight to be effective. Its "Assessments benefit from exchanges with organisations which are unrestrained, frank and candid." In order to maintain this effective oversight, the CAA needs willingness from organisations to "fully engage and support the process without the threat of public recrimination". These organisations "must be confident that the CAA's oversight of them will not lead to disclosure of confidential information about their business". Disclosing the withheld information could lead to financial or other loss. The CAA asserts that disclosure "into the public domain would erode the trust between the organisation and the CAA". This is likely to result in less openness from the organisations concerned and compromise its "ability to carry out [its] safety oversight role...prejudicing [its] ability to regulate effectively".

22. The complainant has expressed their concern over the use of section 31 of FOIA, stating that "the CAA have specifically removed themselves from policing drone crimes, several years since, all drone crime is prosecuted by the police..."

23. The Commissioner notes that the Commissioner's guidance says that,
- “section 31 can be claimed by any public authority, not just those with law enforcement functions...It can also be used by a public authority that has no law enforcement function to protect the work of one that does.”
24. Having seen the withheld information and all the arguments of the CAA (some of which cannot be detailed here) the Commissioner accepts the actual harm which the CAA alleges would be likely to occur if the withheld information was disclosed and that it relates to the applicable interests identified. He also accepts that there is a causal relationship between disclosure and the prejudice the exemption protects and that it is real and of substance. The Commissioner is satisfied that the exemption is engaged at the lower level of prejudice.

### **Public interest test**

25. Section 31 is a qualified exemption. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at section 31 of FOIA outweighs the public interest in disclosing the information requested by the complainant.

### **Public interest factors favouring disclosure**

26. The CAA acknowledges the element of openness and transparency that underlies the FOIA. Releasing the information “would engage with the public in the workings and considerations undertaken by the CAA”. It would also “reinforce public confidence in aviation safety and the way the CAA regulates”.
27. The complainant argues that the information in the emails is -
- “critical as it relates to enforcement against ordinary business people and the police are being involved in civil matters which is outside their remit, as the CAA are the authority that oversees drone legislation it's fundamental, they are transparent”.
28. In their internal review request the complainant also queried “drone laws intended for criminal matters being used for civil matters”. Their view is that the Jockey Club did not want streams on its races although this was not a criminal offence. He maintains that spotters had been arrested and the CAA has said that it was not consulted on the decision. The complainant states that there is a public interest in these arrests which they maintain are happening unlawfully.

29. They further argue that the CAA is,

“not supposed to favour any private sector business and these e-mails involve an influence of a private sector company trying to utilise the CAA’s knowledge to in turn apply legal force against other businesses which are operating within the law”.

The complainant states that the CAA is -

“discussing legal matters with one private sector company while refusing to do so to the rest of the industry makes these e-mails even more concerning from a public interest angle.”

30. The complainant argues that the CAA is trying to mislead by using “a police style exemption when many years since they have removed themselves from the process of policing drones”. They provide a quotation from the CAA’s website to underline their point which the Commissioner was unable to find from the link. However, he did find an very similar quote elsewhere on the CAA’s site:

“The CAA agreed with the Police, in a Memorandum of Understanding signed in 2016, that the Police will take the lead in dealing with drone misuse incidents, particularly at public events, that may contravene aviation safety legislation or other relevant criminal legislation. Any concerns about the use of drones, either from a safety or privacy perspective, should be reported to the local police on 101. Therefore, police forces may have information on further prosecutions.”<sup>2</sup>

## **Public interest arguments in favour of maintaining the exemption**

### **Sections 31(1)(a),(b) and (c)**

31. Firstly, the CAA argues against the release of the information being in the public interest because it “would likely aid skilled, determined malicious parties as it may reveal investigator tactics used by law enforcement against” them “and the CAA as part of enforcement responsibilities”.

32. The information it withheld “represents sensitive internal discussions had by the CAA”. The CAA contends that it needs “safe space open and

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<sup>2</sup> [Corporate Centre \(caa.co.uk\)](http://caa.co.uk)

frank discussions relating to likely enforcement tactics and methods which, if released" could be used by "malicious actors" that "would gain an insight into the thinking and methodology".

### **Section 31(1)(g)**

33. The CAA explained why it had differentiated the public interest in section 31(1)(g) of FOIA from the public interest in sections 31(1)(a), (b) and (c) as follows:

"as to not only the likely criminal implications but also ascertaining whether individuals have breached or infringed the law, engaged in improper conduct or whether regulatory (rather than legal) action is required."

The CAA cited them "in tandem" as it is their position "that often the activities being discussed related to either a criminal activity or a regulatory infringement".

34. It repeats that the release of the information falling, "uniquely to this subsection, undermine the CAA abilities to undertake its audit and regulatory function" and consequently undermines aviation safety. Again, this would not be in the public interest.
35. Releasing this information would be likely to harm the CAA's ability to engage with the aviation industry and ensure that there is full and open discussion between the CAA and those it regulates regarding safety matters. This "depends upon the industry's complete confidence that any matter can be discussed without fear that the pressures of the public arena might delay action or distort the safety focus".
36. The CAA argues that it "relies on such information to discover illegal or improper conduct, assess the need for regulatory action and judge the fitness and competence of the organisation concerned". To release the requested information would be likely to damage the relationship between the CAA and the aviation industry leading to "less candid reporting and placing aviation safety at risk" which is not in the public interest.

### **The balance of the public interest**

37. There is a very strong public interest in protecting the ability of public authorities to enforce the law. The Commissioner, having seen the withheld information, is not persuaded that any undermining of the CAA's role in ensuring aviation safety is outweighed by transparency in this instance.



**Procedural matters**

38. Section 10 of the FOIA requires a public authority to disclose non-exempt information within 20 working days of receiving a request.
39. During the Commissioner's investigation the CAA released some very limited information that it did not believe to be exempt. Therefore it breached sections 1 and 10 of FOIA as this disclosure was outside the statutory timeframe.

## Right of appeal

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40. 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: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

41. 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.
42. 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 .....**

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