

ICO Hearing 50-01315  
**Decision**

Cayman Islands Airports Authority

Jan Liebaers  
Acting Information Commissioner for the Cayman Islands

23 February 2016

**Summary:**

In March 2015 an applicant requested access to records relating to an event dated 22 March 2015 involving two airplanes, which the Cayman Islands Airports Authority had investigated. The public authority withheld certain information under section 21(1)(b) (information concerning the commercial interests of any person or organization) of the *Freedom of Information Law 2007*.

During the appeal to the ICO additional records were discovered which were disclosed in redacted form under section 23(1) (personal information). The applicant confirmed he was not seeking the information exempted under section 23(1) but he did wish to pursue the occurrence report and an audio recording relating to the event, exempted under section 21(1)(b).

In this Hearing Decision, the Acting Information Commissioner, Mr. Jan Liebaers, found that the exemption in section 21(1)(b) did not apply to the responsive records because the disclosure of the information they contained would not prejudice the commercial interests of any person or organization, including the public authority.

Consequently, the Acting Information Commissioner ordered the disclosure of the two responsive records.

**Statutes<sup>1</sup> Considered:**

*Freedom of Information Law 2007*  
*Freedom of Information (General) Regulations 2008*

---

<sup>1</sup> In this decision all references to sections are to sections under *the Freedom of Information Law, 2007*, and all references to regulations are to the *Freedom of Information (General) Regulations 2008*, unless otherwise specified. At the time the request in this case was made the 2015 revision of the FOI Law had not yet come into effect, and therefore this Decision is made under the 2007 FOI Law.

**Contents:**

A. INTRODUCTION .....2

B. BACKGROUND ..... 3

C. PROCEDURAL ISSUES .....3

D. ISSUES UNDER REVIEW IN THIS HEARING .....4

E. CONSIDERATION OF ISSUES UNDER REVIEW.....5

F. FINDINGS AND DECISION .....10

**A. INTRODUCTION**

---

- [1] On 27 March 2015 the Applicant made a request to the Cayman Islands Airports Authority (“the Authority”) for access to a report on an event which took place on 22 March 2015 involving flights UAL1495 (United Airlines) and CAY505 (Cayman Airways), along with any other related documents and reports.
- [2] Three days later the term “other documents” was clarified by the Applicant to include any sound recordings and transcripts of communications between the planes’ cockpits and the control tower.
- [3] On 28 April 2015 the Authority informed the Applicant that it needed a 30-day extension before formally replying. A few days later the Authority explained that it needed the additional time to fully review and evaluate the request.
- [4] On 21 May 2015 the Authority responded to the Applicant, refusing access to the records by reason of the exemption in section 21(1)(b) of the FOI Law, which protects the “commercial interests of any person or organization (including a public authority)” where the disclosure would prejudice those interests.
- [5] An internal review was conducted by the Chief Executive Officer of the Authority, who upheld the decision to withhold the records under section 21(1)(b).
- [6] The matter was appealed to the ICO, and the appeal was accepted on 2 July 2015.
- [7] The Applicant had requested access to, amongst other things, “transcripts” of the audio recording of the communications between the air traffic control tower and the two aircraft involved. In the course of the appeal the Applicant made it clear that the request refers to any existing transcripts, and that no new transcription is required.
- [8] During the appeal the ICO queried why certain types of records, such as emails, had not been included in the response from the Authority in the light of the broad nature of the request. A more comprehensive search was then undertaken, resulting in the partial

disclosure of additional responsive records which were in part redacted under section 23(1) (personal information).

- [9] The Applicant confirmed that he did not wish to pursue the disclosure of the records redacted under section 23(1), and agreed to narrow the scope of the request to the ATC (Air Traffic Control) occurrence report and the sound recording from the traffic control tower and any transcript of the same.
- [10] Since the dispute could not be resolved amicably, the Applicant requested a formal hearing before the Acting Information Commissioner.

## **B. BACKGROUND**

---

- [11] The Cayman Islands Airports Authority is a statutory authority under the Ministry of District Administration, Tourism & Transport, created by, and subject to, the Airports Authority Law (2005 Revision).
- [12] The Authority owns and operates Cayman's airport facilities, consisting of two international aerodromes, Owen Roberts International Airport on Grand Cayman and Charles Kirkconnell International Airport on Cayman Brac.

## **C. PROCEDURAL ISSUES**

---

### Extension of period for initial response:

- [13] As noted above, on 28 April 2015 the CIAA gave notice to the Applicant that it needed to invoke section 7(4) and extend the time required to provide an initial response by 30 calendar days.
- [14] Given that the extent of the records under review at that time consisted only of a single report and transcript, I do not consider that the Authority demonstrated "reasonable cause for such extension" as required under the Law, and I consider their use of section 7(4) inappropriate in those circumstances.
- [15] However, I note that the Authority provided its formal response to the request before the expiry of the extended period.

### Adequate search:

- [16] Despite the wide nature of the request, the Authority did not conduct a comprehensive search, which should for instance have included emails relating to the topic at hand, until the ICO urged it to do so in the course of the appeal. This caused significant delays, in particular when the Authority took almost two months in the course of the appeal to locate, review and partially disclose additional responsive records.
- [17] Therefore, I do not consider that the Authority made reasonable efforts to locate all relevant responsive records when it initially received the request, as required under regulation 6. This is especially so since the Authority claimed that it required an extension of the standard 30-day timeline for its initial response.

## D. ISSUES UNDER REVIEW IN THIS HEARING

---

[18] The single issue under review in this hearing is:

1. **Whether the responsive records are exempt from disclosure under section 21(1)(b) of the FOI Law, and, if so, whether access shall nonetheless be granted in the public interest under section 26(1).**

[19] Section 6(1) provides:

*6. (1) Subject to the provisions of this Law, every person shall have a right to obtain access to a record other than an exempt record.*

[20] Section 21(1)(b) provides:

*21. (1) Subject to subsection (2), a record is exempt from disclosure if-*

*...*

*(b) it contains information (other than that referred to in paragraph (a)) concerning the commercial interests of any person or organization (including a public authority) and the disclosure of that information would prejudice those interests.*

[21] Section 21(2) provides:

*(2) Subsection (1) shall not apply where the applicant for access is the person or organization referred to in that subsection or a person acting on behalf of that person or organization.*

[22] Section 26(1) provides:

*26. (1) Notwithstanding that a matter falls within sections 18, 19 (1) (a), 20 (b), (c) and (d), 21, 22, 23 and 24, access shall be granted if such access would nevertheless be in the public interest.*

[23] Regulation 2 defines “public interest” as follows:

*“public interest” means but is not limited to things that may or tend to-*

- (a) promote greater public understanding of the processes or decisions of public authorities;*
- (b) provide reasons for decisions taken by Government;*
- (c) promote the accountability of and within Government;*
- (d) promote accountability for public expenditure or the more effective use of public funds;*
- (e) facilitate public participation in decision making by the Government;*
- (f) improve the quality of services provided by Government and the responsiveness of Government to the needs of the public or of any section of the public;*
- (h) deter or reveal wrongdoing or maladministration;*

- (i) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
- (j) reveal untrue, incomplete or misleading information or acts of a public authority.

[24] Section 43(2) provides:

- (2) *In any appeal under section 42, the burden of proof shall be on the public or private body to show that it acted in accordance with its obligations under this Law.*

## **E. CONSIDERATION OF ISSUES UNDER REVIEW**

---

### **1. Whether the responsive records are exempt from disclosure under section 21(1)(b) of the FOI Law, and, if so, whether access shall nonetheless be granted in the public interest under section 26(1).**

[25] For the sake of clarity I confirm that the Applicant is not “the person or organization [whose commercial interest is at stake] or a person acting on behalf of that person or organization”, and that subsection 21(2) therefore does not apply.

The position of the Authority:

[26] The Authority’s submission is very brief and, in full, states (emphasis added by the Authority):

***In support of the CIAA position regarding the above mentioned appeal. We submit the following arguments:-***

1. *The CIAA has a commercial interest in controlling the operation of commercial airlines, promoting safety and maintaining relationships of trust and confidence with the airlines and its staff.*
2. *The CIAA is therefore required to properly investigate any occurrences that may impact upon the safety the CIAA and Airlines’ operations.*
3. *In order to properly investigate such occurrences, it is essential that the commercial airlines and their employees and the employees of the CIAA co-operate fully with any investigations and provide information honestly and openly without fear of reprisal or publication.*
4. *The routine disclosure of documents produced in the course of such investigation is likely to ‘harm’ or ‘negatively affect’ the ability of the CIAA to carry out such investigations because the airlines and their employees and the employees of the CIAA are likely to be concerned about the publication of information that they provide and it is likely that they will not be as co-operative, honest and open during future investigations.*

5. *The CIAA therefore generally considers that documents and records produced in the course of safety and occurrence investigations are exempt unless their disclosure is required in the Public Interest in accordance with s. 26.*
6. *Although the CIAA generally considers that such records are exempt for the reasons set out above, it is accepted that there may be circumstances where disclosure is required because it is in the Public Interest (s. 26) - On this occasion there is nothing in the records that requires disclosure on the basis that it is in the public Interest for the records to be disclosed. The records do not contain any information that may promote greater public understanding of the processes or decisions of the CIAA.*

[27] The Authority did not make a reply submission.

The position of the Applicant:

[28] The Applicant did not make an initial submission, but did provide a reply submission.

[29] The Applicant believes the Authority's brief submission "misses the point entirely", as it mostly "reiterates routine duties of the CIAA" in regard to safety and operations.

[30] The Applicant rejects the Authority's claim that "routine disclosure of documents" would have a chilling effect on its ability to conduct investigations. He calls the responsive records in the present case "hardly a 'routine' disclosure", since the incident it relates to could have "threatened the safety of passengers on two aircraft".

[31] On the contrary, the Applicant finds it difficult to imagine that the Authority "is helpless to compel and/or expect the people it regulates to be 'honest and open'", and notes to his surprise that the Authority appears to doubt the honesty and openness of its own employees and others. The Applicant believes that, if their honesty is indeed in question, the case for transparency in the public interest is all the more compelling.

[32] The Applicant believes the issue of public safety, which the records pertain to, is very much a matter of public interest, and that the Authority's arguments against disclosure are "contradictory and... self-serving". He believes that the records,

*...may - or may not - indicate serious problems, and I would submit that passenger safety is a consequential matter of "public interest."*

*Should the records indicate no problems at all, so much the better for releasing them, and, coming full circle, resisting that release only fuels suspicion and a culture of secrecy, not to say obfuscation.*

[33] The Applicant expresses the opposite view from what the Authority is claiming in stating that the responsive records do contain information that "requires public disclosure", which "might 'promote greater understanding of the processes and decisions of the CIAA'".

[34] If, as he believes the Authority is claiming, the responsive records contain little of interest, then why, he asks, would it resist their disclosure? He hypothesizes that "At the very least, it appears the CIAA seeks to conceal something. At the worst, the records indicate internal problems at the Authority." If so, he says, "This must qualify as a matter of 'public interest'".

[35] The Applicant also wishes to make it clear that his request was not made in furtherance of “promoting greater understanding of the processes or decision of the CIAA”, as contended by the Authority except perhaps in “the most oblique sense”.

[36] The Applicant concludes that,

*It would appear from this remark that the CIAA wishes to accede only to requests that promote the image and well-being of the CIAA. This is not what I hope to accomplish.*

Discussion:

[37] Pursuant to section 43(2), quoted above, the burden of proof rests with the public authority to demonstrate that it has correctly exempted the responsive records from the general right to access in section 6(1).

[38] The Authority’s ponderings about the “routine disclosure of documents” produced in the course of an investigation seem irrelevant, since the question before me is not whether these types of records should be routinely disclosed in the normal course of business, but rather whether the specific records that are responsive to the Applicant’s request may be withheld by reason of section 21(1)(b) in the circumstances of the present case. There is no suggestion that these types of records should be routinely disclosed.

[39] The Authority says it “generally considers that documents and records produced in the course of safety and occurrence investigations are exempt...”. However, the blanket exemption of an entire category of records is rarely appropriate, particularly in the light of section 12(1) which demands that exemptions under the FOI Law are applied in a proportionate manner, by providing that access may only be denied to such part or parts of a record that are actually exempt, and that responsive records must be redacted accordingly.

[40] The former Information Commissioner and I have commented in a number of previous Decisions upon the inappropriateness of a blanket application of exemptions, as follows:

*While a public authority can legitimately believe that all responsive records are covered by the same exemption, a blanket approach is rarely the correct approach, particularly where the responsive records are extensive.<sup>2</sup>*

And,

*Questions of disclosure under the FOI Law must relate to specific records and a blanket application of an exemption ... is unjustifiable and disproportionate. Section 12 requires that exemptions be applied only to those parts of a record that are actually exempted. This could never be achieved with a blanket approach.<sup>3</sup>*

---

<sup>2</sup> Information Commissioner’s Office *Hearing Decision 25-00812 Port Authority* 25 October 2012 para 35

<sup>3</sup> Information Commissioner’s Office *Hearing Decision 37-02613 Planning Department* 22 July 2014 para 104, quoting from: House of Lords Hansard 17 October 2000 col 931

[41] The question at hand is therefore not whether the exemption applies in general, but rather whether the exemption that is being claimed applies to these records in the circumstances of this case, and, if so, whether it applies in full or in part.

[42] In order to consider this question, I have broken it down into two parts, as follows:

1. Do the responsive records “contain information concerning the commercial interests of any person or organization (including the public authority)”?
2. Would the disclosure of that information “prejudice those interests”?

**1. Do the responsive records “contain information concerning the commercial interests of any person or organization (including the public authority)”?**

[43] The Authority argues that it has “a commercial interest in controlling the operation of commercial airlines, promoting safety and maintaining relationships of trust and confidence with the airlines and its staff.”

[44] The type of information contained in the responsive records itself is not commercial in nature, and at first glance the responsive records do not seem to contain any information relating to commercial interests.

[45] The term “commercial interests” is not defined in the Law, and so it is to be given its normal, ordinary meaning, i.e. interests relating to “business, trade or profession”<sup>4</sup>, or to “buying and selling”<sup>5</sup>.

[46] In either meaning, the Authority and the airlines clearly do have commercial interests, the former in the form of airport concessions and contracts with suppliers, and the latter in the form of the sale of airline tickets, to name a few.

[47] The Authority’s arguments that seek to link the exemption in section 21(1)(b), which protects commercial interests, with regulatory functions pertaining to safety investigations, are in my view weak. The Authority’s regulatory functions in relation to safety are undertaken on behalf of the Cayman Islands Government in pursuance of the Authority’s legal obligations under section 5 of the Airports Authority Law (2005 Revision). That section obliges the Authority *inter alia* “to provide and control air navigation services” and “to ensure that the airports conform to the standards and recommended practices of the [International Civil Aviation Organisation]”. Such standards and practices extend to investigating and reporting events that have, or may have, safety implications, and maintaining associated safety reporting systems.

[48] The Authority has not adequately explained how or why it presumes that safety investigations have a bearing on commercial interests, which is what the exemption in section 21(1)(b) is about. I do not believe the Authority means to imply that compliance with Cayman Islands legislation and international safety and investigatory obligations, and the cooperation of the airlines and their staff, and the Authority’s own staff in safety investigations, are themselves primarily commercial endeavours.

---

<sup>4</sup> Peter Carey et al *Freedom of Information Handbook* 2nd edition London, The Law Society 2008 p 173

<sup>5</sup> Oxford Dictionaries Online



- [49] Notwithstanding the Authority's weak argumentation in this respect, I accept that the information in the responsive records does have a potential, albeit remote, bearing upon the commercial interests of both the Authority and the airlines concerned. This is so, because the safety record of an airline, and the manner in which the safety of air traffic is regulated by the Authority, may have indirect implications on the commercial success of the airlines, and to a lesser degree on the commercial success of the Authority, respectively.
- [50] **As such, I accept that the responsive records contain information that concerns "the commercial interests of any person or organization (including the public authority)".**

## 2. Would the disclosure of that information "prejudice those interests"?

- [51] The Authority states that disclosure of the responsive records would have a chilling effect on the Authority's ability to conduct safety investigations, and it claims that airlines and their staff, as well as the Authority's own staff, would be less likely to be honest and open for fear of reprisal or publication.
- [52] I do not believe this outcome is reasonably likely. Surely, safety is of paramount importance to the Authority and the airlines alike, and I would hope that compliance with legal and international obligations relating to safety, and honest, straightforward cooperation with a regulator's safety investigations are not as fragile as suggested by the Authority.
- [53] While the disclosure of the type of information contained in the responsive records may in certain circumstances be capable of prejudicing the commercial interests of the two airlines, and to a lesser degree the commercial interests of the Authority itself, it remains to be seen whether this "would" be so in the circumstances of this case.
- [54] In the *McIntyre* case the UK Information Tribunal clarified the following in relation to the term "would prejudice", in similarly worded exemptions in the UK *Freedom of Information Act 2000*,

*The words "would prejudice" have been interpreted by the Tribunal to mean that it is "more probable than not" that there will be prejudice to the specific interest set out in the exemption.<sup>6</sup>*

- [55] The Authority has not adequately addressed the likelihood of prejudice, although it was explicitly encouraged to do so by ICO staff in the course of the appeal process. The Authority does not actually even claim that disclosure "would" prejudice, but rather that it "is likely to 'harm' or 'negatively affect'", which is lower than the threshold required for the exemption in section 21(1)(b) to be engaged, as explained above.
- [56] I note that for the most part the records contain information that has already been published in the form of the Authority's own press release, as well as in the Press.<sup>7</sup>

---

<sup>6</sup> *McIntyre v Information Commissioner and the Ministry of Defence* EA/2007/0068 para 40

<sup>7</sup> See: "Aviation regulator to investigate 'go around'", *Cayman News Service* 26 March 2015; "An 'occurrence' that never should have occurred" *Cayman Compass*, 27 March 2015; "On the

[57] Aside from the Authority's weak reasoning, the contents of the responsive records appear to me to be quite anodyne, and I do not consider that it is reasonable to conclude that the threshold in the exemption in section 21(1)(b) has been met, in that disclosure of the records "would prejudice" or "is more probable than not" to prejudice any commercial interests including the airlines' or the Authority's.

[58] **Therefore, I do not consider that disclosure of the "information... concerning the commercial interests of any person or organization (including a public authority)" contained in the responsive records, "would prejudice those interests".**

[59] **Consequently, I find that the exemption in section 21(1)(b) does not apply to the responsive records.**

Public interest test:

[60] Since I have found, above, that the claimed exemption in section 21(1)(b) is not engaged, I am not required to consider whether "access should nevertheless be [granted] in the public interest" pursuant to section 26(1).

## **F. FINDINGS AND DECISION**

---

Under section 43(1) of the *Freedom of Information Law, 2007* for the reasons stated above I make the following findings and decision.

The exemption in section 21(1)(b) does not apply to the responsive records comprised of:

1. the completed Air Traffic Control ("ATC") Occurrence Report form relating to an event that occurred on 22 March 2015; and,
2. the voice recording relating to the same event.

Consequently, I order the Cayman Islands Airports Authority to disclose the responsive records in full.

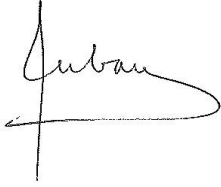
As per section 47 of the *Freedom of Information Law, 2007*, the Applicant or the relevant public body may within 45 days of the date of this Decision appeal to the Grand Court by way of a judicial review of this Decision.

If judicial review is sought, I ask that a copy of the application for leave be sent to my Office immediately upon submission to the Court.

If judicial review has not been sought on or before 8 April 2016, and should the Cayman Islands Airports Authority fail to disclose the responsive records in this matter, pursuant to section 48 of the *Freedom of Information Law* I may certify in writing to the Grand Court the failure to comply with this Decision, and the Court may consider such failure under the rules relating to contempt of court.

---

'occurrence' at Owen Roberts: Just roll the tape" *Cayman Compass* 31 March 2015; Tad Stoner "Air controllers remove Facebook account of airport incident" *Cayman Compass* 2 April 2015.

A handwritten signature in black ink, appearing to read 'Jan Liebaers'. The signature is stylized with a vertical line on the left and a large, sweeping horizontal stroke that curves upwards at the end.

Jan Liebaers  
Acting Information Commissioner  
23 February 2016