



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
GENERAL REGULATORY CHAMBER UNDER SECTION 57 OF THE
FREEDOM OF INFORMATION ACT 2000**

Information Tribunal Appeal Number: EA/2009/0111
Information Commissioner's Ref: FS50167298

Decided at an oral hearing sitting Promulgated
at Field House 6th July 2010.
On 4th - 5th May 2010

BEFORE:

FIONA HENDERSON
And
MICHAEL JONES
And
ANDREW WHETNALL

BETWEEN:

PHILIP KALMAN **Appellant**
And
THE INFORMATION COMMISSIONER **Respondent**
And
THE DEPARTMENT FOR TRANSPORT **Additional Party**

Subject Matter:

Section 24 FOIA national security
Section 2 FOIA - public interest test

Cases:

Secretary of State for the Home Department v Rehman [2001] UKHL 47

PETA v Information Commissioner and University of Oxford EA/2009/0076

Gottfried Heinrich Case C-345/06

Malone v UK(1985) 7 E.H.R.R.14

Representation:

For the Appellant **Mr Kalman Represented himself**

For the Respondent **Miss Anya Proops**

For the Additional Party **Mr Jeremy Johnson**

Decision

The Tribunal allows the appeal in part and varies the Decision Notice **FS50167298** dated 16th November 2009 as set out below and dismisses the rest of the appeal for the reasons set out below and in the Confidential Schedules.

The information to be disclosed (as defined in the Tables attached to the Open Decision and Confidential Schedules¹) should be provided to the Appellant within 21 days from the date of this Decision.

We direct that the Confidential Schedule 1 to our Reasons for Decision should remain confidential until the information so ordered has been disclosed by the Department for Transport. We further direct that Confidential Schedule 2 should remain confidential.

¹ For ease of reference the table in confidential Schedule 2 is complete and contains open and closed material. An edited version containing only open material is appended to the open Decision. References to material that is currently closed but subject to disclosure pursuant to this Decision as well as appearing in Confidential Schedule 2 have been placed in a separate confidential document (Confidential Schedule 1) which must remain confidential until disclosure has taken place.

SUBSTITUTED DECISION NOTICE

Public authority: Department for Transport

Address of Public authority: Zone 9/2 Southside,
105 Victoria Street,
London SW1E 6DT.

Name of Complainant: Mr Simon Kalman

The Substituted Decision

Section 24 FOIA is not engaged in relation to the information already disclosed as set out at paragraph 40 at seq below and as defined in tables to the Open Decision and the Confidential Schedules, and additionally the balance of public interest lies in the disclosure of that information.

The Decision

There are additional breaches of section 1(1)(b) and section 10(1) FOIA in that the public authority failed to disclose at the time of the request, the information as defined in tables to the Open Decision and the Confidential Schedules to this Decision.

Steps Required

Where it has not already done so, the public authority must disclose the information as defined in the tables to the Open Decision and the Confidential Schedules, to the Appellant within 21 days from the date of this Substituted Decision Notice.

Dated this 6th day of July 2010

Signed

Fiona Henderson

Tribunal Judge

Reasons for Decision

Introduction

1. Part II of the *Aviation Security Act 1982 (ASA)* enables the Secretary of State to issue a Direction in writing to (amongst others) the manager of any aerodrome in the United Kingdom or to the operator of one or more aircraft registered or operating in the United Kingdom to conduct searches (as set out in the Direction) by persons specified in the Direction. The Directions are drawn up by the Transport Security and Contingencies Directorate (TRANSEC) following threat information provided by the Joint Terrorism Analysis Centre (JTAC). The Directions are highly sensitive. They set out the detail of the mandatory security procedures. The Directions are not in the public domain.
2. These Directions are not published and are issued to “directed parties” only i.e. those required to carry out security functions set out in the Directions on a need to know basis.

The request for information

3. The Appellant requested information relating to these Directions by letter dated 12th January 2007 from the Transport Security Directorate, Department for Transport, (DfT) which included the following items:

“I understand that your Directorate issues directives to UK Airport Operators regarding the “security screening/searching” of passengers before they board commercial flights at any/all UK airports.

...

- 2) *Does your Department **insist** on the segregation, at “central search”, of all passengers flying on Israeli registered aircraft (e.g. those belonging to El Al, Israir*

and Arkia) and does your Department insist on all such passengers removing their shoes and having them security scanned?

3) *If your Department does have these requirements, I request a copy of all relevant publications issued by your Office.*

...

4. The DfT responded on 2nd February 2007 refusing the request and relying upon sections 24 FOIA (national security) and 31(1) FOIA (prejudice to the prevention of crime or apprehension of offenders).

5. Mr Kalman wrote requesting a review of this decision on 5th February 2007. He also made a second information request which was answered and is not the subject of the Decision Notice or this appeal.

6. The review was conducted by Linda Willson, Deputy Director Maritime and Land Transport Security, TRANSEC and the result was notified to Mr Kalman by letter dated 24th May 2007. The review upheld the refusal of the information relating to the first request in relation to section 24 FOIA but not in relation to section 31 FOIA but for the same reasons set out in the refusal notice.

7. Mr Kalman made another information request on 16th June 2007 which asked: *“...is there a Directive (or any other type/form of instruction) that requires ALL passengers who have been selected to pass through a dedicated central search facility (e.g. El Al at London , Heathrow terminal 1)... to remove their shoes?”*²

8. The DfT refused the request in a letter dated 25 June 2007 under sections 24 and 31(a) and (b) FOIA but confirmed that:

“Several additional Directions were put in place following the threat in August³ including Directions on the search regimes for shoes. These Directions apply to UK

² Mr Kalman also included *“British Airways First Class passengers at London, Heathrow Terminal 1 (check in Zone R)”* but this part of the request did not form part of his appeal .

³ The terrorist plot in 2006 involving the use of liquids to create explosives which resulted in passengers being restricted in the amounts of liquids they could take onto a plane.

Aerodrome Managers regarding the security screening and searching of passengers and staff, travelling from or working at any UK airport. These Directions therefore include and equally apply to El Al passengers.”

9. The internal review conducted by Tim Figures (Head of International Aviation and Safety at the DfT) dated 20th August 2007 upheld the application of these exemptions⁴ but added that:

*“... the Department has issued Directions to Aerodrome Managers setting out the minimum passenger search standards that they must put in place. I can confirm that these Directions include details about the particular search regime for shoes, including the proportion of passengers whose shoes must be screened. **The precise means by which these overall search standards are put in place and maintained is a matter for the discretion of the local airport management, and is not directed by the Department.**”⁵*

The complaint to the Information Commissioner

10. Mr Kalman complained to the Commissioner on 18th June 2007 and 28th August 2007 in relation to the 2 information requests which are the subject of this appeal.

11. The information identified by the DfT at that time as falling within the scope of the request was disclosed to the Commissioner and following an investigation during which the Commissioner sought further information by way of clarification and explanation from the DfT, the Commissioner issued Decision Notice FS50167298 dated 16th November 2009⁶ which found:

- Not all the information provided was caught within Mr Kalman’s request,

⁴ The DfT now accept that they dealt with the request in a “blanket” fashion and did not consider using the Commissioner’s approach of redaction of the document to enable disclosure of some information, which they would now do if faced with the same situation.

⁵ Emphasis added

⁶ The Commissioner’s investigation and Decision Notice dealt with all the information requests which were then outstanding, not all of these are subject to appeal.

- Section 24 was not engaged in relation to some of the material and that in consequence there had been a breach of sections 1(1)(b) and 10(1) FOIA.
- Where section 24 FOIA was engaged the public interest was in favour of withholding the information.
- Where section 24 FOIA was not engaged and the DfT were still relying upon section 31 FOIA, the Commissioner found that section 31 FOIA was not engaged.
- The Commissioner did not make a finding as to whether section 31 FOIA was engaged in relation to the information where he had found that the information was correctly withheld under section 24 FOIA.
- The DfT were required to disclose redacted versions of Annex A-C as provided for in Annex D of the Decision Notice.

The appeal to the Tribunal

12. Mr Kalman appealed to the Tribunal on 18th November 2009 in which he confined his requests relating to the January request to those set out at paragraphs 3 and 7 above. He stated that he was *“not asking for any technical information as to the capabilities of scanning equipment, and whatever “random” additional searches might be conducted”*.

13. He served further and better particulars in response to the Tribunal’s Direction in February 2010. His grounds of appeal were there itemized as:

- Ground 1 “Citizens should not be subjected to a “secret law”.”
- Ground 2 – “the decision of the Commissioner not to order the release of the documents is perverse”.

The Tribunal is satisfied that ground 1 is a matter that should be taken into account in the exercise of the public interest test (under section 2(2)(b) FOIA) and that ground 2 is a challenge as to whether section 24 is engaged and if so whether the Commissioner was right as to where the public interest balance lies.

14. At the start of the hearing Mr Kalman confirmed that he was only appealing the Commissioner's Decision in relation to the June information request to the extent that it was set out in paragraph 7 above.

Scope

15. The Tribunal has limited its consideration of the withheld material to the extent that it falls within the scope of Mr Kalman's request insofar as it is the subject of the appeal. The Tribunal notes that there is no challenge to the Commissioners exclusion of paragraphs 26-56 of Annex C on the basis that they were not within the scope of the request. Additionally Mr Kalman states in his grounds of appeal that:

"I am happy to accept a redacted version of any Direction(s) that deal with these matters". The Tribunal is satisfied that by "these matters" Mr Kalman means the information requests that are the subject of the appeal. Consequently the Tribunal is satisfied that the request for copies of the relevant Directions should be construed as those parts of the directions containing information that falls within the information request that is the subject of this appeal.

16. However, the Tribunal is conscious that Mr Kalman has not seen the withheld information and that there would be a difficulty in establishing a comprehensive definition with him of what constitutes technical information in this context without trespassing upon the contents of the withheld material. Consequently, where there could be a dispute as to whether any of the information which would otherwise be caught within the request that is the subject of this appeal should be excluded because it constitutes technical information, the Tribunal has treated it as within scope.

The withheld information

17. The Tribunal was provided with copies of 3 documents referred to as Annex A, B and C. These were the documents provided by the DfT to the Commissioner as containing the disputed information which fell within the scope of the information requests. These were:

- Annex A:

*Variation Direction to certain Aerodrome Managers Under the Aviation Security Act 1982, relating to Airlines at Significant Risk 3(b)(iv)*⁷

- Annex B:

A Direction to Aerodrome Managers which came into effect on 22nd September 2006

- Annex C:

Direction to Aircraft operators, aerodrome Managers, Regulated Air Cargo Agents, and Catering Undertakings under the Aviation Security Act 1982 Relating to Heightened Security Measures 2005. (First Issued 31 March 2005)

18. Annex A provides at Article 1:

“The Direction under the Aviation Security Act 1982 to certain aerodrome managers relating to airlines at significant and high threat is hereby varied as set out below:

...

A footnote explains that the Direction in Article 1 was:

“issued on 14 May 1999 (Direction 3(b)). As amended by Direction 3(b)(i) and 3(b)(ii) on 3 September 1999, and Direction 3(b)(iii) on 22 December 1999.”

19. During the hearing it became apparent that the original 1999 Direction and those first 3 variations had not been disclosed to the Tribunal. These documents were supplied to the Commissioner and the Tribunal during the hearing. The original Direction itself referred back to a 1998 Direction which had been revoked in 2004 (prior to the information request) when replaced by a Consolidated Direction which came into force in May 2004. The Tribunal and Commissioner were supplied with a copy of the 1998 Direction and the 2004 consolidated Direction.

20. There was no direct evidence as to whether the 1999 Direction was ever provided to the Commissioner during the currency of his investigation. It was noted that the Commissioner requested it (he did not specifically ask for the variations but in asking for the Direction he could be presumed to be asking

⁷ Variation 3(b)(iv) was first issued 31 August 2000

for the Direction that was in force at the date of the information request which would have included the variations) in his letter dated 29th October 2008 to the DfT. The DfT's response to that letter made no reference to supplying the document (unlike the DfT's letter dated 7th October 2008 which supplied Annexes A-C). The Commissioner checked his files and no copy of the document was contained therein and the Decision Notice makes no reference to whether any parts of this document were in scope. Consequently it was the Commissioner's position that no copy was provided, although the Commissioner was unable to explain why in light of his request it had not been followed up.

21. The DfT is unable to confirm whether the document was ever provided.
22. Additionally Variations 3(a) and 3(a i-ii and iii) to the 1999 Directive were provided. There is no dispute that the Commissioner was not provided with a copy of the 3(a) variations, or the 1998 Direction or the 2004 consolidated Direction which replaced it.
23. Having had sight of these additional documents the Tribunal is satisfied that there were parts (as set out in the open decision and in detail in the closed schedules) which were in scope and which should have been considered by the DfT both in their original response to the Information request and by the Commissioner during his investigation. The DfT's evidence was that they concentrated upon Directions that were extant at the time of the request and appeared to be relevant to his concerns. They did not include Directions no longer in force or superceded. The Tribunal accepts that this is the right approach but in this case by failing to follow the paper trail fully, relevant material that was in force was omitted from consideration. Whilst the Tribunal considers this to be a procedural failing in the way that the DfT handled the request, on the basis that the existence of the other documents was apparent from the material provided to the Commissioner, the Tribunal is satisfied that there was no attempt to hide this information from the Commissioner.

Evidence

24. The Tribunal took into account all the evidence and material before it but does not repeat all of it in this Decision. The Tribunal heard both open and closed evidence. Wherever possible evidence is dealt with in the open decision, there are however, 2 closed schedules which refer to the content of and the evidence concerning the disputed material.
25. It was agreed between the parties that Mr Kalman's original grounds of appeal and the first paragraph of ground b of his further and better particulars would stand as his evidence before the Tribunal. Whilst he was not formally cross examined by any party, Mr Kalman added detail to his evidence during the course of the hearing.
26. Mr Kalman told the Tribunal that he used to travel a lot (20-30 flights per year and very frequently to Israel) and he became aware around 2001-2002 (from his own experience) that passengers flying on El Al and their subsidiary airlines also flying from Heathrow to Israel (but not passengers on other airlines to Israel or other destinations) were segregated at Central Search into a specific search channel (the S-Channel) on the far left of the airport. This was in addition to the highly visible extra security checks carried out by El Al on their own passengers. His evidence was that on each occasion there had been a handwritten notice directing "El Al passengers flying to Tel Aviv" to this specific search channel. This notice was stuck to the wall at the entrance to Central Search, but that there was no information relating to this on the website. This notice was plain for all travellers and non travellers to see. After 2006 (when security was tightened in response to the plot to smuggle explosives onto aeroplanes using soft drink containers) it was Mr Kalman's experience that passengers in this search channel were all required to remove their shoes for searching.
27. Around 2008 Mr Kalman told the Tribunal that he was no longer required to go through the S-Channel. It was his calculation based on the number of

flights El Al had per day, that up to 800⁸ people per day had gone through this channel during a 7 year period. When Mr Kalman had challenged the airport as to why he and his family were subjected to what he perceived to be a more rigorous search process, he was led to believe that the Airport “had” to use this process because they were required to by a Direction.

28. The DfT called John Parkinson Deputy Director of TRANSEC from January 2004- July 2007: and tendered Michael Lee, Senior Aviation Policy Advisor TRANSEC for Cross examination at the request of Mr Kalman.
29. Mr Lee confirmed that the Directions did not at the relevant time carry a marking of restricted upon them (since they were disseminated outside government circles) however they were only provided to those who were required to act upon them. They were sent to a named individual with a covering letter. Mr Lee was unable to recall the exact form of words (whether it was “restricted” or “confidential”) but they were not to be circulated publicly. It was accepted that there was no specific offence for the disclosure of these under the ASA (although wrongful disclosure might still constitute an offence under another Act e.g. the Theft Act, depending upon the circumstances).
30. The Directions constituted the minimum requirements and airports could impose additional security measures of their own motion. The Directions set standards but there was flexibility as to how the individual airports achieved these ratios (the proportion of those searched/not searched). This takes into account, for example, that different airports have different layouts. During the course of the hearing the DfT conceded that “*airport security programme*” means a current written statement, maintained by the aerodrome manager and submitted to the DfT, of the measures adopted at the aerodrome to safeguard civil aviation against acts of unlawful interference”. The Tribunal was satisfied that this meant that TRANSEC ought to be aware of any additional measures put in place by aerodromes.

⁸ The DfT place the number at 600 but the Tribunal is satisfied that the difference is not material

31. There was a system of Inspection by TRANSEC in place involving covert and open testing procedures. These audits were not published by the DfT but the compliance regime is on the public website. The DfT have a range of penalties and sanctions available (e.g. as set out in ASA 1982 sections 18A and 18C)⁹ ranging from the issuing of advice and guidance to prosecution (although no airport was prosecuted by TRANSEC in the 3 ½ years Mr Parkinson was in that Post). Although Inspectors ought to be able to ensure whether measures adopted were non-discriminatory, proportionate and effective, to an extent it depended upon the individual Inspector and what they actually saw. It was accepted that the public would have no way of knowing what was in a Direction, and what was part of the airport security programme. Equally they had no way of knowing how efficient an Inspector was.

Legal submissions and analysis

32. Is section 24 FOIA engaged?

“24(1) Information which does not fall within section 23(1)¹⁰ is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

...

(3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b... is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact. ...”

The DfT do not rely upon a certificate under section 24(3).

33. From the wording of Section 24 FOIA the information has to be “required” for the purposes of safeguarding national security. The Commissioner argued and it was not disputed by the other parties that “required” means “reasonably necessary”; and it is therefore not sufficient that the information sought simply relates to national security. The Tribunal adopts this approach.

⁹ Sec 18A and C ASA1982 Enforcement notices and penalties for failing to comply

¹⁰ The exemption at section 23 FOIA protects information supplied by or relating to specified security bodies.

34. There was no challenge in law to the Commissioner's and DfT's reliance upon *Secretary of State for the Home Department v Rehman [2001] UKHL 47* which the Tribunal adopts. This case concluded that:

- National Security is defined as "*the Security of the United Kingdom and its people*". (para 50)
- The risk does not have to be the result of a "direct threat" to the United Kingdom (para 16-17)
- Reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security (para 17).

35. Mr Kalman's dispute is one of interpretation of the evidence. It is his case that the withheld information as a matter of fact would not harm national security and that consequently it is not reasonably necessary to withhold it to safeguard national security. His case is that:

- The existence of an S-Channel is public knowledge because of the notice in a public area that had been there for up to 7 years and the experience of all passengers during this time.
- It was already public knowledge that El Al passengers were subjected to additional security measures (the visible extra security procedures adopted by the airline).
- Frequent travellers already have a pretty good idea about shoe search ratios.
- The Directions were widely disseminated, large numbers of employees of the airport and the airline would be aware of their contents.
- The DfT are overstating the sensitivity of the Directions which were not marked restricted.
- The DfT by their actions did not consider the material to be very sensitive (a sealed package containing the closed bundle of restricted material was accidentally sent to Mr Kalman by the DfT during the preparation of this hearing.)

- The DfT are inconsistent in their approach; disclosing the existence of body scanners at 2 named airports when the same arguments as to sensitivity (i.e other airports might be targeted as a result) could be said to apply.

36. The Tribunal does not accept that the DfT were uniformly overstating the sensitivity of the Directions. Although they were not then marked restricted, they were:

- sent to named individuals,
- only provided on a need to know basis to directed parties,
- with a covering letter stating that the contents were sensitive or restricted.
- There is no evidence before the Tribunal that the contents of any Directions have come into the public domain through insecure handling by airports or airlines.

37. Equally the Tribunal is satisfied that the DfT acted swiftly to retrieve the closed bundle of restricted material, attempting to contact him immediately, visiting him the same day. It is accepted that the package was returned unopened by Mr Kalman.

38. The Tribunal is satisfied that each decision to disclose is made upon its own facts and the line taken in relation to Body Scanners does not undermine the DfT's arguments in this case. The Tribunal heard that the decision to disclose the existence of the Body Scanners was taken at Secretary of State level, in a climate where there were serious public interest concerns relating to privacy and data protection. A judgment had to be made in relation to the risks, but it was believed that disclosure of the use of this level of technology in the UK showed the level of commitment to security in the UK and in this respect was a deterrent to terrorists.

39. The DfT's case (supported by the Commissioner) is that:

- Disclosure would potentially undermine the effectiveness of UK airports' search combs because it would enable those with harmful intent to gain valuable insights into the detailed operation of the UK aviation security capability.
- Selective disclosure of limited quantities or certain types of information would not remove the danger as incomplete or partial information could supplement information that is already publicly available or gained through reconnaissance and can be used to build a clearer picture.¹¹
- With this information terrorists could target their resources accordingly, diminishing the effectiveness of the UK aviation security regime.
- The consequence of getting a prohibited article through the search comb could well be the loss of an aircraft and its occupants.
- Aircraft departing the UK could be used to commit terrorist acts against other states and their citizens.
- Although passengers could make an educated guess as to the ratios of shoe searches or the existence or otherwise of an S-channel, the certainty is not there. Different airports have different regimes. Disclosure would reduce the amount of reconnaissance required, and terrorists are sometimes detected and apprehended because they are carrying out reconnaissance.

40. During the hearing the DfT disclosed some additional material as set out below.

i. From Annex A:

“After article 5 there shall be inserted the following:

“5A. When an operator is operating at significant threat then the aerodrome manager may apply the provisions in article 5B in place of those in articles 2 and 3.

5B It shall be the duty of the aerodrome manager to ensure that:

A designated S-Channel is provided...

ii. From Annex A Article 2 and variation 3(a)iii of the 1999 Direction

¹¹ The Tribunal will refer to this as the “jigsaw effect”.

““S Channel” means a designated security channel”

iii. From variation 3(a)(iii) of the 1999 Direction article 36A is inserted which reads:

“36A “When an operator is operating at significant threat then he may apply the provisions contained in article 36B in place of those in articles 33 and 34. In such cases an S-Channel shall be provided by the aerodrome manager in accordance with article 5B of Direction 3(b) (“5B”)...”

41. These disclosures have the following effect that the relevant aerodromes were **permitted** by the DfT to have an “S-Channel” through which all passengers on specified carriers were required to pass. They only **“insisted”** in the sense that it became mandatory **if the relevant airline asked for an S-Channel**.

42. The Tribunal is satisfied that the DfT were correct to make these additional disclosures because in the view of the Tribunal section 24 was not engaged in relation to that part of the disputed information¹² because as argued by Mr Kalman:

- An S-Channel had been in existence at Heathrow for around 6/7 years at the date of the request,
- This fact was evident to all passengers who were required to pass through it (up to 600-800/day).
- This fact was evident to all other passengers who were not permitted to pass through it (the Tribunal would estimate this at many thousand every day).
- This fact was evident to anyone who read the notice on display in the public area of the airport.

And additionally:

- It was Mr Lee’s professional opinion (in light of his current understanding of FOIA) that disclosure of this fact would not have been a security concern at the relevant time.

¹² Additionally the public interest favours disclosure (for the reasons set out at paragraph 46 et seq below)

43. Whilst it is accepted that this disclosure provides certainty where before there was none, the Tribunal is satisfied that the information was so well disseminated by the date of the information request that those with an interest would have been certain that the system was operating and to whom it applied.

44. In relation to the rest of the disputed material, the Tribunal finds that some additional disclosures should be made as set out in the 1st closed schedule. In these cases section 24 FOIA is not engaged because the matters are already in the public domain (e.g. where the same or almost identical information has already been disclosed by the DfT or because they were already well disseminated or apparent).

45. In relation to the rest of the disputed material, the Tribunal accepts the DfT's arguments as set out at paragraph 39 above and makes the following findings of fact based upon the evidence:

- The disputed information is not in the public domain.
- There is a serious global terrorist threat to the aviation industry,
- The disclosure of the disputed information would reveal information relating to the methodology of the searching of passengers at airports.
- Such information would be of potential use to international terrorists, (especially if combined with other information in the public domain or obtained from reconnaissance).
- The information could be used to target the UK aviation industry or other countries whose planes started their journey in the UK.

Consequently section 24 is engaged. (Additional reasons detailing the disputed information are set out in the closed schedule).

The public interest test

46. Section 24 FOIA is a qualified exemption in that pursuant to section 2 FOIA:
(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

...

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

47. The Commissioner and DfT draw a parallel with *PETA v Information Commissioner and University of Oxford EA/2009/0076* a case concerning section 38 FOIA where the Tribunal agreed that there was significant additional weight in favour of withholding the disputed information because of the nature of the threat (in that case an increased risk of indiscriminate and extreme acts of bombing and arson). In that case (as in this case) it was not suggested that the nature of the risk has the status of turning the exemption into an absolute exemption but, that it requires a very strong public interest to equal or outweigh it. They argued that even if the chances of the risk happening were low, the consequences were so serious that the public interest lay in favour of withholding that information. In this case the threat involves the risk of the death or serious injury of many through terrorist action. This Tribunal sees no reason to depart from that approach which is even more applicable in light of the numbers of those potentially affected in the event of a successful terrorist attack of this nature.

48. All parties accepted that the following were factors in favour of disclosure (although Mr Kalman attributed them the most weight and the DfT the least):

- Public reassurance that detailed measures are in place and are effective in making air travel secure.
- This might increase public confidence in the UK aviation security regime as a whole.
- More informed public debate about wider aviation security policy to promote a spirit of openness and transparency.

49. Mr Kalman and the Commissioner pointed to the system of inspection as the only safeguard that the Directions were being carried out effectively. Whilst the compliance framework was on the DfT website, there were no

league tables or rates of compliance published. No audits or details of the audits were made public. The public was entirely reliant upon the Inspectors to uphold the system but had no way of knowing if they were effective. Whilst the Tribunal agreed in principle, the panel found that the Directions alone (without e.g. the audit rates or additional details of how the Directions would be implemented by those responsible) would not add significantly to the public debate.

50. In favour of disclosure it was argued that this debate would enable the public to assess whether the regime was unnecessary, or insufficient. Mr Kalman argued that those flying El Al and their subsidiaries were subjected to harsher systems and “picked upon”. Airports may have used those flying on Israeli airlines to hit their targets, but this might be unnecessary to meet the security threat or indicate that too little attention was being paid to security on other airlines.

51. The DfT argued that much of this argument can already be made in terms of what is already in the public domain (e.g information relating to cabin bag searching, restriction of liquids in the cabin) and from that which each passenger experiences. Passengers may have had their own shoes searched or seen the procedure take place in relation to other passengers. Additionally since the public would not be aware of the security information and assessments upon which the Directions were based, because this was not included in the Directions, this would reduce their ability to make the judgment as to sufficiency and efficacy from any disclosure of the Directions.

52. Additionally Mr Kalman argues that there should be legal certainty – a citizen should be able to see the legal source of any obligation imposed upon him. He provided by way of illustration a list of examples of laws which imposed duties and legal responsibilities on retailers and others that directly affect consumers which they have available to them e.g *Licensing Act 2003* (age restrictions re the purchase of alcohol). These he contrasted

with the Directions under the ASA. The DfT and Commissioner agree that there is generally a significant interest in ensuring that the sources under which legal obligations are imposed are publicly accessible.

53. The DfT argue that there are no “secret laws” in this case. They point to the fact that the legal framework is in the public domain:

- Common Law whereby an occupier of premises is entitled to impose conditions of entry to the premises,
- The Chicago convention 1944 which requires the UK to comply with regulations adopted by the Council of the International Civil Aviation Organisation (ICAO)
- Part II of the Aviation Security Act 1982 which permits the Secretary of State to issue Directions.

54. However this does not assist the DfT substantially as the Tribunal notes that the obligations and procedures in place are only evident from the Directions and not the legal framework.

55. Additionally the DfT argues that the Directions themselves are not addressed to the public but e.g. the Aerodrome Manager.

56. The Tribunal does not accept that this undermines Mr Kalman’s secret law arguments. Whilst the thrust of the argument before the Tribunal seemed to suggest that the public would never face a sanction because of the contents of the Directions, the Tribunal notes that under section 13(4)(b) ASA 1982 where a Direction given to the manager of an aerodrome is in force, an offence is committed when any person intentionally obstructs “a person acting in the exercise of a power conferred upon him by subsection (3) above”. (which includes the search of a person in any part of the aerodrome whom the searcher has reasonable cause to suspect has an article prohibited under Section 4 of the Act¹³).

¹³ Articles prohibited under section 4 include Firearms, explosives and articles made or adapted to cause injury to persons or damage to property.

57. If wishing to refuse to submit to a search by e.g. an employee of the aerodrome, in order to avoid a criminal sanction, the Public would need to know the contents of a Direction to this limited extent:

- Whether a Direction has been issued in relation to a particular airport?
- When it is in force?
- Who is specified in the Direction?

It was argued that persons choose to fly and that any effect of the Directions upon the public is voluntary. However, the Tribunal is satisfied that a passenger who joins the S-Channel who then declines to be searched can be compelled or subjected to criminal sanctions.

58. It is clear that there is no reference to the search of passengers in the Heathrow By-laws. Mr Kalman sought to use this omission to strengthen his secret law argument, namely that the authority for the searches was in the Directions which were not publicly available. The Tribunal does not consider that this takes the case any further. It notes that the Directions may make it compulsory to adopt certain procedures which would otherwise be optional. It is not that they permit behaviour which would otherwise not be permitted.

59. Mr Kalman referred to *Gottfried Heinrich Case C-345/06* where it was held that EU law cannot have binding force against individuals unless and until it is published. All parties accepted that this case was not a precedent, Mr Kalman argued that it was persuasive and provided support for his arguments against secret laws. The Tribunal considers that it does not add to the arguments already set out above, and notes that there is no independent right to the disputed information, and that the Tribunal's jurisdiction is limited to whether the information is disclosable under FOIA. In this case no EU instrument was involved, and in any event it is not for the Tribunal to rule upon the legal effect of the Directions sought.

60. The Tribunal also considered Malone v UK(1985) 7 E.H.R.R.14 a case which, when considering the legality of telephone tapping, concluded that there had been a breach of the Article 8 (right to respect for private and family life). At Para 67 the Court held that:

“there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by [Article 8(1)]. Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident...”

61. Whilst this is not binding upon this Tribunal (there being no suggestion that these Directions involve a breach of any Human Right) the Tribunal does consider that this case gives support to the general desirability that laws are not too obscure.

62. In Malone the Court did add a caveat (also in paragraph 67):

“In particular the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence”.

The Tribunal considers therefore that this supports the DfT’s arguments that operative details should remain withheld along with information which provides certainty (e.g. who will be searched, when, why and to what level). Additionally the Tribunal gives weight to the DfT’s argument that even absent a breach of Human Rights, the personal liberties at risk in airport security inspections are not on the same scale as freedom from interception of communications.

63. In judging where the public interest lies, the Tribunal further takes into account Silver v UK as quoted in Malone at paragraph 68:

“a law which confers a discretion must indicate the scope of that discretion” although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law. ...the law must indicate the scope of any such discretion.”

64. This has particular relevance in this case and supports the disclosures made at paragraph 40 above and those ordered by the Tribunal in the 1st closed schedule ¹⁴because:

- Section 13(1) of the ASA 1982 specifies that the Directions to the manager of any aerodrome require him to use “his best endeavours” to ensure that specified searches are carried out.
- The evidence was that it is up to the manager of the aerodrome how he chooses to put these Directions into effect,
- The manager of an aerodrome has such wide discretion (as to how the Directions are implemented and what if any additional measures he chooses to take¹⁵) that he is required to submit an “airport security programme” meaning a current written statement of the measures adopted at the aerodrome to safeguard civil aviation against acts of unlawful interference,
- Unless an airline operating at significant threat insists upon the implementation of an S-Channel ¹⁶, the manager has discretion whether to apply the provisions in article 5B (the S-Channel).¹⁷

65. The Tribunal accepts that it is desirable that parties should be aware of obligations that they are required to meet and the Tribunal notes the sanctions in ASA 1982 set out in paragraph 56 above. It was not argued that any specific Human Right was infringed by the shoe searching provisions or the use of the S-Channel. The Tribunal was addressed as to the circumstances where it might be possible to bring a claim of discrimination, or in competition law. The Tribunal accepts that there might be circumstances where a member of the public wanted to bring a

¹⁴ Although disclosure is made on the grounds that section 24 FOIA is not engaged, the Tribunal was also satisfied that were section 24 FOIA engaged, the balance of public interest in relation to this information would lie in favour of disclosure.

¹⁵ See paragraph 9 above

¹⁶ variation 3(a)(iii) Article 36A

¹⁷ Annex A Article 5A

claim but would not know against whom a case lay (airport/airline/DfT) or whether they had a strong case (a Direction based upon security information might have a different status to a security measure brought in by an aerodrome of its own volition). Additionally section 19(2) ASA 1982 provides a bar to civil or criminal claims arising out of anything “*done or not done [...] in compliance with such a direction.*”

66. The public have a legitimate interest therefore in knowing whether an action complained of arises out of a Direction or not. The DfT sought to argue that the process of civil litigation (disclosure to the parties or the Judge) would enable a Court to determine any claims brought. The Tribunal is satisfied that litigation is expensive and uncertain and that it is in the public interest for parties to know, if they have a complaint, where they stand in relation to the powers exercised by airport security staff before bringing legal actions. For example if the public do not know whether security action is taken as a consequence of or under the authority of a Direction under the Act, they would not know whether the bar cited in paragraph 65 above applied.

Factors in favour of withholding the disputed information

67. Against disclosure the DfT and the Commissioner argued that disclosure at the time of the request would:

- weaken the deterrent effect of the search comb by providing certainty,
- potentially enable terrorists to target their resources according to the information available to them,
- Undermine the effectiveness of the UK airports’ search combs,
- Partial disclosure would supplement other information already in the public domain enabling terrorist to build up a jigsaw of useful information which they could use to undermine the security measures,
- Disclosure would increase the risk that the public would be exposed to deadly terrorist attack whereas non-disclosure would safeguard the

interests of the travelling public, and the UK aviation industry which was in the public interest.

68. Mr Kalman accepted these general principles in relation to e.g. technical information which he was clear he did not want, but disputed its relevance to the rest of the disputed information.

69. The Tribunal has taken all the factors in favour and against disclosure as analysed above into consideration and is satisfied for the reasons set out above and in the closed schedules, that where section 24 FOIA is engaged, the public interest in maintaining the exemption substantially outweighs the public interest in disclosing the information.

Section 31 FOIA

70. Section 31 FOIA was only before the Commissioner in so far as it related to the June request. The Tribunal has found that section 24 FOIA is engaged in relation to all the disputed material relating to the June request and therefore does not proceed to consider section 31 FOIA.

Other Matters

71. The Tribunal considers it unfortunate that the DfT did not identify all the material in scope when it dealt with the request, or before the Commissioner and whilst preparing this case. The Tribunal understands that the request was received during the time that TRANSEC was dealing with the implications of the “liquid explosive plot” and that previously they had not had to deal with many FOIA requests and were therefore relatively inexperienced. Additionally the Tribunal accepts that the DfT were concentrating upon the Directions that were in force at the time of the request and what looked to be Mr Kalman’s underlying concerns, consequently they did not identify the need to follow up the references to other Directions and variations. The Tribunal wishes to stress how important it is that ALL the relevant material is identified and considered and that this is re-evaluated during the review process, especially in a case

such as this where the additional Directions were referred to in footnotes of the text of the disputed information which had been identified.

Conclusion and remedy

72. For the reasons set out above and in the closed schedules, the Tribunal is satisfied that the additional disclosures as set out at paragraph 40 above and those provided for in the 1st closed schedule should have been made, and that consequently there were additional breaches of section 1 and section 10 FOIA. To that extent the appeal is allowed. The remainder of the appeal is refused.

Signed

Fiona Henderson
Tribunal Judge

Dated this 6th day of July 2010

**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL GENERAL
REGULATORY CHAMBER UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

Information Tribunal Appeal Number: EA/2009/0111
Information Commissioner's Ref: FS50167298
Decided at an oral hearing sitting Not Promulgated
at Field House On 4th - 5th May 2010

BEFORE:

FIONA HENDERSON

And

MICHAEL JONES

And

ANDREW WHETNALL

BETWEEN:

PHILIP KALMAN

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

THE DEPARTMENT FOR TRANSPORT

Additional Party

CONFIDENTIAL SCHEDULE 1

**To remain confidential until the disputed information set out in the table below has
been disclosed.**

Background

1. From the closed evidence of Mr Lee and Mr Parkinson, the Tribunal heard that S-Channels were introduced by variation 5B of the 1999 Direction as an alternative to the existing regime for searching passengers travelling on airlines at significant and high threat.

Whether Section 24 is engaged:

2. It had been felt that confirmation of the existence of the S-Channel relating to El Al would provide certainty e.g. If terrorists were aware of which airline(s) were considered to be at heightened risk other carriers might be targeted; being perceived to be a softer target. However, for the reasons set out in the open decision at paragraphs 26 & 27 the Tribunal is satisfied that that is of marginal relevance in relation to El Al at this time.
3. In light of the above evidence during the course of the hearing the DfT made a concession that some further limited disclosure could be made. This was provided orally to the Appellant during the hearing and has now been provided in writing as follows:

From Annex A

“After article 5 there shall be inserted the following:

“5A. When an operator is operating at significant threat then the aerodrome manager may apply the provisions in article 5B in place of those in articles 2 and 3.

5B It shall be the duty of the aerodrome manager to ensure that:

(1) A designated S-Channel is provided...

Still withheld is the following:

“ ... at the Central Search Facility to the aerodrome, and

(2) that all passengers intending to travel on a carrier at significant threat must proceed through the Channel,

...”

4. The Tribunal is satisfied that disclosure should be made to the end of 5B(2) because:

- The fact that it relates to a carrier at significant threat is already apparent from the title and preamble to the section which has been disclosed.
- The fact that it is at central search is obvious from the notice and public experience of where the S-Channel has been situated.
- The fact that it applies to **all** passengers travelling on the airline is apparent from the notice and the experience of travellers.

5. The Tribunal is also satisfied that disclosure of the fact that El Al was listed in Schedule 1 to Annex C should be disclosed. From section 3 of Annex C it has already been disclosed that *“This Direction also applies to aircraft operators listed in Schedule 1 to this Direction”*. It is apparent from the redacted version of Schedule 1 as disclosed to the Appellant that there is only one name listed on Schedule 1. In this case El Al is already effectively identified as caught under this Direction. It was common knowledge from the display of the notice and the experience of passengers over many years that an S-Channel was applicable to El Al. El Al already applied additional security precautions to its own flights.

6. Additional disclosure has been made from Annex A and variation 3(a)(iii)

““S Channel” means a designated security Channel”

7. Disclosure has also been made during the appeal hearing from variation 3(a)(iii):

“36A “When an operator is operating at significant threat then he may apply the provisions contained in article 36B in place of those in articles 33 and 34. In such cases an S-Channel shall be provided by the aerodrome manager in accordance with article 5B of Direction 3(b) (“5B”)...”

8. Mr Lee went through the withheld material indicating which of the considerations set out above applied in the view of the DfT the Tribunal accepts this evidence with the exceptions dealt with at paragraph 4 and 5 above which is reflected in the reasons given in the closed schedule below in determining whether section 24 is engaged.

Table of Disclosure with additional reasons

Source Document ¹	Paragraph/information	Disclosure?	Reason
Annex A 3(b)(iv)	1(b) until “provided”. Until the end of 5B(2)	Yes Yes	The DfT have conceded this disclosure as set out in paragraph 40 of the Open Decision For the reasons set out in paragraph 4 of Confidential Schedule 1 and in Confidential Schedule 2.
Annex A 3(b)(iv)	Article 2(b) “S-channel means a designated security channel”	Yes	See Confidential Schedule 2
Annex C	Paragraph 57 definitions Airport security programme	Already disclosed	Whilst not within scope of the request, it is material to the scrutiny argument when balancing the public interest. This was disclosed in open evidence during the hearing.

¹ The source documents are dealt with in the order in which they appeared in the Tribunal’s bundle, they are not chronological.

Source Document ¹	Paragraph/information	Disclosure?	Reason
Annex C	Schedule 1	Yes	Section 24 not engaged (see para 5 above)
Variation 3(a)(iii)	Variation 1a Variation 1(f) up to (“5B”)	Yes	The DfT have conceded the substance of this disclosure, however the Tribunal directs that the additional contextual text e.g “After article 36 there shall be inserted the following” be disclosed for ease of comprehension. For the reasons set out at paragraph 42 of the open decision the Tribunal finds section 24 is not engaged, additionally for the reasons set out at paragraph 46 et seq of the open decision disclosure is in the public interest.
	“S-Channel” means a designated security channel	Yes	The DfT have conceded this disclosure and the Tribunal is satisfied that section 24 is not engaged for the reasons set out in paragraph 12 above.

Dated this 6th day of July 2010

Fiona Henderson

Tribunal Judge