



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

EA/2014/0047

**ON APPEAL FROM
The Information Commissioner's Decision
No FS50509599 dated 10 February 2014**

Appellant: Robert Jeffs

Respondent: The Information Commissioner

Second Respondent: The Department for Transport

Date and place of hearing: On the papers

Date of decision: 12 August 2014

Date of Promulgation: 13 August 2014

Before

**Anisa Dhanji
Judge**

and

**Rosalind Tatam and Darryl Stephenson
Panel Members**

Subject matter

FOIA section 3(2) - whether information is held by another person on behalf of the authority

Case Law

[British Union for the Abolition of Vivisection v Information Commissioner and Newcastle University \(EA/2010/004\)](#)

[Digby-Cameron v Information Commissioner \(EA/2008/0010\)](#)

[Glen Marlow v The Information Commissioner \(EA 2005/0031\)](#)

[Francis v Information Commissioner and South Essex Partnership Foundation NHS Trust \(EA/2007/0091\)](#)

[McBride v Information Commissioner and Ministry of Justice \(EA/2007/0105\)](#)

**IN THE FIRST-TIER TRIBUNAL
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DECISION

This appeal is dismissed.

Signed

**Anisa Dhanji
Judge**

Date: 12 August 2014

**IN THE FIRST-TIER TRIBUNAL
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REASONS FOR DECISION

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the “Commissioner”), dated 10 February 2014.
2. It arises from a request for information made under the Freedom of Information Act 2000 (“FOIA”), by Mr Robert Jeffs (the “Appellant”). The request was for recorded radar data for a specific date, time and airport. It was made to the Air Accident Investigation Branch (“AAIB”), which is part of the Department for Transport.
3. The data was recorded by the National Air Traffic Services (“NATS”), which is not a public authority for the purposes of FOIA.

The Request

4. The Appellant’s request, made on 18 June 2013, was on the following terms:

“This is a FOIA request for a sample of the type of recorded radar data held by NATS and provided to the AAIB in the event of an air accident. This FOIA is directed at the AAIB because it is one of the public authorities that has a direct relationship with NATS and can obtain such sample data from NATS. It is submitted on the presumption that NATS hold data on behalf of the AAIB.

The request is for recorded radar data: Primary or secondary returns (beacon, reinforced beacon & uncorrelated primary returns), in the vicinity of Bournemouth Airport. For 18 June 2013, 12:00 GMT to 13:00 GMT. To be provided in electronic, csv format (or RDIF), i.e. not paper.”

5. The AAIB responded that it did not hold that data, and that any such information would be held by NATS. The AAIB further stated that NATS did not hold such information on behalf of the AAIB. It reiterated this position following an internal review.

The Appeal to the Tribunal

6. The Appellant complained to the Commissioner under section 50 of FOIA. The Commissioner found that the information was not held by the AAIB and was not held on behalf of the AAIB by NATS.
7. The Appellant has now appealed to the Tribunal. All parties have requested that this appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, we

are satisfied that the appeal can properly be determined without an oral hearing.

8. We have considered all the documents received (as contained in the agreed bundle), even if not specifically referred to in this determination. Neither party relies on any witness evidence.

The Tribunal's Jurisdiction

9. The scope of the Tribunal's jurisdiction in dealing with an appeal against the Commissioner's Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Commissioner's Decision Notice is not in accordance with the law or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
10. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

Issues

11. The only issue in this appeal is whether the public authority holds the information requested.

Evidence and Findings

12. Under section 1(1)(a) of FOIA, a person who has made a request for information to a public authority is entitled to be informed, in writing, whether the public authority holds that information. Under section 1(1)(b), the public authority has a duty to provide the information requested. That duty only arises, however, if it holds the information. There is no obligation to obtain information that it does not hold.
13. The Appellant accepts that the AAIB does not itself hold the information requested, but says that it is held by NATS on behalf of the AAIB, and that pursuant to section 3(2) of FOIA, this means that the information is held by the AAIB. The Appellant also accepts that NATS likely no longer holds the information in relation to 18 June 2013, but he seeks a decision as to whether such information, when held, was held on behalf of the AAIB, in order to know what the position would be in the event of any future such requests made at a time when such information is still held by NATS.
14. Section 3(2) of FOIA provides as follows:

(2) For the purposes of the Act, information is held by a public authority if-

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.

15. Did NATS hold the information on behalf of the AAIB? If it did, then by virtue of section 3(2)(b), for the purposes of FOIA, that information was held by the AAIB. To decide whether NATS held the information on behalf of the AAIB, we need to consider the relationship between NATS and the AAIB.
16. NATS was established as Public/Private Partnership in 2001 and was later privatised. It is now a private limited company, albeit partly owned by the Government. It is what is described in the industry as an Air Navigation Service Provider, and is engaged in providing various services in relation to air traffic, including, for example, tower traffic services at UK airports. It also collects and manages a variety of different data, including the data that is the subject of this appeal.
17. The AAIB is part of the Department for Transport. It is responsible for the investigation of civil aircraft accidents and serious incidents within the UK and its overseas territories. Its function is to improve aviation safety by determining the causes of air accidents and serious incidents, and making safety recommendations to prevent recurrence. The Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 provides, in regulation 8, for the appointment of Inspectors of Air Accidents. Regulation 9 sets out the powers of the Inspectors which includes the power to call for any information which they consider to be relevant to an investigation. The Inspectors of Air Accidents thus appointed are part of the AAIB. Under regulation 9(2)(e), Inspectors can also take measures to preserve any evidence they consider appropriate.
18. The AAIB says that NATS does not hold information, generally, on its behalf. It says that although it has wide powers to call for information from NATS and other parties, these powers only arise in the event of an air accident or serious incident. There was no such accident or incident on 18 June 2013 between the hours of 12:00 and 13:00, in the vicinity of Bournemouth Airport. Therefore, the AAIB had no reason to request from NATS the information which is the subject of the present appeal.
19. We have also been referred to the Air Traffic Services Safety Requirements of the Civil Aviation Authority ("CAA"), as set out in the Civil Aviation Publication ("CAP") 670. The provisions in CAP 670 relating to surveillance are designated by the prefix "SUR" as shorthand for "surveillance". Part C, Section 3: SUR 10 is entitled "Requirements for the Recording, Retention and Replay of ATS Surveillance Data". SUR 10.5 - 10.12 deal *inter alia*, with the provision of surveillance data in the use of accident and incident investigations by the AAIB or the CAA. Under SUR 10.11, surveillance data is required to be retained in secure storage for a minimum period of 30 days or longer, if the recordings are pertinent to the investigation of an air accident or incident.

20. It is common ground between the parties that these provisions apply to NATS, and that NATS is required to hold the data of the type requested, for 30 days. Does this mean that the information is held by NATS on behalf of the AAIB (whether just the AAIB or the AAIB and the CAA)?
21. FOIA does not define what is meant by “held”. It does not use terms such as “power, possession or control” found in other legal contexts, nor does it adopt the language in the Environmental Information Regulations 2004, which provide that “held” means information that “is in the authority’s possession and has been produced or received by the authority”. In the context of FOIA, whether information is held by a public authority or held by another person on its behalf, is therefore entirely a question of fact, to be decided on the circumstances of each case. Factors such as ownership of the information, control over it, access to it and responsibility for storing it, may all be relevant considerations, but none of them, by themselves, are definitive, and there is no legal test as such to be applied.
22. We have been referred, for assistance, to the Commissioner’s Guidance entitled “Information held by a Public Authority for the Purposes of the Freedom of Information Act”. This guidance seeks to explain the circumstances in which information is held by a public authority. It is of course simply guidance and has no legislative or binding force, but we agree with what it says at paragraphs 21 – 32, in relation to information held by another on behalf of a public authority.
23. This part of the guidance begins by explaining that there are several situations in which information may be held by another person on behalf of a public authority, for example, under a contractual agreement where documents may be stored on behalf of a public authority, where another body acts as agent carrying out the functions of a public authority either under statute or a contractual arrangement, or where information is held on behalf of a public authority as a result of partnership or consortia arrangement. None of these situations apply in the present case, despite the Appellant’s efforts to suggest otherwise. The evidence indicates that AAIB has no access to the information except in limited circumstances (i.e., in the event of an air accident or serious incident), that it has no control over the recording of the data or its storage, and has no control over who has access to it, nor over which other parties NATS may provide the information to. It also makes no contribution to the costs of collecting or storing the information, nor does it have any say (absent an air traffic accident or incident), over how long the information is retained for, nor over when or how it is deleted. On the evidence before us, there is no basis to find that NATS collects or stores the type of data in question as agent for AAIB, under any contractual arrangement with the AAIB, nor on the basis of any form of partnership arrangement with the AAIB.
24. The fact that NATS is required to hold the radar data for 30 days because it cannot predict when and where an incident may occur, does not mean that it holds such data on behalf of the AAIB. The AAIB has no access to this information unless and until there is an air accident or serious incident and it requests NATS to provide it with information relevant to such accident or

incident, or to preserve such information, pursuant to the Regulations. In our view, access is an important indicator of who holds the information. If the information is physically in the possession of another party and the public authority has no entitlement to access it, except in limited situations, we consider this strongly points to a finding that it does not hold the information.

25. In order for the AAIB to comply with the Appellant's request, it would have to ask NATS to provide it with the information. Absent an accident or serious incident, it would appear that NATS has no obligation to do so. This, too, supports our finding that the information is not held by NATS on behalf of the AAIB. The fact that there may be no bar to NATS providing the AAIB information without there being an air accident or serious incident, is not a point which, in our view, has any significance. It must often be the case that third parties are free to provide public authorities with information that the public authorities may request. Until and unless such information is provided, however, it does not mean that such information is held by the public authority for the purposes of FOIA.
26. The Commissioner records, at paragraph 21 of his Decision Notice, that the Department for Transport has explained that NATS uses the radar data it collects for its own purposes of providing an air traffic service to support, for example, air traffic control, surveillance, and for training. The Appellant says that only a small part of such data is actually used by NATS. We do not need to make any findings about what NATS uses the data for, nor indeed if uses it at all. There is no evidence to suggest that NATS is not entirely free to use the data for its own or other purposes, and this too supports a finding that the data is held by NATS for its own account, and not on behalf of the AAIB.
27. The Appellant says, in his grounds of appeal, that the main argument presented to the Commissioner in relation to a relevant contract between the Ministry of Defence and NATS was not addressed in the Decision Notice. He says that Schedule 5, section 6.3, of the Future Military Area Radar Contract specifies that data must be saved for at least 200 days. This is not a point which we consider is relevant to the appeal before us. The request in the present case was made to the AAIB, part of the Department for Transport, and not to the Ministry of Defence. Even if NATS is under an obligation to any other government department to hold the information, that does not assist the Appellant in establishing that the information is held by NATS on behalf of the AAIB. The Appellant also says that Cap 670 does not place any limitations on the reasons for requesting data. However, SUR 10.11 to which the Appellant refers does not deal with access to the data. Rather, it deals with the obligation to record the data and retain it in secure storage for a minimum period of 30 days or longer. If the recordings are pertinent to the investigation of an air accident or incident, access to the data is provided for by the Regulations.
28. For all these reasons, we find that the AAIB was correct in refusing the Appellant's request on the basis that NATS does not hold the information on its behalf.

Decision

29. The Appellant's appeal is dismissed.
30. Our decision is unanimous.

Signed

Date: 12 August 2014

Judge