

Freedom of Information Act 2000 (Section 50)

Decision Notice

27 January 2009

Public Authority: Department for Transport
Address: Zone 1/28
Greater Minster House
76 Marsham Street
London
SW1P 4DR

Summary

The complainant asked for the identities of airlines which had been subject to targeted inspections by the Civil Aviation Authority. The DfT confirmed that it held information on the identity of foreign carriers who had been inspected under the Safety Assessment of Foreign Aircraft Programme, but refused to disclose this information, citing sections 27(1) and 31 of the Act. During the investigation of the case the DfT also cited section 43(2) to withhold the information in question. After investigating the case the Commissioner decided that the information was exempt from disclosure under section 27(1)(a) and (c) and that the public interest in disclosure was outweighed by the public interest in maintaining the exemption. However he found that the DfT had not complied with the requirements of sections 17(1), 17(1)(b) and 17(1)(c).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. In an email dated 13 December 2006 to the Department for Transport (the "DfT") the complainant requested a list of airlines that had been subject to targeted inspections by the Civil Aviation Authority (the "CAA").
3. By way of background this request followed an earlier email exchange between the complainant and the DfT. In an email dated 8 December 2006 the DfT had informed the complainant that,

“...the International Civil Aviation Organisation (ICAO) is the body responsible for setting out standards and recommended practices for international commercial air transport. The safety regulations of foreign registered aircraft rests with the State of Registry but each state must comply with the appropriate minimum standards set out by ICAO. We have in place on-going procedures to assess foreign operated aircraft flying to the UK to ensure that ICAO safety standards are being complied with. These include targeted inspections by the Civil Aviation Authority of aircraft from countries where safety oversight has been questioned.”

4. The DfT responded to the complainant's request for information in an email dated 11 January 2007. In this email it confirmed that it did hold details of foreign airlines which had been subject to an inspection under the Safety Assessment of Foreign Aircraft Programme (“SAFA”). However, it stated that it believed that this information was exempt from disclosure under sections 27(1) and 31(1)(g) of the Act. In relation to section 31(1)(g) the DfT stated that it believed that the disclosure of this information would prejudice the functions of the CAA to ascertain whether a person had complied with the law, and to protect persons other than persons at work against risks to health and safety arising out of or in connection with the actions of persons at work. It provided further arguments to support its use of these exemptions. Finally, it informed the complainant of his right to request an internal review.
5. In an email dated 11 January 2007 the complainant requested an internal review of this decision.
6. The DfT carried out an internal review, and responded in an email dated 2 February 2007. It informed the complainant that it upheld the use of sections 27(1) and 31. In relation to its use of section 27(1) the DfT stated that,

“...responsibility for the safe operation of aircraft under the prevailing system of regulation of international civil aviation, enshrined in the Convention on International Civil Aviation (known as the Chicago Convention), is vested in the regulatory authorities of the state of registry of each individual airline. Relations between the regulatory authorities are therefore part of the fabric of relations between the governments of sovereign states which are signatories of the Convention. Accordingly, if disclosure of the identity of aircraft subject to targeted safety checks by the UK CAA is likely to impact adversely on these relations, section 27(1) applies.

...In my view a policy of disclosure of the identities of such aircraft would be highly likely to have an adverse impact on aviation relations between the UK and other Chicago signatory states. Targeting of aircraft by the UK is part of a process of ensuring that foreign airlines operating to the UK are doing so in a safe manner. The fact that a particular aircraft is targeted does not in itself mean that it is operating unsafely, or that failings exist in the level of regulatory oversight exercised by the airline's state of registry,

though public disclosure of the airline's identity could well give rise to the assumption that either or both of these things are true.

...If a safety check indicates that problems do exist, the Government will seek to resolve them through bilateral discussions with the state concerned. In the event that the issues cannot be resolved, the Government will apply whatever measures appear necessary to protect the public, up to and including banning the airline concerned, or indeed all airlines from a particular country if the fault appears to lie with the regulatory authorities, from operating in UK airspace. The check may however disclose no serious problems at all, in which case no action by the UK is required. Disclosure of the identity of the airline involved could nevertheless cause embarrassment to the foreign government, and quite possibly serious commercial loss to its airlines, tending in future to make it...less willing to engage in open and frank discussion with the UK on aviation matters, including airline safety. I find therefore that section 27(1) applies."

7. In relation to section 31 the DfT explained that although the CAA is empowered to carry out inspections under Article 144 of the Air Navigation Order 2005, it only has a limited time to carry out such inspections whilst the aircraft are on the ground at UK airports. Therefore the co-operation of the aircraft crews is essential if the inspectors are to be able to carry out their duties efficiently and without causing serious disruption to schedules and to airport operations. The DfT believed that if the UK began to disclose the identity of foreign aircraft targeted for safety checks, it would be highly likely to induce suspicion of CAA inspectors among foreign crews and to lessen their willingness to co-operate constructively with the inspectors.
8. The DfT provided further arguments as to why it believed that the public interest in maintaining these exemptions outweighed the public interest in disclosure. Finally, the DfT informed the complainant of his right to appeal to the Commissioner.

The Investigation

Scope of the case

9. The complainant contacted the Commissioner on 8 February 2007 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the DfT's decision to withhold the requested information was correct.
10. The Commissioner has also considered whether the DfT complied with the requirements of section 17 of the Act.

Chronology

11. The Commissioner wrote to the DfT on 19 May 2008 and asked it to provide him with a copy of the withheld information. He asked the DfT to clarify which parts of section 27(1) and section 31 it believed were engaged. He also asked it to provide further submissions to support its use of these exemptions. In relation to section 27 he noted that in the internal review the DfT had stated that disclosure could cause embarrassment to foreign governments whose airlines had been inspected, making them less willing in the future to engage in open and frank discussion with the UK on aviation matters (including airline safety). He asked it to provide further submissions as to how and why it believed that this embarrassment would occur. Finally, he also asked the DfT to provide him with the following information:

- How are certain aircraft or airlines chosen for targeted inspection?
- If the inspection does find a problem, what happens next? Is any of this information placed in the public domain?
- To the best of your knowledge, is any information about targeted safety checks made under the SAFA programme published by any other State?

He asked for a response within twenty working days.

12. The DfT contacted the Commissioner by way of a telephone call on 20 June 2008. It informed him that it was unable to meet the deadline for response, and asked for an extension. It was agreed that it would provide a response by 4 July 2008.

13. The DfT provided the Commissioner with a substantive response in a letter dated 4 July 2008, including a copy of the withheld information. In relation to section 27 the DfT clarified that it believed that section 27(1)(a), (c) and (d) applied. It argued that,

“Section 27(1)(a) applies for the reasons set out in paragraphs 5 and 6 of the DfT review [see 2nd and 3rd quoted paragraph, at paragraph 6 above], given the close relationship in many cases that may exist between Governments, regulatory authorities and national airlines. Subsections (c) and (d) apply on the basis that disclosure of the names of carriers subject to a targeted inspection by the UK could lead to action by Governments that would be spurious in safety terms, but could cause detriment to UK interests abroad, especially airlines. For example, UK airlines could be subject to capricious safety findings, revocation of operating permits or landing rights, difficulties in remitting monies etc. To give an idea of the number of UK operators who may fly abroad, there are currently around 140 carriers (i.e. whose principal place of business is in the UK) licensed by the UK Civil Aviation Authority (CAA) to carry passengers, cargo and mail, and which may operate within the European Economic Area (EEA), or outside the EEA subject to obtaining the necessary operating permissions from the relevant foreign national authority. In our view, the chances of this prejudice occurring would be quite likely, and is certainly ‘substantially more than remote’. We have seen varying degrees of

retaliatory action within the last 12 months from at least three foreign states, all arising from inspections carried out in the UK on their carriers and appropriate follow-up action on the findings made. In one case a UK airline suffered substantial financial loss as a result of arbitrary retaliatory action following the imposition on safety grounds of a flight ban on a State flag carrier.”

14. The DfT also provided further submissions as to why it believed that disclosure of the withheld information would cause embarrassment to the UK's aviation partners; and why it believed that the public interest in maintaining sections 27(1)(a), (c) and (d) outweighed the public interest in disclosure.
15. The DfT confirmed that it was seeking to rely upon sections 31(1)(g), 31(2)(a), 31(2)(i) and 31(2)(j) to withhold the information in question. It stated that disclosure would be likely to prejudice one or more of its functions as specified in section 31(2), namely,
 - Section 31(2)(a) – Issuing permits for foreign airlines to operate to the UK, and ensuring compliance with permit conditions. This relates to the purpose of ascertaining whether the operator concerned is complying with the conditions of their permit. The purpose of the targeted inspections is to ensure that aircraft are operated in accordance with the requirements of the Air Navigation Order 2005 and any safety conditions attached to the permit issued under article 138 of this Order.
 - Section 31(2)(i) – In carrying out inspections the DfT is exercising a function for the purpose of ascertaining whether the airline has complied with the law, and for the purpose of securing the health, safety and welfare of peoples at work,
 - Section 31(2)(j) – Inspections are also carried out for the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

The DfT provided further submissions to support its use of these exemptions, and why it believed that disclosure would be likely to prejudice the functions listed above. It also provided arguments as to why it believed that the public interest in maintaining this exemption outweighed the public interest in disclosure.

16. The DfT informed the Commissioner that after considering the case further it also believed that section 43(2) of the Act also applied, as disclosure of the withheld information would be likely to prejudice the commercial interests of the airlines whose aircraft have been subject to a targeted inspection. It provided further submissions to support its use of this exemption, and why it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure.
17. Finally, the DfT provided further information in response to the questions listed at paragraph 10 above. This information is discussed further in paragraphs 26 to 32 below.

18. The Commissioner wrote to the DfT on 10 July 2008. He noted that the DfT's use of sections 27(1)(c) and (d), and asked it to provide him with further details to support its argument that if the information were to be disclosed this could lead to retaliatory action by other States against UK interests abroad (especially airlines). The Commissioner asked for a response within ten working days.
19. The DfT contacted the Commissioner by way of a telephone call on 23 July 2008. It informed him that it was unable to meet the deadline for response, and asked for an extension. It was agreed that it would provide a response by 4 August 2008.
20. The DfT contacted the Commissioner again on 30 July 2008. It informed him that it was still unable to meet the deadline for response, and asked for an extension. It was agreed that it would provide a response by 18 August 2008.
21. The DfT contacted the Commissioner again on 19 August 2008 and again asked for an extension. It was agreed that it would provide a response by 2 September 2008. However, the Commissioner also informed the DfT that he would grant no further extensions to this deadline, and would consider issuing an information notice under section 51 of the Act if he did not receive a substantive response by this time.
22. The DfT provided a substantive response in an email dated 2 September 2008. It confirmed that in relation to section 27 it was arguing that disclosure would be likely to cause prejudice. In order to support its arguments it referred the Commissioner to an example of retaliatory action having been taken against a UK airline by another State, following the implementation of an EU ban by the UK on that State's flag carrier. Further to this it stated that it had also, "witnessed retaliatory action from another state in the form of tit for tat safety inspections on UK aircraft which were scarcely justified but which caused considerable inconvenience." It also stated that,

"Some other countries, including geopolitically powerful ones, have threatened retaliatory action against EU airlines when the EU has raised concerns identified by ramp inspections on their carriers. Publication in isolation of data on UK ramp checks might cause such states to conclude that the UK was in the vanguard of a campaign to target their air carriers, which could lead to the UK being singled out for retaliatory action when in fact the matter is being handled at Community level."

The DfT acknowledged that the fact that a targeted inspection had taken place might not, in itself, be enough to trigger retaliatory action (real or threatened) by another State. However, it argued that despite this,

"...publishing the identities of carriers subjected to such inspections, particularly those from more sensitive/volatile states, may lead the state in question to believe that it is being publicly named and shamed, and its operators are perceived as operating unsafely, thus potentially increasing the possibility of retaliatory measures being taken."

It again argued that were the withheld information to be disclosed it believed that this, “could increase the likelihood of specific retaliatory action against UK interests.”

23. The DfT also stated that disclosure of the withheld information may lessen the willingness of some foreign Governments (and their aviation regulatory authorities) to engage in constructive discussion with the UK, either now or in the future, on the question of regulatory oversight of their airlines. It also provided the Commissioner with some general information on the regulation of international aviation safety.
24. In a letter to the DfT dated 7 October 2008 the Commissioner noted its references to retaliatory action (see paragraph 22 above), and asked it to provide more specific evidence to support this argument.
25. In a letter dated 24 October 2008 the DfT provided the Commissioner with further evidence to support its arguments, as listed at paragraph 22. However, due to the sensitive nature of this information the Commissioner does not believe that it is appropriate to discuss in detail in this Notice the evidence provided by the DfT.

Findings of fact

26. By way of background, ‘targeted inspections’ (which are the focus of this request) are carried out at the request of the DfT, by the CAA, under the European Community SAFA programme. The SAFA programme was set up by the EU in order to enforce international safety standards (as set out in the UN Convention on International Civil Aviation – commonly known as the Chicago Convention).¹
27. During the investigation of the case the Commissioner asked the DfT to provide further information about how aircraft and operators are selected for targeted inspection. In its letter to the Commissioner dated 4 July 2008 the DfT provided the Commissioner with the following information (given the detailed nature of the DfT’s response he has quoted it in full):

“All airlines operating commercial services to or from the UK need the permission of the Secretary of State under article 138 of the ANO [Air Navigation Order 2005] unless they are exercising traffic rights granted under Council Regulation 2408/92 which gives access to the European single market in aviation. It is a condition of the permits issued under article 138 that the aircraft are operated in accordance with the standards and recommended practices established by the International Civil Aviation Organisation.

Under Regulation 4 of the Civil Aviation (Safety of Third-Country Aircraft) Regulations 2006 (SI 2006/1384), the Secretary of State is required, inter alia, to ensure that all third-country aircraft (i.e. those registered outside of the EC) landing at an aerodrome in the UK and which are suspected of non-compliance with international safety standards are subject to a ramp (safety)

¹ Further detailed information about the SAFA programme can be found at www.easa.europa.eu/ws_prod/s/s_safa.php

inspection. Although not required by the Regulations, aircraft from other EC states may be subject to ramp inspections if suspected of non-compliance with international standards. State aircraft (this includes aircraft in military, police and customs services) are outside the scope of the Regulations and these inspection procedures. Under regulation 6, the Secretary of State, when determining whether an aircraft is suspected of non compliance with international safety standards is required to take into account the following:

- information regarding poor maintenance of or obvious damage or defects to an aircraft;
- reports that an aircraft has performed abnormal manoeuvres since entering the airspace of a member State which give rise to serious safety concerns;
- safety deficiencies revealed by a previous ramp inspection which give rise to concerns that the deficiencies may not have been corrected and the relevant aircraft does not comply with international safety standards;
- evidence that the State in which an aircraft is registered may not be exercising proper safety oversight;
- concerns about the operator of an aircraft which have arisen from information collected pursuant to Regulation 9(1);
- Safety deficiencies recorded in a ramp inspection report on any other aircraft used by that operator.

A targeted inspection may therefore be carried out where an aircraft is suspected of non-compliance with international safety standards. We derive this information from a variety of sources, including the results of previous ramp inspections in the UK or abroad, information from the European Aviation Safety Agency (EASA), which maintains a database of SAFA reports carried out across Europe, Mandatory Occurrence Reports filed by aeronautical personnel, and information from passengers.

Not all inspections on foreign operators carried out in the UK are targeted inspections. Some are random checks.”

28. The DfT went on to provide further information about what happens when targeted inspections identify problems. Depending on the nature of the findings, these could have different ramifications for the aircraft and the airline as set out in Regulation 8 of the Civil Aviation (Safety of Third-Country Aircraft) Regulations 2006. Depending on the nature of the problem(s) identified, an aircraft could be detained until remedial action was taken by the airline operator. At the opposite end of the scale, if the inspection revealed only findings with a minor impact on safety then the captain of the aircraft would be informed of these findings and no further follow up action would be taken.
29. Where the inspection revealed significant safety deficiencies the operator of the aircraft, the competent authority of the State of the operator (i.e. the authority that is authorised to regulate civil aviation authorities in that State) and, where necessary, the competent authority of the State in which the aircraft was registered, would be informed of these findings.

30. Where an inspection report states that an aircraft does not comply with international safety standards and may pose a potential safety threat the Secretary of State shall without delay send a copy of the report to the competent authority in each EC member State and to the Commission.
31. Finally, the DfT explained that all inspection results are communicated to the other EU Member States and to the European Commission. Any inspection which raises significant findings is normally followed up with the operator and relevant safety oversight authorities, and details of corrective actions to address the findings are requested. Where remedial action is absent or insufficient, consideration will be given to the imposition of an operating ban. The DfT informed the Commissioner that,

“EC Regulation 2111/2005 provides for the establishment of a Community list of air carriers subject to an operating ban within the Community. The intention behind the Regulation is to ensure, so far as practicable, that operating bans are introduced on a Community wide basis. However, Member States are allowed by the Regulation to impose national operating bans where this is necessary to address unforeseen safety problems which are serious and immediate. The Community List is contained in Commission Regulation 474/2006, and is published on the European Commission’s website. This is reviewed at least every three months by the Commission and updated as necessary. Member States may request the updating of the Community List at any time. Operating bans cannot be extended to private flights, overflights or technical or other non-traffic stops as these do not require permits under article 138.”

The list of banned airlines can be viewed at http://ec.europa.eu/transport/air-ban/list_en.htm.

32. Further to this, EASA publishes aggregate information based on the information collected by Member states under the SAFA programme. This report publishes data on the ramp inspections carried out on third country carriers – and includes such information as the aggregate number of checks carried out on all airlines from individual countries, and whether or not an airline has been subject to a ramp check within the reporting period. Although this report does identify the airlines subject to inspections, it does not contain details of which country carried out which inspection. At present this report is only available for the period April to December 2006.²

² www.easa.europa.eu/ws_prod/s/doc/SAFA/Aggregated%20reports/Aggregated%20report%20en.pdf

Analysis

Procedural matters

Section 17

33. The Commissioner has initially considered whether the DfT has complied with its obligations under section 17 of the Act.
34. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within the time for complying with section 1(1) (e.g. within twenty working days of receipt of the request), which –
- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.

The full text of section 17 can be found in the Legal Annex at the end of this Notice.

35. In its refusal notice the DfT informed the complainant that it was relying upon section 27(1) and section 31(1)(g) to withhold the requested information. However, it did not identify the specific aspects of the exemptions under those provisions it was relying on. For this reason the Commissioner believes that the DfT did not comply with section 17(1)(b). Additionally, during the course of the investigation the DfT argued that the withheld information was also exempt from disclosure under section 43(2). The DfT had not been previously referred to this exemption in its correspondence with the complainant. In doing this the Commissioner believes that the DfT did not comply with section 17(1)(b) and (c).
36. The Commissioner has gone on to consider the DfT's application of the exemptions.

Exemptions

Section 27

37. In its correspondence with the Commissioner the DfT has confirmed that it believes that the withheld information is exempt from disclosure under sections 27(1)(a), (c) and (d).
38. Under section 27(1) information is exempt if its disclosure under the Act would, or would be likely to, prejudice:
- (a) relations between the United Kingdom and any other State,
 - (b) [...]
 - (c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.

This is a qualified exemption and is therefore subject to a public interest test.

39. The full text of section 27 can be found in the Legal Annex at the end of this Notice.

40. In support of its use of this exemption the DfT has argued that:

- Disclosure could lead to retaliatory action by other States against UK interests abroad, especially UK airlines. This retaliatory action would be 'spurious' in safety terms. This would, in turn, be likely to prejudice relations between the UK and that State.
- There are close ties between States, civil aviation authorities and the airlines of those States. Given the close ties, disclosure of the withheld information would be likely to be seen as a public criticism by the UK of another States competence in maintaining civil aviation safety of its airlines and/or a public criticism of its airline. This would be likely to damage relations between the UK and the affected other State, and would also contribute to a diminishing readiness by that State to engage constructively with the UK on aviation safety matters.
- Relations between civil aviation authorities are part of the fabric of relations between the governments of States which are signatories of the Chicago Convention.

41. During the course of the investigation the DfT provided the Commissioner with further evidence of the retaliatory action (real or threatened) against UK airlines, which are referred to at paragraphs 13 and 22 above. However, given the sensitive nature of this information the Commissioner has not provided further details of this evidence in this Notice.

42. Finally the DfT has confirmed that it believed that prejudice would be likely to occur.

43. In reaching a view on these arguments the Commissioner has considered the likelihood of prejudice. In reaching a decision on the question of prejudice the Commissioner has been mindful of the test of 'likely to prejudice' as enunciated by Mr Justice Mundy in the case of *R (on the application of Lord) V Secretary of State for the Home Office [2003] EWHC 2073*, and followed by the Tribunal in the case of *John Connor Press Associates Limited V ICO*, where the Tribunal interpreted the expression 'likely to prejudice' within the context of the section 43 exemption as meaning that the chance of prejudice being suffered should be more than hypothetical or a remote possibility, that there must have been a real and significant risk. The Tribunal in that case indicated that the degree of risk must be such that there 'may very well' be prejudice.³

44. In reaching a view on this the Commissioner has also been mindful of the Tribunal's views in *Campaign against the Arms Trade V ICO & the MoD*

³ EA/2005/0005.

[EA/2006/0040], which considered section 27(1). In particular, whilst considering potential prejudice to international relations and UK interests abroad, the Tribunal stated that,

“As a matter of approach the test of what would or would be likely to prejudice relations or interests would require consideration of what is probable as opposed to possible or speculative. Prejudice is not defined, but we accept that it imports something of detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be real, actual or of substance...

...we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA [Kingdom of Saudi Arabia] or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk. Similar considerations would apply to the effect on relations between the UK and the KSA... Finally in this respect we note that it is the relations of the UK and the interests of the UK with which section 27(1) is concerned and not directly the interests of individual companies or enterprises as such.”⁴

45. The Commissioner has considered the DfT's arguments, and the evidence he has been provided with. After considering the evidence the Commissioner finds the DfT's arguments about potential retaliatory action persuasive. If the disclosure of this information were to increase the likelihood of retaliatory action against UK airlines by other States (real or threatened), he believes that this would be likely to prejudice the UK's interests abroad. Whilst the Commissioner notes that Tribunal's statement that the 'interests' referred to in this exemption are those of the UK – and not those of a particular company – he believes that at times a large business' interests (or in this case a business sector) are inextricably linked to the wider relations and interests of the UK as a whole. In this case he believes that given the importance of the civil aviation industry to the UK economically and the potential political impact of any action against UK airlines, retaliatory action against UK airlines would prejudice the UK's interests abroad. Furthermore he believes that actual or threatened retaliatory action would, in turn, be likely to prejudice relations between the UK and that State by making relations more difficult, potentially calling for a diplomatic response to contain or limit damage which would not otherwise have been necessary.

⁴ EA/2006/0040, paras 80-81.

46. On a more general level, after considering the DfT's arguments, the Commissioner is persuaded that the area of international aviation safety is a politically sensitive one, especially given the close relationships between States, civil aviation authority's, and airlines. In particular he has noted the DfT's reference to a State banning UK airlines, following the UK implementing an EU ban on its airlines, and the fact that this action was taken against the UK as the UK had been the first to implement the EU ban. Given this, he finds the DfT's arguments that disclosure of the withheld information could be seen as the UK publicly naming and shaming certain countries a persuasive one. He also accepts that this could lead to a drop in the cooperation of other countries with the UK over aviation safety and, more generally, potentially damage the UK's standing with the international community.
47. Whilst the Commissioner has noted that the DfT's arguments are somewhat wide and sweeping (not identifying particular States who are likely to take retaliatory action), he notes the nature of the DfT's arguments, and the evidence it has provided to show the political sensitivities surrounding civil aviation safety. After considering this evidence he is satisfied that this evidence illustrates the serious political sensitivity surrounding this kind of regulatory activity and the UK's perceived role in this area. He also believes that the evidence demonstrates a real risk that other states could also take adverse actions should this information be released. Furthermore he believes the ever changing nature of the political world (where it can be difficult from one moment to the next to identify which particular States would be particularly sensitive about this issue) makes it very difficult to predict which countries might respond negatively if the withheld information were to be disclosed.
48. Therefore the Commissioner accepts that the disclosure of the withheld information would be likely to lead to retaliatory action against UK airlines abroad (actual or threatened), and that this would be likely to prejudice UK interests abroad. Furthermore he believes that if such retaliatory action were taken (or threatened) this would be likely to prejudice relations between the UK and that State. Therefore he believes that both section 27(1)(a) and section 27(1)(c) are engaged.
49. The Commissioner has not gone on to consider the application of section 27(1)(d).

The public interest test

50. The Commissioner has gone on to consider whether the public interest in maintaining section 27(1)(a) and (c) outweighs the public interest in disclosure.
51. In favour of maintaining the exemption the DfT has argued that there is a significant public interest in allowing UK airlines to operate throughout the world without being subjected to retaliatory measures by other States.
52. The Commissioner believes that there is a public interest in avoiding the prejudice as set out in the text of section 27(1)(a) and (c), i.e. in avoiding prejudice to the UK's international relations, and to the UK's interests abroad. In particular he

believes that it is in the public interest in ensuring that UK airlines are not subjected to retaliatory action (which is not justified on safety grounds) by other States. As noted above, the Commissioner has been provided with evidence by the DfT of retaliatory action (actual and threatened) against UK airlines occurring.

53. In considering the public interest in favour of disclosure the Commissioner recognises that there is a public interest in openness and accountability. In reference to the particular circumstances of this case he believes that there is a public interest in enabling the public to make an informed decision about the safety of air operators flying into and out of the UK, and in improving public confidence in the safety of airlines. Furthermore, he also believes that there is a public interest in improving the public's understanding of international aviation safety and the systems which are in place to ensure compliance with the safety standards enshrined in the Chicago Convention. In light of the arguments presented by the DfT in support of its use of section 27 he also believes that there is a public interest in ensuring that this system is working, and that international relations and political pressures have not had an impact on the identities of airlines subject to safety inspections.
54. The DfT has argued that it does not consider that there is a significant public interest in disclosure,
- “...as on the one hand many checks reveal that there is no systemic safety issue present with a particular airline, and on the other if there is a specific problem the [DfT] will take the steps necessary to protect the safety of travellers. Decisions to refuse operating permits on safety grounds are now coordinated by the European Commission under EC Regulation 2111/2005. A list of airlines which are subject to community wide restrictions is published on the Commission's website...”
55. Similarly, the Commissioner believes that information which has been put into the public domain, at a European Community level (see paragraphs 31 and 32 above), goes some way towards satisfying some of these public interest factors.
56. The Commissioner recognises that the public interest factors in this case are compelling both for and against disclosure. However, he has noted, in particular, the strength of the public interest in avoiding potential retaliatory action against UK interests abroad, and in avoiding prejudicing the relations between the UK and other States. Furthermore he believes that the information put into the public domain at European Community level about safety inspections and blacklisted airlines goes some way towards satisfying the public interest factors in favour of disclosure. Bearing this in mind, and having taken into account all of the above factors, the Commissioner believes that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 31

57. The DfT has sought to rely upon section 31(1)(g), stating that disclosure of the requested information would be likely to prejudice the functions it carried out for the purposes specified in sections 31(2)(a), 31(2)(i) and 31(2)(j).

58. The full text of section 31 can be found in the legal annex at the end of this Notice.
59. As the Commissioner has upheld the use of section 27(1)(a) and (c) he has not gone on to consider the application of this exemption.

Section 43

60. During the investigation of the case the DfT informed the Commissioner that it also sought to rely upon section 43(2) of the Act, as it believed that disclosure of the withheld information would be likely to prejudice the commercial interests of the airline operators whose aircraft had been subject to a targeted inspection.
61. The full text of section 43 can be found in the legal annex at the end of this Notice.
62. As the Commissioner has upheld the use of section 27(1)(a) and (c) he has not gone on to consider the application of this exemption.

The Decision

63. The Commissioner's decision is that the DfT dealt with the following elements of the request in accordance with the requirements of the Act:

It correctly withheld the requested information under section 27(1)(a) and (c).
64. However, the Commissioner has also decided that the DfT did not meet the requirements of section 17(1)(b) and (c).

Steps Required

65. The Commissioner requires no steps to be taken.

Right of Appeal

66. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 27th day of January 2009

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 17

- (1)** A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -
- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2)** Where—
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
- the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where –

 - (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –

 - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 27

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

 - (a) relations between the United Kingdom and any other State,
 - (b) relations between the United Kingdom and any international organisation or international court,
 - (c) the interests of the United Kingdom abroad, or
 - (d) the promotion or protection by the United Kingdom of its interests abroad.”
- (2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.
- (3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it

was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

- (4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-
- (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
 - (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

- (5) In this section-

"international court" means any international court which is not an international organisation and which is established-

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement to which the United Kingdom is a party;

"international organisation" means any international organisation whose members include any two or more States, or any organ of such an organisation;

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom."

Section 31

- (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
- (a) the prevention or detection of crime,
 - (b) the apprehension or prosecution of offenders,
 - (c) the administration of justice,
 - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
 - (e) the operation of the immigration controls,
 - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
 - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
 - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority

- by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

Section 43

(1) Information is exempt information if it constitutes a trade secret.

(2) provides that –
Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

- (3)** The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).