

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 November 2018

**Public Authority:** Air Accidents Investigation Branch  
**Address:** Farnborough House  
Berkshire Copse Rd  
Aldershot GU11 2HH

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to Air Accidents Investigation Branch (AAIB) staff surveys.
2. The Commissioner's decision is that the exemption at section 36(2)(c) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Request and response

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5. On 3 March 2018, the complainant wrote to AAIB and requested information in the following terms:

*"For the following years:*

2010/11  
2011/12  
2012/13  
2013/14  
2014/15

2015/16  
2016/17  
2017/18

*Please disclose copies of all AAIB staff surveys undertaken by AAIB or on behalf of AAIB.*

*If these reports are published, please direct me to where the reports are published."*

6. AAIB responded on 3 April 2018 and refused to provide the requested information. It cited section 36(2)(c) of the FOIA as its basis for doing so.
7. Following an internal review AAIB wrote to the complainant on 30 April 2018 and maintained its position. It advised the complainant that as the AAIB is an integral part of the Department for Transport (DfT) all AAIB staff are employed directly by DfT. DfT publishes its People Survey results annually and the information (which incorporates AAIB), including previous years, is available on the www.gov.uk website at the following web link:

<https://www.gov.uk/government/publications/department-for-transport-civil-service-people-survey>

## Scope of the case

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8. The complainant contacted the Commissioner on 1 May 2018 to complain about the way his request for information had been handled.
9. In his complaint to the Commissioner he stated:

*"To be fully clear, all I have ever sought is the overall, aggregate staff survey scores for AAIB, which should not risk identifying any individual. Should there be incomplete data for any given staff survey question, where the number of respondents is so low that there is a risk of individuals being identified, I would of course accept that this data would not be disclosed.*

*I again reject AAIB's continuing attempt to apply Section 36 exemption as a rationalisation for its inappropriate secrecy over its staff survey results. The routine publication of staff survey results is now an accepted part of public bodies' governance and helps to empower staff. Suppressing such information protects employers and sends a negative message to employees, and is more likely to inhibit honest feedback, not encourage it as implied."*

10. The Commissioner considers the scope of her investigation to be to determine if AAIB has correctly cited section 36(2)(c) of the FOIA in response to the request.

## Reasons for decision

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### Section 36 – prejudice to the effective conduct of public affairs

11. Section 36(2)(c) states:

*"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

12. However, in this case AAIB has stated that the opinion was not required as the withheld information contains statistical information. Section 36(4) states:

*"In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".*

13. The Commissioner has referred to her own guidance<sup>1</sup> which states:

*"The term 'statistical information' has a wider meaning than 'statistics'. It includes the raw data that is used for statistical analysis, the mathematical model or methodology used to analyse the data and the product or outcome of that analysis."*

14. Having reviewed the withheld information the Commissioner can confirm that it is statistical information. Therefore under section 36(4) the exemption may be applied without the 'reasonable opinion of a qualified person' which is usually required before section 36 of the FOIA may be engaged.

15. Accordingly, the Commissioner has considered the public authority's application of section 36(2)(c), that the disclosure 'would otherwise

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

*prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs'* to the requested information.

16. It is the Commissioner's view that a number of the arguments presented by AAIB do not relate to the exemption at section 36(2)(c), rather that they relate to section 40(2) (third party personal data) which is not under consideration here. The Commissioner has therefore not taken these into account when making her decision.

### **The nature of the prejudice**

17. The Commissioner is assisted by the findings of the Information Tribunal in the case of Hogan<sup>2</sup> v Oxford City Council & IC (EA/2005/0026 & 0030) which considered the matter of prejudice at paragraphs 27-36. She notes particularly the following comments:

*"The application of the 'prejudice' test should be considered as involving a number of steps.*

*First, there is a need to identify the applicable interest(s) within the relevant exemption."*

*"Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827)8. If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."*

*"A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in John Connor Press Associates Limited v Information Commissioner (EA/2005/0005) interpreted the phrase "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk."*

**Does the prejudice relate to the conduct of the public affairs claimed?**

18. AAIB stated that disclosure of the information requested would be likely to prejudice the effective conduct of public affairs. It has explained to the Commissioner that the public affairs ('applicable interests') for which it claims prejudice would be caused by the disclosure are:
- a) The staff survey would be less effective as AAIB staff would be more reluctant to either participate or provide honest and frank answers to the survey if they felt these would end up in the public domain.
  - b) This would clearly have a detrimental effect on the staff survey process. Organisations should be able to survey their staff in a completely anonymous way and staff should have a reasonable expectation that their answers will not be published in a form where they could be attributed to them.
  - c) The staff survey results for the AAIB if released in isolation would be releasing individual's personal opinions and views, allowing identification of individuals which may lead others to draw conclusions, based on opinions, partial or incorrect information leading to uninformed speculation.
  - d) The aim of the survey is to help improve the effective conduct of the Civil Service. The risk associated with this type of publication is that it has a negative impact on morale within teams identified and targeted by the media, therefore reinforcing the risk of low participation and/or manipulated responses in future surveys.
  - e) The AAIB is a small organisation, and the names of many of its staff and their roles are published, so commentary could be readily linked to an individual and/or their role. Damage could thereby be caused to employee/employer relations, management of the organisation could be undermined, individuals might come under unwarranted pressure from the press or public, subject to the views that they express in the survey; as might the organisation as a whole, yet the survey views might not be representative of the organisation in any event, e.g. a disgruntled member of staff could pique the interest of the press, leading to misleading or damaging press reporting. This represents a broader reputational risk to the AAIB.
  - f) Equally, the integrity of the process would be undermined: staff might no longer write openly and freely in their responses, knowing that their manager/colleagues/the public/press might

be able to identify them, owing to publication of the surveys. They might come under pressure to respond in a particular way. This could significantly reduce the quality of information in the survey limiting its ability to use it as a tool for learning and accountability. This could be exacerbated if trade unions withdrew their support for the survey.

- g) The results for a specific unit/team relate to the capability of that manager/leader in their capacity as head of that team, the results for that unit can therefore be considered the personal data about the manager of that unit. This requires it to ensure it applies the relevant principles of the Data Protection Act and processes that data in a way that is fair and lawful.
- h) Staff surveys are an internal management tool and public authorities are entitled to consider their results and how to address issues arising from them in a private sphere, away from external pressure and influence.

### **The degree of prejudice**

- 19. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. In this case, the issue is whether disclosure of the withheld information would be likely to inhibit the processes of providing honest and frank answers to the survey.
- 20. As noted above in the case of Hogan, any prejudice caused must be "real, actual or of substance" and the Commissioner will not find an exemption engaged if the prejudice asserted is found to be trivial. In this case, the public authority has explained its view that the prejudice would be to its ability to capture the honest and frank opinions of its staff, and help improve the effective conduct of the civil service.
- 21. The Commissioner notes the confidentiality clause at the end of the surveys and the information already in the public domain:

*"The survey was carried out as part of the 2017 Civil Service People Survey, which is managed by the Cabinet Office on behalf of all participating organisations. The Cabinet Office commissioned ORC International to carry out the survey. ORC International is a member of the Market Research Society, and is bound by their strict code of conduct and confidentiality rules. These rules do not allow for the breakdown of the results to the extent where the anonymity of individuals may be compromised. Groups of fewer than 10 respondents will not be reported on, however their responses do contribute to the overall scores for the unit and organisation they belong to and the overall Civil Service results."*

[https://en.wikipedia.org/wiki/Air\\_Accidents\\_Investigation\\_Branch](https://en.wikipedia.org/wiki/Air_Accidents_Investigation_Branch)  
<https://www.gov.uk/government/organisations/air-accidents-investigation-branch/about/recruitment>

- With regard to points a) to h) above, despite the size of the organisation and having reviewed the withheld information it is difficult to see how individuals could be identified.
  - The information is purely statistical and there is no further commentary from responders.
  - The Commissioner has only found limited information in the public domain following a brief internet search and cannot see how the requested information could be linked to any individual.
  - In addition, she considers the example of a disgruntled member of staff piquing the interest of the press and subsequent reputational risk, to be highly speculative.
  - The Commissioner expects a public authority to provide appropriate context when providing information to help avoid any uninformed speculation.
22. The Commissioner considers that prejudice to the effective conduct of public affairs could refer to an adverse effect on a public authority's ability to offer an effective public service or to meet its wider objectives.
23. There is nothing in the submissions provided to suggest that disclosure of the requested information would cause an adverse effect on AAIB's ability to provide its service of investigating air accidents.
24. As noted above AAIB consider that the prejudice would be to its ability capture the honest and frank opinions of its staff, and help improve the effective conduct of the civil service.
25. AAIB has not provided any wider evidence to suggest that disclosure of staff surveys result in lower participation and the Commissioner considers this to be a speculative argument.
26. The Commissioner acknowledges the benefits of staff surveys and the impact they can have on the way an organisation works. However, given the size of the Civil Service as a whole it is difficult to link the withheld information with the effective conduct of the civil service.
27. The Commissioner therefore finds that the public authority has not established a satisfactory link between disclosure of the requested information and prejudice to the conduct of public affairs, which is more than trivial.

28. Consequently, she finds that the exemption provided at section 36(2)(c) is not engaged and has therefore not gone on to consider the public interest test.

## Right of appeal

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29. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**