

Ian Seager
ics@seager.aero

11 May 2021
Reference: F0005042

Dear Mr Seager

Thank you for your request of 23 November 2020, for the disclosure of information held by the Civil Aviation Authority (CAA).

Your request:

I would like to see any internal advice provided to the CAA board or division heads regarding the scope, detail and implementation of the current EC rebate

I would like to see any communication with the DfT relating to the scope and technical merits of the equipment covered by the current EC rebate

I would like to see any internal documents coming from the CAA board on EC as it applies to GA, the ECWG's EC Strategy (presentation or other documents) and communications with the DfT related to the above.

I would like to see any documents related to the CAA Board's decision (including comms between department directors, and between the CAA and DfT) to revise its EC strategy away from ADS-B.

The remaining part of your request, for *data on the volumes of rebates claimed so far by equipment type*, was previously answered on 5 February.

Our response:

Having considered your request in line with the provisions of the Freedom of Information Act 2000 (FOIA), the information we are able to disclose is attached. However, we have also withheld some further information ("the withheld information") for the reasons set out below.

Section 36 – prejudice to the effective conduct of public affairs

The withheld information primarily consists of discussions between the CAA and the Department for Transport (DfT) in relation to the long term strategy for Electronic Conspicuity (EC) in the UK, which remains a 'live' policy discussion.

FOIA Section 36(2)(b)(i) – the free and frank provision of advice

In the CAA's view, the disclosure of the withheld information would be likely to constrain the CAA's ability to have frank and open policy discussions with Government. As the UK's independent aviation regulator, part of the CAA's role is to provide specialist advice to Government. We want Government to feel able to ask for our candid advice on all matters relevant to our aviation regulation remit, including on potentially contentious issues, and for the CAA to be able to give free and frank advice on any issue.

Disclosure of such discussions into the public domain, particularly on potentially contentious issues, or involving policy options that are not documented or agreed positions, would be likely to cause a 'chilling effect', where officials in both organisations become reluctant to provide advice freely and frankly, or to document such discussions, in anticipation of the material potentially being used to take issue with the outcomes of the policy-making process.

Under Section 36(2)(b)(i) of the FOIA, information is exempt information if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank provision of advice. As the qualified person for the CAA, the opinion of Kate Staples, General Counsel and Secretary to the CAA, is that such prejudice would be likely to be caused by disclosure, and therefore Section 36(2)(b)(i) applies to the withheld information.

FOIA Section 36(2)(b)(ii) – the free and frank exchange of views for the purposes of deliberation

In the CAA's view, the disclosure of the withheld information would be likely to remove the 'safe space' necessary for effective policy determination and jeopardise the ability of the CAA and Government to consider issues in confidence and consider all options fully. Such a safe space allows for all policy options to be considered, tested, and challenged, and disclosure would constrain the CAA's and DfT's collective ability to consider all possible options, particularly more radical ones, in future discussions. As noted above, disclosure of such discussions into the public domain, particularly involving policy options that are not documented or agreed positions, would be likely to cause a 'chilling effect', where officials in both organisations become reluctant to share their views honestly, or to document such discussions, in anticipation of the material potentially being used to take issue with the outcomes of the policy-making process.

Specifically with Electronic Conspicuity, it remains an issue on which a range of views are held by General Aviation stakeholders, drone operators and avionics manufacturers. As the issues remain live, a space that allows an open and detailed policy conversation is needed and the CAA's ability to have open conversations with the DfT in formulating government policy is undermined if information relating to those policy discussions is then disclosed by the CAA.

Under Section 36(2)(b)(ii) of the FOIA, information is exempt information if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation. As the qualified person for the CAA, the opinion of Kate Staples, General Counsel and Secretary to the CAA, is that

such prejudice would be likely to be caused by disclosure, and therefore Section 36(2)(b)(ii) applies to the withheld information.

Public interest test

Section 36 of the FOIA only allows a public authority to withhold information where, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest factors in favour of disclosure

The CAA recognises that Electronic Conspicuity is an issue of significant interest to the General Aviation sector and that policy decisions in this area may have an impact on a wide variety of airspace users. Disclosure of this information would contribute, at least to an extent, to informing public debate on the issue.

There is also a general public interest in the disclosure of information held by public authorities and in greater understanding of decision making by public bodies.

Public interest factors in favour of maintaining the exemption

It is important that the Government is able to seek specialist expert advice from the CAA, and both organisations have the ability to discuss issues freely and frankly, in the knowledge that such information will not be disclosed to the public unless appropriate. There is a strong public interest in Government receiving the best advice from the CAA, and that the decisions that both organisations make are the right ones. It is clearly not in the public interest to hinder the CAA providing, or the DfT seeking, free and frank expert advice as part of the policy making process.

Removing the 'safe space' necessary for effective policy determination is likely to lead to less well informed policy decisions, which would be contrary to the public interest. Disclosure of this information would be also be likely to have a 'chilling effect' on the quality of ongoing and future discussions. Any loss in the quality of decision-making caused by such a 'chilling effect' would be contrary to good public administration and not in the public interest.

Conclusion

The CAA recognises the factors in favour of disclosure, but considers that, for the withheld information, the public interest factors in favour of withholding the information carry significant weight.

We have also considered the timing of the request. The Information Commissioner's guidance is that arguments about a 'chilling effect' are likely to be most convincing while an issue is still 'live', and the long term strategy for EC in the UK remains a 'live' policy discussion.

Overall the CAA has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 42 – legal privilege

We have also withheld a limited amount of information which consists of advice sought from, and given by, the CAA's legal team, as legal professional privilege applies to this information. Under Section 42 of the FOIA, information in respect of which a claim to legal professional privilege could be maintained is exempt from disclosure.

Section 42 is a qualified exemption and we have considered the public interest in the disclosure of this information. The public interest in disclosing the information is as set out above.

However, there is a strong and important public interest in protecting the principle of legal professional privilege, safeguarding openness in all communications involving a public body and its legal advisers to ensure access to full and frank legal advice. We have taken into account the ICO's guidance on this exemption, which states that '*The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP*'.

Having considered the factors on both sides the CAA has concluded that, in relation to this information, the public interest in maintaining the exemption outweighs the public interest in disclosure, and the information has therefore been withheld.

Section 40 – personal information

We have redacted personal information where disclosure of such personal information would be unfair. The individuals concerned would not have had an expectation that their personal data would be disclosed, and the CAA can identify no legitimate interest that would be served by disclosing this personal information. Disclosure would therefore be a breach of one of the data protection principles contained in Article 5 of the GDPR, specifically Article 5(1)(a), which states that personal data shall be 'processed lawfully, fairly and in a transparent manner in relation to the data subject ...' Section 40(2) of the FOIA provides an exception from the duty to disclose information that would contravene any of the data protection principles.

A copy of all these exemptions can be found below.

If you are not satisfied with how we have dealt with your request in the first instance you should approach the CAA in writing at:-

caroline.chalk@caa.co.uk

The CAA has a formal internal review process for dealing with appeals or complaints in connection with Freedom of Information requests. The key steps in this process are set out in the attachment. A request for an internal review should be submitted within 40 working days of the date of this letter.

Should you remain dissatisfied with the outcome you have a right under Section 50 of the FOIA to appeal against the decision by contacting the Information Commissioner at:-

Information Commissioner's Office
FOI/EIR Complaints Resolution
Wycliffe House
Water Lane
Wilmslow
SK9 5AF
<https://ico.org.uk/concerns/>

If you wish to request further information from the CAA, please use the form on the CAA website at <http://publicapps.caa.co.uk/modalapplication.aspx?appid=24>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Stevens'.

Mark Stevens
External Response Manager

CAA INTERNAL REVIEW & COMPLAINTS PROCEDURE

- The original case to which the appeal or complaint relates is identified and the case file is made available;
- The appeal or complaint is allocated to an Appeal Manager, the appeal is acknowledged and the details of the Appeal Manager are provided to the applicant;
- The Appeal Manager reviews the case to understand the nature of the appeal or complaint, reviews the actions and decisions taken in connection with the original case and takes account of any new information that may have been received. This will typically require contact with those persons involved in the original case and consultation with the CAA Legal Department;
- The Appeal Manager concludes the review and, after consultation with those involved with the case, and with the CAA Legal Department, agrees on the course of action to be taken;
- The Appeal Manager prepares the necessary response and collates any information to be provided to the applicant;
- The response and any necessary information is sent to the applicant, together with information about further rights of appeal to the Information Commissioners Office, including full contact details.

Freedom of Information Act: Section 36

(1) This section applies to—

- (a) information which is held by a government department or by [F1the Welsh Assembly Government] and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) 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—

- (a) would, or would be likely to, prejudice—
 - (b)
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the Cabinet of the Welsh Assembly Government.
- (b) would, or would be likely to, inhibit—
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) 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”.

Freedom of Information Act: Section 40

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if
 - (a) it constitutes personal data which does not fall within subsection (1), and
 - (b) the first, second or third condition below is satisfied.

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—

- (a) would contravene any of the data protection principles, or
- (b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

(3B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the GDPR (general processing: right to object to processing).

(4A) The third condition is that—

- (a) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or
- (b) on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

(5A) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(5B) The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies—

(a) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a)—

- (i) would (apart from this Act) contravene any of the data protection principles, or
- (ii) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded;

(b) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene Article 21 of the GDPR (general processing: right to object to processing);

(c) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for confirmation of whether personal data is being processed, the information would be withheld in reliance on a provision listed in subsection (4A)(a);

(d) on a request under section 45(1)(a) of the Data Protection Act 2018 (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

(6)

(7) In this section—

“the data protection principles” means the principles set out in—

- (a) Article 5(1) of the GDPR, and
- (b) section 34(1) of the Data Protection Act 2018

“data subject” has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

“the GDPR”, “personal data”, “processing” and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of that Act (see section 3(2), (4), (10), (11) and (14) of that Act).

(8) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

Freedom of Information Act : Section 42

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.