

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 April 2016

**Public Authority:** Civil Aviation Authority  
**Address:** Aviation House  
Gatwick Airport South  
West Sussex  
RH6 0YR

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from the Civil Aviation Authority (CAA) about the binding agreement with an airline following a delayed flight. The CAA refused to provide the requested information, relying on section 44(1)(a) of FOIA (prohibitions on disclosure) in order to do so. In particular the CAA cited the statutory prohibition on disclosure created by section 237(2) of the Enterprise Act 2002.
2. The Commissioner's decision is that the CAA has correctly applied section 44(1)(a) and the Commissioner does not require the public authority to take any steps.

#### **Background**

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3. Under European Commission Regulation EC261/2004 ('EC261') airline passengers are entitled to support when their flights are disrupted. The CAA is responsible to ensure compliance with EC261 and has statutory powers to undertake criminal prosecutions. It also has the ability to enforce compliance with EC261 using its powers under Part 8 of the Enterprise Act 2002 ('EA02').
4. While the CAA has no power to secure individual redress for individual consumers, Part 8 EA02 gives the CAA powers to take action in the collective interest of consumers for breaches of consumer law.
5. During 2014 and 2015, the CAA conducted a review into 15 airlines and concentrated on the approaches taken by airlines to supporting

passengers during disruption, including their approaches to paying flight delay compensation and the provision of information about their rights.

6. Following the review, in March 2015, the CAA commenced enforcement action against Jet2.com Limited because it had found that it was failing consistently to pay compensation, was imposing a two year time limit for passengers to take compensation claims to court; and had failed to provide satisfactory evidence that it proactively provided passengers with information about their rights, during disruptions.
7. The CAA launched a formal consultation with Jet2.com under section 214 EA02 and sought undertakings to secure compliance with its obligations under EC261. In July 2015, Jet2.com entered into the Undertaking, committing it to take action to cease the breaches of EC261 identified by the CAA. The Undertaking was expressly entered into by Jet2 pursuant to section 219 EA02. This Undertaking is the withheld information.
8. The CAA published a press release about the Undertaking on 15 August 2015 and is available here: <http://www.caa.co.uk/News/CAA-action-leads-to-airlines-changing-policies-and-means-passengers-will-get-better-support-in-the-future/>

## **Request and response**

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9. On 23 September 2015, the complainant requested the following information:

*"Reg 261 of 2004 applies to delays on all flights by EU carriers into the UK. My clients' delay was on their return flight to Manchester from Rome on Jet2.*

*I read that the CAA had entered into a legally binding agreement with Jet2, namely that Jet2 would not treat technical faults as extraordinary circumstances.*

*Are you saying that your legally binding agreement with them only applies to technical faults occurring in the UK?*

*Please can you clarify the situation and please can you accept this email as a request under the FOIA to supply me with a copy of the Legally Binding Agreement referred to above.'*

10. The CAA responded on 15 October 2015 and refused to provide the information citing section 44:

*'The 'legally binding agreement' that you refer to is an undertaking provided by Jet2.com Ltd to the CAA in connection with the CAA's statutory functions under Part 8 of the Enterprise Act 2002 ("EA02") and is 'specified information' for the purpose of Part 9 of EA02. Under Section 237(2) of EA02, such information cannot lawfully be disclosed unless one of the gateways contained in Part 9 EA02 is engaged.*

*Section 239 of EA02 provides a gateway for the release of specified information if consent is obtained from the relevant third party (i.e. Jet2.com Ltd in this case). The CAA sought consent from Jet2.com but the airline has not consented to disclosure. The CAA has considered the other possible gateways for the release of this information pursuant to Part 9 EA02, and has concluded that none of the other gateways can be utilised in this instance in order to permit disclosure of the information.*

*The CAA has, therefore, concluded that the disclosure of the information requested is prohibited by Section 237(2) of EA02. Section 44 (1)(a) of the FOIA provides that information is exempt from disclosure if disclosure is prohibited by, or under, any enactment. Section 237(2) of EA02 is such a prohibition on disclosure and therefore Section 44(1)(a) of FOIA applies.'*

11. On 25 November 2015, the complainant requested a review of the decision and the CAA provided an internal review on 16 December 2015 in which it maintained its original position.
12. On 22 December 2015 the complainant wrote to the Commissioner.

### **Scope of the case**

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13. The Commissioner considers the scope of his investigation to be to determine whether CAA has correctly applied section 44(1)(a) to withhold the information.

### **Reasons for decision**

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#### **Section 44**

14. Section 44 of the FOIA states that:
  - (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
    - (a) is prohibited by or under any enactment,

- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.

15. Section 237 of the Enterprise Act creates a 'General restriction'. Subsection (1) sets out that the restriction applies to 'specified information' relating to any business. Subsection (2) then states that specified information must not be disclosed while the business continues in existence. Under section 245 it is an offence punishable by up to 2 years imprisonment to disclose information in breach of section 237. The full Act can be accessed via <http://www.legislation.gov.uk/2002?title=Enterprise%20Act> .
16. The First-tier Tribunal (Information Rights) has previously been asked to consider the use of section 237 as a statutory prohibition on disclosure and has concluded it can be used in this way<sup>1</sup>.
17. The actual definition of 'specified information' is provided by section 238 of the Enterprise Act. Information is specified information if it comes to a public authority, such as the CAA, in connection with the exercise of any function that the public authority has under various parts of the Enterprise Act, any legislation listed in Schedule 14 of that Act or any secondary legislation specified by the Secretary of State.
18. The complainant has disagreed that the Undertaking provided by Jet2.com to the CAA is related to the airline's business. The CAA has reviewed the Undertaking again and confirms that it remains the CAA's view that the Undertaking contains "specified information" that relates to the business of an undertaking (i.e. Jet2). For example:
  - references to correspondence from Jet2 in paragraph 3;
  - statements of Jet2's legal position and agreement to provide undertakings in paragraph 4;
  - references to the materials provided to the CAA by Jet2 in paragraph 5;
  - references to the specific activities in relation to the operation of its business that Jet2 undertakes to perform set out in undertakings 1, 2, 3; and 4; and

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<sup>1</sup> *Dey v ICO and OFT (EA/2006/0057)*

- the EU261 Policy attached to the Undertaking with which Jet2 undertakes to comply pursuant to undertaking 1.1.
19. Each of these items provide the CAA with information about either what the business of Jet2.com had done prior to the date of the Undertaking, the position its business was taking at the time of the Undertaking, or what the business was promising to do after giving the Undertaking. As such the CAA states that these are all items of information that relate to the business of Jet2.com for the purposes of section 237(1) EA02. There is no requirement for the information to be confidential or commercially sensitive for it to be caught by the general restriction.
  20. Having viewed the withheld information, the Commissioner is satisfied that it is 'specified information' as it clearly relates to the business of the airline and falls under the general restriction provided by section 237 (1) of the Enterprise Act. The information is therefore prohibited from disclosure.
  21. However, sections 239-243 of the Enterprise Act provide certain 'gateways' for disclosure of 'specified information' without breaching the statutory prohibition. These gateways do not compel the CAA to disclose information but do allow it to disclose information for the purposes set out in these sections. In broad terms these include where the business undertaking or individual that the information relates to has given their consent, where a European Community obligation requires the disclosure, or where the disclosure is necessary for certain civil or criminal proceedings.
  22. In the *Dey* case (*Dey v Information Commissioner EA/2006/0057*) the Information Tribunal commented on the gateway provided by section 241 of the Enterprise Act 2002 and stated that "*it gives a power to disclose, not a duty*". The Commissioner therefore accepts that the CAA has discretion as to whether to use the gateways to disclose specified information:  
  
*'The exercise of that power is a matter for the public authority to consider...'* and *'...cannot be short circuited by invoking the Freedom of Information Act provisions'*
  23. In this case the gateway for the release of the specified information would be if the CAA obtained the consent from the airline. At the time of the request, although the CAA was not obliged to do so, the CAA wrote to Jet2.com seeking its consent to disclose the Undertaking. Jet2.com refused to grant consent to disclosure on the grounds, among other things that:

- The information requested is "specified information", was obtained pursuant to the exercise of the CAA's formal powers under Part 8 of the EA02 and prohibited from disclosure under EA02;
  - although Jet2 did not consider it necessary to assess whether publication would be prejudicial to its interests, it considered that, in any case, such disclosure would be prejudicial to it as the Undertaking refers to and contains detailed information which is not otherwise available in the public domain such as Jet2's private policies and procedures in relation to EU261 which it considered to be of commercial interest to competitor airlines and others.
24. The Commissioner has previously accepted arguments that there is no requirement to seek consent to disclose specified information. (See decision notice [FS50535988.pdf](#) and the appeal to the Information Tribunal EA/2014/0143 which was dismissed.) However, the Commissioner notes that, in this case, the CAA requested consent and it was refused by the airline.
25. In conclusion, the Commissioner's decision is that CAA has correctly applied section 44(1)(a) to withhold all the requested information in this case, through the provisions of section 237 of the Enterprise Act 2002. As section 44 is an absolute exemption there is no need to consider the public interest test.

## Right of appeal

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26. 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)

27. 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.
28. 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**