

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 November 2016

Public Authority: Department for Transport

Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Department for Transport for information on its role in monitoring Thomas Cook. The DfT refused the request under the exemptions in section 35(1)(a) (formulation and development of government policy), section 41 (information provided in confidence), section 43(2) (commercial interests) and section 44(1)(a) (prohibitions on disclosure).
2. The Commissioner's decision is that DfT has correctly applied the exemptions in sections 35(1)(a), 41(1), 43(2), 40(2) and 44(1)(a) but that it breached section 10(3) in its handling of the request. The Commissioner's requires no steps to be taken.

Request and response

3. On 31 July 2015 the complainant requested information in the following terms:

"Under the Freedom of Information Act 2000 I would like to know the following:

- i. *What was the DFT's role in monitoring Thomas Cook?*
- ii. *How did the DFT monitor the Thomas Cook restructuring programme?*

- iii. *When did the DfT stop monitoring the Thomas Cook restructuring programme?*
 - iv. *As part of this request I would also like any associated reports, minutes and/or background papers associated with Thomas Cook and the restructuring programme during the period 10/2011 and 11/2012"*
4. The DfT responded to the request initially on 27 August 2015 when it explained that the section 43(2) (commercial interests) exemption applied to the request and it reasonably needed further time to consider the public interest test. It said that it would aim to respond by 28 September 2015.
 5. The DfT contacted the complainant again on 28 September 2015 and explained that it needed to extend the deadline again and that it now aimed to respond by 26 October 2016.
 6. The DfT responded substantively on 26 October 2015. It considered parts i to iii of the request were enquires rather than requests for recorded information and responded to them as 'normal course of business'.
 7. With regard to part iv of the request, DfT refused to provide the requested information citing sections 35(1)(a); 41(1); 43(2) and 44(1)(a) of the FOIA as its basis for doing so.
 8. DfT provided an internal review on 22 December 2015. It maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 25 January 2016 to complain about the way his request for information had been handled.
10. The scope of the Commissioner's investigation is to determine if the DfT has correctly applied the exemptions it has cited to part iv of the request. The Commissioner also agreed with the complainant that she would consider the time taken by the DfT to respond to the request.
11. The Commissioner is mindful that a similar request had previously been made to Department for Business, Innovation and Skills (DBIS) in 2013. The Commissioner issued a decision notice (FS50517990) which DBIS subsequently appealed against.

12. The Information Tribunal promulgated its decision on 20 April 2015.¹ The DfT has cited this decision in response to the Commissioner's investigation in to this case. Where relevant the Commissioner has considered whether the passage of time between the Tribunal decision and the request for information has weakened the position of the DfT in withholding certain parts of the requested information.

Background

13. In 2011 Thomas Cook Group was reportedly close to collapse. £100m of short-term funding was secured in Autumn 2011 and further funding was provided by a consortium of banks.
14. The DfT has explained that it is the department which holds policy responsibility for the Air Travel Organisers Licensing (ATOL) scheme which is managed by the Civil Aviation Authority (CAA), the UK's independent specialist aviation regulator. ATOL is the scheme which provides financial protection for holiday-makers in the event that their travel company becomes insolvent. In the UK, every travel company that sells a flight-inclusive holiday is required to hold an ATOL licence in order to operate.
15. The CAA's role in the ATOL scheme includes holding the legislative authority to grant and refuse ATOL licensing applications; monitoring the financial positions of ATOL license holders; managing the Air Travel Trust (AT); managing insolvency failures and enforcing any breaches within the ATOL scheme.
16. The DfT has confirmed that it is not responsible for monitoring Thomas Cook as that is the responsibility of the CAA as the independent regulator. However, it explained that as the department with policy responsibility for air travel and the ATOL scheme the CAA keeps it informed of a) the general picture relating to ATOL; and b) any significant developments. During the period October 2011 and November 2012 the Department was kept informed of developments in relation to Thomas Cook through confidential briefings provided by the CAA.

¹ Department for Business, Innovation & Skills v Information Commissioner and Patrick Whyte [EA/2014/0173]

Reasons for decision

Section 44(1)(a) – prohibitions on disclosure

Documents 2, 8, 10, 18, 19, 20, and 21

Parts of documents: 1, 4, 5, 12, 13, and 17

17. Section 44(1) of FOIA provides that:

“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,

18. In this case the relevant statutory prohibition is section 23 of the Civil Aviation Act 1982 which prohibits the Secretary of State, Government Officers, and the Civil Aviation Authority from disclosing information which relates to a particular person and has been furnished to the CAA in pursuance of some of its statutory duties, unless an exception to the prohibition applies. In particular the prohibition covers regulatory functions under Section 71 of the Civil Aviation Act 1982, which relate to the ATOL scheme, under which Thomas Cook is licensed by the CAA.
19. The DfT explained that when it receives information that is covered by section 23(1) of the 1982 Act, then it is bound by the same prohibition on disclosure (section 23(2) of the 1982 Act). In fact if the Civil Aviation Authority or Secretary of State did disclose such information to the complainant it would be a criminal offence (s.23(5)), unless consent has been given by Thomas Cook. In this case, the DfT has said that it has also approached Thomas Cook, who have refused consent to disclosure and have made representations which re-affirm the continuing detriment they believe would result from disclosure.
20. The Commissioner has reviewed the information withheld under this exemption and is satisfied that it has been obtained by the CAA in pursuance of its statutory duties relating to the ATOL scheme. In particular the Commissioner understands that the CAA obtained the information while carrying out its functions under the Civil Aviation (Air Travel Organiser's Licensing) Regulations 1995 (as amended). These powers derive from secondary legislation made under the power in Section 71 of the Civil Aviation Act 1982 as amended. For that reason, s23 of the Civil Aviation Act 1982 as amended applies to information provided to CAA for the purpose of carrying out those functions. The information also clearly relates to a particular person, i.e. Thomas Cook

and since none of the exceptions to the prohibition apply the Commissioner finds that the information is exempt under section 44 by virtue of section 23(1) of the Civil Aviation Act 1982.

Section 41(1) – information provided in confidence

Documents 3, 4, 6, 7, 9, 11, 13, 14, and 16

21. Section 41 of FOIA provides that information is exempt if it was obtained from another person and disclosure would give rise to an actionable breach of confidence.

Was the information obtained from another person?

22. The DfT explained that the information withheld under this exemption was provided to it by a third party or else is advice based upon such information. The third party who provided the information was Thomas Cook. This information was either provided directly to DfT or was passed to it by BIS or the CAA.

23. The Commissioner has reviewed the withheld information and is satisfied that it has been obtained from third parties.

Would disclosure constitute an actionable breach of confidence?

24. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- Whether the information has the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

25. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

26. The DfT stated that the information is not publicly available and it is clearly more than trivial. The DfT also referred to the Commissioner's decision notice (FS50517990) and the Tribunal decision referred to in paragraph 11. It further stated that notwithstanding that four years have passed since the information was first supplied, Thomas Cook and CAA have re-confirmed to DfT that the quality of confidence has still not been lost. That qualification of confidence applies not only to documents

specifically considered by the Tribunal but also to additional documents, which DfT has considered for the purpose of this request.

27. DfT explained that the information in question was provided by Thomas Cook under an implied duty of confidence. Prior to replying to the original FOI request DfT consulted with Thomas Cook on the possible release of information that was sent to the Department. Thomas Cook officials confirmed that this information was provided in confidence and that it had an expectation that it would not be placed into the public domain.
28. DfT further argued that the information includes highly sensitive information, and Thomas Cook believes it would be damaged by its disclosure. Thomas Cook has been consulted and indicated that the release of the withheld information will prejudice its commercial interests with its stakeholders.
29. DfT went on to state that unauthorised disclosure will also prejudice its own and the CAA's relationship with industry (particularly Thomas Cook). It will discourage Thomas Cook and other businesses from confiding in public authorities, if they did not have a degree of certainty that such confidences would be respected. This would make it harder for the DfT and the CAA to perform their regulatory functions and to develop effective policies. For the ATOL scheme in particular, the CAA and Government need to have good visibility and understanding of the large businesses that are included in the scheme. In many situations this involves the sharing of sensitive information or views between a business and the CAA in confidence. The scheme will be compromised if businesses are inhibited in the views or information that they share with CAA or the DfT, through fear that the information will be disclosed.
30. The Commissioner accepts that the withheld information is not otherwise accessible. After viewing the withheld information the Commissioner does not consider it to be trivial.
31. It is also clear that the information has been provided under an implied duty of confidence and that Thomas Cook has no expectation that the confidence will be breached.

Would a public interest defence be available?

32. As section 41(1) is an absolute exemption there is no public interest test to apply. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public

interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.

33. The DfT has said that it accepts that there is a general public interest in promoting openness and transparency but it considers that there are strong public interest arguments for not releasing the information. It said that Thomas Cook would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. There is a public interest in maintaining trust and preserving a free flow of information to a public authority. This relationship would be significantly undermined – not only with government but the CAA who are the UK's specialist aviation regulator for Air Travel Organisers' Licensing (ATOL) – if DfT were to engage in breaches of confidence concerning information provided by the industry, this would make it harder for it and the CAA to perform its regulatory functions.
34. Thomas Cook have indicated to DfT in an email dated 15 October 2015, that "there is a public interest in withholding that information if it means Thomas Cook will continue to volunteer the information the CAA (and ultimately the DfT) needs".
35. The DfT again referred to the Commissioner's previous decision and that her conclusion was that there was not a strong enough public interest argument to disclose the information supplied by Thomas Cook in 2011/12. In March 2015, the Information Tribunal also considered the public interest in releasing this information, and found that section 41 is engaged and that there is no public interest justification for a breach of confidence in this case.
36. The Commissioner acknowledges that there is a public interest in transparency but is also mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between the confider and confidant.
37. The Commissioner recognises that the courts have taken the view that in most cases the grounds for breaching confidentiality will need to be particularly strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override

the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.

38. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining the trust between confider and confidant; and that DfT would not have a public interest defence for breaching its duty of confidence.
39. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
40. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA. The Commissioner has next gone on to consider the information withheld by virtue of section 43(2).

Section 43(2) – Commercial interests

Documents: 1, 3, 4, 5, 6, 7, 13, 14, 15, 16, and 17

41. Section 43(2) of the FOIA provides that information is exempt if disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
42. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered her awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*²

43. The exemption is subject to the prejudice and public interest tests. With regard to the prejudice test, three conditions must be satisfied in order for the exemption to be engaged.

²http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

- First, the harm that is considered would, or would be likely to, occur should relate to the applicable interest described in the exemption.
 - Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against.
 - Third, there must be a real risk of prejudice arising as a result of the disclosure of the information in question, with the public authority able to demonstrate that disclosure 'would' or 'would be likely' to have the prejudicial effect. Establishing the appropriate level of likelihood is not only important for finding that the exemption is engaged but it will also have an effect on the balance of the public interest test.
44. The DfT stated that some of the information is being withheld because it would be likely to prejudice the commercial interests of Thomas Cook with their stakeholders. This is because, it says, release of the relevant information would be likely to prejudice Thomas Cook's commercial position in the travel and tourism industry. The prejudice envisaged by the DfT clearly relates to the commercial interests exemption and this satisfies the first step in the test.
45. As regards the nature of the prejudice the DfT's argument, essentially, is that disclosure would be likely to prejudice the commercial interests of Thomas Cook because of the reputational damage that would be caused which would put it at a disadvantage compared to its competitors.
46. DfT further explained that Thomas Cook had been consulted on the possible release of the disputed information. They are of the view that this information relating to Thomas Cook Group (TCG) is very similar in nature (and in some instances identical) to the information that was considered in the Commissioner's previous decision notice and by the Tribunal in the subsequent appeal where it was found to be subject to the exemptions under section 43(2).
47. DfT stated that in that case, Thomas Cook and the CAA provided evidence that *"any adverse publicity, even related to former times, whenever published would be likely to have a significant and weighty chance of prejudice to consumer bookings, share price and supplier negotiations.... This would make Thomas Cook less competitive in a very competitive market place"*. In an email to the DfT of 11 October 2015, Thomas Cook have indicated that in their view the same arguments and impacts apply to the publication of this disputed information, even four years on.

48. In the previous decision the Tribunal upheld Section 43(2) on the basis that disclosure of the disputed information would be likely to prejudice the commercial interests of Thomas Cook. In that decision the Tribunal also accepted that even historical information or commentary would create damaging perceptions and affect Thomas Cook's business and share price. DfT suggest that the arguments advanced at the time have not diminished in value or relevance due to passage of time.
49. The DfT further argued that release of the relevant information would likely prejudice Thomas Cook's commercial position in the travel and tourism industry. It would likely have an impact upon the public perception of the company by consumers, investors and suppliers, leading to reduced bookings, reduction or volatility in share prices, and increased costs.
50. The Commissioner has considered the arguments of the DfT, the withheld information, her previous decision and the subsequent appeal to the Tribunal. Whilst the passage of time may have reduced the sensitivity of some of the information, the arguments for applying the exemption are still relevant. A causal link can clearly be drawn between disclosure of information about Thomas Cook's financial difficulties and its business reputation amongst its customers, competitors and partners which would serve to make it less competitive.
51. A prejudice based exemption like section 43 can be engaged either on the basis that disclosure "would" prejudice or "would be likely to prejudice" a person's commercial interests. The Commissioner's approach is that "likely to prejudice" means that the possibility of prejudice should be real and significant and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not. In this case the DfT has suggested that the lower threshold applies. The Commissioner has considered the arguments and is satisfied that disclosure would be likely to cause the prejudice envisaged by the DfT. Whilst some time has passed since the difficulties experienced by Thomas Cook which are discussed in the withheld information, they are still part of the company's recent history and in the Commissioner's view disclosure may still lead to people, rightly or wrongly, drawing assumptions about the stability of the company. The Commissioner is also mindful that Thomas Cook operates in a very competitive industry and so it is important to maintain the confidence of its customers who might otherwise choose to book with another travel company.
52. The Commissioner understands that the Thomas Cook share price also has a history of volatility and in the past has been susceptible to

negative publicity. In light of this the Commissioner accepts that disclosure of information which focuses on Thomas Cook's financial difficulties, even if this is from several years ago, would still be likely to affect this share price which in turn can affect confidence in the business.

53. In addition to the prejudice to Thomas Cook, the DfT has said that disclosure of document 7 would also be likely to prejudice the commercial interests of the DfT. This is because some of the information discusses negotiations regarding Thomas Cook's shareholding in NATS (National Air Traffic Control System) where the Government is also a major shareholder.
54. The DfT explained that NATS is a Public-Private Partnership, which provides air traffic control and consultancy services in the UK and overseas. In July 2001 46% of NATS was sold to the Airline Group (AG), 5% passed to staff, and the Government retained the remaining 49% share, and a golden share.
55. The Airline Group comprises eight individual shareholders, including Thomas Cook Airlines Limited. Each of the individual Airline Group shareholders has entered into an agreement with the Secretary of State for Transport, through a Deed of Covenant. Under the terms of the Deed of Covenant, the shareholders would need consent from the Secretary of State to transfer or grant security over its shareholding.
56. The DfT has argued that release of the information would put the Secretary of State in a less favourable position compared to other private shareholders because it would release information relating to advice on commercial negotiations and decisions, which would ultimately prejudice Government's commercial interests as the largest shareholder. This issue is now more relevant following the recent announcement in the Autumn Statement and Spending Review 2015 that, subject to a value for money assessment, the Government will explore the sale of its shareholding in NATS
57. The DfT has indicated that these arguments are relevant to a small amount of information in document 7. However, having reviewed the information it is unclear how disclosure of this specific information redacted under section 43(2) would prejudice the Commercial interests of the DfT. However, the Commissioner is satisfied that disclosure would raise the same concerns regarding Thomas Cook's commercial interests. Therefore the Commissioner has concluded that all of the information withheld under section 43(2) would be likely to prejudice the commercial interests of Thomas Cook in the travel and tourism industry if disclosed

and that the exemption is engaged on this basis. The Commissioner has next gone on to consider the public interest test.

Public interest test

58. Section 43(2) is a qualified exemption and is therefore subject to the public interest test i.e. whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

59. The DfT have argued that the commercial interests of Thomas Cook would be prejudiced if the information was released as it would be placed at a disadvantage to other operators. The release of the information would also prejudice Thomas Cook's commercial affairs with its stakeholders.
60. The DfT explained that Thomas Cook has been consulted and has said that it would suffer commercial prejudice for the reasons it gave in evidence to the Tribunal. The Tribunal accepted that even historical information or commentary would create damaging perceptions and affect Thomas Cook's business and share price. The DfT has said that it does not consider there has been any material change in circumstances, or that the justifications for withholding the information have diminished in value or relevance due to the passage of time.
61. DfT again referred to the Tribunal decision stating that *"In arriving at its decision to uphold the Section 43 exemption, the Tribunal undertook a Public Interest Test. Overall, they concluded there is a strong public interest in maintaining the exemption, which outweighs the public interest in disclosure."* For brevity the Commissioner has not repeated the Tribunal decision's considerations here.
62. The DfT referred to the ATOL scheme which it explained exists to protect consumers against the insolvency of tour operators and travel agents. It argues that there is a specific public interest in protecting the commercial interests of any ATOL licensed businesses by avoiding commercial prejudice which would be likely to arise through the release of information.
63. DfT argued that more broadly, there is a public interest in protecting the commercial interests of private sector businesses, which plays an important role in the economy.

Public interest arguments in favour of disclosing the information

64. The complainant has argued that:

- Thomas Cook was part owned by Lloyds Banking Group at the time of its financial difficulties and the main bank behind its refinancing was Royal Bank of Scotland. Both of these banks at the time were part owned by the government. Furthermore, Thomas Cook also held a contract to supply package tours for the Olympics.
- If Thomas Cook had gone out of business it would have caused significant financial and logistical problems for the government
- Not only is there a public interest in accountability and transparency but also in ensuring that public resources are put to best use.

65. The DfT also suggested that disclosure of information may provide transparency on the commercial affairs of a tour operator in the UK as well as enhancing the quality of discussions and decision making.

Balance of the public interest

66. The complainant has argued that the involvement of Lloyds and Royal Bank of Scotland with Thomas Cook presents a case for disclosure. However the Commissioner does not consider that this is a significant factor in favour of disclosure. Just because a bank might be partly government owned is not of itself a reason for disclosing any information about its investments. The Commissioner is also mindful that Thomas Cook's financial difficulties in 2011 were in the public domain both at the time and when the complainant made his request, although not necessarily in the level of detail as in the withheld information. In the Commissioner's view this does go some way towards meeting the public interest in transparency and accountability.

67. As regards the public interest in maintaining the exemption the Commissioner is satisfied that there remains a strong case for withholding the information. Whilst the passage of time may have reduced the severity of any prejudice to the commercial interests of Thomas Cook, the Commissioner accepts that the prejudice to Thomas Cook is certainly real, and more probable than not.

68. The Commissioner has taken into account the fact that any prejudice to the commercial interests of Thomas Cook would also impact upon the operation of the ATOL scheme which provides consumer protection in the event of a travel company failure. Commercial prejudice, leading to greater vulnerabilities for Thomas Cook or other large ATOL holders, will increase the risk to the ATOL scheme. This increased risk would then

have an impact on the availability and cost of insolvency protection, which would need to be borne by the travel sector and ultimately the consumers that purchase the holidays. The Commissioner is also mindful that Thomas Cook has a substantial employee base in the UK. Commercial difficulties could affect staff, either through uncertainty about jobs or actual redundancies, both at a national level or local level. Taken together these arguments present a strong case for maintaining the exemption.

69. The Commissioner's view is that there is a strong public interest in protecting the commercial interests of companies and ensuring that they are able to compete fairly. Whilst the passage of time may have reduced the severity of the reputational damage that might be caused to Thomas Cook, the quite limited arguments for disclosure are still outweighed by the public interest in maintaining the exemption.

Section 35(1)(a) – formulation of government policy
Parts of documents: 1, 7, 13, 15 and 17

70. Section 35(1)(a) provides that information is exempt if it is held by a government department and 'relates' to the formulation and development of government policy.
71. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any kind of prejudice to engage the exemption, only that the request falls within the class of information which the exemption is designed to protect.
72. The Commissioner also considers that since the exemption only requires that information 'relates to' the formulation or development of government policy, it can be interpreted broadly. This means that the information does not itself have to be created as part of the formulation or development of government policy. Any significant link between the information and those activities is sufficient to engage the exemption.
73. The DfT explained that the information withheld by virtue of this exemption relates to the formulation of government policy in the following areas of ongoing policy development:
- The contingency response to the failure of Thomas Cook or another large Air Travel Operators' Licence (ATOL) holder / airline.
 - The development of policy relating to ATOL and NATS.
74. As regards the policy relating to the contingency response, the withheld information includes advice to Ministers about options to repatriate passengers in the event of the failure of a large ATOL business. As the

repatriation operation would have been on an unprecedented size and scale, the information discusses options that go beyond the Civil Aviation Authority's (CAA) conventional contingency response. The DfT has confirmed that this remains a live policy area as it is essential that CAA and Government are prepared for situations as and when they materialise.

75. The Commissioner would not generally consider the government's response to a particular event to involve the formulation and development of government policy. Rather the government's response would generally be seen as involving the implementation of existing policy which had already been formulated and developed.
76. However, as the Commissioner's guidance on this exemption explains, a variety of different processes can encompass government policy making. More specifically, the guidance makes it clear that, depending on the facts of a case, processes involving policy making can include unusually sensitive or high-profile operational decisions.³
77. The DfT also explained that it is currently formulating policy relating to the design of the ATOL scheme and the changes required to provide effective protection under the EU's new Package Travel Directive 2015. It said that these policies will need to be developed and implemented by June 2018, and it will be designing and consulting on options in the meantime.
78. DfT further explained that it also continues to be the government's intention to reform the ATOL scheme, in order to place the scheme on a more robust footing and reduce potential calls for government interventions. It said that this policy development process is likely to continue beyond 2018, depending on the views received in the consultation.
79. The information withheld in document 7 also relates to policy on NATS. This also remains a live policy issue, as the DfT has confirmed that the government is currently considering options for the ongoing ownership and shareholding of NATS. As part of the policy development process, it is likely that a consultation will go ahead in the next two years.

³ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foisection-35-guidance.pdf>

80. Having reviewed the withheld information it is clear that it relates to the formulation or development of government policy with respect to a contingency response to the failure of a large ATOL licence holder as well as policies relating to reforms of ATOL and NATS and that therefore DfT have correctly applied section 31(5)(a) to this information.

Public interest test

Public interest arguments in favour of disclosure

81. The DfT said that it had taken into account the following arguments in favour of disclosure:

- There is a public interest in disclosing policy advice that would inform the public of a tour operator's activities and the wider policy objectives of ATOL reform programme which began in 2011.
- Disclosure of this information may provide reassurance to the public that a sound process was being taken to develop policy in the travel and tourism industry.
- Disclosure of the information would contribute to the government's wider transparency agenda.
- There are also more specific arguments for the public to know the affairs of one of the UK's largest package holiday tour operators in that it might increase consumer trust and confidence, and more broadly inform the consumer booking a holiday with that provider.
- The release of information may also help contribute to the public's greater understanding of public affairs and how government uses its resources.
- The release of information might enhance the quality of discussions and decision making.

Public interest arguments in favour of maintaining the exemption

82. The DfT said that it considered that the following factors supported maintaining the exemption:

- Ministers and officials need a safe space to discuss policy options in private. Disclosing the information would undermine this process and result in less robust, well considered or effective policies.
- The primary aim of the ATOL scheme is to protect consumers from losing their money or being stranded abroad as a result of the insolvency of their tour operator. It is therefore in the public interest that the scheme should function to the optimum level in the interest of its consumers.
- Policies regarding contingency planning, ATOL and NATS reform are all live.
- Disclosure would impact on the frankness of the advice officials give to ministers or on the exchange of views in these policy areas.

Balance of the public interest arguments

83. The Commissioner has considered the competing arguments and accepts that there is a public interest in providing greater transparency about how the Government might respond to the possible failure of an ATOL licence holder, how it intends to reform ATOL and, in the case of document 7, its position regarding NATS. Disclosure would provide transparency about the government's plans and promote better public understanding of the issues under consideration. It would also promote accountability by revealing what actions the Government took to respond to the difficulties faced by Thomas Cook and how it might respond to a similar case in future.
84. However, this has to be balanced against the public interest in ensuring that government is able to formulate and develop policy effectively. In this case the Commissioner is mindful that the policies which the information relates to were still live and very much ongoing at the time of the request. The Commissioner takes the view that there will be a strong public interest in maintaining a safe space in relation to a live policy. The idea behind the safe space argument, accepted by the Commissioner, is that government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
85. The DfT has explained that premature disclosure of the requested information is likely to hamper the development of the Government's policies. It said that, for example, disclosure would raise expectations and pressure that a particular policy should be adopted which may not be appropriate in the circumstances. In the case of the contingency response it said that it may result in the Government having to make a

policy announcement or commitment that it would not otherwise make unless a specific event required it. In addition, the DfT explained that the policies regarding ATOL and NATS are being developed in areas where substantial market sensitivities exist. It said that disclosure would be likely to have a market impact which forces government policy in a particular direction. For example, it said that disclosure could lead consumers to take a view that they may receive more or less effective protection from a particular tour operator based upon the size of the business.

86. In light of these arguments the Commissioner is satisfied that the policies surrounding ATOL and NATS were ongoing at the time of the request and that there is a considerable public interest in allowing the government a safe space to continue the policy development process without the fear that information will be made public which might damage that process. In the Commissioner's view disclosure would be likely to lead to greater speculation and the policy development being hindered by external comment, media attention or pressure from other interested parties. This would distract from the work being carried out by the DfT and would not be in the public interest.
87. The DfT have also argued that disclosure would affect the frankness with which officials are able to discuss policy and provide advice. It also suggested that disclosure would mean that the CAA and other stakeholders would be more reluctant to share information with the DfT in future. This is essentially the 'chilling effect' argument which is the risk that disclosure would impact on the frankness and candour of debate. On this point the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Equally, the passage of time since the information was created, (between 3 years 8 months old and 2 years 9 months old at the time of the request) is likely to reduce the impact of disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry a certain amount of weight.
88. The Commissioner recognises that there is a public interest in disclosure and that the passage of time will have reduced some of the sensitivities about revealing the content of the policy discussions. However, the Commissioner is mindful that the policies to which the information relates were all still live at the time of the request and this weighs strongly in favour of maintaining the exemption. Allowing the Government the time and space to develop effective policies around

ATOL and contingency plans for the failure of an ATOL licence holder ultimately protects the interests of holidaymakers and this is a key factor in favour of maintaining the exemption. Therefore, the Commissioner has decided that in all the circumstances of the case the public interest in maintaining the section 35(1)(a) exemption outweighs the public interest in disclosure.

Section 40(2) – Personal information

89. The DfT has withheld the name of junior officials under the exemption in section 40(2). Most of this information is already aught by another exemption since the names are contained within documents which have been wholly withheld under one of the exemptions already discussed. However, the Commissioner notes that the names and contact details of some officials have been redacted from the information disclosed to the complainant. Whilst the DfT's use of this exemption does not appear to be in dispute the Commissioner has decided that in the circumstances, and for the sake of completeness, she will go on to briefly consider whether the exemption is engaged.
90. So far is relevant to this case, section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles. In deciding whether section 40 is engaged the first thing to consider is whether the requested information is personal data. Personal data is defined in the Data Protection Act 1998 as:

“personal data” means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

91. The information withheld under this exemption comprises the names and contact details of junior civil servants. The information obviously relates to the individuals concerned and allows for them to be identified. The Commissioner is satisfied that this information can be said to be personal data so the next thing to consider is whether disclosure would contravene any of the data protection principles.

92. The DfT has said that that in its view disclosure would contravene the first data protection principle which requires that personal data be processed fairly and lawfully and in particular that it shall not be processed unless one of the conditions in schedule 2 is satisfied. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that disclosure would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
93. In assessing whether disclosure would be unfair, and thus constitute a breach of the first data protection principle, the Commissioner takes into account the reasonable expectations of the data subject and the likely consequences of disclosure including any damage or distress that would be caused.
94. The DfT has said that it has withheld the names of these individuals because they are junior officials below the Senior Civil Service. It also said that these individuals are not in public facing roles and therefore have an expectation that their names will not be put into the public domain.
95. The Commissioner has considered these arguments and would accept that even though the information relates to their public rather than private life, the individuals would have a reasonable expectation of confidence given their status as junior officials and the fact that they were not in a public facing roles. This leads the Commissioner to conclude that disclosure would be unfair.
96. However, notwithstanding individuals' expectations of privacy or any harm that could be caused, there may be occasions when it is still fair to disclose information if there is a public interest in doing so or if the legitimate interests of the applicant outweigh the rights and freedoms of the data subject. The Commissioner has considered whether there is a public interest case for disclosure but in her view releasing the names and contact details of the officials would add very little if anything to public understanding of the issues under consideration, beyond the information which has already been disclosed. Therefore, the Commissioner has decided that the information redacted under section 40(2) is engaged and since this is an absolute exemption there is no public interest test to apply.

Section 10 – time for compliance

97. Section 10(1) provides that a public authority must respond to a request for information promptly and in any event within 20 working days following the date of receipt.

98. Under section 10(3) a public authority may extend this 20 working day deadline 'until such time is reasonable in the circumstances' if a qualified exemption applies and it needs more time to consider the public interest test.
99. What is reasonable is not defined in FOIA but the Commissioner has issued guidance regarding the time limits on considering the public interest following requests for information.⁴ The Commissioner considers that public authorities should aim to respond fully to all requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but, in the Commissioner's view, in no case should the total time exceed 40 working days.
100. In this case the complainant made his request on 31 July 2016 but the DfT did not provide a substantive response until 26 October 2016 – a period of 60 working days. In the Commissioner's view such a delay is not reasonable and therefore she has found that the DfT breached section 10(3) in its handling of the request.

⁴http://www.ico.org.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/fep038_public_interest_test_v3.pdf.

Right of appeal

101. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

102. 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.

103. 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

Paul Warbrick
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Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF