

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2021

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant requested details of meetings with Thomas Cook Group. The Department for Transport ("the DfT") originally relied on section 22 of the FOIA (intended for publication) to withhold the requested information, before later relying on section 43 (commercial interests) and section 35 (formulation of government policy) or section 36 (effective conduct of public affairs) "in the alternative" to withhold information.
2. The Commissioner's decision is that the DfT has not demonstrated that section 43(2) of the FOIA is engaged and is therefore not entitled to rely on that exemption. Section 35 of the FOIA is engaged, but the public interest favours disclosure. As the withheld information engages section 35, the section 36 arguments fall away. Finally, as the DfT failed to respond to the request within 20 working days, it also breached section 10 of the FOIA.
3. The Commissioner requires the DfT to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information in Annex B – with the exception of the personal data it has already identified to the Commissioner.
4. The DfT 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

5. On 23 September 2019, the complainant wrote to the DfT and requested information in the following terms:

"Under the Freedom of Information Act 2000, I would like to request information relating to meetings between Thomas Cook Group and the government.

"Please could you tell me what meetings and correspondence there have been between Ministers and/or Senior civil servants (Grade 5 or above) and employees from Thomas Cook Group between August 1 and September 22, 2019.

"In respect of each meeting, please provide the following details:

- The dates of the meetings*
- Who participated in the meeting (Names, and/or position/rank)*
- Minutes from the meeting(s)*
- Correspondence between the parties"*

6. The DfT responded on 18 November 2019. It confirmed that it held information within the scope of the request, but refused to release it. The DfT stated that it intended to publish the information at a later date and therefore relied on section 22 of the FOIA to withhold the information.
7. The complainant sought an internal review on 21 November 2019. He noted that the DfT had been vague about when the information would be published and was sceptical that the DfT intended to publish all the information it held.
8. Following an internal review the DfT wrote to the complainant on 17 January 2020. It upheld its position that section 22 was engaged and that the public interest favoured maintaining the exemption.

Scope of the case

9. The complainant contacted the Commissioner on 26 February 2020 to complain about the way his request for information had been handled.

10. The Commissioner commenced her investigation on 15 October 2020, with a letter to the DfT asking it to set out its reasons why section 22 would still be engaged.
11. The DfT responded to the Commissioner and to the complainant on 13 November 2020. It noted that matters had moved on considerably since the complaint had been accepted and that it had published all the correspondence between the Government and Thomas Cook Group that would have fallen within the scope of the complainant's request. It also disclosed a list of the meetings that had taken place with Thomas Cook Group and the names of the ministers and Senior Civil Servants that attended those meetings (it withheld the names of the junior officials).
12. However, the DfT wished to withhold some information and now wished to rely on section 43(2) of the FOIA to do so. It also stated that the withheld information was covered by section 35 of the FOIA or, in the event that that exemption was found not to apply, section 36.
13. Given the relatively small amount of information the DfT had identified as falling within the scope of the request, the Commissioner asked for confirmation that no further relevant information was held. The DfT identified that it had not provided the Commissioner with the names of the junior meeting attendees, but maintained that this was the only other relevant information it held that was not already in the public domain.
14. As section 36 cannot apply to information covered by section 35 and as section 43 is only engaged in relation to some of the information, the Commissioner will look at section 35 first. If section 35 is not engaged, she will look at whether section 36 is engaged. If section 35 is engaged, but the public interest favours disclosure, she will also look at whether section 43(2) of the FOIA is engaged.

Reasons for decision

Section 35 – Formulation or development of government policy

15. Section 35(1) of FOIA states that:

Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

- (a) the formulation or development of government policy,*
- (b) Ministerial communications,*

- (c) *the provision of advice by any of the Law Officers or any request for the provision of such advice, or*
- (d) *the operation of any Ministerial private office.*
16. Section 35 is a class-based exemption, meaning that any information of a particular type will fall within the scope of the exemption simply because it falls within that class – the public authority does not have to demonstrate that disclosure would also cause prejudice in order to engage the exemption.
17. In *Department for Education & Skills v Information Commissioner and Evening Standard* (EA/2006/0006), the Tribunal noted that the phrase “relates to” should be interpreted broadly. However, the information must relate to the formulation or development of government policy – not the implementation or administration of existing policy.
18. The withheld information in this cases comprises of a single email, sent from a Senior Civil Servant, summarising, in several bullet points, the discussions that had taken place in the meeting of 9 September 2019 – a meeting which the Secretary of State attended. The DfT stated that this was the only one of the meetings that had resulted in a written record.
19. When explaining why it considered section 35 would apply, the DfT stated that:
- "The information being withheld relates to ongoing policy development on airline insolvency. Whilst HMG's overall policy on Thomas Cook's request for financial assistance and the potential insolvency had been determined at the point that [the complainant]'s request was received, this policy was still evolving as part of a live and developing contingency operation. Release of the information would have undermined this process and resulted in less robust, or effective policies.*
- "Furthermore, the basis of HMG's policy decision was, and remains, part of ongoing policy development on airline commercial and insolvency policy. If this information is disclosed, it would be likely to inhibit the effectiveness of HMG policy on any potential future requests for support that are received from airlines.*
- "It would be likely to cause expectation and pressure that a particular response should be adopted, which may not be appropriate in the circumstances."*
20. The DfT provided a copy of the withheld information in which each line was treated separately. As its submission did not deal with each line

individually and the same exemptions were applied to most of the lines, it is not quite clear why it took this approach. However, the Tribunal in the *Evening Standard* case was clear that a line-by-line approach was unhelpful when considering whether this particular exemption was engaged:

"we are firmly of the view that, when asking the question, whether the minutes of a particular meeting or part of one, a memorandum to a superior or a minister or a note of advice fall within s.35(1)(a), a broad approach should be adopted. If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s.35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable. As acknowledged already, that reassurance is of limited value since the question of the public interest remains."

21. When viewed as a whole, the Commissioner considers that the email in question concerns a meeting at which the Secretary of State discussed the possible approaches the Government could take to deal with financial crisis that was then facing Thomas Cook Group.
22. The Commissioner's guidance on the section 35 exemption states that for information to relate to a particular policy, three factors must be present:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
23. Contemporary media reports suggest that Thomas Cook Group was, around the time of the meeting, seeking a significant injection of funding in order to carry on trading. That funding was not ultimately forthcoming and the company entered into liquidation – leaving around 150,000 British holidaymakers stranded abroad.
24. The Commissioner considers that the decision to provide (or not provide) taxpayer funding to Thomas Cook Group would have involved a particular real world change that the Government was seeking to bring about (or to avoid). Either way, the decision would have had wide-ranging consequences – both to the company's customers and to the travel industry more widely. The company was reportedly seeking a sum of around £250million in order to stay afloat and the Secretary of State confirmed to Parliament that the Government had decided not to provide

this support. The Commissioner is therefore satisfied that the withheld information relates to the formulation of government policy – namely the government's policy toward Thomas Cook Group.

25. The Commissioner also accepts that the withheld information would be relevant to the formulation and development of the government's broader approach to the aviation industry, particularly towards travel companies in financial difficulties.
26. Therefore the Commissioner is satisfied that section 35(1)(a) of the FOIA is engaged.

Public interest test

27. Section 35 is a qualified exemption – meaning that, even if the information falls within the particular class, it can only be withheld if the balance of the public interest favours disclosure.
28. The DfT identified three main arguments as to why the public interest should favour maintaining the exemption.

"The information includes views and commercially sensitive information shared with Ministers in confidence by a Limited company. It also includes the views of the Secretary of State on the different outcomes for consumers in the UK and overseas, which is the subject of live policy development for ATOL and airline insolvency.

"It is in the public interest that companies and other stakeholders are able to share views and commercially sensitive information with Ministers, relating to airline or travel company restructuring, and that these views should also be shared with officials. This is in order that Government can make effective policy decisions (e.g. relating to the ATOL scheme or airline insolvency policies), consider potential commercial decisions (e.g. relating to the ATOL scheme or support for the sector), and prepare contingency plans that mitigate the impacts for consumers when large scale airline failures occur.

"There is a realistic expectation that there would be harm from releasing the information, which will then inhibit officials, experts or companies from freely sharing frank advice or information with Ministers in the future. This will potentially lead to ineffective policy making, commercial decisions and impacts on consumers."

29. Weighed against these arguments, the DfT noted that there was always a public interest in transparency and informing the public about the policy-making process.

The Commissioner's view

30. In the view of the Commissioner, the public interest in this case favours disclosure.
31. As with any public interest test, the Commissioner has started with a consideration of the actual information that has been withheld.
32. The withheld information in this case is, according to the DfT, the only record of any of the four meetings which took place with Thomas Cook in August and September of 2019 and records the only meeting at which the Secretary of State himself was present.
33. As the Tribunal made clear in the *Evening Standard* case, given the wide range of material that could potentially fall within this exemption – including information that could not possibly be harmful to disclose – the public interest test is important in distinguishing between information that remains sensitive and that which does not.
34. The content of the email itself is brief and only gives a high-level indication of discussion topics. There is no record of the precise discussions or the alternatives that were discussed. There is no detailed indication of the positions that any of the parties took in that discussion. Nor does the withheld information discuss any potential risks or evaluation of particular approaches.
35. At the point the DfT responded to the request, the Government had already determined its approach toward Thomas Cook Group. The Government decided that an injection of cash did not represent value for money and the company had entered into administration before the request was responded to. The Secretary of State announced the decision (and the Government's approach) to the House of Commons on 25 September 2019 (*Official Report vol 664, 25 September 2019, Col 688*). Therefore the Commissioner considers that, at the point the request was responded to, the particular policy-making process relating to Thomas Cook Group had reached its conclusion. It thus follows that the public interest in protecting that process had weakened by that point.
36. Whilst the Commissioner accepts that other airlines would have a reasonable expectation that the Government's approach to Thomas Cook Group's difficulties would be replicated if they had to approach the Government for support, she considers that the withheld information contains very little information about what the Government's approach actually was (or would be). In her view, the withheld information contains arguably less information about the principles underlying the

Government's response than have been contained in the Government's statements to Parliament and the media.

37. The Commissioner considers that civil servants should now be well aware that their correspondence may be subject to disclosure under the FOIA. She nevertheless expects officials to be robust and forthright when providing advice and to not be easily swayed by the mere possibility that their views might one day be placed into the public domain.
38. Whilst the Commissioner acknowledges that the policy-making process should not take place "in a goldfish bowl", in the specific circumstances of this case, that particular process was complete and she does not consider that there are any particular reasons why disclosure of this information is likely to cause further harm.
39. On the other side of the equation, around 9,000 people were employed by Thomas Cook Group when it went into administration and the Government had to repatriate many thousands of British nationals. That is not to say that the Government made the wrong decision – the company may have collapsed anyway – and the Commissioner expresses no opinion on the Government's reasoning. However, given the large number of people involved, there will be a strong public interest in understanding how this particular decision came about.
40. The Commissioner therefore considers that, whilst section 35 is engaged, the public interest in disclosure outweighs the interest in maintaining the exemption.

Section 36 – prejudice to the effective conduct of public affairs

41. Section 36 is a prejudice-based exemption which, in broad terms, protects information whose disclosure would inhibit a public authority's processes of internal debate or otherwise inhibit the public authority from going about its business.
42. The DfT provided submissions and an opinion from a minister stating that, if section 35 did not apply, section 36 would.
43. However, for section 36 to be engaged, it is a pre-requisite that the information must not engage section 35. As the Commissioner has found that section 35 is engaged – even though the public interest favours disclosure – section 36 cannot, by definition, apply.

Section 43(2) – Prejudice to commercial interests

44. Section 43(2) of the FOIA states that:

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

45. The exemption can be engaged on the basis that disclosing the information either “would” prejudice commercial interests, or the lower threshold that disclosure only “would be likely” to prejudice those interests. For the Commissioner to be convinced that prejudice “would” occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of “would be likely to” occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.

46. In explaining why the exemption applied, the DfT stated that:

“The meeting minutes contain highly sensitive commercial discussions which need to remain confidential. The approach taken in the conversations with Thomas Cook is pertinent to wider discussions the government may engage with from time to time with other entities in the sector.

“In reaching a decision on this exemption, we considered the impact that disclosure would have on the government’s relationship with the sector. Disclosing this information would be likely to prejudice the government’s relationship with third parties and would make them less likely to share intelligence in the future. This would be likely to prejudice the government’s commercial interests.”

47. In its public interest arguments, the DfT further explained that:

“HMG has built strong relationships with the external market. They are a key source of information which HMG relies on to make critical decisions, both in terms of routine policy and also potential commercial decisions. Disclosing this commercially sensitive information would result in confidence being lost and intelligence being less likely to be shared with HMG in the future. This would make it harder for HMG to develop appropriate policies for the aviation market and would be likely to prejudice HMG’s commercial interests to the detriment of the taxpayer.”

The Commissioner's view

48. In the Commissioner's view, the DfT has not come close to demonstrating that this particular exemption is engaged in respect of the withheld information.
49. Whilst the Commissioner does not doubt that the discussions between the DfT and Thomas Cook Group would have entailed "*highly sensitive commercial discussions*", the content of the withheld information does not reflect that and certainly does not contain such details.
50. Furthermore, by the time the request was responded to, Thomas Cook Group had entered into administration. The company therefore no longer had commercial interests to protect and the DfT has not provided any arguments that would suggest that disclosure of the information would have impeded the ability of the administrators to realise maximum value for the company's remaining assets.
51. Section 43(2) can still be engaged if the public authority can demonstrate that its own commercial interests would be prejudiced by disclosure of the information. The DfT identified two strands to this argument: firstly that disclosure would prevent other companies from sharing confidential information with Government departments and secondly that disclosure of the details of this discussion would potentially inhibit the DfT from negotiating with other companies in the future.
52. As to the first argument, any company that deals with a public authority will be (or, at least, should be) aware that any information they supply is potentially vulnerable to an information request. Equally, they should have an expectation that, in most circumstances, the most sensitive information will not be disclosed. Each request must be balanced on its own individual facts and companies should be aware that balance will need to be struck.
53. In the Commissioner's view, disclosure of this particular information would not alter that balance. Disclosure of information, about a company that no longer trades, should not create a reasonable expectation that more sensitive information, about still-active companies, will be disclosed. Equally, disclosure of general information about a company's financial status (especially when such information is either already in, or is superseded by information already in, the public domain) should not create an expectation that more detailed information will also be disclosed.
54. Turning to the DfT's second argument, the Commissioner rejects this argument for the same reasons that she rejected the DfT's public

interest arguments in respect of the section 35 exemption. Every other airline was fully aware, at the point the request was responded to, that the Government had refused to support Thomas Cook Group. The Commissioner does not consider that the withheld information would provide any useful indication of why the Government chose not to support this company or of the terms on which the Government might have been prepared to provide support. Nothing within the email would be of use to another airline considering approaching the DfT and the Commissioner considers that any suggestion that the DfT would be disadvantaged in a future negotiation is fanciful at best.

55. As the DfT has not demonstrated that any significant commercial harm would result from disclosure, the Commissioner cannot consider that section 43(2) of the FOIA is engaged.

Section 40(2) – Personal data

56. The DfT has redacted, both from the withheld email and from the information it has already disclosed, the names of the junior civil servants involved.
57. The Commissioner's general approach is that those below Senior Civil Servant (SCS) grade can usually have their names redacted as they do not have the same level of responsibility.
58. The complainant's request only sought correspondence sent by (or to) those with an SCS grade and the Commissioner considers that disclosing the names of junior civil servants would add nothing to public understanding of the issues involved – whilst representing an intrusion into those individuals' privacy. She is therefore satisfied that the DfT can rely on section 40(2) of the FOIA to withhold this information.

Procedural matters

59. Section 10 of the FOIA requires responses to be provided "*promptly and no later than the twentieth working day following the date of receipt.*"
60. The Commissioner notes that the DfT failed to provide a response within 20 working days and therefore breached section 10 of the FOIA.

Other matters

61. The Commissioner considers that it was inappropriate for the DfT to have cited both section 35 and 36 for the same information when it knows (or should know) that these exemptions are mutually exclusive.
62. A well-resourced government department such as the DfT should be able to determine whether particular information does or does not relate to its policy-making process. Once that determination has been made, the DfT can then decide which exemption is appropriate.
63. The Commissioner expects the DfT to have decided whether information is covered by section 35 or by section 36 before providing its submission in future. It is the DfT's responsibility (and not hers) to decide which exemption to apply.

Right of appeal

64. 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@justice.gov.uk

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

65. 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.
66. 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

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