

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

### **Decision notice**

**Date:** 7 April 2021

**Public Authority:** HM Treasury  
**Address:** 1 Horse Guards Road  
London  
SW1A 2HQ

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

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1. The complainant requested information relating to advice and requests for approvals to Ministers following the collapse of Thomas Cook. The public authority withheld the information held within the scope of the request (the disputed information) on the basis of the exemptions at sections 35(1)(a), 35(1)(b), 40(2) and 43(2) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 35(1)(a) as the basis for withholding the disputed information.
3. No steps are required.

## Request and response

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4. On 16 October 2019 the complainant submitted a request to the public authority in the following terms:

"In an appearance in front of the Business, Energy and Industrial Strategy Committee on Tuesday 15 October, Business Secretary Andrea Leadsom was questioned about the collapse of Thomas Cook.

Asked about Thomas Cook's request for government intervention (financial or otherwise) Leadsom said that "the Treasury had looked very carefully into the case."

Therefore I would like to request a copy of any report(s), formal advice, requests for approvals or authorisations to Ministers in writing during September 2019, relating to Thomas Cook..."

5. The public authority provided its response on 12 November 2019. It confirmed that it held information within the scope of the request which it considered exempt on the basis of the exemption at section 35(1)(a) FOIA (information relating to the formulation or development of government policy).
6. On 12 November 2019 the complainant requested an internal review of the public authority's response. His dissatisfaction with the decision was expressed as follows:
- "Given the level of government involvement, the huge sum of money, and the massive job losses I believe the public interest in disclosure outweighs that of withholding the evidence..."
7. On 31 January 2020 the public authority wrote back to the complainant with details of the outcome of the internal review. The review upheld the original decision to rely on the exemption at section 35(1)(a) and further concluded that some of the information held was additionally exempt on the basis of section 40(2) FOIA (personal data).

## Scope of the case

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8. The complainant contacted the Commissioner on 26 February 2020 to complain about the way that his request for information had been handled, specifically the public authority's refusal to disclose the information held within the scope of his request.

9. Following the complaint to the Commissioner, the public authority sought to additionally rely on the exemptions at sections 35(1)(b) FOIA (Ministerial communications) and 43(2) FOIA (commercial interests).
10. The scope of the investigation was to consider whether the public authority was entitled to withhold the information held within the scope of the complainant's request of 16 October 2019 above (the disputed information) on the basis of the exemptions at sections 35(1)(a), 35(1)(b), 40(2) and 43(2) FOIA.

## **Reasons for decision**

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### Background

11. On 23 September 2019, following the collapse of Thomas Cook, the Government launched the UK's largest peacetime repatriation programme code-named, 'Operation Matterhorn', to fly more than 150,000 stranded passengers<sup>1</sup> back to the UK. It is however important to note that Operation Matterhorn also included a potential Government rescue financial package for Thomas Cook along with financial and other support for stranded passengers.
12. The Thomas Cook Compensation Bill 2019-20 was announced in the Queen's speech on 19 December 2019 to enable the Government to administer a capped compensation scheme to support customers of Thomas Cook facing the most serious hardship as a result of life-changing injuries, illness or loss of life for which UK-based Thomas Cook companies would have been liable.
13. At the same time the intent to bring in Airline Insolvency legislation was also announced with the stated aim of protecting passengers in the event of an airline going bust by reforming the airline insolvency process.

### The disputed information

14. The disputed information consists of 4 submissions between 5 September and 21 September 2019 from officials to Ministers in relation

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<sup>1</sup> The CAA's estimate of the number of stranded passengers - <https://www.caa.co.uk/News/Operation-Matterhorn-brings-over-127,000-Thomas-Cook-passengers-back-to-the-UK-in-the-first-ten-days/?catid=4294967428>

to Operation Matterhorn including discussions regarding a rescue package for Thomas Cook and support for stranded passengers.

Section 35(1)(a)

15. The Commissioner initially considered whether the public authority was entitled to apply the exemption at section 35(1)(a) to the disputed information.

16. Section 35(1)(a) states:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy.”<sup>2</sup>

Public authority's submissions

17. The public authority's submissions are summarised below.

18. The disputed information relates to the formulation and development of government policy on airline insolvency and therefore engages the exemption at section 35(1)(a)<sup>3</sup>. The Government's decision to legislate to protect passengers in the event of airline insolvency was laid out in the Queen's speech on 19 December 2019<sup>4</sup>. The Government is still in the process of developing the general policy for airline insolvency and taking forward relevant legislation.

19. With respect to the balance of the public interest the public authority acknowledged that there is a general public interest in transparency and accountability of public authorities which may be promoted by the disclosure of the disputed information. Specifically, it recognised that there is a public interest in transparency in relation to arrangements by Government in the event of a potential or actualised airline insolvency particularly with respect to the use of public funds.

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<sup>2</sup> The full text of the exemption is available here:  
<http://www.legislation.gov.uk/ukpga/2000/36/section/35>

<sup>3</sup> For the avoidance of doubt, the Commissioner is satisfied that the disputed information falls within the scope of the complainant's request.

<sup>4</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/853886/Queen\\_s\\_Speech\\_December\\_2019\\_-\\_background\\_briefing\\_notes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf)

20. The public authority however submitted that the public interest in transparency and accountability in this case is to a large extent met by the information already publicly available on the Government's airline insolvency policy in general and its handling of the Thomas Cook insolvency in particular.
21. For example, an oral statement to Parliament was made by The Rt Hon Grant Shapps MP (Secretary of State for Transport) on 25 September 2019 on the steps being taken to support passengers and employees affected by the collapse of Thomas Cook<sup>5</sup>. A report published by the National Audit Office (NAO) into the Government's response to the collapse of Thomas Cook includes significant amount of information on Government preparation plans for a potential insolvency<sup>6</sup>.
22. Furthermore, a number of Parliamentary questions have been answered on the subject by Government Ministers covering; the insolvency itself<sup>7</sup>, legislative proposals to support costumers<sup>8</sup>, and compensation<sup>9</sup>.
23. In favour of maintaining the exemption, the public authority argued that there is a public interest in protecting the Government's ability to discuss and develop policies and to reach well-informed conclusions. The disputed information relates to the Government's decision making with respect to airline insolvency. At the time the request was received (16 October 2019), responded to (12 November 2019), and upheld (31 January 2020), the policy on airline insolvency was, and is still, under consideration. The Government's decision to legislate to protect passengers in the event of airline insolvency was laid out in the Queen's speech on 19 December 2019.
24. The Government actively monitors airlines at risk of insolvency as a result of the risks to passengers' welfare and the economic impacts on local and national economies more generally and particularly so during the Covid-19 pandemic. Over the course of 2020 there was more active work on airline insolvency including the subsequent work on the

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<sup>5</sup> <https://www.gov.uk/government/speeches/thomas-cook-update>

<sup>6</sup> <https://www.nao.org.uk/wp-content/uploads/2020/03/Investigation-into-governments-response-to-the-collapse-of-Thomas-Cook.pdf>

<sup>7</sup> <https://questions-statements.parliament.uk/written-questions/detail/2019-10-16/1082>

<sup>8</sup> <https://questions-statements.parliament.uk/written-questions/detail/2020-01-23/7266>

<sup>9</sup> <https://questions-statements.parliament.uk/written-questions/detail/2020-03-23/33754>

potential insolvency of Flybe which occurred in March 2020. Since then, the global Covid-19 pandemic has meant that airline insolvency has continued to be a live issue with numerous UK airlines accessing Government support schemes such as the Coronavirus Corporate Financing Facility and the Coronavirus Job Retention Scheme to maintain their liquidity. Policymaking in these scenarios is highly commercially sensitive with implications for passenger safety and welfare if stranded abroad. This continues to be an aspect that Government monitors to this day.

25. It is therefore evident that the policy position on this issue was very much live at the date of the request and remains so. At the time of the internal review on 31 January 2020, the policy remained under consideration as the subsequent legislation on airline insolvency had (and still remains) yet to be laid in Parliament. It was imperative that Ministers and officials felt they could continue to have free and frank discussions about airline insolvency and that remains the case.
26. Disclosing the disputed information would have likely inhibited those discussions and in turn have had a prejudicial effect on the outcome of the decision-making process in relation to future discussions on airline insolvency. Although the disputed information relates to the insolvency of Thomas Cook, it includes advice in relation to the risk of further airline insolvencies as well as the principles underpinning Government decision-making for airline insolvencies in general.
27. The decision on how and whether to intervene in Thomas Cook's potential insolvency was a high-profile policy decision and subsequent policymaking with respect to Flybe and many UK airlines during Covid-19 is also high-profile. It was important for good decision making that officials, including Special Advisers, felt able to provide free and frank advice. Fear of release of the disputed information would have likely inhibited the nature of the discussions and the advice provided. This would have had a prejudicial effect on the outcome of the decision-making process in relation to discussions on airline insolvency generally.
28. It is also in the public interest for the public authority to maintain relationships with stakeholders that have an interest in government policies that affect their business sector including the airlines sector. If the public authority were seen to routinely disclose such information it would likely deter such stakeholders from freely providing views in future.

### Complainant's submissions

29. The complainant's submissions are summarised below.
30. The request was very specifically about the financial situation at Thomas Cook at the time of its collapse so the exemption is not engaged. However, if the disputed information contains specific points about government policy, these should be redacted.
31. Former Business Secretary Andrea Leadsom MP said the Treasury's thinking informed the government's decision not to offer Thomas Cook financial assistance. The Official Receiver has estimated that Thomas Cook collapsed with a liabilities of £9 billion. It is therefore in the public interest to understand the thinking behind the government's refusal to offer financial assistance as it might have cost tax payers a lot less money in the short term.
32. The statement by The Rt Hon Grant Shapps MP to Parliament on 25 September 2019 does not satisfy the public interest in understanding the thinking behind the Government's refusal to offer financial assistance to Thomas Cook. These were historical losses "and not relevant" to the state of the company's then current finances. In a letter published by the BEIS Select Committee, Thomas Cook's financial request to the Government is shown to be very small<sup>10</sup>. There was also an exchange at the Select hearing into the collapse of Thomas Cook which showed different departments trying to pass the blame for the company's collapse on to each other<sup>11</sup>.

### **Commissioner's considerations**

#### *Is the exemption engaged?*

33. The exemption in section 35(1)(a) is one of the class-based exemptions in the FOIA. This means that unlike a prejudice-based exemption, there is no requirement to show harm in order to engage it. The relevant information simply has to fall within the class described, and that would be enough to engage the exemption. The prejudicial effect of disclosure

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<sup>10</sup> <https://old.parliament.uk/documents/commons-committees/business-energy-and-industrial-strategy/Correspondence/2019-20/Letter-to-DfT-dated-18-September-2019.pdf>

<sup>11</sup> <https://www.theguardian.com/business/live/2019/oct/15/thomas-cook-mps-parliamentary-grilling-collapse-bank-of-england-imf-pound-business-live?page=with:block-5da5d46f8f084862358fe7ef#block-5da5d46f8f084862358fe7ef>

will inevitably be considered within the framework of the competing public interest factors.

34. The Commissioner considers that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' of policy may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
35. The Commissioner considers that the term 'relates to' in section 35 can be interpreted broadly within the meaning of the class based exemption. This means that information which relates to any significant extent to the formulation or development of policy will be caught by the exemption even if it also relates to policy implementation or other issues. Policy formulation or development does not have to be the sole or main focus of the information as long as it is one significant element of it.
36. Furthermore, the exemption is not limited to information directly created as part of the policy process. Information created after a policy is finalised can still be covered if it describes or otherwise refers to its formulation or development.
37. It is clear from the Queen's speech that the Government intends to enact Airline Insolvency legislation as a consequence of the impact of Thomas Cook's liquidation on the public purse. According to the Government, the main benefits would be "making sure the industry can get passengers home quickly and effectively if and when an airline collapses. This will balance strong consumer protection with the interests of the taxpayer."<sup>12</sup>
38. The Commissioner is mindful that the disputed information does not only contain advice regarding a potential Government rescue package for Thomas Cook in order to prevent its imminent insolvency. The advice extends to handling the impact of Thomas Cook's insolvency such as repatriation of stranded passengers and providing passengers with other forms of support including financial support.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/853886/Queen\\_s\\_Speech\\_December\\_2019\\_-\\_background\\_briefing\\_notes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf)



39. Given the scope of the proposed Airline Insolvency legislation, the Commissioner considers that the disputed information in its entirety relates to the formulation or development of government policy on airline insolvency. The Commissioner is satisfied that both the advice in relation to a potential rescue package for Thomas Cook and in relation to handling the impact of Thomas Cook's insolvency on stranded passengers relate to a significant extent to the formulation or development of government policy on airline insolvency.
40. The Commissioner does not share the complainant's view that his request was "very specifically" about the financial situation at Thomas Cook at the time of its collapse and that therefore the exemption is not engaged. In the Commissioner's view, the wording of the request does not suggest that it was. The complainant had asked the public authority to provide a copy of any reports, formal advice, requests for approvals or authorisations in the context of a question posed to the former Business Secretary about Thomas Cook's request for government intervention (financial or otherwise).
41. It seems to the Commissioner that the request should be interpreted as a request for information on deliberations regarding the nature and extent of the Government's intervention, financial and otherwise, pursuant to Thomas Cook's liquidation. In any event, the question really is whether any part of the disputed information which contains information regarding the financial situation at Thomas Cook relates to the formulation or development of government policy; the Commissioner is satisfied that it does.
42. The Commissioner therefore finds that the public authority was entitled to engage the exemption at section 35(1)(a) to the entirety of the disputed information.

*Balance of the public interest*

43. The exemption in section 35(1)(a) is one of the qualified exemptions in the FOIA. Therefore, further to the requirement in section 2(2)(b) FOIA, the Commissioner next considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the disputed information.
44. There will always be a public interest in disclosing official information in the interests of openness and transparency. Specifically in this case, the Commissioner shares the view that there is a public interest in understanding why the Government did not consider that preventing the collapse of Thomas Cook was a viable option to pursue in the interests of stranded passengers, employees, and more broadly tax payers. Closely aligned is the public interest in understanding the principles

underpinning Government decisions in relation to airline insolvencies. The Commissioner is satisfied that the disputed information would add some insight to these important public interest considerations.

45. The Commissioner considers the statement by The Rt Hon Grant Shapps MP to Parliament, particularly in relation to the rationale for the Government's decision not to offer a bailout package to Thomas Cook, significant with respect to balancing the competing public interest factors in this case. Mr Shapps was clear that in the Government's assessment, a bailout could have ended up costing tax payers significantly more.
46. However, the Commissioner has not given any weight to the NAO report which was published on 19 March 2020 after the request was submitted and considered. The Commissioner also did not give any weight to the Parliamentary Questions. The question regarding the number of employees who had been made redundant in each region of the UK was tabled on 16 October 2019 but does not appear to have been answered before Parliament was dissolved on 6 November 2019. The question relating to legislative proposals to support customers of Thomas Cook was tabled on 23 January 2020. However, it was answered on 3 February 2020 after the public authority's final response to the request was issued on 31 January 2020. Similarly, the question on the progress the Government had made on introducing the Thomas Cook Compensation Bill was tabled on 23 March 2020 and received an answer on 31 March 2020. In addition, whilst the Commissioner is mindful of the increased significance of airline insolvency policy in view of the impact of the Covid-19 pandemic on the industry, the decision in this case has to be restricted to circumstances at the time of the request.
47. In favour of maintaining the exemption, the Commissioner considers that disclosing the disputed information is likely to result in a chilling effect on future discussions relating to airline insolvency and, in the circumstances of this case, there is a strong public interest in preventing that outcome. Civil servants should not be easily deterred from giving impartial and robust advice by the possibility of future disclosure. However, the impact of a chilling effect on discussions in relation to airline insolvency policy should not be underestimated, particularly when free and frank advice is required in order to deal with complicated and fast moving situations, such as the sudden collapse of a major UK travel company or the impact of pandemics like Covid-19. In addition, some of the information shared by Thomas Cook with officials in order to inform the Government's decisions was commercially sensitive. If the disputed information is disclosed, stakeholders may be less willing to share similar information with officials in future for fear that it could also be published prematurely and this would have a detrimental effect on the formulation or development of airline insolvency policy.

48. Furthermore, there was a strong public interest in protecting the private thinking space for officials and Ministers to consider options in relation to the proposed Airline Insolvency legislation. In view of some the lessons learned as a result of the collapse of Thomas Cook, the Government decided it was necessary to enact Airline Insolvency legislation and it was included in the Queen's speech in December 2019. Disclosing the disputed information at the time of the request in October 2019 or at the time of the internal review in January 2020 is likely to have become a source of distraction for officials and Ministers working on delivering the Government's proposed Airline Insolvency legislation as well as the Thomas Cook Compensation Bill. Whilst disclosure would have informed the debate regarding the handling of the collapse of Thomas Cook, it would have affected ongoing wider deliberations with Thomas Cook, for example, in relation to the Thomas Cook Compensation Bill. In addition, it would have become a source of distraction from deliberations relating to the broader government objective of ensuring that in future, consumers and tax payers are better protected by the airline industry when an airline collapses.
49. The Commissioner is not persuaded that Mr Shapps' statement to Parliament does not explain the Government's thinking behind the decision not to bail out Thomas Cook. According to Mr Shapps:
- "It have also seen it suggested in the press that the government should have avoided the collapse with a bailout of up to £250 million for the company and its shareholders. Given the perilous state of the business, including the companies £1.5 billion half year loss reported in May, followed by a further profit warning in November, this was simply not the case, with no guarantee that such an injection would have secured the future of the company. And in effect Mr Speaker our concern is we would have put in £250 million and it would have risked being thrown away good money after bad. And then we'd still have had to pay for the cost of this repatriation." [sic]
50. The historical losses were mentioned in order to give Parliament a fuller picture behind the Government's decision beyond the relatively small amount of money that it had been reported Thomas Cook requested. The Commissioner has not attached significant weight to the exchange between the former Business Secretary Andrea Leadsom MP and the Business, Energy and Industrial Strategy Select Committee into the collapse of Thomas Cook on the basis that it "showed different departments trying to pass the blame for the company's collapse on to each other." The Commissioner does not share this observation of the exchange and is not persuaded in any event that it undermines Mr Shapps' statement.

51. Given Mr Shapps' statement to Parliament and the strong public interest factors against disclosure, the Commissioner finds that on balance, the public interest in maintaining the exemption outweighs the public interest in disclosing the disputed information.
52. In light of this decision the Commissioner has not considered the additional exemptions.

## Right of appeal

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53. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

54. 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.
55. 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**.....

**Terna Waya**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**