



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0143

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50535988
Dated: 28 May 2014

Appellant: JOHN BRAMLEY
Respondent: INFORMATION COMMISSIONER
On the papers: NEWCASTLE SSCS
Date: 21 OCTOBER 2014
Date of decision: 27 NOVEMBER 2014

Before

ROBIN CALLENDER SMITH
Judge

and

JEAN NELSON and PAUL TAYLOR
Tribunal Members

Date of Promulgation: 1 December 2014

REPRESENTATIONS:

For the Appellant: Mr J Bramley
For the Respondent: Ms H Davenport, solicitor for the Information Commissioner

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2014/0143

Subject matter: FOIA

- s.44 (1) (a)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 28 May 2014 and dismisses the appeal.

REASONS FOR DECISION

Background

1. The background to this appeal is that Mr John Bramley (the Appellant) appears to have suffered a delay in his Thomas Cook flight between Gatwick and Tenerife (TC X1454) on 22 December 2012.
2. He subsequently took his complaint about this delay to the Civil Aviation Authority (CAA).
3. His complaint was not upheld and the CAA would not tell him what reasoning or evidence Thomas Cook had provided to the CAA as part of its review of his complaint.

The request for information

4. On 3 December 2013, the Appellant contacted the CAA and asked:

.... would you please advise why you are unable to provide information about why our flight was delayed.... would it be that Thomas Cook are refusing to give consent or are you not asking for consent on my behalf because it is i.e. (A) Part 1, 3, 4, 6, 7, 8 which

prevents you from doing so, also subsection (2) does not prevent the disclosure of any information if the information has on an earlier occasion been disclosed to the public....

.... had the CAA any knowledge or involvement in the Macclesfield County Court case....

.... This reply was provided by Dame Hutton CBE on 22 Oct 2013 in which I had requested that this be reviewed by the CAA legal department. Would you therefore state they have been involved in the reply of 22 Oct 2013 request under the FOI Act 2000.

5. On 23 December 2013 the CAA responded to the Appellant to advise that it had identified three requests within his letter dated 3 December:

(1) Why the CAA are unable to provide information why his flight was delayed under the consent part of Part 9 of the Enterprise Act 2002. Would it be that Thomas Cook are refusing to give consent or are the CAA not asking for consent on the Appellant's behalf?

(2) Did the CAA have any knowledge or involvement in the Macclesfield County Court case?

(3) Under the Freedom of Information Act, were the CAA legal department involved in the reply to the Appellant from Dame Deirdre Hutton on 22 October 2013?

6. The CAA told the Appellant that neither the Enterprise Act 2002 nor FOIA placed an obligation on the CAA to seek consent to disclosure from the business concerned (Thomas Cook). Thomas Cook had not been approached for its consent.

7. It also told the Appellant that it had no involvement in the Macclesfield County Court case and, in addition, that its legal department had not been directly involved with Dame Hutton's letter.

8. On 31 December 2013 the Appellant asked why the CAA had not sought consent from Thomas Cook. It responded 28 January 2014 repeating that it did not have an obligation to ask Thomas Cook and the CAA continued to rely on section 44 (1) (a) as the reason for not providing the requested information.
9. There was an internal review that maintained the previous refusal. Following that, the CAA stated that it had taken account of the large number of passenger complaints it received each year when set against the limited resources it had to consider them.
10. Its position was that if it had routinely to seek consent to disclose information it would take more time to consider each complaint and lead to longer delays in responding to passengers.
11. In considering whether to seek consent for the Appellant's particular case the CAA had considered the risk that would create setting a precedent for all other cases and that would have made an efficient system of complaints handling unworkable. The Appellant was reminded that he could approach Thomas Cook directly himself if he wanted to seek consent for disclosure.

The complaint to the Information Commissioner

12. On 25 February 2014 the Appellant complained to the Commissioner arguing that the CAA did have a legal right to contact Thomas Cook and that FOIA should "... override any speculation from CAA that it would cause a heavy workload and in the interests of natural justice..." they should assist passengers in obtaining relevant information.
13. The Commissioner found that section 44 (1) (a) was engaged and that the CAA was not obliged to disclose the requested information.

The appeal to the Tribunal

14. In his Grounds of Appeal to the Tribunal the Appellant made the following points:

- (1) He believed the decision by the Commissioner to accept the CAA's argument was against natural justice in respect of the power to disclose rather than a duty to disclose.
- (2) He believed that airlines such as Thomas Cook used the CAA to hide behind "extraordinary circumstances".
- (3) The Commissioner was relying on out of date case law.
- (4) His request would not set a precedent in respect of the CAA.

Evidence

15. The Tribunal has seen the closed, confidential information held by the CAA that was not disclosed to the Appellant.

16. The Tribunal has considered carefully whether this should be disclosed to the Appellant and, indeed, whether the request had been correctly treated as a Freedom of Information Act 2000 request.

Conclusion and remedy

17. The Tribunal has concluded that the relevant exemption in the case is section 44 (1) (a) FOIA. This relates to information which is "exempt information" because its disclosure by a public authority holding it (in this case the CAA) is prohibited by or under the Enterprise Act 2002.

18. Section 237 of that Act states that “specified information” relating to any business of an undertaking must not be disclosed while the undertaking continues in existence and it is an offence under section 245 (1) of the Enterprise Act to do so.
19. The Commissioner was correct to say that the information the Appellant had requested – and which is the subject of the appeal – is “specified information” and its disclosure is prohibited under section 44 (1) (a). There is a mechanism for disclosure (by virtue of section 237 (3) of the Enterprise Act) if it has, on an earlier occasion, been disclosed to the public.
20. That mechanism does not operate in this scenario because the specified information requested has not previously been provided to the general public.
21. Essentially it is a matter for the CAA to determine whether it is appropriate to exercise its discretion to exercise its power in any particular case. The CAA decided it would not exercise its discretion to seek consent for the disclosure of the requested information and gave reasons for that: the additional burden that it could create in terms of responding to myriad consumer requests.
22. As the Commissioner points out in his submissions, it is not his job to conduct what would amount to a judicial review of the exercise of the CAA’s discretion in respect of any of the Gateway provisions in any particular case.
23. The Tribunal agrees with this approach and adopts it because the Tribunal itself cannot conduct what would amount to a judicial review of the reasonableness of the exercise of this discretion.

24. There is no public interest test within section 44 FOIA. It is an absolute exemption.

25. For these reasons the Tribunal upholds the CAA and the Commissioner's decisions to withhold the information.

26. In those circumstances the Appellant's appeal must fail.

27. Our decision is unanimous.

28. There is no order as to costs.

Robin Callender Smith

Judge

27 November 2014