IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0173
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice dated 19 June 2014
FS50517990

Appellant: **Department for Business, Innovation & Skills**

First Respondent: **Information Commissioner**

Second Respondent: **Mr Patrick Whyte**

Hearing held at Field House London on 19 March 2015

Before
John Angel
(Judge)
and
John Randall and David Wilkinson

Subject matter: s.44 (prohibited under another enactment); s.41(1) (confidential information); s.43(2) (commercial interests).

Cases: *DWP v IC & FZ* [2014] UKUT 334 (AAC)
Coco v AN Clark (Engineers) Ltd [1969] RPC 41
Evans v Information Commissioner & DBIS [2012] UKUT 313 (AAC)

DECISION

The Tribunal allows the appeal to the extent that exemptions are still claimed. Otherwise the Tribunal upholds the Decision Notice dated 19 June 2014. The Tribunal substitutes a new decision notice as follows:

SUBSTITUTED DECISION NOTICE

Dated 20th April 2015

Public authority: Department for Business, Innovation & Skills

Address of Public authority:1,Victora Street,London,SW1H 0ET

Name of Complainant: Mr Patrick Whyte

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 19 June 2014.

1. The Pink Information in the Report for No 10 and Internal Advice Note is exempt under s.44 FOIA.
2. The factual part of the Orange Information in the Report and Advice is exempt under s.41 FOIA.
3. For the rest of the Orange Information s.43 FOIA is engaged and the public interest in maintaining the exemption outweighs the public interest in disclosure.
4. The rest of the disputed information is not caught by any exemptions except in relation to some personal information.

No action is required because the information subject to 4. above has already been disclosed in redacted form.

Dated this 20th day of April 2015

REASONS FOR DECISION

Background

1. The Thomas Cook Group plc ("Thomas Cook") is a well known UK group of companies offering leisure travel services. In 2009 it became a sponsor of the London 2012 Olympics, providing ticket and travel packages for the Olympics and committing £20 million in sponsorship.
2. In 2011, Thomas Cook experienced financial difficulties. The group attributed these difficulties to the political situation in the Middle East, which impacted its operations particularly in Tunisia and Egypt, and to the consequent impact that this situation had upon its cash flow. In October 2011 it was able to negotiate an additional £100 million with its financiers. However, in November 2011 it required further liquidity and approached its lenders for further financing, causing a collapse in its share price.
3. On 23 November 2011 the Prime Minister was quoted by Reuters as saying "*I have obviously asked the Business Department to give me a report on what is happening in terms of Thomas Cook because I think it is important to make sure that this business is in a healthy state..*"[1]

The Request and Complaint

4. On 2 August 2013 Mr Whyte requested from the Department for Business, Innovation and Skills ("BIS") "*a copy of this report [to the Prime Minister] and any further correspondence between the two departments*" [BIS and Department for Transport ("DfT")].
5. BIS refused the request on 20 August 2013, on the basis it was exempt under s.43 FOIA ("Refusal Notice").
6. Mr Whyte sought an internal review on the same day. BIS upheld its decision on 18 September 2013.
7. Mr Whyte complained to the Information Commissioner ("IC") on 24 October 2013. During the course of his investigation BIS also relied on two additional exemptions, namely ss.36(2)(b) and 41 FOIA and released some information to Mr Whyte.
8. The IC issued a Decision Notice on 19 June 2014 ("DN") in relation to the information BIS continued to hold, namely the report to the Prime Minister dated 25 November 2011. In summary the IC found:
    a. S.41 was engaged and the parts of the information provided to BIS in confidence, and identified by it as such, could be withheld: DN§§58-75;
    b. S.36(2)(b) was engaged, as BIS had provided evidence that in the reasonable opinion of a qualified person disclosure would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation. However the public interest lay in favour of disclosing the information within the exemption: DN§§33-44;

[1] www.uk.reuters.com/article/2011/11/23/uk-thomascook-cameron-idUKTRE7AM12U20111123

c. S.43 was not engaged because BIS had not demonstrated that disclosing the particular parts of the information requested, in respect of which the exemption was claimed, would have prejudiced Thomas Cook's commercial interests at the time of the request: DN§§54-56.

Appeal to the Tribunal

9. BIS appealed to the Tribunal on 19 July 2014 and Mr Whyte was joined as a party on 24 July 2014.
10. BIS submitted an amended grounds of appeal claiming another exemption for some of the withheld information, namely s.44 FOIA, on the basis that its disclosure was prohibited by s.23 of the Civil Aviation Act 1982 ("CAA").
11. In preparation for the hearing BIS applied on several occasions for some evidence to be considered as closed evidence and this was determined under rule 14(6) of the GRC Rules of Procedure.
12. The case had been originally set down for hearing in November 2014 but due to BIS' late s.44 claim and the need to hear three witnesses in both open and closed sessions this meant the hearing could not proceed in one day as listed. As a result the November hearing was adjourned and a two day hearing was then arranged to accommodate the new circumstances.
13. Some more of the withheld information was disclosed to Mr Whyte during the preparation for the hearing and at the hearing itself. Some personal information was redacted from this disclosed information where it was deemed to contain personal data exempt under s.40(2) FOIA. The remaining information consisted of those parts of a "Report for No 10" and an "Internal Advice Note as Background to Letter to Stewart Jackson MP – Thomas Cook" which were highlighted in orange and pink (the "Disputed Information").
14. The eventual issues for the Tribunal to determine were as follows:
    a. Whether parts of the disputed information are covered by s.23(1) CAA, such that their disclosure is prohibited and s. 44 FOIA is engaged;
    b. Whether parts of the Disputed Information were obtained by BIS from another person, and whether their disclosure would constitute an actionable breach of confidence, such that section 41 FOIA is engaged;
    c. Would disclosing parts of the Disputed Information prejudice, or be likely to prejudice, the commercial interests of Thomas Cook such that s. 43 FOIA is engaged? If so, does the public interest in this case nonetheless favour disclosure?
    d. On the basis that s.36 FOIA is engaged whether the public interest favours disclosing the remaining information?
15. The Tribunal heard evidence in both open and closed sessions from three witnesses on behalf of BIS.
16. Mr Duncan Budd became the Deputy Director in charge of the Industrial Development, Devolution & Economic Shocks team which forms part of the Regional Growth Directorate within BIS in February 2012 and was not

involved at the time of Thomas Cook's financial difficulties in 2011. He is a very experienced and senior civil servant.

17. Ms Rebecca Symondson is a Group Senior Legal Counsel at Thomas Cook. She was standing in for Group General Counsel Mr Craig Stoehr who had been called away on crucial company business but was familiar with the circumstances in the case.
18. Mr Simon Froome is Head of Risk Management at the Civil Aviation Authority ("CAA"). At the time of the original date of the hearing a witness statement was produced by Mr Andrew Cohen a senior manager in CAA's Consumer Protection Group who was Head of ATOL because Mr Froome would have been unavailable to give evidence. Fortunately Mr Froome was able to give evidence before us at the March hearing.
19. We are grateful to the witnesses for the way they were able to assist the Tribunal at the hearing. We found the leisure and travel market expertise of Ms Symondson and Mr Froome very helpful indeed.
20. It was determined that some evidence during the closed sessions should be provided in open court and a note of this evidence was given to Mr Whyte.

Applicable law

21. A person requesting information from a public authority has a right to have that information communicated to him, if the public authority holds it: s.1 FOIA. That right is subject to certain exemptions. The following have been claimed in this case.
22. S. 44(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

    (a) is prohibited by or under any enactment,

    (b) is incompatible with any EU obligation, or

    (c) would constitute or be punishable as a contempt of court.

23. The enactment in this case is contained in s.23 CAA which (in relevant part) provides:

> (1) Subject to [subsections (4) and (4A)] below, no information which relates to a particular person and has been furnished to the CAA in pursuance of any provision of this Act to which this section applies or of an Air Navigation Order shall be disclosed by the CAA, or a member or employee of the CAA [Civil Aviation Authority] unless—
> (a) the person aforesaid has consented in writing to disclosure of the information; or
> (b) the CAA, after affording that person an opportunity to make representations about the information and considering any representation to them made by that person about it, determines that the information may be disclosed […]

> (4) Nothing in subsection (1) above prohibits the disclosure of any information
> (b) by an officer of the Secretary of State to the CAA or a member or employee of the CAA or to such an organisation or, in accordance with directions given by the Secretary of State—
> (i) to an officer of any government department […]
>
> (5) If the CAA or a member or employee of the CAA or an officer of the Secretary of State discloses any information in contravention of subsection (1) above, it or he shall be liable—
> (a) on summary conviction, to a fine not exceeding the statutory maximum; and
> (b) on conviction on indictment, to a fine or, except in the case of the CAA, to imprisonment for a term not exceeding two years or to both.

Under s.71 CAA, Regulations may be made by the Secretary of State to enable the Civil Aviation Authority to undertake its functions under the CAA.

24. S.41(1) Information is exempt information if-

> (a) it was obtained by the public authority from any other person (including another public authority), and
>
> (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

25. S.43(2) Information is exempt information if its disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). In *DWP v IC & FZ* [2014] UKUT 334 (AAC) the Upper Tribunal found at §26 "It is well established that the prejudice must be real, actual or of substance, and that in this context "likely" means a very significant and weighty chance of prejudice (see *R (Lord) v Secretary of State for the Home Department* [2003 EWHC 2073 (Admin) at §106).

26. S.36(2)(b) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the Act

> (b) Would, or would be likely to inhibit-
>
> (i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation.

27. Both ss.43 and 36 are qualified exemptions and subject to a public interest test under s.2(2)(b): s.1(1)(b) does not apply if or to the extent that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Is s.44 engaged for the Pink Information?

28. BIS claims that certain information highlighted in pink in the second part of the Disputed Information relating to the Internal Advice Note ("the Pink Information") is exempt from disclosure under s.44 FOIA.
29. Under s.71 CAA the Secretary of State has made Regulations to enable the Civil Aviation Authority to monitor the activities of the organisations it licences (under s.3 CAA), like Thomas Cook. As a result Thomas Cook provides certain financial information to the Authority. Mr Froome gave evidence to us that this information is provided in confidence. We accept that this is the case but whether or not our finding is correct under s.23(1) CAA the Civil Aviation Authority cannot disclose the information to anyone not permitted under the section. It is permitted to disclose information to the Secretaries of State of DfT and BIS. It is not permitted to disclose information to Mr Whyte other than by consent, which Thomas Cook has not given. In fact if the Civil Aviation Authority or Secretary of State did disclose such information it would be a criminal offence (s.23(5)). This would appear to be the case even if the information is already in the public domain.
30. We were provided by the CAA with a Source Information Document ("SID") which it had provided to DfT. It contained information it had received from Thomas Cook. It is submitted that the SID was the basis for the Pink Information which was passed by DfT to BIS to help with the provision of the Disputed Information.
31. We have reviewed the SID and accept that this is correct and that the Pink Information is caught by s.23. We also accept from the evidence before us that information from the SID was passed by DfT to BIS and that this is part of the lawful disclosures allowed under s.23(4)(a).
32. The SID was only produced in evidence during the course of this appeal and was not available to the IC during his investigation of the complaint. The IC now accepts that s.44 is engaged because s.23 prohibits the disclosure of the Pink Information to Mr Whyte and invites us to substitute a new decision notice accordingly. In view of our finding of fact we also find that s.44 is engaged. S.44 is an absolute exemption and so we are not required to consider any public interest test.

Whether s.41 is engaged for the Orange Information?

33. So we are left to consider the Orange Information. This comprises facts and commentary of a judgmental nature. Having considered the detailed evidence we are of the view that whereas the "factual information" could

be subject to s.41 the "commentary information" may not. Therefore we only intend to consider the factual information under s.41.

34. Under s.41(1) for the exemption to be engaged we must first be satisfied that the information was "obtained by [BIS] from any other person (including another public authority)".
35. Ms John on behalf of the IC submits that there are 4 possible routes from which BIS could have obtained the Orange Information:
    a. Thomas Cook provided it to BIS directly;
    b. Thomas Cook provided it to the Civil Aviation Authority who provided it to BIS;
    c. Thomas Cook provided it to the Civil Aviation Authority who provided it to the DfT who passed it on to BIS;
    d. Thomas Cook provided it to the DfT who passed it on to BIS.

36. Ms John argues that we must consider the evidence before us to decide whether any of these routes apply and in order to do so we must be satisfied on the balance of probabilities that at least one of these routes applies. We agree that this is the right test and note that Mr Peretz QC on behalf of BIS did not disagree with this approach.
37. We know from Mr Froome's evidence that Thomas Cook had regular meetings with the DfT mainly through Mr Andy Cooper who was Director of Government and External Affairs at Thomas Cook, but also through other more senior executives. Although Mr Cooper would have been unlikely to be in a position to provide very detailed information about the state of affairs in 2011 he would have been in a position to brief the department about the sort of information which is part of the Orange Information. There is documentary evidence that Mr Cooper was in touch with the Economic Development Division of BIS in November 2011 at about the time when the Disputed Information was being produced. Ms John says that the relevant emails were after the Note to number 10 was produced. However the evidence indicates that the Orange Information was not in the public domain as at [25] November 2011. Mr Froome says the Authority did not provide it. So we can only conclude on a balance of probabilities that it came from Thomas Cook itself either through Mr Cooper or another Thomas Cook executive to the DfT and/or BIS, and if to the DfT was passed on to BIS.
38. We therefore consider that BIS obtained the "factual" Orange Information from Thomas Cook or DfT in order to help it provide the Disputed Information.
39. We should explain at this point that the reason we do not consider the commentary information was obtained by Thomas Cook is because the evidence suggests that the commentary is the sort of information which civil servants in government departments like the DfT and BIS would provide in a briefing to number 10. The language is such that it is unlikely to come from Thomas Cook in the circumstances of this case. Therefore we find on a balance of probabilities that that commentary information is not caught by s.41(1)(a).
40. We now turn to the second limb of s.41 in relation to the factual Orange Information, namely whether "disclosure of the information to the public…by the public authority holding it would constitute a breach of

confidence actionable by that or any other person". When considering this requirement Tribunals have adopted the following test:

> "*First, the information itself … must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it*."
>
> (Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, at 47).

We consider this is an appropriate test in this case. Moreover this test has been adopted by higher courts in similar cases so we are now most likely bound by it.

41. We consider the Orange Information satisfies the first test, namely it has the necessary quality of confidence about it. The factual information is largely about additional funding arrangements and the position of the company at the time. The witnesses informed us that the information would only have been provided in confidence, although there is no direct proof of this. This was highly sensitive information and the company would have been significantly damaged by its disclosure. Having reviewed the information and the circumstances in which it was provided we agree that it must have been imparted in circumstances importing an obligation of confidence.
42. The third part of the test in our view is also satisfied. Clearly any new information which could possibly have caused concerns for consumers, shareholders, suppliers or staff would be likely to have a detrimental effect on Thomas Cook. We are satisfied therefore that all three limbs of the test are met and that disclosing the information to Mr Whyte, which under FOIA is regarded as disclosure to the public, would constitute a breach of confidence likely to be successfully actionable by Thomas Cook.
43. However the Upper Tribunal found in *Evans v Information Commissioner & DBIS* [2012] UKUT 313 (AAC) that a "breach of confidence…..will not be actionable if the defendant shows that the breach was justified in the public interest" at [222].
44. Mr Whyte offers possible justifications in an email to the IC's Office on 23 January 2014. He considers that there is a plausible suspicion of wrongdoing by BIS. He says there may have been considerable problems for government if the company ceased trading when it had been awarded the contract for short-haul breaks to the 2012 Olympics which suggest government interference. He also says that because Thomas Cook was partially rescued by the taxpayer controlled RBS the government may have put political pressure on the Bank to avoid a political headache. No evidence was provided of potential wrongdoing and therefore what Mr Whyte says is mere speculation on his part.
45. We have reviewed the Disputed Information and the evidence given about it and cannot find any evidence that there was any wrongdoing in the terms expressed by Mr Whyte or any other form of wrongdoing. It is rather

the reverse. We find that the Disputed Information was produced as a response to a Parliamentary Question and in order to prepare a response to an MP and no further. We find there is no evidence that the information in question or any other part of the Disputed Information involved any form of wrongdoing, just evidence of a government taking a responsible approach in the public interest.

46. We find therefore that s.41 is engaged and that there is no public interest justification for a breach of confidence in this case.

Is s. 43 engaged?

47. What remains in dispute is the non factual Orange Information, which we have described as commentary of a judgmental nature.
48. S.43(2) FOIA is claimed for this information, namely that if it is disclosed it would, or would be likely to, prejudice the commercial interests of Thomas Cook.
49. In November 2011 Thomas Cook was having significant financial difficulties which had a clear causal relationship to their commercial interests particularly with consumers and suppliers. Although by the time of the request measures had been taken to deal with these difficulties the evidence before us shows that they continued.
50. However is the "prejudice" test satisfied? The test adopted by other Tribunals to show the exemption is engaged is that the public authority must show *"that the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*" of Thomas Cook's commercial interests being prejudiced by disclosure of this information: *John Connor Press Associates Ltd v IC* (EA/2005/0005) at [15]. Although we are not bound by this decision we note that in *DWP v Information Commissioner and another* [2014] UKUT 334 (AAC) at [26] the Upper Tribunal adopted the test in *R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin) at [106]* which was the test *John Connor* was based on, namely "*It is well established that the prejudice must be real, actual or of substance, and that in this context "likely" means a very significant and weighty chance of prejudice".* We therefore adopt this test which requires BIS to establish three things:

    - What the likely prejudice would be;
    - That there is a real and significant risk that this prejudice will arise;
    - That it would, or would be likely to, be caused by the fact of the Orange Information being disclosed.

51. The evidence before us indicates that Thomas Cook's problems over a number of years have resulted in publicity from all areas of the media – various nationals and trade press, in various sections of these newspapers and journals from the financial to travel etc. Also social media have played their part. Ms Symondson says Thomas Cook's commercial interests are affected by this publicity, such as share price rising or falling depending on the news and similarly with consumer bookings. She emphasises the

sensitivity of the company's fortunes to publicity. We have been provided with many examples of press comment since 2009 to the present day.

52. Although we must be careful not to overplay the effect of the press on Thomas Cook stakeholders the evidence in this case suggests to us that the possible prejudice to the company's commercial interests are real, actual and of substance.
53. However at the time of the request and internal review was there a significant and weighty chance of prejudice? Ms John argues that by August/September 2013 measures had been taken to deal with the problems experienced in 2011 for example a new and permanent CEO and FCO had been appointed, new funding arrangements were in place and the Olympics had successfully taken place. As a result disclosure of the remaining Disputed Information at the time in question would no longer have a significant and weighty chance of prejudice. This is a strong argument.
54. However the evidence of Ms Symondson and Mr Froome suggests 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. Ms Symondson explained that when a customer is considering booking a holiday and deciding between travel companies publicity about a company is likely to be a factor a consumer takes into account particularly because booking a holiday is costly and an important purchase for most consumers. Thomas Cook's share price has a history of volatility and disclosure of commentary about the company by a government department even if historical, in her view, would be likely to affect the share price. When suppliers consider a company is less stable they negotiate more stringent terms as the deal is likely to be a greater risk. This would make Thomas Cook less competitive in a very competitive market place.
55. Ms John says most of this evidence is hypothetical and does not meet the necessary test. In any case stakeholders can make their own assessment of any press coverage.
56. We have considered all the evidence and have come to the conclusion that the disclosure of the commentary information would be likely to prejudice the commercial interests of Thomas Cook. The history of the company is evidence of this even up to the present day with the CEO leaving last year and the recently announced strategic partnership with Fosun International Limited in Shanghai.
57. We therefore find that the exemption is engaged for the non factual Orange Information. S.43 is a qualified exemption and we now need to consider the public interest test set out in paragraph 27 above.
58. The public interest factors in favour of maintaining the exemption are very strong in this case.
59. Thomas Cook is an international company that has a substantial business and is a household name in the United Kingdom. Very large numbers of consumers book holidays with it every year. Adverse publicity could result in the company not only losing business also, by damaging cash flow, putting at risk holidays already booked. Suppliers may require more costly terms making the company less competitive.

60. As has been shown in recent years the share price is volatile. This volatility can affect the confidence in the company making it more difficult to raise capital or make borrowing more expensive.
61. Commercial difficulties affect staff through redundancies or general uncertainty about jobs. Although Thomas Cook is a national company it employs large numbers at its headquarters in Peterborough. If the company's commercial interests are prejudiced it may have a particular adverse affect on a local community. This is no doubt why the local MP raised the difficulties of the company at PMQs in November 2011.
62. The taxpayer could be adversely affected. Thomas Cook is supported by RBS and Lloyds Bank, in which the government had major holdings. If the company's commercial interest are affected this could in turn affect the position of the banks at possible cost to the taxpayer.
63. Also Thomas Cook is protected by the ATOL scheme which reimburses customers yet to travel, and rescues those stranded abroad in the event of a travel company failure. The government guarantees the scheme and because of the size of Thomas Cook the guarantee would be likely to be called upon in the event of a failure. This could impact on government finances and ultimately the taxpayer.
64. The risk of these factors coming into play would provide a very strong public interest in maintaining the exemption. However Ms John argues that the circumstances existing at the time the public interest is being tested (at the time of the request or by the time for statutory compliance) these factors were not so strong because by then measures had been put in place by the company to alleviate the very difficult situation existing in 2011.
65. In our view this argument certainly goes some way towards diminishing the strength of the public interest in maintaining the exemption. However we still consider the factors taken together amount to a strong public interest in maintaining the exemption.
66. The public interest factors in favour of disclosure are to some extent the above factors but looked at from the public interest perspective of transparency and openness.
67. A potential collapse of a UK company serving such a large number of consumers, which is a major employer and whose collapse could result in significant taxpayer exposure suggests a strong public interest in disclosure. However the evidence in this case is that Thomas Cook's overall commercial situation was in the public domain although not necessarily in the detail contained in the Disputed Information. The Orange Information is largely commentary which is made judgmentally by civil servants. To some extent the judgments are speculative and the document was produced expeditiously over a couple of days following a call from the Prime Minister's Office for a background report by way of briefing on a draft letter to an MP who had asked a Parliamentary Question. Therefore its value to the public may be limited particularly some 18 months later. Nevertheless, the release of speculative judgments, even some time after the event, could have the damaging consequences identified in paragraph 59 above.

68. Balancing these public interests we find that the public interest in maintaining the exemption outweighs the public interest in disclosure.

The position of the s.36 exemption

69. In view of the above findings and the fact that parts of the original Disputed Information which were only subject to the s.36 exemption have now been disclosed, we no longer need to consider this exemption. Mr Peretz QC accepted this position on behalf of BIS if we found that the Orange Information was exempt under ss.41 and 43.

Conclusions

70. Some parts of the Disputed Information have been disclosed. The rest – Orange and Pink Information - are exempt under various exemptions as explained above. This means that we partially uphold the DN but otherwise allow the appeal in relation to the Orange and Pink Information. We substitute a new decision notice accordingly.

Signed:

Judge J Angel

Dated: 20/04/2015