

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 May 2014

Public Authority: Civil Aviation Authority
Address: Aviation House
Gatwick Airport South
West Sussex
RH6 0YR

Decision

1. The complainant has requested information from the Civil Aviation Authority (CAA) about the consent from an airline on the reasons for his delayed flight. The CAA refused to provide the requested information, relying on section 44(1)(a) of FOIA (prohibitions on disclosure) in order to do so. In particular the CAA cited the statutory prohibition on disclosure created by section 237(2) of the Enterprise Act 2002.
2. The Commissioner's decision is that the CAA has correctly applied section 44(1)(a) and the Commissioner does not require the public authority to take any steps.

Background

3. Under European Regulation 261/2004, in certain circumstances, airlines have to provide compensation to passengers for delayed or cancelled flights. However, airlines have no obligation to do so if the flight was delayed or cancelled due to 'extraordinary circumstances'.
4. Each Member State is required to appoint an enforcement body to regulate the airlines' compliance with their obligations. In the UK, this is the CAA.
5. UK passengers that do not feel they have received the compensation they deserve from airlines can complain to the CAA. When complaints are being investigated, in order to give passengers a view as to whether compensation is payable, the CAA have to express a regulator's opinion

on whether the 'extraordinary circumstances' exemption applied to the delay or cancellation of a particular flight and to decide whether to take enforcement action.

Request and response

6. During the correspondence about his delayed flight (on 22 December 2012) the CAA wrote to the complainant in June 2013 stating that the CAA had reviewed the evidence provided by the airline and concluded that the airline could rely on the defence of 'extraordinary circumstances'.
7. After further correspondence, the complainant wrote to the CAA on 3 December 2013 and requested:

'Why the CAA are unable to provide information why your flight was delayed under the consent part of Part 9 of the Enterprise Act 2002. Would it be that (redacted name of airline) are refusing to give consent, or are you not asking for consent on my behalf'
8. The CAA responded on 23 December 2013. It stated that

'Part 9 of the Enterprise Act 2002 prevents the CAA from releasing information that relates to a particular business and has been provided to the CAA as part of our statutory functions under Part 8 of the Enterprise Act. Neither the Enterprise Act nor the FOIA places any obligation on the CAA to seek consent to disclosure from the business concerned, and in this case (redacted name of airline) has not been approached for their consent.'
9. After further correspondence and a telephone call, the CAA wrote to the complainant on 28 January 2014, to confirm that they did hold information relating to the reasons for the disruption *'which was provided to us by (redacted name of airline) under Part 8 of the Enterprise Act 2002, in order to investigate disruption to your flight'* and to formally refuse the release of the information under the FOIA, citing section 44(1)(a).

'Information protected by Section 237(2) of the Enterprise Act can be released with the consent of the business concerned. However, neither the Enterprise Act, nor the FOIA, places any obligation on the CAA to seek consent to disclose from the business concerned and the CAA has not approached (redacted name of airline) for their consent in this case. This is in accordance with our policy to not seek such consent in individual cases.'

10. On 30 January 2014, the complainant requested a review of the decision as the FOIA *'should help it reverse the ruling of the CAA not to seek consent'*.
11. The internal review on 24 February 2014, upheld the CAA position citing section 44(1)(a) of FOIA on the basis of the prohibition in section 237 of the Enterprise Act 2002 and found that *'there was no compelling reason in this case to depart from the CAA's normal policy and the CAA acted reasonably in refusing to seek consent'*

Scope of the case

12. On 25 February 2014 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
13. The Commissioner considers that the issue which has to be determined is whether, in the circumstances of this case, the CAA is entitled to rely on section 44(1)(a) to refuse to provide the requested information.

Reasons for decision

Section 44

14. Section 44 of the FOIA states that:
 - (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 Community obligation, or
 - (c) would constitute or be punishable as a contempt of court.
15. Section 237 of the Enterprise Act creates a 'General restriction'. Subsection (1) sets out that the restriction applies to 'specified information' relating to any business. Subsection (2) then states that specified information must not be disclosed while the business continues in existence. Under section 245 it is an offence punishable by up to 2 years imprisonment to disclose information in breach of section 237. The full Act can be accessed via <http://www.legislation.gov.uk/2002?title=Enterprise%20Act> .

16. The First-tier Tribunal (Information Rights) has previously been asked to consider the use of section 237 as a statutory prohibition on disclosure and has concluded it can be used in this way¹.
17. The actual definition of 'specified information' is provided by section 238 of the Enterprise Act. Information is specified information if it comes to a public authority, such as the CAA, in connection with the exercise of any function that the public authority has under various parts of the Enterprise Act, any legislation listed in Schedule 14 of that Act or any secondary legislation specified by the Secretary of State.
18. In this case the European Regulation 261/2004 defines the 'extraordinary circumstances' that may delay a flight and each Member State is required to appoint an enforcement body to regulate the airlines' compliance with their obligations. In the UK, this is the CAA.
19. In view of the above, the Commissioner is satisfied that the information provided by the airline to the CAA concerning the reasons for the delayed flight is 'specified information' and held for one of the functions listed in section 238 of the Enterprise Act. The information is therefore prohibited from disclosure.
20. However, sections 239-243 of the Enterprise Act provide certain 'gateways' for disclosure of 'specified information' without breaching the statutory prohibition. These gateways do not compel CAA to disclose information but do allow it to disclose information for the purposes set out in these sections. In broad terms these include where the business undertaking or individual that the information relates to has given their consent, where a European Community obligation requires the disclosure, or where the disclosure is necessary for certain civil or criminal proceedings. In the *Dey* case the Information Tribunal commented on the gateways and stated that "*it gives a power to disclose, not a duty*". The Commissioner therefore accepts that CAA has discretion as to whether to use the gateways to disclose specified information.
21. In this case the gateway for the release of the specified information would be if CAA obtained the consent from the third party ('redacted name of airline'). The complainant is unhappy that the CAA did not seek this consent.
22. The CAA has stated that it did consider whether to exercise its discretion to seek consent in this case and took the following factors into account when deciding not to do so:

¹ *Dey v ICO and OFT (EA/2006/0057)*

- There is a risk of setting a precedent to seek consent for all cases which would be unworkable due to the added pressure it would put on the CAA's limited resources to deal with complaints relating to EC 261/2004.
 - The prohibition on disclosure is backed by criminal sanctions so the CAA would have to ensure very carefully that clear consent was obtained from the correct party/parties, which again would be unworkable due to limited resources if a precedent was set.
 - There is no compelling reason why the CAA should seek consent in this particular case.
 - The complainant could approach the (redacted name of) airline directly for the information he is seeking.
23. CAA did not consider it was practical to obtain consent (and was not obliged to do so) and the Commissioner accepts that there was no obligation on CAA under the Enterprise Act to seek consent to disclose the specified information.
24. This point has been confirmed in the Information Tribunal case of *Dey v Information Commissioner EA/2006/0057* where the Tribunal stated in respect of the gateway provided by section 241 of the Enterprise Act 2002 that:
- 'The exercise of that power is a matter for the public authority to consider...' and '...cannot be short circuited by invoking the Freedom of Information Act provisions'*
25. The decision notice <http://ico.org.uk/FS50475081> also covers the arguments that there is no requirement to seek consent to disclose specified information. In that case, the council chose not to apply a gateway to disclosure and the Commissioner found that there was no gateway to allow for the disclosure of the requested information.
26. Following the judgment in the Upper Tribunal of March 2011 (Ofcom/BECTU Case No. GIA/605/2010) it is not for the Commissioner (or the Tribunal) to consider whether a public authority acted reasonably in deciding a course of action that would have engaged a gateway provision and so dis-apply a statutory bar. It may be appropriate for the Commissioner to take into account whether or not (as a matter of fact) the regulator exercised its discretion to disclose in any particular case, but it is not for him to question whether that discretion was applied correctly or not.
27. In conclusion, the Commissioner's decision is that CAA has correctly applied section 44(1)(a) to withhold all the requested information in this

case, through the provisions of section 237 of the Enterprise Act 2002. As section 44 is an absolute exemption there is no need to consider the public interest test.

Right of appeal

28. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

29. 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.
30. 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

Pamela Clements
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