

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 December 2023

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the Department for Transport was entitled to withhold the Equality Impact Assessment associated with its proposal to change rail ticket offices, under section 35(1)(a) of FOIA. This exemption concerns the formulation of government policy.
2. It's not necessary for the Department for Transport to take any corrective steps.

Request and response

3. The complainant made the following information request to the Department for Transport (DfT) on 11 July 2023:
 - "1) Any and all Equality Impact Assessments (which may also be called Impact Assessments, Diversity Impact Assessments, or by another name) undertaken by the Department for Transport regarding the potential closure of rail station ticket offices in England. This includes any reports, studies, or analysis conducted internally within the department.
 - 2) Any and all Equality Impact Assessments (which may also be called Impact Assessments, Diversity Impact Assessments, or by another name) submitted to the Department for Transport by train operating

companies regarding the potential closure of rail station ticket offices in England. This includes any reports, studies, or analysis conducted by the train operating companies and submitted to the department.”

4. Regarding part 2 of the request, DfT withheld the Equality Impact Assessments (EIAs) that the train operating companies (TOCs) undertook under section 21 of FOIA as those EIAs were already published. DfT provided links to that information. Regarding part 1, DfT withheld the EIA that it undertook under section 35(1)(a) of FOIA and maintained that position following its internal review.

Reasons for decision

5. On 12 December 2023 DfT provided the complainant with links to research that had informed its EIA. However, the complainant has confirmed to the Commissioner that they want to progress their complaint about DfT’s application of section 35 to part 1 of their request.
6. Under section 35(1)(a), information held by a government department is exempt information if it relates to the formulation or development of government policy.
7. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
8. In their request for an internal review the complainant submitted the following arguments for the information’s release:
 - An EIA isn’t a policy document. It shouldn’t contain personal opinions of ministers or other officials and shouldn’t contain information about private discussions or minutes from meetings. The document contains no new information on how policy is developed and decided. Therefore, Ministers and officials didn’t need a "safe space away from public scrutiny" to develop this policy.
 - Each train operating company has released its own EIA. Therefore, it’s only the Government that’s seeking to make decisions without transparency.
 - It wasn’t relevant that, as the process is ongoing, train operators might amend their proposals and therefore the “draft Equalities Impact Assessments may be updated.” EIAs are, by their nature, living documents. They’re amended and added to as proposals

develop, impacts are identified, and mitigations are put in place. To reiterate a previous point, this argument hadn't been used to prevent train operators from releasing their own EIAs.

- Furthermore, if there were concerns that the proposals, which were subject to public consultations, might undergo significant amendments during discussions with passenger representative bodies, it was essential to establish a clear point at which these proposals would be reissued for public consultation. This process should be transparently communicated to the public to maintain trust in the decision-making process.
9. The complainant presented similar arguments in their complaint to the Commissioner.
 10. In its submission to the Commissioner, DfT has explained that it created its EIA to support industry proposals for station reform and multiskilling. An associated consultation was launched on 5 July 2023. The details included in DfT's EIA didn't solely concern ticket office closures; there were references to related policies to improve passenger experience at stations.
 11. DfT says that this is an important distinction from the TOCs' EIAs which only concerned the Ticketing and Settlement Agreement (TSA) process that was ongoing, and ticket office closures.
 12. DfT notes it received the request when the consultation on ticket offices was still 'live' and as such the policy was very much being formulated and developed. Following the consultation period, and in conjunction with the passenger bodies, TOCs were constantly adjusting and changing their proposals to consider public feedback. This was clearly evidenced by the changes the TOCs made to their original proposals. For example, when it published its objection on 31 October [2023], Transport Focus stated that "the train companies have made significant improvements to their original proposals in response to concerns raised in the consultation, especially in reinstating staffed hours at many stations."
 13. Prematurely disclosing DfT's EIA while the consultation was still live would be likely to have negatively affected this work, DfT says. It would have prevented TOCs from making substantial improvements that sought to maintain passenger experience standards and mitigate accessibility concerns. This would be equally impactful on DfT, as DfT runs the franchise and the four 'Operator of Last Resort' TOCs.
 14. DfT has confirmed that, at the time when it received the request, the public consultation had just started. The policy/proposals were constantly under review as evidenced by the changes made by TOCs, which were acknowledged by the passenger bodies. For example, a

number of the proposals which TOCs consulted on included a significant number of station closures. These were later revised to ensure that no currently staffed station went unstaffed. This was clear and significant change to the station reform policy position. As such, DfT's EIA on 11 July 2023 clearly related to the formulation and development of 'live' Government policy on station reforms and related policies to improve passenger experience at stations.

The Commissioner's conclusion

15. Section 35 is class-based, meaning it's not necessary to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described.
16. The complainant considers that DfT's EIA isn't a policy document and that it doesn't contain any new information on how policy [the proposal to change rail ticket offices] is developed and decided.
17. Information is exempt under section 35(1)(a) if it "relates to" the formulation of government policy. In his published guidance on section 35, the Commissioner discusses the phrase "relates to" and explains:

"This means the information does not have to be created as part of the activity. Any significant link between the information and the activity is enough. Information may 'relate to' the activity due to its original purpose when created, or its later use, or its subject matter."
18. It states in DfT's EIA that the EIA records the analysis DfT undertook in relation to ticket office reform in order to fulfil the requirements of the Equality Act 2010. The EIA includes an overview of the reform policy and an assessment of the impact of the policy on passengers and staff from protected groups.
19. The Commissioner considers that there's an unambiguous link between the EIA and the formulation of DfT's policy on station and ticket office reform which included changes to ticket offices, including closure. As such, the EIA clearly "relates to" the formulation of that policy and the Commissioner is satisfied that the EIA engages the exemption of section 35(1)(a) of FOIA. He's gone on to consider the related public interest test.

Public interest test

20. In their request for an internal review, the complainant presented the following arguments for disclosing the information:
 - This EIA was requested during the consultation period when the proposals were subject to public scrutiny. Given that the primary opposition to the proposals was accessibility for disabled

passengers, it seemed vital that an EIA be part of the materials considered by the public. The impact of the proposed closure of rail ticket offices was profound, particularly on individuals with protected characteristics. The public must have access to the EIA to understand the potential consequences fully.

- The decision to withhold the EIA not only undermined transparency but also disregarded the valuable input of the 680,000 people who responded to the public consultation. If policy decisions are made based on information inaccessible to the public and consultation responses, it calls into question the legitimacy of the entire process.
 - Individuals with protected characteristics needed a comprehensive understanding of how the potential closure of ticket offices would affect them to provide informed responses to the consultation. Providing information that enables informed responses is a fundamental principle of any consultation process, as outlined in the 'Gunning Principles'.
21. DfT says that at the time it received the request, it recognised that disclosing DfT's EIA would contribute to the Government's wider transparency agenda, increase trust and allow the public to be involved with commercial decisions the Government makes on rail matters. It could also have helped the complainant, or the wider public, to understand the basis on which the proposal was made.
22. However, DfT has presented the following arguments against disclosing the information:
- On 11 July 2023 DfT's EIA was a core component of a 'live' government policy decision regarding ticket offices and wider station reforms. It was important that ministers and officials had a safe space away from public scrutiny to formulate and develop 'live' government policy. ICO guidance acknowledges that the need for a safe space is strongest when the issue is still live, as it was in this case.
 - TOCs needed to have confidence that they could share information as part of the process in an environment which suitably encouraged free and frank discussion without fear that information would be prematurely released to the public. This was to ensure that the correct decisions were made. The process was still live and train operators could amend their proposals further to discussions with passenger representative bodies. As such the draft EIAs could be updated and therefore that draft would not be representative of the plans that could be implemented. This was

clearly seen from the significant changes seen in a number of TOCs proposals.

- If DfT were to have disclosed its EIA during the open consultation period, TOCs would have been reluctant to provide information as well as their views and opinions. This would have made it harder for DfT to have developed its policies on station reforms and led to poorer decision making which was clearly not in the public interest. Good government depends on good decision making and this needs to be based on up-to-date information and a full consideration of all the options without fear of premature disclosure.
- It would also have been distracting for DfT who would have had to deal with any queries on the EIA rather than being able to focus on formulating and developing station reform policies.
- As set out in the TSA, in the case of proposals being objected to by the passenger bodies at the end of the consultation, proposals could have been referred to the Secretary of State for final decision. The Secretary of State, ministers and officials needed to be confident they could conduct rigorous assessment on any future policy concerning passenger services without the risk of the information, such as the EIA, being prematurely disclosed. Disclosure could have closed off better options.

Balance of the public interest

23. The consultation on changes to rail ticket offices opened on 5 July 2023 and closed on 1 September 2023. But in its submission DfT has advised that the EIA still remains a core component of a 'live' government policy on proposals for reforms to modernise stations. While ministers have asked TOCs to "withdraw" their station reform proposals, the policy formulation/development stage has still not ended because certain proposals are still being considered. The consultation process under the TSA on ticket office changes (referred to in the request as the potential closure of rail station ticket offices) was part of a wider set of proposals under consideration for proposed reforms to modernise stations.
24. DfT says that although the TSA process and the consultation process to which the request refers have now concluded, the EIA was under review at the time of the request and is still under review; presently in relation to broader ongoing proposed reforms to modernise stations. Therefore, the formulation/development stage of the policy has still not ended. The proposed reforms to modernise stations, to which DfT's EIA relates, remains ongoing.
25. The Commissioner appreciates that the potential closure of rail ticket offices would impact a great deal of people, including those with

protected characteristics. Disclosing DfT's EIA at the time of the request would have indicated what risks DfT had identified from changes to ticket offices and how it intended to mitigate those risks. That could have informed how people responded to the related consultation. However, as the complainant has noted, the consultation nevertheless received 680,000 responses without the EIA having been disclosed.

26. The policy on changes to ticket offices was being formulated at the time of the request; the consultation was open, and it was very much a 'live' issue. In addition the wider policy matters about ticket offices that the EIA concerns – in addition to potential closures – continues to be live.
27. The Commissioner considers that the need for a 'safe space' to debate policy and reach decisions without external comment and distraction is a valid argument. It has been generally accepted by both the Commissioner and First-tier Tribunal that significant weight should be given to maintaining the section 35 exemption where a valid need for safe space is identified. A compelling public interest in favour of disclosure is required when a need for safe space is demonstrated.
28. The public interest in favour of disclosure in this case, while strong, isn't compelling in the Commissioner's view. The general public interest in transparency has been met to an adequate degree, in the Commissioner's view, through the consultation process, the TOC's published EIAs and the related research material to which DfT directed the complainant. As such, the Commissioner agrees with DfT that the balance of the public interest favoured withholding the EIA at the time of the request, in order to protect the integrity of the policy-making process.

Right of appeal

29. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.
31. 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

Cressida Woodall
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