

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 April 2024

Public Authority: Department for Transport

Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant requested from the Department for Transport (DfT) a copy of an Equality impact Assessment related to proposed redeployment of former ticket office staff. The DfT refused to provide the information citing section 35(1)(a) (formulation and development of government policy) of FOIA.
2. The Commissioner's decision is that the DfT has correctly relied on section 35(1)(a) FOIA.
3. The Commissioner's decision is also that the DfT has not complied with sections 1(1)(a), 10(1) and 17(1) of FOIA as it did not provide a response to the complainant's request within 20 working days.
4. The Commissioner does not require any steps.

Request and response

5. On 26 June 2023 the complainant made the following request for information under FOIA:

'Does this now mean that all former ticket office staff will be deployed on the platform and trained to use ramps to assist #disabled people to board, @transportgovuk?

Have you conducted an equalities impact assessment? If not, why not? If so, please can you link to it?

Yes, for the avoidance of doubt, please consider this an FOI request for information relating to the impact on disabled people and other groups under the Equality Act 2020, specifically but **not** limited to the Equalities Impact Assessment. I look forward to hearing from you.'

6. The DfT responded on 1 September 2023 stating that it had conducted a full Equality Impact Assessment (EIA). It further stated that it was refusing to disclose the requested information, citing section 35(1)(a) of FOIA as a basis for non-disclosure. The complainant sought an internal review on 23 October 2023, stating that they did not consider the requested information to be 'government policy' and stated the reasons, together with several public interest arguments.
7. The DfT provided its internal review response on 20 November 2023. It upheld the original decision to apply section 35(1)(a) to the requested information.

Reasons for decision

Section 35(1)(a) – formulation of government policy

8. Section 35(1)(a) FOIA provides an exemption from the duty to disclose information to the extent that it requires the disclosure of information relating to the formulation and development of government policy. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
9. The purpose of subsection 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 policy options in private.

10. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
11. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.
12. The Commissioner has had sight of the withheld information and has received detailed submissions from the DfT. At the time of the request, the public consultation had not started, industry had not received any feedback on their proposals and a decision had not been made by government to ask train operators not to proceed with ticket office closures. Officials and industry were still yet to assess the outcome of the consultation, in particular the views of the passenger bodies and whether to take forward any part of the policy/proposals, which were broader than just ticket office closures. This included how best to progress with policy options that would need to be progressed carefully by train operators due to commercial and employment issues.
13. Therefore, the policy on whether to take forward many of the actions intended to mitigate the impact of ticket office closures (which formed much of the content of the EIA) was still 'live' and under development and needed further consideration to take account of the consultation responses. As such, the DfT's EIA clearly related to the formulation and development of 'live' Government policy with regards to station reforms and related policies to improve passenger experience at stations.
14. The Commissioner is satisfied that the above policy was still 'live' and ongoing at the time of the request. He therefore accepts that section 35(1)(a) FOIA is engaged in respect of the requested information and has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

15. In their request for an internal review, the complainant presented the following public interest arguments for disclosing the information:
 - The request was made after the policy decision had already been taken to instruct the train operating companies (TOCs) to start the consultation process. Therefore the complainant argues that safe space and chilling effect factors no longer apply or at least became much less significant.

- The DfT failed to take into account the fact that disclosure would allow public scrutiny and inform public debate. The DfT further failed to consider the widespread and significant impact of the policy on the public and how disclosure would further public debate on these highly important issues.
 - The EIA was requested during the consultation period when the proposals were subject to public scrutiny. Individuals with protected characteristics needed a comprehensive understanding of how the potential closure of ticket offices would be likely to impact them in order to provide informed and evidence-based responses to the consultation before it closed. Providing information that enables informed responses is a fundamental principle of any consultation process.
15. The DfT states that at the time it received the request, it recognised that disclosing the 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.

Public interest arguments in favour of maintaining the exception

16. Whilst the DfT recognises that transparency and openness in its policy-making process improves public trust, it considers that it is important for ministers and officials to be able to have a safe space to undertake discussions and develop ideas. It takes the view that the section 35 exemption is intended to ensure that the possibility of public exposure does not deter from the full, candid and proper deliberation of policy formulation and development.
17. The DfT has further argued that civil servants and subject experts need to be able to engage in the free and frank discussion of all policy options internally, to expose their merits and demerits and their possible implications as appropriate. It considers that their candour in doing so will be affected by their assessment of whether the content of such discussion will be disclosed in the near future. It believes that the premature disclosure of information protected under section 35 could prejudice good working relationships and the neutrality of civil servants.
18. At the time of the request the 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. The Commissioner's guidance acknowledges that the need for a safe space is strongest when the issue is still live, as it was in this case.

19. 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.
20. If the 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 the 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 divert resources to deal with any queries on the EIA rather than being able to focus on formulating and developing station reform policies.
21. As set out in the Ticket Sales Agreement (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 the 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. TOCs also needed to ensure that information was not prematurely shared with parties it would be necessary for them to consult, potentially causing prejudice to the process.
22. Sharing the information prematurely would be likely to have resulted in negative impacts on being able to deliver reforms that would benefit passengers and/or generate efficiencies benefitting the taxpayer. Consideration was given as to whether the public interest favoured sharing a redacted document, which would in effect release only the information related to ticket office closures. However, this would have also meant that the mitigations intended to minimise and manage passenger impacts from ticket office closures would have been redacted.

This would be likely to have caused confusion or given the incorrect impression that the DfT had not considered mitigations. Key to the assessment of the equalities impact was consideration of the mitigations industry was proposing and how far they addressed any impacts on passengers with protected characteristics. However, a redacted document would have had to remove these considerations as the mitigations were still subject to live policy consideration as to whether they should continue and how. Sharing a heavily redacted document could have led to confusion as to why the DfT had reached certain conclusions on the impacts on protected characteristics.

The balance of the public interest test arguments

23. The consultation on changes to rail ticket offices opened on 5 July 2023 and closed on 1 September 2023. However, in its submission the DfT has advised that the EIA still remains a core component of a 'live' government policy on proposals for reforms to modernise stations which 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. The DfT states 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 DfT also considered whether the EIA could be shared now that a decision has been taken not to proceed with ticket office closures. However, as noted earlier it includes several other policies for modernisation of the retail and passenger experience at stations, which may still proceed even though ticket offices will not close. In relation to those policies, train operators would need to conduct meaningful consultations before making decisions on whether to implement these. Due to the fact development of these policies is still a live issue the same argument applies as to why the DfT does not consider it appropriate to publish this information or publish a heavily redacted EIA.

26. 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.
27. 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.
28. 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.
29. The public interest in favour of disclosure in this case, while strong, does not in the Commissioner's view outweigh the public interest in favour of maintaining the exemption. 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 states that it 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.

Procedural requirements

30. Section 1(1) of FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

31. Section 10(1) of FOIA states that a public authority must comply with section 1(1) promptly and "not later than the twentieth working day following the date of receipt".
32. The DfT responded to the complainant's request of 26 June 2023 on 1 September 2023.
33. From the evidence provided to the Commissioner in this case, it is clear that the DfT breached sections 1(1)(a) and 10(1) of FOIA.

Right of appeal

34. 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

35. 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.
36. 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

**Deirdre Collins
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