

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 October 2024

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

Decision (including any steps ordered)

1. The complainant has requested copies of any written assurances that the Department for Transport has issued about financial support to the Air Travel Trust ('ATT') and details of any financial support it has given to the ATT since 2018. The Department for Transport ('the DfT') relied on section 35(1)(a) of FOIA (formulation of government policy), section 35(1)(b) of FOIA (ministerial communications) and section 43(2) of FOIA (commercial interests) to refuse the request.
2. The Commissioner's decision is that although section 35(1)(a) and section 35(1)(b) of FOIA are engaged, the public interest is weighted in favour of disclosure. He also finds that the DfT is only entitled to rely on section 43(2) of FOIA to withhold part of the requested information falling under its reliance on this exemption.
3. The Commissioner requires the DfT to take the following steps to ensure compliance with the legislation.
 - Disclose the information it was relying on sections 35(1)(a) and 35(1)(b) of FOIA to withhold.
 - Disclose the information it has withheld under section 43(2) that does not relate to interest rates or delegated spend and decision-making.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 January 2024, the complainant wrote to the DfT and requested information in the following terms:

“Please provide:

Documents

- a. A copy of the “recent written assurance” quoted above that HM Government will provide “additional financial support” to the ATT.
- b. A copy of any “written assurance” that HM Government will provide “additional financial support” to the ATT, for its accounting period ending March 2023.
- c. A copy of any “written assurance” that HM Government will provide “additional financial support” to the ATT, for its accounting period ending 31 March 2024.

Information

- d. A brief explanation as to what “financial support” has been “provided to the ATT over many years”. I am happy for the following date range limiter to be applied to this request: 1 January 2018 to present.”
6. The DfT responded on 21 February 2024. It stated that it held the requested information but it was relying on section 35 of FOIA to withhold it.
7. Following an internal review, the DfT wrote to the complainant on 10 May 2024. It maintained its reliance on section 35(1)(a) of FOIA and advised that it also considered sections 35(1)(b) and 43(2) of FOIA to apply to some of the requested information.

Scope of the case

8. The complainant contacted the Commissioner on 29 May 2024 to complain about the way their request for information had been handled.

9. The Commissioner considers that the scope of his investigation is to determine whether the DfT was entitled to rely on the stated exemptions to refuse the request.

Reasons for decision

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

10. Section 35 of FOIA states:

“(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to—

(a) The formulation or development of government policy”

11. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.
12. The Commissioner’s guidance explains that there is no standard form of government policy. Policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policies can be formulated and developed within a single government department and approved by the relevant ministers. The key point is that policymaking can take place in a variety of ways and there is no uniform process.
13. However, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - The final decision will be made either by the Cabinet or the relevant ministers;
 - The Government intends to achieve a particular outcome or change in the real world; and
 - The consequences of the decision will be wide-ranging.
14. Section 35 of FOIA is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described, in this case being the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.

The complainant's position

15. In their complaint to the Commissioner, the complainant has stated that they do not believe section 35 of FOIA to apply as the requested information concerns written assurances that have already been provided to a third party outside of the DfT and the Government itself. The complainant stated that they are requesting information on decisions already made, and not information about the decision-making process or how future decisions may be made.

The DfT's position

16. The DfT explained that the requested information relates to the Air Travel Organisers' Licensing (ATOL) scheme. The ATOL scheme provides insolvency protection for package holidays that include a flight, and some "flight only" sales. If an ATOL protected passenger is abroad when their travel provider becomes insolvent, the Civil Aviation Authority ('CAA') will assist them getting home. If they have yet to travel, they will be able to apply to the CAA for a refund. It explained that the ATOL scheme is administered by the CAA and trustees of the Air Travel Trust (ATT), the fund behind the ATOL scheme, on behalf of the Secretary of State for Transport.
17. The information in scope of the request comprises a number of letters between ministers, and from ministers to the ATT. The DfT has explained that the requested information relates to the Government's policy of providing financial support to the ATT, and recent written assurances of additional financial support to the ATT should the fund's resources be exhausted.
18. The DfT has confirmed that the policy and decision making process concerning work surrounding the requested information is still ongoing. It explained that whilst there is no current explicit commitment to stand behind the ATOL scheme, it is plausible further commitments could be sought in the future to financially support the ATT if, in some scenarios (for example, a pandemic, significant market downturn, the failure of a single very large ATOL holder), the ATT risked not having sufficient funds to cover its demands. The DfT stated that it continues to consider its general approach to such a request should that eventuality occur, and explained that disclosure of the requested information would be likely to inhibit good decision-making by having a chilling effect on the ability of officials and Ministers to engage in free and frank debate.
19. The DfT also explained that disclosure of the requested information could have a chilling effect impact on its wider policy work on the reform of the ATOL scheme. It explained that it is in a period of heightened interest in the development of the policy as it is currently exploring

options for reforming the ATOL scheme, with future consultation planned pending the approval of new Ministers. The DfT considers that disclosure of the requested information may prompt an unusually high level of public speculation about future policy, potentially jeopardising its proposals before it is ready to present them.

20. The Commissioner has viewed the withheld information and notes that the DfT has only highlighted a few sentences over a number of items of correspondence that it considers to be covered by section 35(1)(a). The Commissioner is satisfied that these sentences relate to the formulation of government policy and therefore section 35(1)(a) is engaged. As DfT has also relied on section 35(1)(b) of FOIA to withhold some of the requested information, he has considered the public interest test in respect of the two limbs of section 35 together as set out below.

Section 35(1)(b) - Ministerial communications

21. Section 35(1)(b) states that:

“Information held by a government department or by the Welsh Government is exempt information if it relates to –(b) Ministerial Communications”.

22. Having reviewed the withheld information, the Commissioner is satisfied that part of the correspondence constitutes Ministerial communications because it comprises letters between ministers.

Public interest test

Public interest in disclosing the information

23. The DfT has acknowledged that disclosure of the requested information would promote greater transparency in this area, specifically transparency regarding the impact of COVID-19 on the ATT and the discussions between government departments on the best way to protect the customers of insolvent travel organisers during this period of economic difficulty, as well as in the future. This includes transparency on early considerations for the ongoing ATOL reform process.
24. It considers that disclosure would also promote transparency on conditions and procedures put in place when offers of loan-funding are made to the ATT. Disclosure may also enable the public to better scrutinise the financial liabilities of the ATT, and how these liabilities might influence ATOL reform.
25. The DfT also considers that disclosure would promote accountability and increase public awareness of how government departments work together to financially protect consumers, informing the public of

activities carried out on their behalf. Disclosure would contribute to the Government's wider transparency agenda, increase trust, and allow the public to scrutinise discussions and decisions the Government makes. More specifically, decisions made during the COVID-19 pandemic, as well as considerations taken into account for ongoing discussions on ATOL reform.

26. It added that disclosure may also increase public participation in the democratic process to an extent, particularly given the ongoing consultation relating to the ATOL scheme, which is important to ATOL operators and the travelling public alike.

Public interest in maintaining the exemptions

27. The DfT has explained that there is public interest in maintaining the exemptions so that a safe space can be maintained for policy discussion on HM Government financial support of the ATT in private, without external interference from parties who may seek to influence the decision-making and outcome of the reforms in their favour. It argued that loss of this safe space may lead to poorer decision making, which would not be in the public interest.
28. The DfT considers that disclosure would be likely to have a chilling effect on the free, frank and candid discussion between the DfT and HM Treasury to consider policy options for the ATOL Reform Programme. It explained that if the requested documentation was disclosed, future discussions and correspondence may not be free, frank and candid because officials and Ministers would be reluctant to give their views and opinions if they felt that they would be disclosed outside of Government. It considers that this would impact both current and future discussions on the development of the ATOL Reform Programme.
29. The DfT has stated that the timing of the request is important because it is currently exploring options for reforming the ATOL scheme through the ATOL Reform Programme. It explained that a key part of its considerations is the extent to which the Government should support the scheme in the future, and on what terms. As this position remains under review, the DfT considers that disclosing previous parameters of support would be likely to raise expectations around the Government's actions in the future, and harm its ability to consider the most effective policy. It added that disclosure would be likely to also prompt an unusually high level of public speculation about future policy, and potentially jeopardise its proposals before it is ready to present them.
30. The DfT explained that as ATT Trustees act as individuals, rather than a public body, disclosure would be likely to have a chilling effect on the Trustees' willingness to disclose risks to the Government and other

stakeholders going forward for fear these will become public, with concerns regarding their individual liability and public discussion on their conduct and adequacy as a Trustee. It explained that the CAA and the Government need to have good visibility and understanding of the risks that the scheme covers, otherwise it would not be possible to prepare effectively for large failures when they do happen. The DfT therefore considers that a loss of the free and frank provision of information from the ATT Trustees on potential risks will mean that policy will not be based upon the best evidence available, leading to poorer decision-making and policymaking.

31. The DfT added that a significant amount of the information on assurances by HM Treasury is already in the public domain. The DfT explained that the complainant was sent a copy of a Pre-action Protocol letter dated 15 March 2023 which stated that "some time and quantum limited offers of support, in the form of interest-bearing loans, were provided by the Department to the ATTF during and as a result of, the COVID-19 Pandemic. In the event, these offers of support were not called upon. The availability period for the proposed loans expired in September 2022".
32. It added that this information is also confirmed in the DfT and the ATT's accounts ([Annual Report and Accounts 2021-22](#) page 271 and [Annual Report and Accounts 2022-23](#) page 317 and 320). The DfT argued that it is not clear therefore how the further information on the administrative detail of the offer of support (interest rates and delegated spending limits of DfT), contained in the information being requested, adds materially to the picture regarding the Government's offer to support the ATT financially if needed up until September 2022. The DfT added that the offer was never called upon meaning disclosure of the requested information would not tell the public about funds spent on their behalf.
33. In addition to the above arguments, and in respect to its application of section 35(1)(b) of FOIA to some of the requested information, the DfT added that disclosing ministerial communication would be likely to harm "the convention of collective responsibility" and would reveal the view of an individual Minister on a government decision, or views that are likely to contribute towards a decision on ATOL policy that will be made in the near future in due course.

Balance of the public interest

34. The Commissioner acknowledges that there is a public interest in understanding financial support arrangements to the ATT, particularly as its role is to protect and support air travel customers when travel operators can no longer carry out their services due to insolvency. He

also acknowledges the public interest in the measures taken by Government to mitigate against the impact of COVID-19 and the wider accountability in its decision-making processes and use of public funds.

35. Although both limbs of the exemption are engaged, neither carries any inherent weight in favour of maintaining the exemption.
36. The Commissioner agrees that it is important for the DfT to have the ability to maintain a safe space to discuss potential policy developments about current and future support arrangements. However, in reviewing the withheld information he is not persuaded that the general references to future policy reform are specific enough to give weight to the argument that disclosure would shape expectations of future support to the ATT. The Commissioner notes the DfT has not applied section 35(1)(a) to the references on previous funding conditions, and that the withheld information does not contain sufficient detail to show what the focus of longer-term reforms may be.
37. With regards to the information withheld under section 35(1)(b) of FOIA, the Commissioner notes that although the information does comprise ministerial communications, it does not represent a minister's candid view of government policy. The correspondence merely sets out what the government's policy is. Both correspondences withheld under section 35(1)(b) came in response to requests from the DfT, and it is not clear why the letters would have been any different if disclosure was assumed. So whilst they are a ministerial communications, there is little public interest in maintaining the exemption in circumstances where there is no prospect of undermining collective responsibility or any genuine ministerial discussion.
38. In the Commissioner's view, the balance of the public interest therefore lies in disclosing the withheld information.
39. The Commissioner's decision is that although the DfT has correctly applied sections 35(1)(a) and 35(1)(b) of the FOIA to withhold some of the requested information, the public interest arguments are not compelling enough to prevent disclosure.

Section 43 – commercial interests

40. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
41. In order for section 43(2) to be engaged, three criteria must be met:
 - the harm which the public authority envisages must relate to someone's commercial interests;

- the public authority must be able to demonstrate a causal relationship between disclosure and prejudice to those commercial interests. The resultant prejudice must be real, actual or of substance; and
 - the level of likelihood of prejudice being relied upon by the public authority must be met (that is, it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
42. The DfT has explained that the withheld information relates to terms and conditions attached to particular support. It stated that disclosing this information could prejudice the DfT and HM Treasury when considering and negotiating future support for the ATT or other parties. It considers that disclosure could also prejudice the ATT in future negotiations with banks, insurers, and financial markets.
43. The DfT repeated its argument about the impact on the free-flow of information. It considers disclosure of the requested information would be likely to affect the free-flow of information between the DfT, HM Treasury and the ATT Trustees, as well as the free-flow of information from travel organisers to the CAA and the ATT. This would make it harder for the DfT to work with the travel sector if the parties only provided information they were required to and therefore prejudice the DfT's commercial interest.
44. The DfT explained that the commercially sensitive information within scope of the request is used to assess the key risks to the ATT and to properly prepare for the possible financial support required. The DfT has argued that it is unable to make the best commercial decisions and to secure the best use of public resources, without access to the full range of information available. It considers that disclosure of terms and conditions attached to particular support could prejudice both the DfT and HM Treasury when considering and negotiating future support for the ATT or other parties.
45. In its submission to the Commissioner, the DfT advised that it had sought the views of the ATT via the CAA with regard to the ATT's own commercial interests. The ATT considers that disclosure of the arrangements surrounding the departments' financial support to the ATT fund would be likely to prejudice the ATT's position in future negotiations with banks, insurers and wider financial markets. The DfT also consulted with HM Treasury about its handling of the request and HM Treasury agreed with its approach.
46. The Commissioner has reviewed the withheld information and considered the DfT's submissions and he is not convinced that section 43 of FOIA applies to all of the information withheld under this

exemption. With the exception of references to interest rates and delegated spend and decision-making, he does not agree that disclosure of the requested information would be likely to prejudice the commercial interests of the DfT or the ATT.

47. The Commissioner does not accept the DfT's argument that disclosure of the requested information could affect the free-flow of information. Indeed, the DfT has leverage to demand whatever information it requires when considering funding support and organisations seeking funding are likely to provide any information that is required to support their cause.
48. The Commissioner considers that the funding conditions previously given to the ATT are either so unique to the ATT that they could not be replicated in any other arrangement or so generic that they would apply to all such arrangements.
49. The Commissioner also considers that the parts of the withheld information relating to the ATT's financial position in previous years is less specific than will already have been published in its annual accounts. He is not convinced that any bank or financial institution would determine its support today on information from a number of years ago when very different conditions applied due to the pandemic.
50. For these reasons the Commissioner finds that the majority of the information withheld under section 43 of FOIA does not meet the three criteria outlined in paragraph 39.
51. With regards to the references to interest rates and delegated spend and decision-making, the Commissioner is satisfied, first, that the harm the DfT envisages relates to commercial interests; those of the DfT itself, HM Treasury, and of the ATT.
52. Second, the Commissioner accepts that a causal link exists between disclosing the information and commercial prejudice. The information is related to particular support arrangements offered to the ATT. The terms and conditions of the support would have been tailored to the ATT and disclosure of the details of this could affect the DfT's ability to negotiate similar offers of support in the future.
53. In its submission to the Commissioner, the DfT has stated that it considers the prejudice would be likely to happen and the Commissioner accepts the lower threshold of likelihood in this case.
54. Since the three criteria above have been satisfied, the Commissioner accepts that disclosing this part of the withheld information would be likely to result in commercial prejudice to the DfT, HM Treasury and the ATT alike. The exemption at section 43(2) is engaged.

55. The Commissioner will now consider the public interest factors in favour of disclosing this part of the redacted information or continuing to withhold it.

Public interest test

56. Section 43(2) is subject to the public interest test, as set out in section 2 of FOIA. This means that although the exemption is engaged, the requested information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

Public interest in disclosing the information

57. The DfT has put forward the same factors in favour of disclosure as set out in paragraphs 23 to 26 above.

Public interest in maintaining the exemptions

58. The DfT has explained that it considers that the requested information would be likely to prejudice its commercial interests, in particular its ability to secure the best use of public resources, facilitating good decision-making by Government, in ongoing discussions regarding the procedure and options for obtaining financial support of the ATT both in some scenarios (e.g. a pandemic, significant market downturn, the failure of a single very large ATOL holder), and on a more explicit ongoing basis, both from the Government and from commercial lenders.
59. The DfT considers that disclosure would be likely to severely prejudice its commercial interests if a commercial borrowing facility is chosen as the best option for ATT support going forward. It explained that this would mean the commercial lender would have access to the interest rates and amounts previously agreed and it could use these to its advantage in commercial negotiations. The DfT considers that this is more likely to be the case because the offers of support are relatively recent.
60. The DfT also considers that disclosing the requested information would be likely to cause a moral hazard. It argues that is because disclosure is likely to give rise to an unrealistic expectation that the Government will always step in to provide a guarantee to finance the response to a major failure. It explained that releasing the requested information could encourage the industry to act more riskily if they think the Government will step in, which would lead to consumer detriment and an increase in exposure for the ATOL scheme. It added that this could also place pressure on the Government to act in this way if such a failure materialised, which would close off policy options and the potential for any further commercial negotiation with potential lenders.

61. The DfT explained that disclosure of the requested information is likely to discourage experts, commercial partners, or other third parties, including the ATT Trustees, from exchanging views with officials or Ministers due to the risk that those views may be made public. The DfT argued that it is unable to make the best commercial decisions, to secure the best use of public resources, without access to the full range of information available.
62. The DfT has explained that disclosure would also be likely to prejudice the commercial interests of the ATT and ATT Trustees who have shared information with the DfT. It argued that the position is likely to be harmed by unduly weakening the ATT's relationship with its current lenders, due to disclosure of concerns regarding the funds available to the ATT compared to the financial risks it faced due to ATOL-holders deemed to be at risk.
63. It added that disclosure would also be likely to prejudice the commercial interests of the ATT and ATT Trustees with any potential future lender because it may create an unrealistic expectation that the Government will always step in to support the ATT. This would mean commercial lenders wouldn't be willing to spend time in commercial discussion regarding their potential to support the ATT financially, if they considered that government funding would always be utilised instead.
64. The DfT repeated its argument that there is already information available to the public about government support to the ATT, as set out in paragraph 32 above.

Balance of the public interest test

65. Whilst the Commissioner accepts that there is public interest in transparency about how the DfT spends public money, he also understands the importance of maintaining its ability to negotiate competitively and explore a range of financial support options.
66. The Commissioner is also mindful that the prejudice to commercial interests extends to the ATT itself and also to HM Treasury.
67. As stated above, the Commissioner considers that the information that the DfT routinely publishes meets the public interest in transparency to a satisfactory degree.
68. He therefore considers that the balance of the public interest is weighted in favour of non-disclosure of the specified part of the withheld information as he agrees that the release of this information is likely to result in a reduction in both the DfT's and the ATT's ability to negotiate with potential lenders.

69. The Commissioner's decision is that while the DfT is entitled to withhold the information that refers to interest rates and delegated spend and decision-making, it should disclose the remainder of the information is has withheld under section 43 of FOIA.

Right of appeal

70. 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

71. 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.
72. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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