

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 June 2021

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

Decision (including any steps ordered)

1. The complainant requested copies of correspondence relating to the Government's agreement of an emergency funding package for Transport for London. The Department for Transport ("the DfT") relied on sections 35(1)(a) (formulation of government policy) and 41 (breach of confidence) of the FOIA to withhold the requested information.
2. The Commissioner's decision is that section 35(1)(a) of the FOIA is engaged for all of the withheld information and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require any further steps.

Request and response

4. On 26 May 2020 the complainant requested information of the following description:

"Please send me all correspondence from 19 March to 14 May 2020 relating to emergency funding received by Transport for London, between:

- *[name], Director General Resources and Strategy Group in the Department for Transport (DfT)*

- *[name], Special Advisor at the DfT*
- *[name], Special Advisor at the DfT*

"And:

- *[name], Special Adviser to the Prime Minister*
- *[name], The Prime Minister's Private Secretary*
- *Sadiq Khan, Mayor of London*
- *Mike Brown, Commissioner, Transport for London*
- *[name], Chief Finance Officer, Transport for London*
- *Heidi Alexander, Deputy Mayor of London for Transport*
- *Counterparts at the Treasury"*

5. On 22 June 2020, the DfT responded. It refused to provide the requested information and relied on section 35(1)(a) and section 41 of the FOIA to do so.
6. The complainant requested an internal review on 25 June 2020. The DfT sent the outcome of its internal review on 23 July 2020. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 10 August 2020 to complain about the way his request for information had been handled.
8. As the DfT has only applied section 41 of the FOIA to its correspondence with Transport for London ("TfL"), but has applied section 35(1)(a) to all the correspondence within scope, the Commissioner will look at section 35 first. If and to the extent that that exemption is not engaged in relation to the correspondence with TfL – or where the public interest favours disclosure – she will also look at section 41.

Reasons for decision

Section 35 – Formulation or development of government policy

9. Section 35(1) of FOIA states that:

Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

(a) the formulation or development of government policy,

- (b) Ministerial communications,*
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or*
 - (d) the operation of any Ministerial private office.*
10. Section 35 is a class-based exemption, meaning that any information of a particular type will fall within the scope of the exemption simply because it falls within that class – the public authority does not have to demonstrate that disclosure would also cause prejudice in order to engage the exemption. TfL has applied Section 35(1)(a) to all of the withheld information.
 11. In *Department for Education & Skills v Information Commissioner and Evening Standard (EA/2006/0006)*, the Tribunal noted that the phrase “relates to” should be interpreted broadly. However, the information must relate to the formulation or development of government policy – not the implementation or administration of existing policy.
 12. On 15 May 2020, TfL announced that it had agreed an emergency funding settlement with the Government. TfL receives a considerable amount of its revenue from fares and the congestion charge – both of which declined dramatically during the first Covid-19 lockdown, forcing TfL close to insolvency.
 13. The Government agreed a package worth around £1.6bn in grants and additional borrowing facilities. In return, TfL was required to make pledges on future fare levels, restrict concessionary travel and subject itself to more direct Government oversight of its day-to-day operations.
 14. The withheld information in this case consists of a chain of emails between the DfT and TfL as officials hammer out the terms of the agreement. There are also chains of emails between the DfT and Number 10 and between the DfT and the Treasury as the Government as a whole reaches a deal that it can accept.
 15. The Commissioner accepts that this information relates to the formulation or development of Government policy. In particular it relates to the formulation of the Government’s policy towards TfL’s funding crisis in May 2020 – although the DfT has also noted that it relates to the development of the Government’s policy towards TfL’s funding more generally.
 16. The Commissioner is therefore satisfied that the withheld information falls within the class of information covered by this exemption. She therefore find that section 35(1)(a) of the FOIA is engaged in respect of the withheld information.

Public interest test

17. Information covered by section 35 can only be withheld if the balance of the public interest also favours maintaining the exemption.

18. In explaining why he considered that the public interest should favour disclosure, the complainant drew attention to the large number of people who rely on London's public transport system to move around the city. TfL's pledges on fares would, he argued, affect large numbers of people who lived and worked in the capital.

19. In addition, he argued that:

"There are also discrepancies in the public announcements from both Government, the Mayor's office, and TfL on who pushed for which bits of the deal, who knew about aspects of the deal at what time, and whether party political interests came into play as has been alleged. The disclosure of these emails will inform the public debate and address these discrepancies on this vitally important decision for Londoners, and on a huge investment of public funds."

20. In explaining why the balance of the public interest should favour maintaining the exemption, the DfT argued that a number of factors should be taken into account:

"The public interest in giving Ministers and officials a safe space to think through the implications of options and undertake rigorous and candid assessments.

"The public interest in preserving effective public administration and decision making, the provision of advice and exchange of views.

"Ministers and officials need a safe space in which to formulate and develop Government policy in this area without fear of premature disclosure. Good Government depends on good decision making and this needs to be based on the best available advice and a full consideration of all the options.

"If correspondence of this type was routinely placed into the public domain it would inhibit officials from providing free and frank advice / their views which would clearly damage the policy making process.

"Timing is also an important factor. The information request was received only 8 days after the Government's written statement to Parliament. Information Commissioner's Office guidance is clear that arguments will be strongest when there is a 'live' policy process to protect."

The Commissioner's view

21. In the Commissioner's view, the balance of the public interest in this case favours maintaining the exemption.
22. As the DfT has pointed out, the request was made after TfL had announced the deal to the stock exchange and after a statement had been made to Parliament. Whilst the correct point for assessing the balance of the public interest is the point at which a request is responded to, not the point it is received, the Commissioner does not consider that the DfT any longer required a "safe space" in which to make decisions. A decision had been made; it had been announced and the DfT had had an opportunity to explain the decision to the public.
23. However, as the DfT had rightly pointed out in its submission, whilst this particular funding package had been agreed, there was, at the time of the request, a realistic prospect that either further emergency support or a more sustainable long-term funding solution would be necessary. This has been borne out by events: TfL received a second funding package in November 2020 and that was extended by a further 7 weeks in March 2021.¹
24. Disclosure of the withheld information at the point the request was responded to, would have undermined the DfT's ability to have negotiated future funding settlements – including the October 2020 settlement. This is because it would reveal the Government's internal thinking and its true negotiating position (ie. what it would have been *prepared* to accept instead of what it *did* accept). Whilst some of the factors would be different at a later date, the Commissioner considers that a number of key themes emerge from the withheld information that would be likely to feature strongly in any future negotiation. Disclosure would therefore make it more difficult for the DfT to achieve a settlement that provided best value for taxpayers.
25. Whilst the Commissioner is usually sceptical of "chilling effect" arguments – public officials are well aware of FOIA and should be robust enough to give their views anyway – in the particular circumstances of this case, she is persuaded that those arguments are valid.
26. The withheld information reveals a group of officials working diligently together to achieve mutually agreeable terms. The Commissioner

¹ <https://content.tfl.gov.uk/transport-for-london-settlement-letter.pdf>

considers that the officials would, in future, be less candid and less willing to be flexible if they were aware that their correspondence would become public. On the contrary, it is likely that each official would become more concerned with protecting both their and their organisation's own reputation rather than reaching a deal. This would make a future deal harder to achieve and would not be in the public interest.

27. With regard to the specific matters the complainant raised, the Commissioner notes that, whichever party pushed for whichever bit of the deal is of little relevance since the final terms were agreed by all parties. Nor does the withheld information appear to substantiate the complainant's suggestion that party political considerations drove the Government's response.
28. The Commissioner is conscious that, at the time the withheld information was created, officials were often working around the clock to solve problems created or exacerbated by the pandemic. Decisions that would normally have been considered for months had to be taken in a matter of days – or even hours. Where decisions have, for reasons of urgency, had to be taken outside normal processes, there will be a stronger than usual public interest in disclosure.
29. However, in the circumstances of this case, the Commissioner considers that the balance of the public interest lies in allowing officials a confidential environment in which to hammer out agreements.
30. The Commissioner is therefore satisfied that the DfT is entitled to rely on section 35(1)(a) of the FOIA for all of the withheld information and that the balance of the public interest favours maintaining the exemption.

Right of appeal

31. 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: 0870 739 5836

Email: grc@justice.gov.uk

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

32. 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.
33. 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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