

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 October 2022

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

Decision (including any steps ordered)

1. The complainant has requested information about changes to rail services. The Department for Transport (DfT) has withheld the information under section 35(1)(a) of FOIA as it considers that it concerns the formulation of government policy.
2. The Commissioner's decision is as follows:
 - DfT is entitled to withhold the requested information under section 35(1)(a) of FOIA and the public interest favours maintaining this exemption.
3. The Commissioner does not require DfT to take any corrective steps.

Request and response

4. On 3 September 2021 the complainant requested information of the following description:

"I request:

 - guidance provided to franchised train operators;
 - targets provided to franchised train operators; and/or
 - ministerial directions

relating to the following:

- reductions in the cost of running the railway;
- reductions in, or changes to, timetables; and/or
- selection of train services to be removed from timetables.

This should reflect, but not be limited to, the guidance referred to in the c2c press release quoted below.

I request this because it is in the public interest to understand the extent to which guidance issued by the Department and directions by ministers are consistent with the Williams-Shapps review's commitment to protect off-peak services...”

5. On 1 October 2021 DfT responded. It provided a narrative response to the complainant's request. DfT withheld recorded information relevant to the request for guidance under section 43(2) (commercial interests) of FOIA. It withheld information relevant to the request for ministerial directions under section 35(1)(a).
6. The complainant requested an internal review on 1 October 2021. They suggested that DfT could redact exempt information and provide them with the remaining information.
7. DfT provided an internal review on 29 October 2021. It withdrew its reliance on section 43(2) but confirmed that it considered that section 35(1)(a) applied to [all] the relevant information it holds. DfT advised that the narrative information that it had provided in its original response to the request was essentially the same as the information in the document being withheld that does not engage section 35.

Scope of the case

8. The complainant contacted the Commissioner on 5 December 2021 to complain about the way their request for information had been handled.
9. The Commissioner's investigation has focussed on whether DfT is entitled to withhold the requested information under section 35(1)(a) of FOIA, and the balance of the public interest.

Reasons for decision

10. Section 35(1)(a) of FOIA says that information held by a government department is exempt information if it relates to the formulation or development of government policy,

11. In its submission to the Commissioner DfT has said that in responding to the complainant, it conducted a thorough search of its records and identified one letter that it deemed to be in scope of this FOI request ('the letter'). The letter was sent from Peter Wilkinson, Managing Director of Passenger Services, to the Managing Directors of franchised Train Operating Companies (TOCs) on 14 July 2021. The complainant submitted their information request just over seven weeks later on the 3 September 2021. At that time the information in the letter was highly sensitive and related to the formulation and development of 'live' government policy on railway matters. DfT confirmed that the letter still remains sensitive. It has provided the Commissioner with a copy.
12. DfT confirmed that its internal review concluded that the majority of the letter contained information that related to the formulation and development of 'live' government rail policy, adequately engaging section 35(1)(a). In its review response to the complainant, DfT assured them that its original response contained a good level of context and in effect it had provided the complainant with the contents of the letter that did not engage the section 35 exemption.
13. DfT's submission goes on to discuss the withheld letter which it says communicates to TOCs the government's thinking on developing a train service. This, in DfT's view, clearly falls into the type of information caught by the section 35(1)(a) exemption.
14. DfT has explained that this was and remains a live and developing picture. The letter represents one stage of the department's thinking around the services passengers need, post-Covid recovery, DfT's "potential future spending envelope and the evolving demand picture". The letter therefore sits in the wider context of rail related-considerations such as the Williams-Shapps plan for rail, consultations on planned service changes and the spending review, all set against a backdrop of uncertainty and rapid change.
15. DfT has noted that the complainant is aware of the Williams-Shapps white paper and wants to see how the instructions DfT is giving to TOCs fit with the white paper's ambitions. The complainant suggests that the decision of c2c (a train operating company) not to reinstate some services goes against the white paper's commitment to protect off-peak services. DfT considers that the guidance it provided to TOCs **is** aligned with the Williams-Shapps plan: the plan emphasises the importance of adapting rail services to meet future passenger demand, and Peter Wilkinson's letter instructs operators to be responsive to the substantial changes in travel seen since March 2020, and to focus on maintaining a reliable and high performing service.
16. The changes TOCs are instructed to make are not a one-off direction, but form part of policy development, as DfT is laying the groundwork for

the implementation of future reforms. Service changes, demand analysis and occasionally difficult decisions are necessary both in the current (post-recovery) context and to deliver a reliable, passenger-focused railway. For this reason, DfT says it sought to disclose as much information as possible, without encroaching on the policy-development space.

17. DfT says it wants to make it clear that it is not applying a blanket ban on releasing communications from the department; it is committed to transparency, and it has carefully considered the merits of disclosing the letter in its public interest test, discussed below.
18. DfT believes that disclosing the content of this letter would make operators less likely to engage with the department openly and honestly, if they feel that sensitive requests the department makes of them risk becoming public so soon after the letter was issued. Clearly, DfT says, it would make it harder for the department to operate in the rail market without co-operation from the train companies.
19. Releasing this letter would be likely to prove detrimental in the future, as it would be likely to prevent operators from reaching out to DfT's Managing Director as openly and freely as they do now. DfT says it needs to make sure that TOC Managing Directors feel comfortable writing to it – whether it is to inform DfT of relatively mundane issues, or to let it know they discovered financial irregularities, safety issues, and so on. The best and most effective way to establish that level of trust has been to make sure they understand the correspondence between them and Peter Wilkinson will be treated in strict confidence by the department, in both directions, when and if such correspondence refers to sensitive matters that can impact negatively on the way industry manages railway operations.
20. Most importantly, disclosing this correspondence would be likely to inhibit free and frank discussions that would otherwise contribute to the development of government policy. This is because officials would be reluctant to share views with TOCs if their communications were routinely disclosed ahead of any formal announcements. DfT acknowledges that the complainant does have a legitimate interest in how decisions are made, and the right to scrutinise the way government conducts its business. It says that whilst it decided to withhold the full communications detailed in the letter, it has tried to meet the complainant's request as far as possible, by extracting the key points from the letter and building this into a broader explanation of the changes to rail service levels since the pandemic.
21. DfT says that the following points were taken from the letter and shared with the complainant in its response:

- DfT has seen significant changes to passenger demand for rail services, which have been driven by the pandemic, and it is working with the rail industry to respond to these changes.
 - DfT instructed operators to develop timetables that reflect changing travel habits.
 - DfT places great emphasis on the importance of prioritising performance on the railway, to ensure it is delivering the best service for passengers, whilst protecting taxpayers' interests.
 - DfT takes great care to ensure its ongoing work with industry aligns with the Williams-Shapps plan for rail, which will enable it to build back a reliable, passenger-focused railway.
22. In providing the above information, DfT says it has attempted to strike the balance between giving the complainant sufficient information to respond to their request, without compromising the 'safe space' between the department and train operators.
23. Regarding the relevance of the stage of the policy formulation/development process, with regard to section 35(1)(a), DfT explained that, while it refers to the formulation and implementation of policy related to the Williams-Shapps plan for rail, its broader argument around maintaining a 'safe space' between the department and operators is not limited to this policy area.
24. Officials have worked hard, DfT says, to create an environment that encourages open and honest communication between the department and operators, so DfT can get to the root of complex issues regarding the railway and identify the best, most cost-effective solutions. DfT stresses the importance of preserving a 'safe space' to allow the exploration of options regarding passenger services, which will be especially important as it works with industry towards achieving the commitments of the Williams-Shapps plan for rail. Without this 'safe space' trust and transparency between the department and operators will be reduced, which will affect the quality of policy development.
25. Finally, DfT has confirmed that it has had regard to the requirements of section 35(4) of FOIA and, other than the information that it has already provided to the complainant, there is no additional factual information contained within the letter which has been used, or is intended to be used, to provide an informed background to decision taking.

The Commissioner's conclusion

26. 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 minister
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
27. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. It 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, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
28. With regard to the criteria at paragraph 26, the Commissioner is satisfied that the final decision about any new rail policy would be made by the relevant minister in DfT.
29. The Commissioner is also satisfied that the government intends to achieve a particular change or outcome in the real world – the development of train services – and that, clearly, the consequences of those policy decisions will be wide-ranging.
30. The Commissioner is therefore satisfied that the information being withheld relates to the formulation or development of government policy – specifically, government policy on train services.
31. He finds that the section 35(1)(a) exemption was therefore engaged at the time of the request and internal review in September and October 2021. The Commissioner has gone on to consider the public interest test.

Public interest test

Public interest in disclosing the information

32. DfT has identified the following arguments:
- Disclosing the letter would contribute to the government's wider transparency agenda, increase trust and allow the public to scrutinise communications between government and train operators, and decisions ministers make on rail matters, including on the implementation of the Williams-Shapps plan for rail.
 - As public knowledge of the way in which the government works increases, the public contribution to the policy making process could become more effective.

Public interest in withholding the information

33. DfT has identified the following arguments:

- The letter relates to the formulation and development of 'live' government policy on rail matters with decisions made by ministers or by the department. Disclosing this sensitive information so soon after the letter was issued would be likely to make operators less likely to engage with the department openly and honestly, if they feel the requests the department makes of them risk becoming public. This would clearly have an effect on the department's ability to operate in the rail market.
- The letter issued to senior officials in the rail industry forms part of ongoing 'live' policy development. There is a strong public interest in government being able to explore policy ideas with the rail industry, particularly as DfT is working to recover from the pandemic and implement the ambitions and commitments of the Williams-Shapps plan for rail. Disclosing this information would weaken the government's ability to ascertain the genuine views of the rail industry.
- There is significant benefit to maintaining a "safe space" in which to develop 'live' government policy and explore options that best achieve the ambitions and commitments of the Williams-Shapps Plan for Rail. Removing this safe space would be likely to make both the department and third parties (in this case, train operating companies) less willing to engage in the exploration of new policy ideas if emerging thinking is subject to premature public scrutiny.
- Disclosing the letter relating to the formulation and development of 'live' government policy, in respect of passenger services, would inhibit free and frank discussions, as officials would be reluctant to provide views and opinions if they were routinely disclosed ahead of any formal announcements.
- If the letter were released it would be likely to generate a high volume of correspondence which would distract officials from continuing to formulate and develop government rail policy.

Balance of the public interest

34. DfT notes that the factors it considered with regard to disclosure were largely generic public interest arguments in favour of transparency, whereas the public interest arguments against disclosure stemmed from specific concerns.
35. In the Commissioner's view, the timing of the request is a key factor in this case because the policy process was still live at the time of the

request (and currently). As the requested information relates to that policy making, he considers that the need for a 'safe space' to debate policy and reach decisions without external comment is a valid argument. As is the need for the TOCs to be prepared to engage with DfT in the development of those new policy ideas and the need for officials to be able to focus on this policy area as it is being developed rather than field associated queries from outside interests. It has been generally accepted by both the Commissioner and First-tier Tribunal that significant weight should be given to maintaining the 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.

36. That compelling public interest in favour of disclosure is not evident in this case. The general public interest in transparency has been met to an adequate degree, in the Commissioner's view, through the relevant, narrative information DfT has provided. As such, the Commissioner agrees with DfT that the balance of the public interest favoured withholding the information at the time of the request.

Right of appeal

37. 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

38. 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.
39. 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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