

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 June 2018

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

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Department for Transport for details of representations made by airlines on the future of the EU 261 regulation and passenger compensation arrangements after the UK leaves the European Union. The DfT refused the request under the exemption in section 35(1)(a) (formulation and development of policy) and section 27 (international relations).
2. The Commissioner has decided that section 35(1)(a) was correctly applied to the withheld information and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 25 July 2017 the complainant made a freedom of information request to the DfT which read as follows:

"Please could you send me details of representations made by airlines on the future of EU 261 and passenger compensation arrangements after the UK leaves the European Union."
4. The DfT responded to the request on 17 August 2017 when it confirmed it held some information falling within the scope of the request but explained that this was being withheld under the exemptions in section 35(1)(a) and sections 27(1)(a), (b), (c) and (d).

5. The complainant subsequently asked the DfT to carry out an internal review of its handling of his request and it presented its findings on 21 September 2017. The review upheld the initial response to the request.

Scope of the case

6. On 21 September 2017 the complainant contacted the Commissioner to complain about the DfT's decision to refuse her request.
7. The Commissioner considers the scope of her investigation to be to consider whether the DfT was correct to refuse the complainant's request under section 35 and/or section 27.

Background

8. EC Regulation 261/2004 is a regulation in EU Law establishing common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellations or long delays. It came into effect on 18 February 2005.

Reasons for decision

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

9. Section 35(1)(a) of FOIA provides that information is exempt if it relates to the formulation and development of government policy.
10. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy
11. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead the exemption is engaged so long as

the requested information falls within the class of information described in the exemption. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can be given a broad interpretation given that it only requires that information "relate to" the formulation and development of government policy.

12. In this case the DfT has confirmed that the withheld information relates to the Government's EU Exit policy for aviation. It consists of relevant extracts from a letter, briefing and meeting minutes where airlines have made representations on the future of EU law – Regulation 261/2004 concerning airline passenger compensation arrangements after the UK leaves the EU. The Commissioner has reviewed the withheld information and found that it relates to the Government's plans in respect of compensation arrangements for the aviation industry post Brexit. The Commissioner is satisfied that it relates to the early stages of the policy formulation and development process and that therefore section 35(1)(a) is engaged. The Commissioner will now go on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosure

13. The complainant argued that the public interest favoured disclosure because airlines may be lobbying government to protect their commercial interests "at the expense of 22 million passengers who fly every year" and that presumably disclosure would be in the public interest as it would shed light on whether or not this was in fact happening.
14. The complainant also said that the position of the airlines should be seen as akin to lobbyists and referred to the Commissioner's guidance on section 35 which he said suggests that information from external lobbyists will have less protection under section 35.¹
15. For its part the DfT said that it acknowledged that releasing the information would increase transparency regarding a significant live issue such as EU Exit. It also said that it was in the public interest for the public to be able to assess the quality of advice being given to

¹ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

ministers and understand its decision making process regarding EU Exit policy.

Public interest arguments in favour of maintaining the exemption

16. The DfT argued that it needed a confidential space to be able to investigate and formulate its proposals for EU Exit policy so that it is properly equipped to assess all possible options available. It said that good government depends on good decision-making, based on the best advice available and that therefore it must also have the ability to fully consider all of the EU Exit policy options without fear of premature disclosure.
17. The DfT went on to say that disclosing information provided by airlines would be likely to have a negative impact in its ability to accurately develop its negotiating position (on leaving the EU) and its relationship with the industry. This is because, it said, it relied heavily on the aviation industry to inform it of the impact of various options and outcomes and it risked losing the confidence of the industry to provide it with an honest reflection of their views if they believed that the information they provided would be made public.
18. The DfT also argued that any suggestion of what position the UK Government (or industry) is considering before negotiations have begun would be likely to have a detrimental impact on the success of the negotiations for leaving the EU. It said that one particular aspect of the UK's position is the level of regulatory alignment that the UK is seeking in its future economic partnership with the EU and the matter of EU 261 was part of that.

Balance of the public interest arguments

19. The Commissioner has considered the competing arguments and accepts that disclosure is in the public interest in so far as this would help to promote transparency around the government's plans for compensation arrangements within the Aviation industry following Brexit. UK passengers have benefited from the consumer rights enshrined within EU 261 and it is a matter of legitimate public concern if similar arrangements will continue to operate following the UK's withdrawal from the EU.
20. However, any arguments for disclosure have to be balanced against the harm that would be caused to the policy making process through disclosure of the withheld information.

21. The DfT's arguments for maintaining the exemption essentially focus on the concepts of a 'safe space' and 'chilling effect'. The idea behind the safe space argument, accepted by the Commissioner, is that government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
22. The need for a safe space will be strongest when an issue is still live and in this case the DfT has explained that the policy making process is indeed still live, has not yet been finalised and no announcements have been made.
23. The Commissioner has reviewed the withheld information and found that the discussions are at an early stage. The policies being discussed are still live and as the DfT said, no final decisions have been made. As such there is a considerable public interest in allowing the government a safe space to continue its discussions and contribute to the formulation/development of policy without the fear that these discussions will be made public.
24. It appears to the Commissioner that the information relates to the early stages of policy formulation and development where the government is sounding out industry on the possible options and seeking their advice on the best way forward. Disclosure at the time the request was received would be likely to lead to a great deal of media interest, speculation and attempts to influence the Government's policy in one direction or another. This would distract from the policy making process and would not be in the public interest.
25. The Commissioner accepts that the government is entitled to a safe space in which it is able to consider and formulate its post EU Exit policy so that it is properly equipped to assess all possible options available. The Commissioner has always taken the view that good government depends on good decision making and it is in the public interest for the DfT to be able to consider all of the possible policy options without fear of premature disclosure.
26. The complainant had suggested that the airlines are effectively lobbyists seeking to influence government policy and therefore there is a greater case for disclosure. He referred to the Commissioner's guidance on the section 35 exemption where it advises that:

Traditionally safe space arguments relate to internal discussions but modern government sometimes invites external organisations/individuals to participate in their decision making process (eg consultants, lobbyists, interest groups, academics etc). Safe space arguments can still apply where external contributors have been

involved, as long as those discussions have not been opened up for general external comment. However this argument will generally carry less weight than if the process only involved internal contributors. (para. 198)

27. The Commissioner would accept that the public interest in withholding the contributions from third parties may attract less weight than purely internal discussions. However, disclosure in this case would nevertheless reveal information on the government's policy thinking and given the timing of the request, and for the reasons mentioned above, the Commissioner finds that the safe space argument still attracts significant weight.
28. The Commissioner is also mindful that the Government's policy around the future of EU 261 and aviation compensation arrangements is especially sensitive since it will form part of the wider negotiations on leaving the EU and the extent of regulatory alignment post Brexit. Disclosure in these circumstances would be particularly disruptive since it would risk placing the UK at a disadvantage during the negotiations on exiting the EU. This weighs in favour of maintaining the exemption.
29. As regards the chilling effect argument, which is concerned with the loss of candour in future discussions, the Commissioner has found that having reviewed the withheld information it amounts to free and frank advice from the aviation industry which was still recent at the time the request was received. The information is clearly on a sensitive issue where they would not expect their contributions to be disclosed. In the circumstances the Commissioner is of the view that disclosure would be likely to discourage the airlines from contributing to future discussions regarding the future of EU 261 and other areas of aviation policy.
30. The DfT has made it clear that it relies heavily on the aviation industry to inform it of the impact of the various options it might be considering through its aviation policy. In light of this, the Commissioner accepts that the impact of any chilling effect is likely to be significant and therefore there is a strong public interest in maintaining the exemption. If airlines are reluctant to share their views with the DfT this would result in less informed decision making. This is particularly significant because it would be likely to lead to the UK securing a deal with the EU that is less successful than it could be.
31. The complainant again referred to the Commissioner's section 35 guidance and suggested that disclosure was unlikely to have any chilling effect on the airlines because they are effectively acting as lobbyists.

"Where lobbyists have been involved in the discussions then they are even less likely to be inhibited in their contributions by the possibility of disclosure as they are trying to further their own agenda by influencing departments." (para. 203)

32. The Commissioner has considered the complainant's arguments but does not accept that a direct comparison can be made with a lobbyist that seeks to proactively influence government policy. Rather it appears to the Commissioner that the position here is one where important members of the aviation industry have been invited by the government to offer their advice and put forward their views on a sensitive area of government policy. The DfT have made it clear that they rely heavily on their advice and so any reluctance on their part to cooperate with government would be very damaging. Even if disclosure would be unlikely to lead to airlines refusing to cooperate with the government altogether, it may well result in them being more guarded in their advice which would result in less effective decision making.
33. In conclusion, the Commissioner has found that withheld information is recent, sensitive and relates to a live policy where no final decision had been reached or announcements made at the time the request was received. Whilst disclosure would promote transparency and accountability, this is outweighed by the arguments for withholding the information.
34. The Commissioner's decision is that in all the circumstances of the case the public interest in maintaining the section 35(1)(a) exemption outweighs the public interest in disclosure.

Other exemptions

35. The Commissioner is satisfied that all of the withheld information is exempt on the basis of section 35(1)(a) and therefore she has not gone on to consider whether the section 27 exemption might also apply as well.

Right of appeal

36. 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@hmcts.gsi.gov.uk

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

37. 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.
38. 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

Paul Warbrick
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