

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 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 has requested the Equality Impact Assessment (EIA) from the Department for Transport (DfT) associated with its proposal to change rail ticket offices. The DfT refused to provide the information citing sections 35(1)(a), 43(2) and 21(1) of FOIA.
2. The Commissioner's decision is that the DfT was entitled to withhold the requested information, under section 35(1)(a) of FOIA. He has found that section 21 is not engaged.
3. The Commissioner does not require further steps.

Request and response

4. On 2 November 2023, the complainant wrote to the DfT and requested information in the following terms:

"I understand that you have previously rejected a request to release the overall equality impact assessment that the Department carried out into the planned closures of nearly 1,000 ticket offices by train companies.

Now you have decided that the closures will not go ahead, I believe your explanation for refusing the request - that the EIA might be used to help formulate a government policy decision on the closures

- no longer applies as the decision has been made.

Please now release that EIA document or documents.”

5. The DfT responded on 28 November 2023 exempting the requested information under sections 21 (information accessible to the applicant by other means), 35(1)(a) (the formulation and development of government policy) and 43(2) (commercial interests) of FOIA.
6. On the same date the complainant requested an internal review arguing that the public interest favoured disclosure.
7. The DfT provided an internal review on 15 January 2024 in which it maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 18 January 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 look at the DfT's citing of sections 21, 35(1)(a) and section 43(2) of FOIA.

Reasons for decision

Section 21 - information accessible to the applicant by other means

10. Section 21 of FOIA provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
11. Section 21 is an absolute exemption which means that there is no requirement to carry out a public interest test, if the requested information is exempt.
12. Unlike most exemptions, the circumstances of the applicant/requester can be considered, as the information must be reasonably accessible to them. Unless a public authority is aware of any particular circumstances or contrary evidence, it is reasonable to assume that information is accessible to the applicant/requester as a member of the public.

The DfT's view

13. The DfT explained that it was not required to provide information which was reasonably accessible to the requester/complainant and provided several links:

“some of the information used in the EIA included research data which was already publicly available, as well as references to the train operating companies’ proposals and their own EIAs that were published during the public consultation period of the Ticketing and Settlement Agreement process”.

It believed that the request “potentially” brought “into scope EIAs produced by the train operators” that were documents -

“published on each TOC website during the consultation period (and most train operators kept them available even after the end of the public consultation period) and therefore already available to the applicant”.

14. The complainant was not content with the citing of section 21 as they explained to the Commissioner that they considered that it was impossible to know whether the information was in the EIA.
15. The complainant has not suggested that the information at the links is inaccessible to them. The DfT explains that the request had asked for the “EIA or documents” potentially bringing into scope EIAs produced by the train operators’ but the Commissioner notes that the request says – “that EIA document or documents” the interpretation of which he would suggest is that the complainant wants the EIA document or the EIA documents for the “overall equality impact assessment” which may have comprised of more than one document.
16. The complainant had difficulty in knowing which parts of the information in the links that were provided were in the EIA as this was not made clear. The Commissioner has reviewed the information the DfT directed the complainant to and in order for section 21 to apply, the information in the public domain needs to match what the applicant asked for. The links provided are perhaps a well-intentioned attempt to provide information the DfT considered had informed the EIA but the Commissioner does not accept that the exemption is engaged.

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

17. The Commissioner will first look at the DfT’s citing of section 35(1)(a). He has been provided with the withheld information.
18. Section 35(1) of the FOIA states that information held by a government department (or by the National Assembly for Wales) is exempt if it

relates to-

“(a) The formulation or development of government policy.

(b) Ministerial communications...”

19. The Commissioner’s guidance¹ considers that certain factors are indicators of the formulation or development of government policy:

- The final decision will be made by the Cabinet or Executive Committee or the relevant Minister.
- The government intends to achieve a particular outcome or change in the real world.
- The consequences of the decision will be wide-ranging.

20. In order to be exempt, the requested information must relate to the formulation or development of government policy. The guidance explains that the terms refer to “the design of a new policy, and the process of reviewing or improving existing policy”. It is important to identify where formulation or development ends and implementation starts as the exemption doesn’t cover the application or implementation of policy that is established. The term “relates to” is a broad term and means that, “Any significant link between the information and the activity is enough”. The timing of the request is not relevant but whether the information relates to the activity.

21. 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.

The DfT’s view

22. The DfT has explained that when -

“the FOI request was made, the public consultation had concluded, and a decision had been made by government to ask train operators not to proceed with ticket office closures. However, at this time officials and industry were still assessing 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

¹ [Section 35 - Government policy | ICO](#)

were broader than just ticket office closures. This included how best to progress with policy options...”

23. The DfT’s view is that at the time of the request -

“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”.

The DfT therefore contends that “it is the primary exemption” it is relying on “as it applies to ongoing policy consideration of all of the policy initiatives covered in the EIA, other than ticket office closures...”

The complainant’s view

24. The complainant argues that Transport for All believes that the “excuses for not releasing the information were a ‘smokescreen’ to prevent significant government failings being revealed and to stop future reforms being undermined.’

25. The complainant says that the DfT -

“expects to release the EIA when its policy on station reform has been settled. That could take many months or even years. There can be no transparency about the reform process without this information being released”.

The Commissioner’s view

26. The Commissioner accepts that the exemption is engaged and has relied on the reasoning in his recent decision notice where the request included an earlier version of the EIA [ic-260271-f2n4.pdf \(ico.org.uk\)](#) (paragraphs 15 and 17-19). In this instance the withheld information is dated two months later which suggests that the document has gone through different iterations and supports the view that it is still in formulation/development.

Public interest test

27. The Commissioner has gone on to consider where the public interest lies in this matter and whether it has changed since his earlier decision.

Public interest factors in favour of disclosing the requested information

28. The complainant argues that

“there are very strong public interest grounds for release of the information because the planned closure of ticket offices has now been abandoned, but also because further reforms are still ongoing and it is vital that disabled people are able to see the EIA so they can make a judgement on how future reforms could affect them”.

Their view is that “the interests of disabled people in being able to access public transport far outweigh the mild difficulties this might cause DfT and the rail companies”. The complainant does not accept that it’s “right that the government’s calculation of how proposed reforms would impact disabled rail passengers” should be “kept secret”.

29. The DfT recognises that “disclosing the EIA would contribute to the Government’s wider transparency agenda, increasing trust and allowing the public to be involved with decisions the Government makes on rail matters”. It could “have helped to allow the individual concerned, or the public, to understand the basis on which a proposal was made”.

Public interest factors in favour of maintaining the exemption

30. The DfT states that the EIA -

“was a core component of a ‘live’ government policy decision on whether and how to progress with other reforms at rail stations that were originally proposed to mitigate the impacts of closing ticket offices but could still have a passenger benefit”.

31. The decisions were “part of wider considerations on ensuring efficiency due to changing passenger use of the railway since the pandemic” which are considered confidential.

32. The DfT contends that ministers and officials need to -

“have a safe space away from public scrutiny to formulate and develop policy, especially where we are considering the response to a public consultation which generated significant interest and the views of independent passenger bodies.”

33. Train Operating Companies (TOCS) “needed to ensure that information was not prematurely shared...” If the information had been shared “prematurely [it] 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”. They also needed to have the confidence that they can share information “including their own

views on whether and how to progress some reforms, in an environment" where "free and frank discussion" is encouraged. The DfT's opinion is that this "was to ensure that the correct decisions were made".

34. The process is still 'live' "although the decision had been taken not to proceed with closing ticket offices when the FOI was submitted". Decisions had not been taken on "whether to progress other reforms considered in the EIA" or "on how to address consultation feedback".
35. The DfT considered whether it was in the public interest to provide a redacted version of the EIA "which would in effect release only the information related to ticket office closures". It was decided that "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 Department had not considered mitigations". These mitigations "were still subject to live policy consideration as to whether they should continue and how". The DfT believes that "a heavily redacted document could have led to confusion as to why the Department had reached certain conclusions on the impacts on protected characteristics".

Balance of the public interest

36. The Commissioner has informed his decision with paragraphs 23-28 of his recent decision notice [ic-260271-f2n4.pdf \(ico.org.uk\)](#).
37. However, he has considered whether the slightly less than four month difference between the request made here and his previous decision made any significant difference as to whether the information should be released. He has also taken into account the complainant's public interest arguments.
38. The Commissioner recognises the strength of the complainant's view regarding the interests of disabled people in accessing public transport which is clearly of significance. They suggest that the proposed reforms should not be "kept secret" because of their potential impact on "disabled rail passengers". However, the EIA has wider reform proposals than those relating to ticket office closures and they are still under review. The Commissioner has reached the same conclusion as in [ic-260271-f2n4.pdf \(ico.org.uk\)](#) that the formulation/development stage of the policy has not ended. In his previous decision notice, he referred to the potential impact on those with protected characteristics. The Commissioner noted that disclosure would have indicated what risks DfT had identified from changes to ticket offices and how it intended to mitigate those risks. However, as the Commissioner previously noted,

the consultation process, the published EIAs from the TOCS, and the research material adequately met the public interest.

39. 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. His decision is that there remained enough weight in the need for a safe space when this request was made.
40. As the Commissioner has decided that section 35(1)(a) was appropriately cited to the EIA and the public interest favours non-disclosure, he has not gone on to consider section 43(2) of FOIA.

Right of appeal

41. 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

42. 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.
43. 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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