

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2023

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

Decision (including any steps ordered)

1. The complainant has requested DfT to disclose correspondence sent to or from the Secretary of State for Transport relating to 26, 27 and/or 28 February 2022, in which discussions took place over a flight which took off from Inverness Airport to Moscow on 26 February 2022. DfT refused to disclose the requested information, citing sections 27(1)(a) and (b), 35(1)(b) and 36(2)(b)(ii) of FOIA. At internal review, it also stated that it wished to rely on sections 35(1)(a), 40 and 42 of FOIA.
2. The Commissioner's decision is that DfT is entitled to rely on sections 35(1)(a) and (b) and 36(2)(b)(ii) of FOIA. He therefore does not require any further action to be taken.

Request and response

3. On 1 June 2022, the complainant wrote to DfT and requested information in the following terms:
4. "I request: Copies of any correspondence sent to; or from the Secretary of State for Transport relating to the following: February 26,27 and/or 28 this year, in which there is a discussion of a flight which took off from Inverness Airport for Moscow on February 26."

5. DfT responded on 12 July 2022, advising the complainant that it required additional time to complete the public interest test considerations.
6. DfT issued its full response on 5 August 2022. It refused to disclose the information citing sections 27(1)(a) and (b), 35(1)(b) and 36(2)(b)(ii) of FOIA.
7. The complainant requested an internal review on 23 August 2022.
8. DfT carried out an internal review on 22 September 2022 and notified the complainant of its findings. It upheld its earlier application of the exemptions it cited but also informed the complainant that it now wished to rely on sections 35(1)(a), 40 and 42 of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 19 October 2022 to complain about the way their request for information had been handled. They believe the information requested should be disclosed.
10. The Commissioner has reviewed the withheld information and obtained detailed submissions from DfT. The withheld information consists of a briefing and paper for a Ministerial Cabinet Committee meeting and internal emails between department officials on the matter. For the first element, the Commissioner is satisfied that sections 35(1)(a) and (b) of FOIA apply. For the second, the Commissioner is satisfied that 36(2)(b)(ii) applies. The following section of this notice will explain why.

Reasons for decision

Section 35(1)(a) and (b)

11. Section 35 of FOIA allows a public authority to refuse to disclose information if it relates to the formulation and development of policy (35(1)(a)) and Ministerial communications (35(1)(b)).
12. Section 35 is classed based, so there is no need to consider the sensitivity of the information in order to engage the exemption and it must simply fall within the class of information described. The classes are interpreted broadly and catch a wide range of information.
13. The Commissioner is satisfied that the briefing and paper for a Ministerial Cabinet Committee are communications between Ministers and therefore engages section 35(1)(b) of FOIA. The information also

relates to the formulation and development of live government policy (government policy for the restrictions on travel to and from Russia) and therefore engages section 35(1)(a) of FOIA.

14. As both subsections apply, the Commissioner will now go on to consider the public interest test. The public interest test consideration below will address the arguments presented for both subsections.

Public interest test

15. DfT recognised the strong public interest arguments in favour of transparency and accountability and in allowing members of the public access to information which enables them to understand more closely how decisions are made in relation to travel to and from Russia in light on the ongoing war in Ukraine.
16. However, it considers there are stronger public interest arguments in favouring of maintaining both section 35(1)(a) and (b) of FOIA.
17. DfT confirmed at the time of the request the policy for the restrictions on travel to and from Russia remained in development due to the ongoing war. It stated that it is a live and fluid policy issue, which will require ongoing submissions, exchanges of emails and reports on this subject matter. It considers the public interest rests in maintaining and protecting the ability of Ministers to discuss and debate the policy issues and options in a free and frank manner, away from public scrutiny, especially as the issues under discussion and debate are still live and fluid.
18. DfT argued that there is a stronger public interest in favouring of protecting this safe space and the ability of Ministers to debate the issues candidly, consider options freely and frankly so as to ensure that the most appropriate decisions are made on the way that is best for the policy to develop.
19. It went on to say that it acknowledged that there is a public interest in the very topical issue of travel to and from Russia. However collective responsibility is a constitutionally important convention which underpins the system of Cabinet Government. The principle requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions are reached. DfT said that disclosure would undermine this united front, thereby undermining Government unity and effectiveness. DfT concluded by saying that there is a need in this case to protect Ministerial unity and collective decision making so as to ensure the policy making process is not undermined by premature disclosure.

20. The Commissioner acknowledges the significant public interest arguments in favour of disclosure in this case. Disclosure would allow the public to see how decisions were made around this flight and provide an insight into the government's formulation and development of policy in this area. The public will want to know what the government's policy on travel to and from Russia is, how this is developing and what options have been debated and considered. They will also be interested to see what the government's position was on the named flight and why.
21. However, in this case the Commissioner agrees with DfT that there are stronger public interest arguments in favour of maintaining both subsections of this exemption. He notes that policy development was still live and ongoing at the time of the request (and may remain the same today, as the war continues). Ministers should be afforded the safe space to consider their options, discuss and debate issues around this topic without the fear or distraction of premature disclosure. There are also stronger public interest arguments in protecting Ministerial unity and collective decision making to ensure that the most appropriate decisions are made on how government policy on this topic develops and how the government approaches issues and matters on the war in Ukraine as they arise.
22. For the above reasons, the Commissioner has decided that the public interest rests in maintaining sections 35(1)(a) and (b) of FOIA.

Section 36(2)(b)(ii)

23. DfT has applied this exemption to email exchanges between department officials on the topic. Section 36(2)(b)(ii) enables a public authority to refuse to disclose information if, in the qualified person's opinion, its disclosure would or would be likely to inhibit the free and frank exchanges of view for the purposes of deliberation.
24. DfT confirmed that submissions were made to a DfT Minister as the qualified person in accordance with section 36(5)(a) of FOIA.
25. The DfT said that it is the qualified person's opinion that, because the information in these emails are free and frank exchange of views with regards to the issue of travel to and from Russia and the application of existing government policy between officials, disclosure would be likely to prejudice the free and frank exchange of views for the purposes of deliberation.
26. It said that disclosure would be likely to impinge and discourage the space in which Ministers and officials are able to develop their thinking in a free and frank manner and explore options on contentious issues in discussion with other Ministers. DfT advised that policy officials need a

safe space where they can be open in raising flaws in a current law and how those laws can be strengthened including via press lines relating to a critical press article.

27. The Commissioner accepts that this is a reasonable opinion to hold in the circumstances and therefore that section 36(2)(b)(ii) is engaged. The contents of the emails do contain free and frank discussion on the topic and it therefore seems logical that disclosure at the time of the request would have been likely to prejudice the ability of Ministers and policy officials to share and debate their views.

Public interest test

28. DfT again said that it acknowledges the public interest in favour of disclosure in this case, for the same reasons detailed above in paragraph 15.
29. However, in this case it considers there are stronger public interest arguments in favour of maintaining the exemption. It stated that there are stronger public interest arguments in ensuring that there is an appropriate environment in which DfT is able to undertake rigorous and candid assessments of the risks of a particular situation or event. It commented that while the incident in question has now passed, and notwithstanding the strengthened sanctions position, there is still a need for safe space for officials to test the policy and legal position should such an incident occur again.
30. The Commissioner, again, acknowledges the public interest arguments in favour of disclosure in this case. These are detailed above in paragraph 20.
31. However, he is satisfied given the circumstances at the time of the request, the nature of the withheld information and the live and ongoing nature of the war in Ukraine (within that how travel to and from Russia is to be managed) that the public interest rests in maintaining the exemption.
32. He agrees with DfT that the public interest lies in this case in protecting and maintaining an appropriate environment in which DfT is able to undertake rigorous and candid assessments of incidents of this nature and any other issues that come up with regards to the war in Ukraine. Often they have to act fast and there is a need for safe space to enable officials to debate and considers their options openly and candidly to ensure that the most appropriate decisions going forward are made. As DfT has said, while the decisions over the flight were made, the discussions that took place feed into the wider policy formulation over travel in and out of Russia. This was still very much live and ongoing at

the time of the request and it knew that there would be ongoing discussions and debates around that in the near future. Ministers and policy officials therefore required the safe space to conduct those further discussions and develop and formulate its wider policy on travel to and from Russia as the war continues.

Right of appeal

33. 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

34. 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.
35. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF