

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 5 August 2022

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the decision to place South Africa on the red list during the pandemic.
2. The DfT refused to provide the withheld information, citing section 35(1)(a) and section 35(1)(b) (government policy) of FOIA.
3. The Commissioner's decision is that the Department for Transport (DfT) was entitled to withhold the requested information, citing section 35 (government policy) of FOIA as its basis for doing so.
4. The Commissioner does not require the DfT to take any steps.

#### **Request and response**

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5. On 19 September 2021 the complainant made the following request:  
"Access to the information used to classify South Africa as a red list country including all relevant data used and internal emails and meetings used to make this decision."
6. On 28 September 2021 the DfT responded and refused to provide the information, citing section 35(1)(a) and section 35(1)(b).
7. On 28 September 2021 the complainant requested an internal review.
8. The DfT provided the outcome to its internal review on 25 October 2021. It upheld its original position.

## **Background information**

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9. During the COVID-19 pandemic, the government managed the risk of new variants and overall case rates in the UK by introducing various travel restrictions. This involved a traffic light system, which categorised countries and territories into either red, amber or green, based on risk levels.
10. The system was implemented on 17 May 2021 to allow 'the safe and sustainable reopening of international travel following the national lockdown.'
11. The Joint Biosecurity Centre (JBC), in conjunction with Public Health England (PHE), produced risk assessments of specific countries and territories. The decision to rate a country or territory red, amber or green was then made by ministers who also took into account wider public health factors.
12. The regulations underpinning this policy were The Health Protection (Coronavirus, International Travel and Operators Liability (England) Regulations 2021. These regulations were repealed on 18 March 2022 and there are not currently any COVID-19 related obligations or restrictions for people arriving in England.

## **Scope of the case**

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13. The complainant contacted the Commissioner on 25 October 2021 to complain about the way their request for information had been handled.
14. The complainant explained 'I am not looking for information on other countries or other future decisions. I am looking for information on how a decision was made in the past.'
15. During this investigation, the DfT confirmed that, whilst both section 35(1)(a) and section 35(1)(b) were engaged at the time that the request was made, it did not consider that section 35(1)(a) currently applies to the information. This is because the traffic light system is no longer in place and the policy to which the requested information relates is no longer 'live.'
16. The DfT indicated that, in the place of section 35(1)(a), it would apply section 27 (international relations). The DfT stands by its application of section 35(1)(b).
17. When he considers a complaint under section 50 of FOIA, the Commissioner must take into account the circumstances that were in

place at the time that the request was made, including in his consideration of the public interest.

18. Therefore, the Commissioner considers the scope of his request to be to determine if the DfT was correct to withhold the requested information under section 35(1)(a) and section 35(1)(b). Should he find section 35(1)(a) is not applicable the Commissioner may go on to consider section 27.
19. There are two pieces of information being withheld in response to the request. Firstly, the JBC and PHE risk assessment produced for South Africa to which the DfT applied section 35(1)(a).
20. Secondly, minutes from a Covid 19 Operations Committee ('COVID-O')<sup>1</sup> committee meeting, from Friday 17 September 2021, discussing changes to the traffic light system to which the DfT applied section 35(1)(b).

## Reasons for decision

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

21. Section 35 of FOIA states:

"(1) Information held by a government department is exempt information if it relates to -

(a) the formulation or development of government policy.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

(a) For the purposes of subsection (1)(a), as relating to the formulation or development of government policy."

22. The Commissioner's guidance 'Section 35 – Government Policy'<sup>2</sup> states 'the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would

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<sup>1</sup> [Government transparency and accountability during Covid 19: The data underpinning decisions - Public Administration and Constitutional Affairs Committee - House of Commons \(parliament.uk\)](https://www.parliament.uk/business/committees/committees-a-z/commons-affairs/public-administration-and-constitutional-affairs-committee/committees-reports-and-publications/government-transparency-and-accountability-during-covid-19-the-data-underpinning-decisions/)

<sup>2</sup> [section-35-government-policy.pdf \(ico.org.uk\)](https://ico.org.uk/section-35-government-policy.pdf)

undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.'

23. Section 35 is a class-based exemption; this means that information simply has to relate to the formulation or development of government policy; there is no requirement for disclosure to prejudice either of those policy processes.
24. Section 35 only applies to central government departments, such as the DfT.
25. Section 35 is also a qualified exemption which means that it is subject to the public interest test. A department may only withhold information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
26. In line with Tribunal decisions the Commissioner considers that the term 'relates to' should be interpreted broadly. Information does not have to contain policy options, advice or decisions; any significant link between the information and the formulation or development of government policy is sufficient.
27. Within the Commissioner's guidance it defines statistical information as 'factual information presented as figures, and any further mathematical or scientific analysis of those figures. It is not simply a view or opinion which happens to be expressed numerically.'
28. The Commissioner is satisfied that there is statistical information contained within the risk assessment, largely relating to case rates, variants, travellers and vaccinations.

### **Formulation or development vs implementation**

29. It is obvious that the information being withheld relates to government policy, specifically, the government's response to COVID-19 in relation to international travel.
30. However, in order to determine whether the data being withheld is exempt under section 35(1)(a), and to determine whether the statistical information contained within is captured by section 35(1)(a) also, the Commissioner must consider to what extent the information relates to the formulation or development of government policy, rather than the implementation of the policy itself.
31. As part of his investigation, the Commissioner asked the DfT to explain when the formulation and development of the policy ended and the implementation began. Making this distinction is not always simple.

32. When the complainant made their request the decision had been made to place South Africa on the red list. Usually, when an announcement has been made to the general public it signals that a final policy decision has been made.
33. However, the DfT has explained that 'As a result of the constantly evolving epidemiological situation, while the regulations were in force the government's policy was constantly under review. As new evidence came to light, for example; therapies and evidence of their efficacy, the roll out of the national vaccination and booster programme, shifting infection and hospitalisation rates domestically and abroad, and as new variants of concern emerged; policy on international travel was amended.'
34. The DfT has explained that, at the time that the request was received, the policy was still 'live' in the sense that 'the policy was being implemented at that time but was necessarily being continuously developed to reflect new risks.'
35. The Commissioner's guidance states 'Not every decision or alteration made after an original policy was settled will amount to the development of that policy. If policy is a plan to achieve a particular outcome in the real world, the development of that policy is likely to involve a review of its intended outcomes, or a significant change to the original plan. By contrast, minor adjustments made in order to adapt to changing circumstances, avoid unintended consequences, or better achieve the original goals might more accurately be seen as decisions on implementation.'
36. The Commissioner notes the outcomes of the policy were to manage the 'risk of new variants, which had the potential to be resistant to the vaccines and treatments available for COVID-19, and reducing overall case rates in the UK and pressure on the NHS.' The Commissioner is satisfied that these outcomes remain unchanged by any adjustments made to the policy itself.
37. However, the Commissioner does not consider the decisions made regarding the traffic light system, which included adding specific countries to a 'red list' represent 'minor changes.'
38. There are no universal rules to help the Commissioner ascertain whether decisions made in relation to a policy represent the formulation or development of that policy or implementation changes. However, the more limited and case-specific the consequences of a decision, the more likely it is to represent the implementation of a policy. The more wide-ranging the consequences of the decision, the more likely that it involves an element of policy review or development.

39. Any changes made to the traffic light system had wide reaching consequences for the public, affecting the extent to which they could freely travel in and out of England to specific destinations and the health measures that they were subject to.
40. Even if only a specific group was affected by these changes, for example, those travelling to and from a country which was added to the red list, these consequences affected so many people that they cannot be described as individual.
41. In determining whether information relates to policy development or implementation, the Commissioner considers the following factors relevant:
  - 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.
42. Whilst the overall outcome of the policy remains the same, and the Commissioner acknowledges that the decision to place South Africa on the red list had already been taken when the request was made, he agrees with the DfT that the constant reviewal and adjustments made to the policy invoke changes of such significance that they represent policy review or development rather than implementation. The Commissioner also notes that the final decision relating to the status of countries and territories lay with ministers. Therefore the Commissioner considers the exemption is engaged.
43. The Commissioner's guidance states 'If one purpose, use or subject of that document (or section) is a relevant activity, then everything within that document (or section) will relate to it.' The JBC and PHE risk assessment, a whole document, has been created and used to inform the policy. The Commissioner therefore considers that the exemption is engaged in relation to the risk assessment in its entirety.
44. Since section 35(1)(a) is engaged the Commissioner will go on to consider whether the public interest lies in disclosure or in maintaining the exemption later on in this notice.
45. Since section 35(1)(a) is engaged the Commissioner does not need to go onto consider section 27.

## **Section 35(1)(b) – ministerial communications**

46. Section 35 of FOIA states:

“(1) Information held by a government department is exempt information if it relates to –

(b) Ministerial communications.”

47. Section 35(5) defines Ministerial communications as:

““Ministerial communications” means any communications—

(a) between Ministers of the Crown,

(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

(c) between members of the Welsh Assembly Government, Government policy and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the Cabinet of the Welsh Assembly Government.”

48. As with section 35(1)(a), section 35(1)(b) is a class-based exemption and also a qualified exemption and therefore subject to the public interest test.

49. The Commissioner is satisfied that the COVID-19 committee meeting minutes do not contain any statistical information. Therefore, he does not need to consider section 35(2)(a).

50. The Commissioner’s guidance states ‘The purpose of section 35(1)(b) is to protect the operation of government at ministerial level. It prevents disclosures which would significantly undermine ministerial unity and effectiveness or result in less robust, well-considered or effective ministerial debates and decisions.’

51. Section 35(1)(b) can only apply to information between ministers. It will not encompass correspondence from a minister to someone who is not a minister. However, the Commissioner’s guidance clarifies that ‘communications do not have to be exclusively between ministers: the exemption will cover communications between two (or more) ministers even if others are copied in.’

52. To reiterate, there were two stages to rating, or reviewing the rating, of a country or territory in the traffic light system. Firstly, the JBC and PHE would produce a risk assessment of specific countries and territories. Then, ministers made the final decision to rate a country or territory either red, amber or green.



53. The concept of 'communications' for the purpose of section 35(1)(b) is broad. It includes written communications such as letters, memos, emails and any other written documents. It also includes telephone conversations. What is specifically relevant to this case is communications also includes meetings, including Cabinet or Cabinet committee meetings, such as those of the COVID-O committee.
54. Like section 35(1)(a), the exemption covers information which 'relates to' ministerial communications. Once again 'relates to' is interpreted broadly, information does not have to 'be' a ministerial communication itself to be captured by the exemption; it will also be captured if it recounts or refers to a ministerial communication, such as the minutes of a meeting.
55. The Commissioner is satisfied that the minutes in question represent oral communications between ministers. Therefore, the exemption is engaged. Now the Commissioner needs to go on to consider whether the public interest lies in maintaining the exemption or in disclosure.
56. Due to the nature of the exemption, there is some overlap between section 35(1)(a) and section 35(1)(b). The COVID-O committee meeting minutes discusses changes to the traffic light system and associated travel restrictions. Clearly, the minutes represent ministerial communications but are also used to formulate or develop government policy.
57. The DfT has conducted one public interest test, rather than two separate public interest tests for section 35(1)(a) and section 35(1)(b). As the Commissioner accepts that there is overlap between section 35(1)(a) and section 35(1)(b) in this instance, he will do the same.

## **Public interest test**

### **Public interest arguments in disclosure**

58. The DfT acknowledges that 'Amending International Travel Regulations is a high-profile subject with significant public interest.' Disclosure would demonstrate accountability and justify the decision to place South Africa on the red list.
59. The DfT has also acknowledged that the travel regulations had a 'significant impact' on businesses, consumers and individuals. The policy was heavily criticised and, with that criticism, comes the need for transparency and accountability.
60. Ultimately, the DfT recognises that disclosure would 'help the travel industry and the public as a whole to better understand the decision-making process of the Government.'



61. Disclosure would also increase transparency across the government, increase public trust and allow the public to scrutinise discussions and decisions the government undertook in relation to travel restrictions.

### **Public interest arguments in maintaining the exemption**

62. To reiterate, section 35(1)(a) is designed to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. The DfT has explained that 'it is a matter of public interest for decisions on amending International Travel Regulations to be based on scientific evidence and officials' advice, and for there to be a "safe space" to debate live issues away from external interference and distractions.'
63. The DfT has emphasised that the policy in question was 'live' at the time that the request was made and restrictions were constantly being reviewed, evaluated and changed. If the requested information was disclosed, this could affect the 'safe space' required for individuals and ministers to debate the issues and provide advice freely and frankly, away from external distractions.
64. The DfT is concerned that, whilst the policy was live, the requested information must be withheld in order to avoid a 'chilling effect', which would discourage the free and frank debate, and the provision of advice, in order to develop and formulate effective and robust policy.
65. The DfT is concerned that, 'Officials and external stakeholders would be reluctant to provide advice, views, and opinions if they felt that these would be routinely placed in the public domain ahead of the policy being finalised.' If ministers, officials, or stakeholders become more guarded in their discussions relating to the development or formulation of policy, this could, in turn, hamper the effectiveness of the policy itself.
66. To reiterate, section 35(1)(b) is designed to protect the operation of government at ministerial level. To a certain extent, the public interest arguments about protecting the 'safe space', and preventing the 'chilling effect', also apply.
67. However, the focus of section 35(1)(b) is to prevent disclosures which would significantly undermine ministerial unity. The DfT is concerned that the withholding of the requested information is necessary to protect 'collective responsibility.'
68. The Commissioner's guidance states 'Collective responsibility is the longstanding convention that all ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions. It is a central feature of our constitutional system of government. Ministers may express their own views freely and frankly in

Cabinet and committees and in private, but once a decision is made they are all bound to uphold and promote that agreed position to Parliament and the public.'

69. The DfT is concerned that disclosure of the meeting minutes would undermine collective responsibility which, in turn, would undermine ongoing government unity and effectiveness. Arguments relating to collective responsibility carry considerable weight.
70. However, the Commissioner is sceptical of this public interest argument. He has reviewed the COVID-O meeting minutes and notes that it does not reveal the view of an individual minister. Therefore, there is no collective responsibility to protect and the Commissioner has discounted this argument when considering where the balance of the public interest lies.

### **The balance of the public interest**

71. In this instance, the Commissioner believes that the public interest lies in maintaining the exemption.
72. The Commissioner recognises that the policy in question had significant repercussions for individuals, whose ability to travel were restricted in an unprecedented manner. It also had unprecedented effects for businesses, including the aviation and travel industry, some of which never recovered. With this comes the need for transparency and accountability.
73. However, the Commissioner also recognises the speed at which the government needed to formulate and develop its policies during the pandemic, given the pace at which infection rates and variants developed. He recognises the need to protect the 'safe space' required for Ministers and officials to freely and frankly exchange views, and provide advice, for the purpose of formulating and developing this policy.
74. Throughout this investigation, the Commissioner has reminded himself of why the policy was introduced in the first place, to manage the risk of new variants, reduce overall case rates in the UK and alleviate pressure on the NHS during the pandemic.
75. The Commissioner agrees that both the JBC and PHE risk assessment and the ministerial communications relate to the formulation and development of government policy. For the reasons above, the Commissioner assigns considerable weight to protecting the safe space required for this policy to be continuously developed and formulated in order to mitigate the effects of the pandemic.

76. Ultimately, the Commissioner is satisfied that the government's policy regarding international travel, in response to COVID-19, was 'live' at the time that the request was made and engaged section 35. The Commissioner is also satisfied that, at the time that the request was made, the public interest favoured maintaining the exemption and the DfT was correct in its handling of the request.

## **Right of appeal**

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77. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

78. 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.
79. 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**

**Alice Gradwell**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**