

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 February 2023

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

Decision (including any steps ordered)

1. The complainant requested that the Department for Transport (DfT) disclose the Heywood Report on HS2. The DfT refused the request under section 35(1)(a) of FOIA.
2. The Commissioner's decision is that the DfT has correctly applied the exemption and the public interest lies in withholding the information.
3. The Commissioner does not require the DfT to take any steps as a result of this decision notice.

Request and response

4. On 29 March 2021, the complainant made the following request for information to DfT:

"In November 2017, you refused my FOIA request F0015131 on the public interest test, claiming that the Heywood Report on HS2 related to Government policy which was still being developed.

A record of that request, and one for IPA/MPA reports on HS2 can be found here

[link redacted]

Given that over three years have passed since then and it is over two years since Sir Jeremy passed away, I would like to re-request this information.”

5. On 19 May 2021, the DfT responded. It refused to provide the requested information citing section 35(1)(a) (formulation or development of government policy) and 35(1)(b) (ministerial communications) of FOIA.
6. On 10 June 2021, the complainant replied to the DfT stating that they found the reason given for why the four-year old report could not be released (i.e., because policy was still being formulated) to be 'spurious'. This was due to the fact that the complainant considered the entire review to have been superseded by the subsequent Oakervee review.
7. On 5 August 2021, the DfT provided an internal review in which it maintained its original position. The DfT stated that the Oakervee Review is a review on whether the HS2 project is still viable, weighing up its advantages and disadvantages. The Heywood report was an in-depth study into looking into many different options relating to the HS2 project. Many of the issues within the report are still under consideration and consequently it is still a live/fluid policy issue. Subject matters such as construction of stations and purchase of rolling stock are still very much issues which will require Ministerial input and decision making.
8. The DfT said it reviewed the information that fell within the scope of the request, which in this instance are two reports produced by Jeremy Heywood relating to the HS2 project. While a number of decisions have been made surrounding the wider HS2 programme, it remains a fluid policy which still requires Ministerial input and decision making. The DfT was satisfied that the information falls within the class relating to the formulation and development of government policy.

Scope of the case

9. The complainant contacted the Commissioner on 24 September 2021 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to consider whether the DfT can withhold the requested information under section 35 of FOIA.

Reasons for decision

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

11. Section 35(1)(a) of FOIA provides an exemption from the duty to disclose information to the extent that it requires the disclosure of information relating to the formulation and development of government policy. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
12. The purpose of subsection 35(1)(a) is to protect the integrity of the policymaking process and to prevent disclosures which would undermine this process and result in less robust, well-considered policy options in private.
13. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
14. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February 2007), the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.
15. The Commissioner understands that the Oakervee Review is a review on whether the HS2 project is still viable, weighing up its advantages and disadvantages. The Heywood report was an in-depth study into looking into many different options relating to the HS2 project.
16. DfT stated that many of the issues within the Heywood report are still under consideration and consequently is still a live/fluid policy issue. Subject matter such as construction of stations, purchase of rolling stock are still very much issues which will require Ministerial input and decision making.
17. DfT clarified that while a number of decisions have been made surrounding the wider HS2 programme, it remains a fluid policy which still requires Ministerial input and decision making.
18. Whilst policy development cannot be ongoing indefinitely, the Commissioner's view is that the HS2 project is ongoing and the policy remains 'live' in that it is constantly under review, subject to change, development and evolution.

19. The Commissioner is satisfied that the Heywood report clearly comprises information relating to the formulation or development of government policy. The Commissioner considers that the exemption at section 35(1)(a) has been correctly applied by the DfT.
20. The Commissioner has therefore gone on to consider the public interest and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

Public interest arguments in favour of disclosing the information

21. DfT accepts that the disclosure would continue to promote transparency and accountability in Government decision making. It stated that the released information would provide further reassurance to the public that Government officials have considered project reviews in the support of decisions undertaken on the project.
22. DfT also acknowledged that the disclosure would increase public understanding of the policy issues considered in the Report and enable debate and scrutiny of the policy issues.

Public interest arguments in favour of maintaining the exemption

23. The DfT stated that the requested report includes references to live policy decisions such as the Rolling Stock procurement and design optimisation. The DfT argued that the release of this information would therefore result in commercial advantage being lost, leading to financial detriment to the public purse.
24. The DfT also argued that the release of the requested report would adversely affect the policy making process with regarding to securing permissions to build future phases of HS2.
25. The DfT stated that with live policy matters discussed in the requested report still to be completed, it remains important that a continued safe space for officials and ministers to be informed on issues is maintained through to policy completion.
26. The DfT has also argued that it would not be in the public interest to disclose information contained within the requested report that relates to the formulation and development of 'live' government policy on phases of the HS2 Project, including Phase 2 which, at the time of the request/the complaint to the Commissioner, was going through the Bill process. The DfT stated that ministers and officials need a safe space away from public scrutiny in order to formulate and develop government

policy in this area without fear of premature disclosure, which may add additional cost to the taxpayer.

27. The DfT argued that to do so would be likely to close off the consideration of better options and so result in poorer decision making which would be likely to have an adverse effect on the public purse and so would not be in the public interest. It stated that good government depends on good decision making which is based on the best advice available and with full consideration of all of the options.
28. The DfT stated that officials and stakeholders would be reluctant to contribute to the policy making process if they felt that policy information contained in the requested report was routinely disclosed. This may result in a reduction in the levels of communication between Ministers and Departmental stakeholders, therefore giving rise to sub-optimal outcomes for policies where formulation is taking place.

The Commissioner's conclusion

29. The purpose of section 35(1)(a) is 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. In particular, it ensures a safe space to consider policy options in private.
30. The Commissioner accepts there is a general public interest in openness and transparency. He also accepts there is a more specific public interest in the HS2 project. This will extend to understanding how the DfT developed policy on specific areas, and the requested information in this case would go some way to increasing the public's understanding of how the DfT formulated its position.
31. The Commissioner is mindful that there is no inherent or automatic public interest in withholding information that falls within the section 35 exemption. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed.
32. The Commissioner gives weight to the argument that disclosure would harm the effectiveness of the policy itself as it continues to evolve and change as the project rolls out.

33. The safe space arguments therefore carry significant weight; there is a need for ministers and officials to be able to discuss and debate and consider evidence in a candid, free and frank manner. There is a public interest in preserving this safe space.
34. The HS2 Project is still live, and, at the time of the request, there were areas still under consideration and therefore still to be discussed and evaluated. The Commissioner accepts that this gives weight to the argument that it is not in the public interest to disclose information while the issues are still live and under review.
35. Taking all of the above into account, the Commissioner is satisfied that there remains a need for an appropriate degree of safe space within which to develop ideas and consider policy issues away from external interference and distraction, and to protect the policy and the formulation/development process.
36. Therefore, the Commissioner concludes that section 35(1)(a) is engaged in this case, and the public interest favours withholding the requested information.

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

Pamela Clements
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