

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

### **Decision notice**

**Date:** 10 February 2023

**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 applied section 14(2) (repeat requests), section 35(1)(a) (formulation of government policy), section 35(1)(b) (ministerial communications) and section 27(1) (international relations).
3. The Commissioner's decision is that:
  - Section 14(2) does not apply and therefore the DfT is not entitled to rely upon it to refuse the request.
  - Section 35(1)(a) is engaged and the public interest lies in maintaining the exemption.
4. The Commissioner does not require the public authority to take any steps.

## Request and response

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5. On 8 April 2022, the complainant wrote to the DfT and requested:

"Hello, I currently have a case with the ICO but please treat this request as a separate request.

I would like to know what information the DfT based its decision to add and keep South Africa on the travel red list in 2021. I would also like information on the banning of flights from the day day (sic) window in November 2021 from South Africa. What information was the decision based on? There are no longer an (sic) travel restrictions in the UK and the red list is no longer active government policy therefore there should be no issue with this request as it is historical."

6. The DfT responded on 4 May 2022. It refused the request, citing section 14(2) as its basis for doing so.
7. On 4 May 2022 the complainant requested an internal review.
8. The DfT provided the outcome to its internal review on 31 May 2022. It upheld its original position.

## Scope of the case

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9. The ICO case that the complainant refers to in their request was dealt with under the reference IC-136815-X0J9.<sup>1</sup> It dealt with a similar request which the complainant submitted on 19 August 2021.
10. The Commissioner provided his outcome in relation to IC-136815-X0J9 on 5 August 2022. His decision was that the DfT was entitled to withhold the requested information under section 35. He did not go onto consider the DfT's application of section 27(1).
11. The Commissioner's analysis of IC-136815-X0J9 emphasised that, at the time that the request was made on 19 August 2021, the traffic light system was a 'live' government policy and therefore the public interest favoured maintaining the exemption.
12. The complainant raised their concern with the Commissioner (about their request of 8 April 2022) on 5 August 2022, the day that the

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<sup>1</sup> [ic-136815-x0j9.pdf \(ico.org.uk\)](#)

Commissioner upheld the DfT's application of section 35 in relation to IC-136815-X0J9. The request of 8 April 2022 is the one that is the subject of this notice.

13. During this investigation, the DfT maintained that first and foremost it was relying upon section 14(2), as the request of 8 April 2022 was a repeat of the request of 19 August 2021.
14. The DfT also clarified to the Commissioner that, in the alternative, it would once again rely upon section 35(1)(a), (b) and section 27(1).
15. The scope of this case is to determine whether the DfT is entitled to rely upon section 14(2), or an exemption in the alternative.

## Reasons for decision

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### Section 14(2) – repeat requests

16. Section 14(2) of FOIA states:

“Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.”

17. The DfT has explained to the Commissioner, ‘The key words in Section 14(2) of the FOI Act are “previously complied with a request for information”. Given we had responded to an earlier request for information from the complainant and this was, at the time, the subject of an ongoing ICO investigation, the Department were of the view that our response complied with the Act.’
18. However, the DfT appears to have misinterpreted the meaning of ‘complied’ with a request for information in this instance. The Commissioner’s guidance<sup>2</sup> on repeat requests clarifies:

“You may only apply section 14(2) if you have:

- a. previously provided the same requester with the information in response to an earlier FOIA request; **or**

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<sup>2</sup> [Dealing with repeat requests | ICO](#)

- b. previously confirmed that you do not hold the information, in response to an earlier FOIA request from the same requester.”
19. In the specific context of section 14(2), for a public authority to have **complied** with the previous request it's not sufficient for it to have issued a refusal notice. It must have either provided the information or told the requestor that it doesn't hold any relevant information.
20. Since the DfT did not disclose any information in response to the previous request, the request of 8 August cannot represent a repeat request. Therefore, the Commissioner will go onto consider the DfT's application of the exemptions in the alternative.

**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 DfT has explained that ‘In our initial response to the new request (ICO-185106-SOR3), the Department did not seek to rely on the exemption in section 35(1)(a) because when this response was prepared, we accepted that Government policy on international travel restrictions related to preventing the spread of Coronavirus was effectively dormant, as all remaining restrictions were lifted by The Health Protection (Coronavirus, International Travel and Operators Liability (England) Regulations 2021 which came into force on 18 March 2022.’
23. However, the Commissioner's guidance makes it clear that, when it comes to engaging section 35(1)(a), the timing of the request is not relevant. In order to engage the exemption, the information must relate to the formulation or development of government policy, irrespective of whether the policy in question was ‘live’ at the time that the request was made.
24. Paragraphs 22 to 45 of IC-136815-X0J9 outlines why the withheld information engages the exemption. The Commissioner doesn't deem it necessary to repeat that whole analysis here and, for the same reasons

as in the previous case, considers all of the withheld information engages section 35(1)(a).

25. Therefore, he will go onto consider whether the balance of the public interest lies in disclosure or in maintaining the exemption.

### **Public interest test**

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

26. Paragraphs 58 to 61 of IC-136815-X0J9 outline the public interest arguments in favour of disclosure. The Commissioner considers the same arguments apply here.

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

27. The DfT has explained to the Commissioner that 'The Prime Minister announced new International Travel Restrictions<sup>3</sup> in respect of arrivals from mainland China on 30 December 2022. These measures (The Health Protection (Coronavirus, International Travel from China) (England) Regulations 2023) came into force on 5 January 2023...On this basis, we submit that the policy space surrounding international travel restrictions on public health grounds, to restrict the spread of COVID-19, is again very much a 'live' and sensitive policy for the Government.'
28. With the above in mind, the public same arguments in favour of maintaining the exemption, outlined in paragraphs 63-70 of IC-136815-X0J9, also apply here.

#### **Balance of the public interest**

29. The Commissioner considers this to be unique case. He accepts that, with the introduction of travel restrictions in relation to China, the matter is once again live. Having looked at the withheld information, the Commissioner is satisfied that it draws a line between infection rates, travel patterns and recommendations for restrictions. Although the withheld information relates to South Africa, the Commissioner accepts the disclosure of this information would be likely to affect the 'safe space' which ministers require to make such decisions.
30. To reiterate, section 35(1)(a) is designed to protect the integrity of the policymaking process, and to prevent disclosures which would

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<sup>3</sup> [Travel to England from another country during coronavirus \(COVID-19\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/travel-to-england-from-another-country-during-coronavirus-covid-19)

undermine this process and result in less robust, well-considered or effective policies. If decisions need to be made about reintroducing travel restrictions, it is not in the public interest to dilute these discussions.

31. When considering the public interest, the Commissioner must take into account the public interest factors in disclosure at the time that the request was made. At the point that the request was made, the policy was not live and the DfT chose to refuse the request under 14(2), which it was not entitled to do. However, where considering where the balance of the public interest lies, the Commissioner must also take into the effect of its release in all the circumstances of the case.
32. Whilst the Commissioner questions the extent to which this chilling effect would be replicated, over a year later, when these decisions are less common, he does recognise the policy is one again live. In ten months the government has imposed restrictions upon travellers entering the UK from one country, China. This is not the reintroduction of the traffic light system that was in place during the pandemic; however, it is still important that this policy is able to be formulated and developed away from external scrutiny.
33. Whilst the policy was not live at the time that the request was made, the Commissioner recognises the potential prejudice in ordering disclosure of this information now. Whilst the frequency, severity and extent of this prejudice will be lesser than in IC-136815-X0J9, it is still not in the public interest to compromise the DfT's ongoing efforts to mitigate the spread of COVID-19.
34. In reaching his decision, the Commissioner has been mindful of the decision in Department of Health v Information Commissioner (EA/2018/0001 & 0002, 26 February 2019<sup>4</sup> in which the requirement for the 'safe space' to protect the policymaking process waxed and waned depending on how fixed the policy in question was at the time. Therefore, for now, the public interest remains in maintaining the exemption.
35. The Commissioner has therefore not gone onto consider the DfT's application of section 35(1)(b) or 27(1)(a).

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<sup>4</sup> [Department of Health EA.2018.0001 & 0002 \(22.02.19\) Open.pdf \(tribunals.gov.uk\)](#)

## Other matters

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36. Whilst the Commissioner has determined the policy is still live, the DfT must be mindful not to consider the withheld information, or any similar information, to represent 'a continuous process' or 'a seamless web of policy.'<sup>5</sup> At a certain point, COVID-19 travel restrictions will end for definite, or an appropriate amount of time will have passed, for the chilling effect to decrease to the extent that it no longer outweighs the public interest in disclosure.

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<sup>5</sup> [Section 35 - Government policy | ICO](#)

## Right of appeal

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

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

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