

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2024

Public Authority: Disabled Persons Transport Advisory Committee

Address: c/o Department for Transport
Great Minister House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested annual reports and meeting minutes from the Disabled Persons Transport Advisory Committee (DPTAC). DPTAC applied section 22 of the FOIA (information intended for future publication) to withhold annual reports and information about its work programme and section 36(2)(b) of the FOIA (prejudice to effective conduct of public affairs) to withhold the meeting minutes.
2. The Commissioner's decision is that DPTAC was entitled to rely on section 22 and section 36 of FOIA to withhold the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 27 May 2023, the complainant wrote to DPTAC and requested information in the following terms:

"a) The Disabled Persons Transport Advisory Committees' (DPTAC) Annual Reports from 2018 – present.

- b) The number of non-disclosure agreements (NDAs) or other confidentiality agreements that have been signed by DPTAC members since March 2022, and by whom.
 - c) Meeting minutes involving the National Rail Accessibility Steering Group from May 2022 – present.
 - d) DPTAC's work programme and those involved in the different workstreams.
 - e) How DPTAC is constituted, employment terms of members, details of the structure involved in the DfT's 'sponsorship' of DPTAC and an explanation of what measures exist for its independence.
 - f) Financial information including DPTAC's projected and actual income/expenditure and any tendering, procurement or contract related services."
5. On 24 July 2023, DPTAC responded to the request. In regard to parts a and d, it applied section 22(a) of the FOIA to withhold information identified within scope of these parts. In regard to part c, it applied section 36(2)(b) of the FOIA to withhold information it identified within scope of this part. In regard to parts b, e and f of the request, it provided information in the form of answers.
 6. The complainant wrote to DPTAC on the same day and asked it to review its response to parts a and d of the request.
 7. On 22 August 2023, DPTAC carried out a review and wrote to the complainant maintaining its original decision.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way their request for information had been handled. They specifically raised concerns about its responses to parts a, c and d of the request.
9. DPTAC explained and provided evidence to the Commissioner that, it did not hold information within the scope of part d of the request at the time the request was received. This is because it was developing the work programme and information about those involved in the different work streams at the time of receiving the request. The complainant subsequently agreed to withdraw their complaint about this portion of the request.

10. The Commissioner has considered whether DPTAC was entitled to rely on section 22 to withhold the information under part a of the request and 36(2)(b) to withhold the information under part c of the request.

Reasons for decision

Section 22 of FOIA – information intended for future publication

11. Section 22 of FOIA states that information is exempt from disclosure if held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not) and in all the circumstances it is reasonable to withhold the information until its planned publication.
12. The Commissioner is satisfied that the annual reports of 2018-19 and 2020-22 were held at the time of the request by DPTAC with a settled expectation that they will be published at some future date and that it was reasonable to withhold the information until then.
13. The complainant argued that the publication of DPTAC's annual reports have been pending since 2018 and therefore at least some of the reports should have been published to date.
14. DPTAC explained that at the time of the request, the 2018-19 annual report was in draft and required a forward and updated financial information. It also said that no annual report was produced for 2019-20 (information not held) due to Secretariat staff being re-deployed on COVID response work. It also said that the 2020-22 annual report also remained in draft at the time of the request and the 2022-23 annual report had not been drafted at the time the request was received.
15. DPTAC explained that publication of the annual reports was set back by the impact of the COVID-19 pandemic on resourcing of the DPTAC Secretariat, when staff were redeployed to respond to the emergency transport situation. Since then DPTAC has been focussing on putting new systems in place to resource and re-establish the secretariat, whilst also rectifying issues that occurred during the pandemic.
16. DPTAC explained that its annual reports are required to go through parliamentary process before they can be published more widely. Section 125 of the Transport Act 1985 requires the Secretary of State to present DPTAC annual reports to Parliament before being circulated more widely. Point 22 of the House of Commons 'Guide to laying papers' states:

"The copy of the paper laid before the House must be the final version. The published version of the paper, which cannot be published before the paper is laid, must be the same as the laid version. Publishing a paper prior to laying is seen as discourteous to the House and can carry political risks for departments".

17. DPTAC provided the Commissioner with a copies of its annual reports for 2018-19 and 2020-22. It explained that at the time of receiving the request the reports were in draft and incomplete and therefore not ready for laying before Parliament and subsequent publication. DPTAC's said that its publication scheme evidences its intention to publish its annual reports on its website, and the fact that it has prepared the reports is also evidence of this fact. It also confirmed that the reports will be published as soon as the Secretary of State and Parliament have accepted them. It also provided evidence of its intention to publish the reports by way of an email to Parliament clarifying the process to lay the annual reports in Parliament prior to publication.
18. DPTAC said that it would be more helpful to complete the drafting of the reports and publish an accurate and complete account of DPTAC's work in line with due process, rather than publish to the world at large prematurely. It also said that it believes the request and subsequent complaint is motivated by a lack of transparency around DPTAC's work. It offered to disclose the annual reports to the complainant once they have been laid before parliament and invited the complainant to a meeting to help assuage their concerns.
19. The Commissioner has reviewed the annual reports provided by DPTAC. He also notes that he has previously considered a number of cases concerning the application of section 22 of FOIA to draft information. It has been the Commissioner's established viewpoint that documents can go through many drafts before they are finalised. However, if the intention or expectation in producing anyone of the drafts is to publish the information in it, the exemption can be considered. Therefore, if there is a settled intention to publish the information on which the requested information is a draft, at the time of the request, the exemption can apply. There is no requirement in this exemption to have a determined publication date. The public authority only has to demonstrate that there was a settled intention to publish the requested information at the time of the request at "some future date".
20. The Commissioner is satisfied that DPTAC has sufficiently demonstrated a settled intention at the time of the request to publish annual reports of 2018-19 and 2020-22 (held in draft) at some future date and that because of due process it was reasonable to withhold the reports until the intended publication.

21. Section 22 is a qualified exemption and therefore subject to the public interest test. So, in addition to demonstrating that section 22 of the FOIA is engaged, the public authority must consider the public interest arguments for and against disclosure and demonstrate in this case that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Public interest test

22. The Commissioner acknowledges the public interest in transparency and accountability and in the public having access to information to enable them to better understand the work of a public authority and how this may affect them.

23. He also noted the complainant's concerns about the length of time taken by DPTAC to publish the annual reports and DPTAC's reasons for this, primarily around delays due to COVID, DPTAC's work to re-establish the secretariat and that the annual reports are required to undergo parliamentary process before being published.

24. The Commissioner however also acknowledges that to disclose draft and incomplete annual reports that have not undergone required parliamentary process risks providing the public with inaccurate information about DPTAC's work.

25. The Commissioner is satisfied that the public interest lies in favour of maintaining the exemption to ensure complete and accurate annual reports of DPTAC's work that have undergone due process are published.

Section 36(2)(b) of FOIA - (prejudice to effective conduct of public affairs)

26. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a Qualified Person, disclosure would, or would be likely to, inhibit –

i) the free and frank provision of advice, or

ii) the free and frank exchange of views for the purposes of deliberation

27. The Commissioner's guidance on section 36¹ states that information may be exempt if its disclosure would, or would be likely to, inhibit the

¹ [Section 36 - Prejudice to the effective conduct of public affairs | ICO](#)

ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when giving their views as part of the process of deliberation.

28. DPTAC explained that disclosure of the requested information under FOIA “would” inhibit its remit to advise on policy development and inhibit on the free and frank exchange of views and ideas relating the National Rail Accessibility Strategy (NRAS) and its steering group. It is therefore relying on the higher likelihood of prejudice occurring.
29. DPTAC provided the Commissioner with a copy of its section 36(2)(b)(i) and (ii) arguments along with the qualified person’s opinion.
30. The Commissioner is satisfied that the Minister of State for Transport is the authorised qualified person under section 36(5) of the FOIA. He is also satisfied that the Minister gave the opinion that the exemption is engaged on the basis that the aims of DPTAC and others within the NRAS steering group, are only achievable, if the information relating to the meetings remains confidential, otherwise the objectives of section 36 of FOIA would be undermined and harmed.
31. In determining whether the exemption is engaged, the Commissioner must, nevertheless, consider whether the qualified person’s opinion was a reasonable one.
32. The Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person’s opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person’s position could hold. The qualified person’s opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
33. The Commissioner considers that the exemptions at section 36(2) are about the processes that may be inhibited, rather than focusing only on the content of the information.
34. With regard to the limbs of section 36(2)(b), the issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information itself does not necessarily have to contain views and advice that are in themselves free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think

that its disclosure could inhibit the provision of advice or the exchange of views.

35. Therefore, although it may be harder to engage the exemptions if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order not to inhibit the free and frank provision of advice and the free and frank exchange of views. This will depend on the facts of each case.
36. The DPTAC has argued that disclosure would be prejudicial to the effective conduct of public affairs. The purpose of this exemption is to carve out a safe and confidential space for public authorities to think, discuss and evaluate, to request and receive advice, and to deliberate. In the case of the aims and function of the NRAS steering group and DPTAC's involvement with it, this is particularly important because it is a 'key part' of the governance arrangements put in place by Great British Railways Transition Team (GBRTT) to deliver the commission by DfT to design the early policy development and consideration of the strategy on behalf of the Government.
37. DPTAC said that there is need to ensure that a "safe space" is maintained in which it can deliver on its remit to advise on policy development in a way that is confidential, enabling a free and frank exchange of views and ideas so decision making is properly informed. Release of the information requested would clearly and demonstrably harm the interests protected by s36(2)(b)(i) and (ii) and (c)
38. The Commissioner is satisfied that sections 36(2)(b) and (i) are engaged in relation to the withheld information.
39. As section 36 is a qualified exemption, the Commissioner has gone on to consider the public interest.

Public interest test

40. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner has taken account of the age of the requested information, the function of the NRAS steering group and DPTACs part in it, and the space it is afforded to advise and confidentiality to think, discuss and evaluate issues and ideas relating to the strategy in a free and frank manner.
41. This process is vital for the operation of the steering group, so that DPTAC can freely provide advice and members can frankly ask for and receive advice, exchange views and generally effectively conduct and manage affairs related to the strategy. This not only supports the internal and formal decision-making processes of the steering group but ensures that decisions made are properly considered, receive

appropriate advice, and are thoroughly debated. This is necessary to support the steering group's work which DPTAC is a part of and to carry out its functions.

42. The Commissioner considers the public interest in the ability to provide advice by DPACT and good decision making by NRAS to be compelling arguments in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency, and greater public understanding of the NRAS steering group's decision-making processes (which DPTAC is a part of) would be served if the information was disclosed. On balance, he finds the public interest in protecting the steering group's space to discuss matters relating to and make important decisions about the strategy to be the stronger argument.
43. Consequently, the Commissioner is satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that DPTAC was entitled to rely on sections 36(2)(b)(i) and (ii) of FOIA to refuse the request.

Right of appeal

44. 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

45. 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.
46. 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
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