

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 April 2024

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

Decision (including any steps ordered)

1. The complainant has requested DfT to disclose the information it based its decision to add and keep South Africa on the travel list in 2021. They also requested information on the banning of flights from the small window in November 2021 from South Africa. DfT refused to disclose the information citing sections 27(1)(a) and (c) and 35(1)(b) of FOIA.
2. The Commissioner's decision is that section 27(1)(a) and (c) is not engaged. In terms of section 35(1)(b) the Commissioner found that this only applied to some of the withheld information, not all, and for that which it did, the public interest in favour of maintaining the exemption is outweighed by the public interest in favour of disclosure.
3. The Commissioner requires DfT to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 23 July 2023, the complainant wrote to DfT and requested information in the following terms:

“I would like to know what information the DfT based its decision to add and keep South Africa on the travel list in 2021. I would also like information on the banning of flights from the small window in November 2021 from South Africa. What information was the decision based on?”
6. DfT responded on 18 September 2023. It refused to disclose the information citing sections 27(1)(a) and (c) and 35(1)(b) of FOIA.
7. The complainant requested an internal review on 18 September 2023.
8. DfT carried out an internal review and notified the complainant of its findings on 16 October 2023. It upheld the application of the exemptions it initially cited.

Scope of the case

9. The complainant contacted the Commissioner on 16 October 2023 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to determine whether or not DfT is entitled to rely on sections 27(1)(a) and (c) and 35(1)(b) of FOIA to withhold the requested information.

Background

11. The complainant has made two former requests to DfT for very similar information; both of which resulted in a decision notice being issued.
12. On 19 September 2021 the complainant requested:

“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.”

13. DfT applied sections 35(1)(a) and 35(1)(b) of FOIA. The Commissioner issued a decision notice¹ on 5 August 2022, upholding the application of both exemptions. The Commissioner decided that, at the time the request was made on 19 August 2021, the traffic light system was 'live' government policy and therefore the public interest favoured maintaining the exemption.
14. The complainant made a further request on 8 April 2022 as follows:

"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."
15. DfT refused to disclose the requested information citing section 14(2) of FOIA first and then alternatively, sections 35(1)(a) and (b) and 27. The Commissioner issued a further decision notice² on 10 February 2023. This did not uphold section 14(2) but did uphold the application of section 35(1)(a) of FOIA.
16. It noted that with the introduction of travel restrictions in relation to China on 30 December 2022 the matter was once again live and there was therefore a need to protect the 'safe space' ministers require to make such decisions. It however noted that this was not a reintroduction of the traffic light system in place during the pandemic and 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.
17. The Commissioner notes that the request being considered here is the same as the one made in April 2022, just 14 months later.

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

² [ic-185106-s0r3.pdf \(ico.org.uk\)](#)

Reasons for decision

Section 27 – international relations

18. Section 27 states that information is exempt from disclosure if its disclosure would or would be likely to prejudice –
 - (a) relations between the United Kingdom and any other State.
 - (b) relations between the United Kingdom and any international organisation or international court.
 - (c) the interests of the United Kingdom abroad, or
 - (d) the promotion or protection by the United Kingdom of its interests abroad.
19. DfT has claimed that disclosure would be likely to prejudice subsections (a) and (c).
20. DfT first explained how it was not responsible for decisions about adding countries to the red list during the pandemic. Instead Ministers from a range of departments took decisions about whether to add countries to the red list, taking into account a wide range of factors through a collective agreement process. It is concerned that disclosure of the information DfT holds would be likely to give the impression DfT made the decision in isolation, which is not the case. It said that further supporting information and deliberations that may not be captured in the information DfT holds, but were material in making the decisions, would not be represented, potentially leading the complainant and other relevant parties, including nation states, to conclude adversely that the decisions were based on one set of facts, when they were in fact based on a wider set of information.
21. It argued that it was also important to be mindful that disclosure of the requested information is not to the complainant alone. It may be published and so its disclosure would have a far wider impact, including in relation to this case, relations with other nation states, DfT's ability to respond effectively to future health outbreaks and the ability of other nations to respond effectively to such issues, with potentially widespread and significant public health consequences.
22. DfT confirmed that it has been careful to note the time period that has elapsed since the complainant's earlier requests and acknowledges that the policy surrounding international travel restrictions is no longer 'live', as previously set out in responses to the earlier requests. It therefore

said that it acknowledges the potential strength of its arguments in favour of section 27 of FOIA have commensurately reduced.

23. DfT has reviewed the diplomatic sensitivity again based on the circumstances at the time of this latest request and obtained updated expert advice from officials in the Foreign, Commonwealth and Development Office (FCDO). It remains of the view that section 27 of FOIA is engaged.
24. It argued that the UK Government must balance difficult and sensitive considerations in taking decisions that could damage relations with international partners. In this case, it judges that disclosure of the requested information would be likely to prejudice relations between the UK and South Africa and other Southern African states. In addition DfT considers disclosure would be likely to prejudice the interests of the UK abroad. It said that there are several factors contributing to this assessment.
25. DfT confirmed that the withheld information contains confidential risk assessments used by Ministers to make decisions on imposing border measures on travellers from South Africa. In estimating the likelihood of prejudice, it advised that it has considered the reactions of the government of South Africa to it remaining on the red list in September 2021, and to its addition to the red list again in November 2021, including the imposition of a flight ban. It argued that supporting its assessment, it has also considered the reaction of other countries and territories that were added to the red list. Policy experts in FCDO provided advice that took these and other factors into account. It argued that South Africa would view the data held by DfT as a complete picture of the decision to add and keep it on the red list would be high, and this would be likely to reignite a debate about how countries operate surveillance and share information about pathogens with each other.
26. DfT also considers disclosure would be likely to prejudice relations with other countries, as it may impact other countries' attitudes towards the sharing of health-related information. It said that this could impact a global response to a future pandemic by making countries more reticent to share in confidence or other information between states about public health risks.
27. Additionally, it said that disclosure would be likely to set a precedent for the disclosure of future risk assessments or other information relied on by Ministers in making decisions on public health approaches to other countries, even where an assessment had been made with advice from relevant government officials that such disclosure would be likely to prejudice relations with other states. DfT argued that this further increases the likelihood of prejudice to international relations with

multiple countries and the UK's interests abroad, as it would be more likely that similar information would then be disclosed with similar consequences in relation to other countries in the future.

28. DfT stated that maintaining good international relations is vital so that essential, sensitive and confidential information, both in public health but also on other issues, can continue to be shared by countries publicly and between countries. There is a need to protect a safe space for an effective pathogen surveillance culture and information exchange.
29. In terms of the passage of time, DfT again stated that it consulted FCDO so that the level of sensitivity could be re-assessed. It said that FCDO's assessment had not changed and in fact it was noted that countries such as South Africa have become more strident in their approach on related issues, with a greater sense of inequalities brought about by the pandemic.
30. Firstly, the Commissioner wishes to highlight that his decision here, does not set a precedent for future information requests for similar information. Each case is considered on its own merits based on the specifics of that request and the circumstances at the time it was made.
31. Secondly, any disclosure made can always be accompanied with explanation from the relevant public authority. DfT is free to explain that it was not responsible for the decision to add South Africa or any other country to the red list. It can explain how the decisions were made collectively and how the information it holds forms only part of the information and deliberations that will have taken place. This would prevent any misinterpretation or misunderstanding and does not prevent information from being disclosed.
32. The Commissioner acknowledges the need and importance of countries sharing data, intelligence and information on such matters and similar, especially when those matters are live and current. However, with the passage of time it is accepted that such information will become less and less sensitive and the likelihood of prejudice will diminish.
33. The requested information is two years old at the time of the request and the traffic light system had long ended, with the likelihood of it being re-introduced very slim. Restrictions on China were the last to be lifted and this occurred in April 2023, a few months prior to this request. South Africa and other countries that had been on the red list had all restrictions lifted in March 2022.
34. Given the passage of time and the significant change in circumstances, the Commissioner does not agree that disclosure at the time of this request would be likely to have the effects on international relations with

South Africa or other countries that DfT has described. At the time of the traffic light system the UK and other countries were dealing and trying to control the pandemic – a unique set of circumstances that required international cooperation and fast action. South Africa was not the only country placed on the red list, others were too, and many others on the amber list. Those decisions were not taken lightly and were based on numerous factors and considerations – the withheld information only be part of that. Most understood and appreciated that there had to be travel restrictions in place in order to prevent the spread of new variants. It was equally understood that restrictions were reviewed regularly and as soon as it was possible to lift those restrictions, they were. Common factors and deliberations would have been used for all countries.

35. Although DfT has said that it consulted FCDO again over the sensitivity of the information and it was felt that disclosure would reignite a debate over surveillance and information sharing and it had also seen a shift in countries such as South Africa becoming more strident in their approach on relates issues (feeling a greater sense of inequalities brought about by the pandemic), DfT has not explained exactly how disclosure of the specific contents of the withheld information at this late stage would be likely to prejudice international relations further. The decisions were made 2.5 years ago and any effects of those decisions are already known and felt. The uplifting of those restrictions took place over 12 months prior to the request being considered here too. Disclosure would only be disclosing some of the information the UK relied on when making those decisions. DfT has not explained exactly how the disclosure of that specific information at the point of the request, despite the passage of time, would be likely to have the effects described.
36. The Commissioner also notes from the submissions he received from DfT under case reference IC-136815-X0J9 that the following comment was made about the data and information DfT holds which informed the decision to put South Africa and others on the red list:

“...some of the data used to inform decision making was publicly available and was being published pertaining to each of the decisions about the red list...”
37. The submissions were dated 14 July 2022 and highlight how some of the withheld information was publicly known and being published to support the government’s decision to put certain countries on the red list. This weakens to an extent DfT’s arguments of prejudice and the application of section 27(1)(a) and (c).
38. For the above reasons, the Commissioner is not satisfied that section 27(1)(a) and (c) are engaged.

39. He will now go on to consider section 35(1)(b) of FOIA.

Section 35(1)(b) – Ministerial communications

40. Section 35(1)(b) states that information is exempt if it relates to ministerial communications.
41. The Commissioner accepts that this applies to the Covid-19 Operations Committee communications, as despite the passage of time this information is still information which relates to ministerial communications.
42. However, it is the Commissioner's review that section 35(1)(b) of FOIA can no longer apply to the JCB and PHE risk assessments and this information should be disclosed, as section 35(2)(b) confirms that once a decision as to government policy (which would have been the decisions to place South Africa and other countries on the red list or other categories of the traffic light system) has been taken, any statistical information used to provide an informed background to the taking of that decision is not to be regarded for the purposes of subsection 1(b), as relating to ministerial communications.
43. The Commissioner guidance highlights that statistical information includes statistics (ie factual information presented as figures), and any further mathematical or scientific analysis of those figures. This is the contents of the JCB and PHE risk assessments.
44. As the Commissioner accepts that section 35(1)(b) does apply to the Covid-19 Operations Committee communications, he will now go on to consider the public interest test.

Public interest test

45. DfT advised that it understood the amendment of International Travel Regulations was a high profile subject with significant public interest. The decisions that were taken had a material impact on people's lives and the transport sector. It said that although the International Travel Regulations have waned since their withdrawal in March 2022, it considers there remains a substantial public interest in the decisions that were taken and how the government went about making these decisions.
46. DfT confirmed that the decisions made will be in the scope of the Public Inquiry into the government's handling of the pandemic and the information it holds may be disclosed to that Inquiry. It acknowledges that disclosure of the withheld information would be likely to help the travel industry and the public as a whole to better understand the decision-making process the government took at the time.

47. It stated that disclosure would contribute to the government's wider transparency agenda, increase public trust, and allow the public to scrutinise discussions and decisions to International Travel Regulations.
48. However, it remains of the view that the public interest rests in maintaining the exemption despite the passage of time. It said that the withheld information relates to ministerial communications, and ministerial views on proposals. They also include cross-government policy thinking on the merits of policy options. Withholding the information is necessary to protect collective responsibility.
49. It said 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. 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. It argued that disclosure would have a chilling effect on the ability of ministers to engage in a free and frank debate.
50. It stated that the government published methodologies and data sources which provided an explanation of the decisions that were taken along with key data used. It does not consider the ministerial communications that are held would materially improve the public's understanding of the decision making process that was undertaken and would prejudice future decision making by impinging on the safe space ministers need to be able to take, sometimes difficult decisions, at pace.
51. DfT acknowledged how the Commissioner had previously noted in his earlier decision that the focus on section 35(1)(b) is to prevent disclosure of information which would significantly undermine ministerial unity, and that because the withheld information did not contain the views of any one particular minister, there is no collective responsibility to protect. It said that in its opinion this seems counter-intuitive. The process of collective agreement, as it has been careful to highlight in this case, is where multiple ministers convene to discuss openly and candidly finely balanced arguments taking into account a wide range of factors, including, in this case, public health data and advice, and make decisions. In this case these decisions were made at pace to protect public health. It therefore considers the collective unity and collective agreement process is clearly undermined if the safe space for such deliberations is interfered with through disclosure of papers and minutes regardless of whether they represent the views of one or multiple ministers in their content.
52. It commented that this view is supported by the Commissioner's earlier decision that considerable weight is placed on arguments of protecting

collective agreement or responsibility and that public interest arguments about protecting the 'safe space' and preventing the 'chilling effect', also apply to section 35(1)(b).

53. As the Commissioner's guidance on section 35³ highlights, once a policy decision is made and the matter is no longer live, arguments about safe space and the chilling effect will carry little weight in the consideration of the public interest test. It also highlights how it is also difficult to successfully argue a more generalised chilling effect on all future discussions.
54. There is no inherent or automatic public interest in withholding information just because it falls within the definition of section 35(1)(b) of FOIA. A contents based approach to applying the public interest test must be taken – considering the timing of the request, the age of the information, the circumstances at that time and the overall sensitivity of the information.
55. The Commissioner notes that the withheld information was 2 years old at the time of the request, there had been no traffic light system since March 2022 and all restrictions on mainland China came to an end April 2023, a couple of months prior to this request. The matter to which the withheld information relates is no longer live and there was minimal prospect of its being revisited. DfT's arguments of safe space and chilling effect therefore carry minimal weight here when considering the balance of the public interest.
56. There are also significant public interest arguments in favour of disclosure in this case too. Despite the passage of time there is still a significant interest in Covid-19 and how the pandemic was managed, especially in relation to significant and wide reaching decisions such as the travel restrictions that were put into place to try and mitigate the spread of the virus and any new strains. Disclosure would enable the public to understand more closely how those decisions were made and based on what information.
57. However, it is noted that collective responsibility is the longstanding convention that all ministers are bound by cabinet decisions and carry joint responsibility for all government policy and decisions. 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

³ [Section 35 - Government policy | ICO](#)

united front when decisions have been reached. It requires that the privacy of opinions should be maintained.

58. If the information reveals the views of an individual minister on a government position or disclosure would undermine the united front that is required in order to protect the longstanding convention of collective responsibility by revealing details of diverging views, public interest arguments about maintaining collective responsibility and therefore section 35(1)(b) are likely to carry significant weight.
59. The Commissioner has reviewed the withheld information and he is satisfied that it neither contains the specific views of any individual minister or a situation whereby it contains diverging views which, if disclosed, would undermine the concept and importance of collective responsibility.
60. There is also the general principle that once a decision is made, all ministers are then bound to uphold and promote that agreed position to Parliament and the public. It is noted that DfT has said that some information was published at the time to support its decision over South Africa and other countries. But it is difficult to say that this meets the public interest in disclosure, considering the significance of those decisions and the pandemic as a whole on the UK and the rest of the world. The Commissioner is considering a unique set of circumstances and government decisions which had profound effects on the entire population. The public interest in understanding those decisions in these circumstances is high.
61. Given the significant public interest arguments in favour of disclosure, the significant passage of time between the relevance of these decisions and the request and, the contents of the withheld information itself, the Commissioner has decided that the public interest in this case rests in disclosure.

Right of appeal

62. 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

63. 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.
64. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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