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for Transport

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Our Ref: F0020406

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Freedom of Information Act Complaint – F0020406

I am replying to your request, received on the 19th November 2021, for an internal review of the Department's response to your FOI request. You originally asked:

'In Parliamentary question UIN 41131 it was confirmed that "The Department commissioned quantitative and qualitative research to assess potential interest in flexible season tickets amongst rail users and non-users."

Please send me the research reports referred to in this question, within the time period from 01 March 2020 to present. If there is not enough time, please limit this to the main reports, as were summarised/briefed to ministers. Please include any report or summary that assesses the impact of flexi-tickets on traditional season ticket sales. Provided there is enough time, please send me any summaries/briefings of reports or research regarding flexi-tickets that were presented to ministers, including cost-benefit analyses, demand forecasts and equality impact assessments. This relates to the period from 01 March 2020 to present.'

The Department's reply dated the 19th November 2021 confirmed that it held relevant recorded information and released the summary analysis on the impact of the introduction of flexible season tickets. The flexible season ticket research reports were withheld in reliance on the qualified exemption at section 22(1) of the FOI Act covering information that is intended for future publication. The Department's Public Sector Equality Duty Analysis (PSED analysis) was withheld in reliance on the qualified exemption at section 35(1)(a) of the FOI Act covering information that relates to the formulation or development of Government policy. In both instances the Department decided that on balance the public interest tests favoured withholding.

In your request for an internal review you said:

'I have a fundamental issue with the exemptions used, as Flexi season tickets were released 5 months ago - it is difficult to understand why the policy is said to be 'information', or 'awaiting publication' when it has in fact already been launched.

Therefore I would like to request an internal review of this FOI request.'

Your request for a review has been passed to me to deal with as I had no involvement in the handling of your original request.

In reaching my decision I have carefully considered your complaint and have sought copies of the withheld information from the officials who handled your original request.

Scope of the Review

The scope of my review will be to consider if the Department was correct to cite the exemptions at sections 22(1) and 35(1)(a) of the FOI Act to withhold some of the information you seek and if engaged whether, on balance, the public interest tests favoured withholding the information.

Findings

I have viewed the withheld information, namely, the research reports and the PSED analysis. The research reports consist of two power point slide decks with multiple slides. The PSED analysis is a single multi page word document.

It has been explained to me that the Department will seek to publish the research reports by the end of February 2022. Historically these types of research and analysis reports are published by the Department. For example the fares and pricing research can be found at this link: <https://www.gov.uk/government/publications/passenger-views-on-rail-fares-and-pricing-in-great-britain> . I am therefore satisfied that the exemption at section 22(1) – 'information intended for future publication' is engaged.

It has been explained to me that the PSED analysis is a 'live' document that is currently being used as part of a 'live' review of Government policy on flexible season tickets. The outputs of the review will lead to the PSED analysis itself being updated. Having reviewed the withheld information and considered the points put forward by the policy officials and yourself it is my view that the information does relate to the formulation and development of 'live' Government policy. Therefore the exemption at section 35(1)(a) of the FOI Act is engaged.

Section 22(1) Exemption

For the exemption at section 22(1) of the FOI Act to apply the information must be held by the Department with a view to its publication, by the authority or any other person, at some future date whether determined or not. Secondly the information must be held with a view to publication at the time you submitted your request for information and lastly it has to be reasonable in all the circumstances that the information should be withheld from disclosure until the publication date. I am content that the first two points are satisfied.

Turning to the last point, I have reviewed the Department's public interest test arguments for and against disclosure and I agree with all of them. On balance I think the public interest for withholding the research reports until the publication date, which is only a few weeks away, outweighs the public interest in disclosure now.

Section 35(1)(a) Exemption

The exemption at section 35(1)(a) of the FOI Act allows a Government Department to withhold information if it relates to the formulation or development of Government policy. The exemption is qualified so is subject to a public interest test to weigh the arguments for and against disclosure.

As part of my review I have read Information Commissioner's Office guidance on the exemption. The guidance makes it clear that the term 'relates to' in the Act can be interpreted broadly. This means that information which relates to any significant extent to the formulation or development of Government policy will be covered, even if it also relates to policy implementation or other issues. Policy formulation or development does not have to be the sole or main focus of the information, as long as it is one significant element of it.

The exemption is not limited to information directly created as part of the policy process. Information created after a policy is finalised can still be covered if it describes or otherwise refers to its formulation or development. Neither is the exemption limited to information which contains policy options, advice or decisions.

Public Interest Test

Just because the exemption is engaged doesn't mean the information cannot be released. If the public interest in disclosure outweighs that for maintaining the exemption then the information should be released.

I have reviewed the Department's public interest arguments for disclosure and I agree with them. I would add that disclosure of the PSED analysis would not only allow the public to scrutinise the analysis but it would also contribute to the Government's wider transparency agenda.

I have also reviewed the arguments for withholding the information and I agree with all of them. Whilst you're right, flexible season tickets were launched a few months ago the information in the PSED analysis is being used as part of a formal review of these tickets. Good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure. Ministers and officials need a safe space in which to be able to formulate and develop 'live' government policy in this area. I agree that officials would be reluctant to provide advice and their views if they felt that these and any related information would be routinely placed into the public domain whilst formulation and development of 'live' government policy was ongoing - in this case where PSED considerations are themselves being reviewed.

In my view it would also be distracting for the Department who would have to deal with any queries about the PSED analysis as opposed to being able to focus on carrying out the review of flexible season tickets.

On balance, and for the reasons that I have explained above I have concluded that the public interest in withholding the information outweighs the public interest in disclosure.

Summary

Taking everything into consideration, I uphold the Department's decision to withhold the research reports in reliance on the exemption at section 22(1) of the FOI Act covering information intended for future publication and the PSED analysis in reliance on the exemption at section 35(1)(a) covering information that relates to 'policy formulation & development'. In my view, on balance the public interest tests favour withholding.

Next Steps

If you are not content with the outcome of this internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: <https://ico.org.uk/make-a-complaint/official-information-concerns-report/official-information-concern/>

Yours sincerely

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