

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

### **Decision notice**

**Date:** **6 February 2013**

**Public Authority:** **Highways Agency (an executive agency of the Department for Transport)**

**Address:** **Piccadilly Gate  
Store Street  
Manchester  
M1 2WD**

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to "The Road Worker Safety Action Forum" from April 2007 until April 2012 inclusive. The Highways Agency provided some information to the complainant. It withheld 15 documents under section 36(2)(b)(ii) of the Freedom of Information Act 2000. It said that section 40(2) FOIA was also applicable to some of the information contained in those documents. It made a redaction to some of the information it disclosed under section 35(1)(a). During the course of the Commissioner's investigation it withdrew the application of section 35(1)(a) FOIA and confirmed that the information redacted could now be disclosed.
2. The Commissioner's decision is that the Highways Agency has correctly applied section 36(2)(b)(ii) FOIA in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information which was originally redacted under section 35(1)(a) FOIA as the Highways Agency has confirmed that this exemption is no longer applicable.
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

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5. The Commissioner notes that the Highways Agency is not a public authority in its own right but is an executive agency of the Department for Transport. Therefore the public authority in this case is the Department for Transport. For the purpose of this decision notice the Highways Agency is also referred to as if it were the public authority.
6. On 24 April 2012 the complainant made the following request for information under the FOIA for:

“In relation to new initiatives, trials, strategies and decisions to promote road worker safety on the Highways Agency Network, please forward all minutes of meetings by the "The Road Worker Safety Action Forum" from April 2007 until April 2012 inclusive.”
7. On 18 June 2012 the Highways Agency responded. It provided the complainant with some of the information he had requested, but made redactions under section 30(1)(b) and 35(1)(a) FOIA. It also withheld some of the information requested under section 22 FOIA.
8. The complainant requested an internal review in relation to the application of section 30(1)(b) and section 22 FOIA on 21 June 2012. The Department for Transport (DfT) sent the outcome of the internal review on 7 August 2012. It revised its position. It said that section 30(1)(b) FOIA was not applicable and therefore disclosed the information which had been redacted under this exemption. It said that section 22 FOIA was not applicable however it said section 36(2)(b)(ii) was applicable to this information and therefore this information was not disclosed. The complainant did not ask the DfT to review the redaction made under section 35(1)(a), however it did so and upheld the application of this exemption. Finally the DfT also said that section 40(2) FOIA was also applicable to some of the withheld information.
9. During the course of the Commissioner's investigation the Highways Agency said that it no longer wished to apply section 35(1)(a) FOIA and that the information redacted under this exemption could be disclosed.

## Scope of the case

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10. The complainant contacted the Commissioner to complain about the way his request for information had been handled.

11. The Commissioner has considered whether the Highways Agency was correct to apply section 36(2)(b)(ii) to withhold the 15 documents within the scope of the complainant's request and whether section 40(2) FOIA was also applied correctly to some of that withheld information.

## Reasons for decision

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12. Section 36 FOIA provides that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(b) would, or would be likely to, inhibit-

- ii. the free and frank exchange of views for the purposes of deliberation, or

13. In determining whether section 36(2)(b)(ii) was correctly engaged by the Highways Agency the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was reasonable.

14. The Commissioner's approach to the reasonableness test in section 36 is set out in the external guidance document on the exemption.<sup>1</sup> Paragraphs 19 and 20 state-

*In this context this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO*

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[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx)

*will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law.*

*The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. 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.*

15. The Highways Agency has explained that, Mike Penning MP is the qualified person in this case and his opinion was obtained on 20 July 2012. The Highways Agency has provided the Commissioner with a copy of the qualified person's opinion as well as the submissions which were put to the qualified person to enable the opinion to be reached.
16. The following submissions were put to the qualified person in relation to the application of section 36(2)(b)(ii):
  - Disclosure of the information would inhibit the free and frank exchange of opinions on the effectiveness, viability and value of trialled products and processes. Funding for the trials is shared with private industry, with the Highways Agency chairing the discussion forum and providing secretariat support. Disclosure of these minutes would result in a reluctance from members to discuss matters openly and frankly if such discussions were made public. It is also likely that some industry members would withdraw from the discussions or even from the trials themselves.
17. The qualified person's response agrees that section 36(2)(b)(ii) is engaged. The qualified person's opinion is that the prejudice in this case would occur.
18. The Commissioner considers that it is reasonable to conclude that disclosure of early discussions between the Highways Agency and private industry relating to road worker safety trials, would have the prejudicial effect claimed. This is because private industry is not subject to the FOIA and may be reluctant to be involved or provide funding if it was thought that these early discussions would be disclosed into the public domain. It may also be inhibited from engaging in such open and frank discussing relating to the trials.
19. The Commissioner therefore accepts that it was reasonable to conclude that disclosure would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.

20. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(b)(ii) was correctly engaged.
21. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)<sup>2</sup>.
22. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by s 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

### **Public interest arguments in favour of disclosing the requested information**

23. The Highways Agency has acknowledged the following public interest arguments in favour of disclosure:
  - Provide transparency in the trials process, providing the public with a confidence that products and processes that may lead to increased road worker safety are trialled fairly and robustly.

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2. EA/2006/0011 and 0013

- Allow greater participation in the development of products and processes to improve road worker safety. Making the discussion of issues public would enable others to innovate and join in the process.
- The knowledge that arguments and discussions would be made public might improve the quality of arguments.

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

24. The Highways Agency has acknowledged the following public interest arguments in favour of maintaining the exemption:

- Members of the Trials Team need space to discuss openly and frankly the possible outcomes or current status of trials.
- Disclosure of the minutes would not provide any meaningful accountability of public funds.
- Funding for the trials is shared with private industry. It is not in the public interest to undermine discussions which could lead to a reduction in private investment in road work safety.
- The outcomes of trials are published as part of the Highways Agency's Knowledge Compendium. These reports are produced after rigorous verification and validation of the content. It is not in the public interest to publish earlier discussions that may contain early opinions on the trials.
- An expectation of disclosure would be likely to result in private industry working independently of public authorities to achieve the same goals. The public interest is best served by continuing a collaborative approach between both sectors.

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

25. The Commissioner considers that there is a public interest in openness and transparency to demonstrate that road worker safety trials are conducted fairly and robustly. It enables the public to participate in discussions surrounding this issue. It may also improve the quality of the Trial Team's arguments and submissions if they were aware that such discussions were going to be disclosed publicly.
26. The Commissioner considers that there is a strong public interest in allowing members of the Trial Team space to discuss openly and

frankly the possible outcomes or current status of trials. Furthermore there is also a strong public interest in private industry being involved in and having input into these trials, particularly as they provide some of the funding to enable this to proceed.

27. On balance the Commissioner considers that public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
28. As the Commissioner considers that section 36(2)(b)(ii) FOIA was correctly engaged in this case he has not gone on to consider the application of section 40(2) FOIA any further.

## Right of appeal

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29. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

30. 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.
31. 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**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**