

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 October 2017

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

Decision (including any steps ordered)

1. The complainant has requested information about the Mersey Gateway Bridge. Department for Transport (DfT) released information within the scope of one of the requests and says it holds no further relevant information. DfT said information that it holds that is within the scope of two of the requests is exempt from release under section 42 of the FOIA as it attracts legal professional privilege.
2. The Commissioner's decision is that:
 - DfT does not hold further information within the scope of request 4 and has complied with section 1(1) with regard to this request.
 - The information DfT holds that is within the scope of requests 1 and 2 is exempt from release under section 42(1), with the public interest favouring maintaining the exemption.
3. The Commissioner does not require DfT to take any steps to ensure compliance with the legislation.

Request and response

4. By way of background, the Mersey Gateway Bridge is a six lane toll bridge over the river Mersey, opening in October 2017, between the towns of Runcorn and Widnes. These twin towns together with a number of villages make up the borough of Halton.
5. Registered Halton residents, who have paid a £10 annual administration fee, qualify for free crossings of the Bridge.
6. On 10 March 2017, and on behalf of the 'National Alliance Against Tolls' (NAAT) and 'Scrap Mersey Tolls', the complainant wrote to DfT and requested information in the following terms:
 - "1. What, when and from whom was the advice that showed "there would be a significant risk of a successful legal challenge to a decision to extend free tolling to some local Councils and not others".*
 - 2. This is probably covered by request (1) but can we have a copy of "the legal opinion .. that any scheme open to one neighbouring authority has to be open to all."*
 - 3. Which local authorities "have tried to piggyback on this process" and can we have a copy of the correspondence including any emails. If there have been any meetings with any of the authorities to discuss this then can we have a copy of any record of the meeting.*
 - 4. The statement says that the cost of the discount to Halton residents is being "split between the government" and Halton Council. My understanding is that Halton Council are not bearing any part of the cost of the discount to their residents, the residents discount is being financed by the Government and by the tolls from non-residents (including Halton businesses). I must assume that my understanding is not correct and what the Minister said is correct and is based on information that you have. So will you let us have whatever summary figures you have which show how much of the residents discounts are being financed by Halton Council and how much is being financed by the Government."*
7. DfT responded to the requests on 16 March 2017. It said the information the complainant had requested in requests 1 and 2 is exempt from disclosure under section 42 of the FOIA and that the public interest favoured maintaining the exemption. DfT indicated that it did not hold the information requested in request 3 and provided some information that it considered to be within the scope of request 4; namely that Halton Borough Council (BC) is funding its share of the

discount scheme through revenues and a share of the procurement savings.

8. DfT provided an internal review on 21 April 2017. With regard to requests 1 and 2, DfT confirmed that it does not hold any relevant information other than that covered by the section 42 exemption. It confirmed that it was satisfied that section 42 applies to this information.
9. DfT confirmed that it does not hold the information requested in request 3 and asked the complainant to clarify this request if he considered it had misunderstood it. With regard to this request, the complainant submitted a clarified request on 3 May 2017 to which the DfT subsequently provided a response.
10. With regard to request 4, DfT acknowledged that it had misinterpreted this request. It released some relevant information concerning the Government's share of the cost of the discount but said it does not hold related information concerning Halton BC. It said that the amount of funding being provided by Halton BC to cover the cost of an initial proposed discount scheme (subsequently superseded) was a matter for Halton BC.

Scope of the case

11. The complainant contacted the Commissioner on 4 May 2017 to complain about the way his request for information had been handled.
12. The Commissioner has first considered whether the DfT handled the request under the correct information regime, namely the FOIA rather than the Environmental Information Regulations (EIR).
13. The Commissioner has then investigated whether DfT holds any information within the scope of request 4 and whether the information that it holds within the scope of requests 1 and 2 is exempt from release under section 42 (or the EIR equivalent).
14. With regard to request 3, the complainant has told the Commissioner that he did not intend to submit a separate complaint to her about DfT's response to his clarified request of 3 May 2017. However, he considers DfT's response to the original request submitted on 10 March 2017 was incorrect. Since request 3 of 10 March 2017 was effectively superseded by the complainant's subsequent clarified request, the Commissioner has considered this particular matter under 'Other Matters'.

Reasons for decision

Is the request a request for environmental information?

15. DfT handled the request under the FOIA; however, the complainant has suggested that it would have been more appropriate for the request to have been processed under the EIR. He considers that apart from the direct effects of the road or the bridge on the environment, there are indirect effects. He says that tolling is usually claimed to have environmental benefits (such as discouraging motorists from using the bridge or road and so reducing pollution) or drawbacks (such as causing more pollution by causing vehicles to take longer detours or use more congested routes, and so increasing pollution).

16. Regulation 2(1) of the EIR provides definitions of what constitutes environmental information:

“(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);”

17. The Commissioner has referred to her decision in FS50608471.¹ As in that case, the Commissioner does not consider that the complainant's requests are for information that could be said to constitute or relate to measures that are likely to impact on the matters identified in regulation 2(a) or 2(b). Whilst she accepts that the definition of environmental information has been widely drawn, the Commissioner considers that information relating to bridge tolls sits at several removes from the matters identified in regulation 2(1) and, in isolation does not constitute a measure as defined within regulation 2(1)(c).
18. In conclusion the Commissioner is satisfied that the requested information does not constitute environmental information as defined by the EIR and that DfT correctly dealt with the request under the FOIA.

Section 1 – general right of access to information

19. Section 1(1) of the FOIA says that anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to him or her if it is held.
20. With regards to request 4, DfT has released some information to the complainant that it holds relating to the share of the tolling discount being financed by the Government. In its submission to the Commissioner DfT confirmed that its position remains that it holds no relevant information relating to Halton BC and the original discount scheme.
21. DfT has told the Commissioner that the information was searched for by a policy official and subject matter expert who has been responsible for the scheme in question for the last 15 years. DfT says that this official is the only person who files documents relevant to this scheme. All relevant files are held in electronic form only and everything in the relevant folder was personally reviewed by the policy expert when answering the complainant's original request.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624040/fs_50608471.pdf

22. DfT has provided the Commissioner with the name of the relevant file and has confirmed that no information that is not also filed in this formal Mersey Gateway Project ('the Project') folder is held on personal computers.
23. DfT says it is confident that no further information relevant to request 4 is held. Furthermore, DfT is not aware of any relevant information ever having been held by the Department and subsequently deleted.
24. DfT has explained that its retention policy requires officials to keep policy development and legal documents for 20 years. All information relating to the Mersey Gateway Project is kept as a record of the history of the scheme which is still under construction. It says the Project will be of interest to the Department for at least the next 30 years given that that is the length of the Private Finance Initiative funding contract. The Department will be providing funding for it over a number of those years so its successors will want to know the background to the scheme. This means that DfT will therefore need to seek a Retention Instrument to keep records for operational purposes for more than 20 years in due course. However, as stated above, DfT has confirmed it holds no information relevant to request 4 relating to Halton BC and never has.
25. DfT considers that, in this case, the complainant's belief regarding what the Department holds is incorrect. It says that he has mentioned in subsequent emails to it that the then Parliamentary Under Secretary of State for Community Health and Care, Mr Mowat MP, had made the following public statement: *'Unfortunately, two local authorities have now begun legal proceedings against the Government'*. DfT says this statement is incorrect – there had been no discussions with other local authorities about the Project. Nor is DfT aware that any legal proceedings have been initiated by local authorities (or indeed anyone) about the scheme. DfT says it is unable to comment on the basis for Mr Mowat MP's statement as he lost his seat at the last election so is no longer an MP. However, DfT says it can confirm that it was inaccurate and that the Department does not hold the information requested about Halton BC.
26. The complainant has also provided the Commissioner with a submission.
27. By way of background, in request 4 the complainant begins by saying that his understanding was that Halton BC is not bearing any part of the cost of the discount to its residents (for using the toll bridge) and that the discount is being financed by the Government and tolls from non-residents.

28. The complainant goes on to state that, as a result of a Minister's statement, his understanding must not be correct and that Halton BC must be financing a proportion of the residents' discount.
29. The Commissioner has reviewed a page about the related Local User Discount Scheme on the Project's website. The page suggests that, in 2014, the Government extended its funding contribution so that, from the previous 300 free trips across the bridge per year (which had been the proposed discount scheme originally), eligible Halton residents will now receive unlimited free trips. The annual registration fee that Halton residents will pay to Halton BC will cover the cost of administering the discount scheme. This information suggests to the Commissioner that the full cost of tolls will be met for Halton residents by the Government and that the complainant's original understanding was correct.
30. However, in his further submission, the complainant has referred to the statement about the Project made by Andrew Jones MP, parliamentary-under-secretary for transport (and who the Commissioner understands is the 'Minister' referred to in his request), which was published in the Liverpool Echo. The statement included the line "*If, as is the case with Halton, the cost was to be split between the Government and local authorities...*" The complainant has queried where Mr Jones would have got the £604m/£377m figures from, in his statement, if he was not aware of the amounts involved in a split between Halton BC and the Government. The newspaper article suggests to the complainant that Halton BC *is* bearing some of the cost of the residents discount scheme and, by implication, that DfT *does* hold information within the scope of request 4, about Halton BC.
31. The complainant has also referred the Commissioner to the information DfT released at internal review. This included the amount of funding the Government is scheduled to provide to part-fund the payments of the scheme - £126m. The complainant is incredulous that the Government would give this amount of money to Halton BC but that it had no idea of how much of that related to the original discount scheme.
32. The Commissioner put these points to DfT. With regard to the newspaper article, in the DfT's view Andrew Jones MP's quote seems to be in relation to a distinct, but related, matter – namely what work DfT subsequently did to see what the cost of extending the tolling to other specific areas adjacent to Halton would be. In response to that question, DfT says that a report was produced and the Government decided not to extend the tolling – this was announced in January 2017. DfT says that one of the reasons it decided not to extend the discount to other areas was the cost to the tax payer. This cost would have been split between the Government and the relevant local authority areas. DfT has explained that the aforementioned report is where the

£604m/£377m figures quoted by Andrew Jones MP in the newspaper article came from. The matters raised in the newspaper article appear to concern the original discount scheme. As such, it appears to the Commissioner that the article does not support the complainant's argument that Halton BC is bearing some of the cost of the residents' discount scheme and that DfT therefore holds information within the scope of request 4. She is prepared to accept that DfT does not hold this information.

33. With regard to the complainant's second point, DfT has referred the Commissioner to the information it released at internal review. This comprised the most recent (at that time) letter for the discount scheme dated 24 February 2016. It showed, in columns, the amount of funding the Government was scheduled to provide to part-fund the payments of the scheme, followed by the cost of the additional funding the Government was scheduled to provide to cover the difference between the original discount scheme set up by Halton and what was needed to make crossing the Bridge free to the majority of Halton residents.
34. This figure was followed by a one off payment which was to be made in year 1 of the payments schedule (2017/18) and refunded in year 5 to provide a buffer for the first year of repayments. The final column was the total amount that the Government was scheduled to provide towards the cost of financing the scheme. At the point of the review, all amounts were indicative and based on traffic and financial modelling and were likely to change once the scheme opened and real traffic information (and thus toll income) became available.
35. As to the amount of funding being provided by Halton to cover the cost of the original discount scheme, DfT's internal review confirmed that it does not hold this information. It had suggested to the complainant that this was a matter for Halton BC and, by implication, that if any relevant information is held, it would be held by Halton BC. It may cause the complainant incredulity, but having queried DfT on this matter more than once the Commissioner is now prepared to accept that it does not hold this particular information.

Section 42 – legal professional privilege (LPP)

36. Section 42(1) of the FOIA says that information that attracts legal professional privilege (LPP) is exempt from disclosure. This exemption is subject to the public interest test.
37. The purpose of legal professional privilege is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths

of their position can be properly assessed. Therefore legal professional privilege evolved to make sure communications between a lawyer and their client remain confidential.

38. DfT has provided to the Commissioner the information it is withholding under this exemption. It comprises five email exchanges dated from 1 June 2015 to 12 December 2016.
39. In using this exemption, DfT has told the Commissioner that it is relying on advice privilege, rather than litigation privilege. However, as it had told the complainant, DfT says this part of the exemption (that is, litigation privilege) may apply in the future. DfT says the advice was between a professional legal advisor (a member of the Government Legal Department (GLD) co-located within DfT) and client (a DfT officer). Having reviewed the material in question, the Commissioner can confirm that this is the case, whilst noting that other government officers are included in the correspondence.
40. As in its review decision, DfT has confirmed to the Commissioner that the sole reason for the communications was to obtain legal advice; that the advice was communicated in the legal adviser's legal capacity and that the privilege has not been waived (ie it has not been shared).
41. As a result of the above, the Commissioner is satisfied that the information in question attracts advice privilege and consequently engages the section 42(1) exemption. Despite the information being exempt from disclosure under section 42(1), it may still be disclosed if the public interest in disclosing the information is greater than the public interest in maintaining the exemption. The Commissioner has therefore gone on to consider the public interest arguments.

Public interest arguments

42. As DfT explained to the complainant in its internal review letter, the Commissioner's guidance on section 42 recognises that '*the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice*'. Moreover, DfT says in this case there was (and remains) a possibility that legal proceedings may be brought. The review argued that bodies subject to FOIA should not be in a less favourable position in legal proceedings compared to parties that are not subject to the provisions of FOIA.

43. DfT has confirmed that its consideration of the public interest test took into account the complainant's arguments in favour of disclosure made in his request for a review dated 24 March 2017. DfT's review acknowledged that the information requested concerns a locally-controversial scheme and that the tolls would have a financial impact on large numbers of motorists. It also observed that there is a public interest in making available information about the operation of the tolls and about decisions in respect of exemptions from paying them. The review noted that information on this subject had been made available online for some time by Halton BC, which had been promoting the scheme, and the review provided links to the information that is in the public domain.
44. DfT has said that, while the legal professional privilege exemption is qualified, the public interest in disclosing specific information being requested must be strong so as to outweigh the strong public interest in legal advice being withheld. It acknowledges that disclosing the information in question would serve transparency and inform public debate on the Mersey Bridge tolls. However, the internal review concluded that the specific public interest arguments for releasing the information were not sufficiently strong to match the public interest in the information being withheld and that it was legitimate for the Department to have applied the section 42 exemption.
45. DfT has confirmed to the Commissioner that, having considered the request again, it maintain this view. Furthermore, it argues that it is in the public interest that the decisions taken by government are taken in a fully-informed legal context. Disclosing legal advice has a significant potential to prejudice the government's ability to defend its legal interests; both directly, by unfairly exposing its legal position to challenge, and indirectly, by diminishing the reliance it can place on full and comprehensive legal advice. DfT consequently maintains the application of the exemption at section 42(1) FOIA.
46. During her investigation, the Commissioner provided the complainant with an assessment of DfT's reliance on section 42(1), which was that the exemption was engaged and that the public interest favoured maintaining the exemption. She recognised that the Mersey Gateway Project was a controversial project, locally, and acknowledged the complainant's public interest arguments for releasing the information. He had referred to the amount of money being spent on the Project, and the financial hardship and mental pain that the Project will cause to drivers.
47. The complainant had not, however, provided any compelling evidence to substantiate his arguments and, having conducted an internet search (albeit not in any way exhaustive), the Commissioner did not identify

evidence of concerns about the Mersey Gateway Project that are so compelling that they outweigh the arguments for maintaining LPP.

48. In his later submission, the complainant has argued that there is no possibility of legal proceedings (litigation) being brought against DfT. The Commissioner considers DfT may be better placed to make an assessment of this than the complainant and does not consider this particular argument from the complainant to be a stronger argument for release than the argument for general lawyer/client confidentiality.
49. The complainant has also referred to mounting concern about the imminent imposition of tolls since his request for a review of 24 March 2017 and that people are contacting DfT about the matter and receiving a standard reply that, with regard to extending the Mersey Gateway Bridge toll discounts to other areas, having considered the legal position and the costs to the taxpayer, free tolling would not be extended beyond Halton BC. He has provided the Commissioner with a copy of a letter DfT sent to Faisal Rashid MP on 12 September 2017 as evidence of this. The complainant's position is that he does not consider it reasonable to use legal advice as an 'excuse' without publishing that advice.
50. The complainant has discussed further his claim that there is public interest in releasing the information because of the money being spent on the Project and the financial hardship tolling will cause drivers. He has referred the Commissioner to various websites which refer to cost of the Project. He has discussed why the 'imposition' of a toll will cause financial hardship to those drivers who have to cross the bridge daily, and the potential effect on those people who are fined for non-payment of the toll. Finally, the complainant has referred the Commissioner to a Facebook group – 'Scrap Mersey Tolls' – which has over 13,000 signatures and which the complainant considers is evidence that there is strong public interest in the withheld information being published.
51. The Commissioner acknowledges that the cost of the Mersey Gateway Project is substantial, as a project of this size would be. She also appreciates that the imposition of a toll to cross a river that had been previously free to cross will be frustrating for local residents and others.
52. While the complainant may consider that there is no possibility of legal proceedings being brought against DfT, DfT says in this case that there was (and remains) a possibility that legal proceedings may be brought. The dates of the withheld information – mid June 2015 to December 2016 – make the advice either fairly or very recent at the point the request was received in March 2017. In addition, in the Commissioner's view, the discount scheme, and so the advice about this scheme, was

and currently remains a 'live' issue. Both these factors for maintaining the exemption carry significant weight.

53. In reaching a decision on this matter, the Commissioner has considered the following factors in favour of disclosure: accountability and transparency, the amount of money involved and the number of people affected. She has considered the following factors in favour of maintaining the exemption: the importance of ensuring frankness between lawyer and client; that the advice is recent, that the issue of tolls for particular users of Mersey Gateway Bridge remains live, that litigation against DfT may be possible in the future and that there do not appear to be concerns about DfT's transparency or actions with regard to the discount scheme that are extraordinarily compelling.
54. Having deliberated on the matter, the Commissioner has concluded that the public interest in maintaining the section 42 exemption outweighs the public interest in releasing the information, on this occasion.

Other Matters

55. The complainant's request 3 of 10 March 2017 was as follows:

"Which local authorities "have tried to piggyback on this process" [that is, the process of legal proceedings] and can we have a copy of the correspondence including any emails. If there have been any meetings with any of the authorities to discuss this then can we have a copy of any record of the meeting."

56. In her initial assessment of his complaint, the Commissioner had advised the complainant that, with regard to his request 3, it seemed to her that in its response and internal review DfT had provided a response to this particular request as it had interpreted the request, and that this interpretation was not unreasonable. At internal review, DfT acknowledged that it might have misunderstood the request and invited the complainant to submit a clarified request, which he had then done.

57. It was not clear to the Commissioner how else DfT could have handled this particular request; the Commissioner saw no evidence that DfT's possible misunderstanding of this request was disingenuous, for example.

58. The complainant considers that DfT read words into the original request that were not there ie. it had restricted its response to local authorities that had begun legal proceedings. The Commissioner can only confirm her initial assessment ie. that in her view DfT's interpretation of the request had not been unreasonable. DfT had suggested at internal review that the complainant could submit a clarified request if it had misunderstood it and, the Commissioner again notes, the complainant had elected to do this.

Right of appeal

59. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

60. 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.
61. 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

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