

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 30 March 2021

Public Authority: Highways England Company Limited
Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested information about automated cameras used to enforce the use of Red X lanes on the strategic road network. Highways England refused to provide the information it held on the basis of sections 38 and 31 of the FOIA.
2. The Commissioner's decision is that Highways England has correctly withheld the information at part e) of the request on the basis of section 38(1)(b), but has failed to demonstrate that either section 38(1) or 31(1)(a) is engaged in relation to parts c) and d) of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information requested at parts c) and d) of the request.
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 13 March 2020 the complainant made a request to Highways England ("HE") in the following terms:
 - "a) How many times have you provided information to the police in relation to possible offences detected by automated camera enforcement of the red X?*
 - b) How many times has police action been taken as a direct result of automated camera enforcement of the red X? If possible, please break this down by Educational Course, Fixed Penalty Notice and Court Proceedings.*
 - c) How many active cameras are currently installed that are capable of automated camera enforcement of the red X, but are not currently being used to launch police action?*
 - d) How many active cameras are currently installed that are capable of automated camera enforcement of the red X and are currently being used to launch police action?*
 - e) Which police forces are you currently actively working with to take action against red X offenders that are automatically detected by red X enforcement cameras?"*
6. HE responded on 2 April 2020. For parts a) and b) of the request HE stated the information was not held. For parts c), d) and e) HE stated the information was held but was being withheld from disclosure under sections 31 and 38 of the FOIA.
7. The complainant requested an internal review on 7 April 2020. He accepted the information at parts a) and b) was not held but did not agree that the information in parts c), d) and e) should be withheld and he provided his reasoning for this.
8. Following an internal review HE wrote to the complainant with the outcome on 7 May 2020. HE upheld its decision to withhold the information at parts c), d) and e) of the request, but did provide some additional explanations.

Scope of the case

9. The complainant contacted the Commissioner on 7 May 2020 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of her investigation to be to determine if HE has correctly withheld the information requested at

parts c), d) and e) of the request on the basis of either section 31(1)(a) or section 38 of the FOIA.

Reasons for decision

Section 38 – health and safety

11. HE has stated it is relying on section 38(1) to withhold the information requested at parts c), d) and e) of the request – that is the number of active cameras currently installed that are capable of automated camera enforcement of the Red X but are not used to launch police action and how many are being used to launch police action, as well as the police forces HE is working with to take action against Red X offenders who are automatically detected by Red X enforcement cameras.
12. For clarity, a Red X lane is used to identify when a lane is closed and indicates that drivers should move into an open lane to continue their journeys. They are used on smart motorways and other major routes to help manage traffic and incidents effectively and efficiently.
13. Section 38(1)(a) states that information is exempt if its disclosure would, or would be likely to, endanger the physical or mental health of an individual.
14. Section 38(1)(b) states that information is exempt if its disclosure would, or would be likely to, endanger the safety of any individual. For the exemption to be engaged, it must be at least likely that the endangerment would occur.
15. The Commissioner considers the term 'endangerment' in section 38(1) should be interpreted in the same way as 'prejudice' in other FOIA exemptions. In order to accept the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment, and the likelihood of it occurring as a result of disclosure of the information in question, is real, actual and of substance, rather than trivial or insignificant. As part of this, she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
16. The Commissioner's guidance¹ sets out under section 38(1)(a), endangering physical health usually means an adverse physical impact

¹ [health-and-safety-section-38-foia.pdf \(ico.org.uk\)](https://ico.org.uk/health-and-safety-section-38-foia.pdf)

and often involves medical matters. This can relate to individuals or groups.

17. Endangering safety (section 38(1)(b)) is usually connected to the risk of accident and the protection of individuals. Information that could endanger an individual's safety could also endanger their mental or physical health. If so, both parts of the exemption may be relied upon.
18. HEs arguments centre around the possibility that disclosing the information could lead to users of the network risking ignoring Red X signs if they are aware of where they are and are not enforced in an area. It is argued this would significantly risk the health and safety of both the road users and road workers in those areas.
19. HE has argued in both its submissions regarding section 31 and section 38 that the information should be considered as a whole as disclosing the answers to c) and d) in conjunction with e) would provide locations of where Red X offenders would and would not be prosecuted. This would lead to a potential increase in driving in Red X lanes in areas where drivers believe they may be less susceptible to police enforcement.
20. The Commissioner can consider arguments relating to the 'mosaic' effect. This involves considering if any stated prejudice may be likely to arise if the requested information were put together with other information. This generally only applies where the prejudice may be caused by combining the requested information with information in the public domain. HE has not argued that there is already information in the public domain that could be combined with the requested information so the Commissioner has considered whether the request may set a precedent.
21. In considering this the Commissioner must determine if complying with one request would make it more difficult to refuse requests for similar information in the future. For example if responding to the request now would make it more difficult for a public authority to refuse a subsequent request, the harm can be considered. However, in this case HE has not argued that disclosing the information may make it more difficult to refuse requests for similar information in the future; rather that disclosing the number of cameras capable of automated enforcement that are in use and not in use, alongside disclosing the police forces working with HE would together lead to the endangerment and/or prejudice HE has argued.
22. The Commissioner does not therefore consider it relevant to consider the precedent in this case as she is of the view that the parts of the request are distinct and can be considered separately. Parts c) and d) are intrinsically linked as they relate to the number of active cameras in

use and not in use. Part e) is separate as it relates to the police forces working with HE.

23. HE has argued that disclosure of the requested information could impact on the general public using the road networks as well as workers undertaking repairs in lanes closed and marked by a Red X by affecting their mental or physical health and their safety as a consequence of more drivers using a Red X lane. The Commissioner is satisfied there can be a link between road usage, lane closures and the possible adverse effects to individuals, specifically in relation to possible road traffic accidents.
24. For example, in relation to the number of cameras in use, were the figure to be zero, or very low, then this may indicate the cameras are not actually being used which could encourage some road users to use lanes marked with a Red X, thereby increasing the likelihood of accidents. Similarly, if it was known which police forces were actively using data from automated cameras to take action then, if this was only a small number of police forces, some road users may take a calculated risk to use Red X lanes in areas where they calculate that the risk of enforcement is lower.
25. The Commissioner is therefore satisfied the information requested is relevant to this exemption and the applicable interests test is met.
26. The Commissioner has therefore gone on to consider the next stage of the prejudice test; that is, whether there is a causal link between disclosure and the harm referred to by HE. In her guidance on the prejudice test, the Commissioner acknowledges that it will not usually be possible for a public authority to provide concrete proof that the prejudice 'would' or 'would be likely' to result. This is because the test relates to something that may happen in the future. However, the Commissioner considers that the engagement of an exemption cannot be based on mere assertion or belief, but must reflect a logical connection between the disclosure and the prejudice.
27. The Commissioner accepts there is some causal link between road users not using Red X lanes and accident risk; she must therefore next consider whether there is a real risk of endangerment to physical or mental health and/or to the safety of individuals through disclosure of the requested information.
28. Turning first to the information requested at parts c) and d) i.e. the number of cameras in use and not in use for police action; as already mentioned the Commissioner does not agree that disclosure sets a binding precedent but, rather, each case must be considered on its merits. It is possible that if HE was to respond to such requests in the future, numbers may have fluctuated due to maintenance or technical

reasons and the information given in response to such requests will represent a snapshot of a specific moment in time.

29. The Commissioner considers that most individuals will be aware that not all automated cameras are in operation all of the time for a number of reasons and therefore it is a personal choice as to whether an individual adheres to lane instructions; there will always be some individuals likely to ignore Red X lane instructions.
30. Having viewed the withheld figures, the Commissioner is not convinced that disclosure of the number of active cameras and inactive cameras would pose a real risk to the health and safety of individuals. The majority of road users will adhere to instructions and avoid Red X lanes regardless of whether there is a risk of being caught as there is usually a valid reason for lanes being 'out of bounds' such as roadworks or accident recovery. The number is a single number showing the situation at the time of the request across the whole strategic road network. With no other information disclosed alongside this, no road user could be certain where cameras are in operation and where they are not, revealing nothing about the enforcement on any specific part of the road network.
31. The Commissioner is not satisfied that the level and nature of the prejudice identified would be likely to constitute an endangerment to the physical or mental health and/or safety of the general public in relation to the information at parts c) and d). She is therefore not satisfied that sections 38(1)(a) or (b) of the FOIA is engaged and so has not gone on to consider the public interest test. However, the Commissioner will consider later in this notice whether the information at parts c) and d) can be withheld under section 31(1)(a) of the FOIA.
32. In terms of the information at part e) of the request – the police forces working with HE to take action against Red X offenders who are automatically detected – the Commissioner considers there is a clearer causal link between disclosure and endangerment to health and safety.
33. This information, if disclosed, provides an indication of areas where police action is likely. As already stated, most road users will adhere to lane closures regardless of any knowledge of enforcement. In this case consideration has to be given to those small number of road users who will risk driving in a Red X lane and to not providing them with information which will make this more likely to occur. The Commissioner considers that information that would make the location of enforcement areas known is information that could increase the likelihood of those drivers who take risks to do so. This in turn would endanger the health and safety of other road users and anyone in Red X lanes.

34. The Commissioner therefore considers that, for the information at part e) of the request, section 38(1)(a) and (b) are engaged. She has now gone on to consider the public interest in the disclosure of this information.

Public interest arguments in favour of disclosure

35. HE acknowledges there is a public interest in a public authority being open and transparent with stakeholders and actively engaging with road users.
36. Specifically in relation to the withheld information; HE accepts there is a public interest in knowing if Red X signs are enforced to ensure that HE upholds its accountability to network user safety.
37. The complainant has pointed to the fact The Road Traffic Offender (Prescribed Devices) Order 2019 was brought in to allow automated Red X enforcement and at the time of the request had not even been in force for a year. The complainant considers there is a public interest in information on how HE are using this new technology to enforce Red X offences so that the public can determine if this new legislation is effective.

Public interest arguments in favour of maintaining the exemption

38. HE argues that allowing the release of information on police services currently enforcing Red X cameras could lead to people ignoring a Red X sign, putting road users, road workers, enforcement agencies, traffic officers and police officers in jeopardy.

Balance of the public interest arguments

39. The Commissioner does consider there is weight to the arguments for disclosing the information as, with any new legislation, it is important to understand how effective it is. Similarly as a public authority HE should be accountable and transparent in its activities.
40. That being said, in the Commissioner's view there is a very strong public interest in ensuring the safety of individuals. The Commissioner has already established that disclosing the information would be likely to endanger the health and safety of individuals and she considers that, for this information to be disclosed there would need to be weighty arguments in favour of disclosure.
41. The Commissioner is of the view that disclosing the number of cameras capable of automated enforcement goes some way to meeting the public interest in transparency as it will show the potential capability and capacity of automated enforcement cameras. Disclosing which police forces are working with HE provides more specific information on the

areas that are taking action as a direct result of the automated enforcement cameras; the Commissioner sees this information as distinct from numbers, as it identifies geographic areas of higher risk of action which can be factored into the thinking of any driver weighing up the decision to drive in a Red X lane.

42. Whilst the Commissioner considers that the number of individuals likely to drive in a Red X lane is likely to be low, regardless of what information is placed in the public domain, she must be mindful that disclosing any information that might make this more likely is likely to endanger public health and safety and she does not consider the reasons for disclosing the police forces working with HE are substantive enough to risk this endangerment.
43. As such the Commissioner finds that HE has correctly withheld the information from part e) of the request on the basis of section 38(1)(b) of the FOIA.

Section 31(1)(a) – the prevention or detection of crime

44. As the Commissioner did not find that the information at parts d) and e) of the request – that is the number of active cameras currently installed that are capable of automated enforcement of the Red X but are not used to launch police action and how many are being used to launch police action – engaged the exemption from disclosure at section 38 of the FOIA she has gone on to consider if section 31 provides a basis of withholding this information.
45. HE has stated it is relying on subsection (1)(a) of the section 31 exemption to withhold the information. Section 31(1)(a) of the FOIA states that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the prevention or detection of crime. This exemption is subject to consideration of the public interest.
46. This exemption can be used by public authorities with no specific law enforcement responsibilities if it can be argued that the information has been or is being used by a law enforcement agency or if it can be argued that disclosure of the information would make anyone more vulnerable to crime.
47. Again, HEs arguments relate to the idea that the information at parts c) and d) when combined with e) would provide locations of where Red X offenders would and would not be prosecuted and thus lead to a potential increase in driving in Red X lanes in areas where drivers know they are not susceptible to police action.
48. The Commissioner has already explained why she does not consider that the information that has been withheld should be considered as a whole,

as parts c) and d), when taken in isolation, do not relate to the locations of the cameras themselves.

49. Without location information it is difficult to see how disclosing the number of cameras capable of automated enforcement that are active at any one time would be likely to prejudice the prevention or detection of crime. The Commissioner has previously stated that these numbers are reflective of a moment in time and the numbers will be based on several factors including cameras occasionally not being operational due to maintenance. Without location information, what disclosing this information will show is that there are cameras across the whole strategic road network that are capable of automated enforcement of Red X lane violations and if anything, the Commissioner considers this could be argued as a deterrent to individuals using Red X lanes.
50. In any event the Commissioner, for much the same reasons as stated for section 38, does not accept there is causal link between the information requested at parts c) and d) of the request and prejudice to the prevention or detection of crime.
51. The Commissioner finds section 31(1)(a) is not engaged in relation to the information requested at parts c) and d) of the request and she requires HE to disclose this information.

Right of appeal

52. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.
54. 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

Jill Hulley
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