

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

### **Decision notice**

**Date:** 20 September 2022

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

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

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1. The complainant has requested information concerning Highways England's name change to "National Highways". The Department for Transport ("the DfT") provided a small amount of information, but relied on section 36 of FOIA (prejudice to the effective conduct of public affairs) to withhold the remainder.
2. The Commissioner's decision is that the DfT has correctly engaged both section 36(2)(b)(i) and section 36(2)(b)(ii) of FOIA but that the balance of the public interest favours disclosure.
3. The Commissioner requires the DfT to take the following steps to ensure compliance with the legislation.
  - Disclose, to the complainant, the information it has withheld. The DfT may redact contact details and the names of junior staff.
4. The DfT 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. On 19 August 2021 the complainant requested information of the following description:

“Under the Freedom of Information Act (2000), I am requesting the following information relating to the change of name from Highways England to National Highways:

  - “[1] Any internally produced estimates of the cost to change the name of Highways England to National Highways to include the cost of changing signage, vehicle livery and branded clothing (uniforms, PPE, etc.) as well as changing any relevant branded items (websites, published materials, etc.).
  - “[2] Electronic copies of any written or electronic correspondence between the members of the Highways England Board/Executive Teams and anyone in the Department for Transport relating specifically to the name change from Highways England to National Highways.”
6. On 17 September 2021, following a request from the DfT, he clarified element [2] of the request as follows:

“I am seeking any correspondence specifically discussing the change in name from Highways England to National Highways, which should include any discussions of:

  - cost of the name change;
  - reason for the name change;
  - public perception of the name change; and
  - potential operational impacts of the name change.”
7. On 15 October 2021, the DfT responded to the clarified request. It provided information about costs incurred but refused to provide any further information. It relied upon section 36 of FOIA as its basis for doing so:
8. The complainant requested an internal review on 18 October 2021 – noting that the information that had been provided was not the information that he had sought. The DfT sent the outcome of its internal review on 15 November 2021. It upheld its original position.

## Scope of the case

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9. The complainant contacted the Commissioner on 15 November 2021 to complain about the way his request for information had been handled.

10. The Commissioner notes that the complainant has made a very similar request to National Highways itself. The Commissioner has considered both complaints in parallel and is issuing a similar decision to National Highways today.
11. The Commissioner considers that the scope of his investigation is to determine whether the DfT is entitled to rely on section 36 of FOIA to withhold the information.

## **Reasons for decision**

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12. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
13. Section 36(2)(b) of FOIA states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
  - would, or would be likely to, inhibit—
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation
14. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide his own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure himself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

## **Who is the Qualified Person and have they given an opinion?**

15. The DfT provided the Commissioner with a copy of the submission that was provided to the then-Secretary of State for Transport (the Rt Hon Grant Shapps MP) and Baroness Vere, Parliamentary Under Secretary at the Department for Transport, on 12 October 2021. The DfT also provided a copy of an email, dated 15 October 2021, from the Secretary of State's Private Office, confirming that both ministers were content with the submission.
16. The DfT noted that, as the Secretary of State also acts as the Qualified Person for National Highways, the submissions seeking the Qualified Person's opinion for the complainant's requests to both the DfT and

National Highways had been sent – and agreed to – under the same cover.

17. Both the Secretary of State and Baroness Vere were entitled to act as the Qualified Person, as both are ministers of the Crown. The Commissioner considers that, in signifying that they were content with the submission, both the Secretary of State and Baroness Vere have adopted the arguments set out in the submission as their own opinion. Given that both ministers provided identical opinions on the same day, it does not matter which opinion the Commissioner selects. However, in the interests of clarity, the Commissioner has adopted the Secretary of State's opinion (given that he was the more senior minister) as the Qualified Person's opinion for the purpose of this notice.
18. The Commissioner is therefore satisfied that the Qualified Person has provided an opinion and that he did so on 15 October 2021.

### **What was the Qualified Person's opinion and was it reasonable?**

19. As has been noted above, it is not the Commissioner's role to substitute his own opinion for that of the Qualified Person – who is best-placed to judge the possible prejudice that may arise from disclosure. It follows that the bar for demonstrating that an opinion is reasonable is not high.
20. The opinion need not be the most reasonable opinion available or the one with which the Commissioner most agrees. It must simply fall within the spectrum of opinions that a reasonable person might hold.
21. An opinion will not be reasonable if it is irrational or absurd or if it fails to make out the particular limb of the exemption being cited.
22. The submission provided to the Secretary of State laid out a number of public interest arguments both for and against disclosure. Whilst the Commissioner recognises that the Secretary of State may have been interested in such matters, he would note that the Qualified Person's role is to provide their opinion on the likelihood and severity of the prejudice that might result from disclosure. He also notes that the DfT claimed, in the submission to the Secretary of State, to have already carried out a public interest test, despite the exemption having not yet been engaged.<sup>1</sup>

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<sup>1</sup> Section 36 cannot be engaged until the Qualified Person has provided an opinion stating that disclosure will cause one of the forms of prejudice covered by the exemption.

23. Nevertheless, the Commissioner notes that the submission did contain some arguments that were relevant to prejudice and, in particular the two limbs of section 36(2)(b) that the DfT wished to engage:

"It is important to maintain a 'safe space' in which discussions can be undertaken in order to develop ideas, debate live issues and reach decisions away from external interference and distraction. This includes submissions to Ministers which, although covered by the scope of the request and containing balanced advice, we feel appropriate to withhold under s36 on grounds of preserving that safe space for officials and Ministers to have deliberations with candour, without the fear of inhibition that disclosure would cause.

"Releasing the documentation requested also risks causing confusion as it only provides a partial picture of the advice that ultimately informed the decision. This is because the correspondence and documentation reflects ongoing discussions over several months, during which a range of approaches and considerations were debated. Not all were ultimately relevant to the final decision made, which is not necessarily made clear in the documentation. The correspondence and documentation also doesn't provide a clear picture of advice and options, as discussions also took place via meetings and one to one conversations."

24. The Commissioner recognises that the above arguments do relate to the matters covered by sections 36(2)(b)(i) and section 36(2)(b)(ii) of FOIA and neither argument is irrational or absurd. He is therefore satisfied that the Qualified Person's opinion is reasonable and that these two limbs of the exemption are engaged at the lower bar – that disclosure "would be likely to" cause prejudice.

### **Public interest test**

25. Even where the Qualified Person has identified that disclosure of information would be likely to cause prejudice, the public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.
26. Given that the Commissioner has accepted the possibility that disclosure might cause prejudice, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.
27. The Commissioner has accepted as reasonable that the lower bar of prejudice is engaged. This means that that the chance of prejudice occurring does not have to be more likely than not, but there must still

be more than a remote or hypothetical chance. Whilst it is easier to demonstrate that the lower bar of likelihood is met, the weight to be attached to that prejudice is also lower.

28. In seeking an internal review, the complainant argued that:

“As the decision to rebrand from Highways England has already been made, announced to the public and reported widely in the media, it is not clear how disclosure of the requested information would inhibit the free and frank provision of advice or exchange of views. Nearly two months from the announcement of the decision, the issue is no longer live. The advice has been given. The views have already been exchanged. It is, therefore, not reasonable to expect that disclosure of the requested information would have any effect that would inhibit deliberation with candour and the information should not be considered exempt.

“Employees of public bodies (such as the Department for Transport and National Highways/Highways England), particularly senior officials, know or ought to know that the Freedom of Information Act 2000 allows for the disclosure of any physically recorded information. As such, they would be aware that any electronic correspondence, including emails, could be requested under the Act. As only physically recorded information can be requested under the Act, officials wishing to keep their advice or views out of the public would have had the option of making those views by another means. Any electronic correspondence containing free and frank advice or exchange of views will have been sent with full knowledge that the correspondence could become public. There is, therefore, no reason to expect that disclosure of this information would inhibit deliberation with candour.

“Neither the Freedom of Information Act 2000 nor the associated guidance from the ICO allows for an exemption from information disclosure on the basis that it may cause confusion as it only provides a partial picture of the advice informing the decision. It is in the very nature of developing policy and delivering public services that the information provided to the public by the government/public bodies only provides a partial picture of the information informing decisions. One of the primary purposes of the Freedom of Information Act 2000 is to allow for the provision of a more complete picture of the information used in decision making. Withholding such information therefore undermines the intent of the Act and must be considered contrary to the public interest. The Department for Transport is free to use its discretion to provide such information as is necessary to provide a complete picture of the advice informing the decision. It is not at all clear that disclosure of the requested information would cause any significant harm to the public interest.”

29. In explaining why the balance of the public interest should favour maintaining the exemption, the DfT argued that:

"We considered the need to maintain a 'safe space' in which deliberations can take place, to allow an exchange of views and ideas to reach the desired outcome, essentially allowing the Government to function effectively without the fear of any thoughts or input, which is not taken forward or consequently considered, automatically being released upon request. We further considered that the requested documents only present a partial or incomplete picture of the advice that informed the decision to proceed with the renaming of Highways England. Their release is therefore likely to give rise to confusion.

"We determined that it would be more appropriate and informative to only release details of actual costs to date along with anticipated future costs of the name change, rather than the advice surrounding that data, some of which ultimately had no bearing on the final decision or the associated costings. To release information which is essentially the exchange of potential ideas, policies or initiatives, risks inhibiting Ministers and Officials in future discussions and restricts willingness to put forward any views or thoughts which are not within the public interest. Much of the information requested was hypothetical at the point it was written, and inconsequential to the final decision being made and would serve no purpose in being disclosed. Whilst we welcome the need for transparency within Government which is reflected in our initial response by providing actual agreed figures and anticipated future costs, along with a rationale for the name change, it would not be conducive to future policy considerations or development, or in the public interest, to disclose documentation that outlines very early thinking and ideas that ultimately were discarded. It also allows for speculation and interpretation without any real context. Therefore, the public interest weighed in favour of withholding the information. The Department notes that it is the process that would be inhibited, in addition to concerns about the information itself, and considers there to be a likelihood that the release of this information would be likely to inhibit the process for future exercises of this nature."

### **The Commissioner's view**

30. In the Commissioner's view, the balance of the public interest in this case should favour disclosure.
31. The decision in question had been both taken and communicated to the general public at the point the DfT responded to the request. There would thus be no need for the DfT to continue to need a safe space in

which to deliberate ideas. The process of deliberation had clearly concluded.

32. The Commissioner turns next to so-called "chilling effect" arguments – of which he has traditionally been sceptical. If the contents of private advice or private discussions between civil servants is disclosed, the argument goes, those civil servants (and civil servants more generally) will feel inhibited when participating in discussions in future. They will either not take part in future discussions, or fail to do so candidly because they fear that their opinions will be come public knowledge.
33. The Commissioner recognises that there can occasionally be force in this argument. It is in the public interest for civil servants to speak candidly and to be unafraid to suggest radical new ideas or to offer advice on controversial matters. If they fail to do so, fresh thinking is unlikely to emerge and poorly thought-through policy ideas may not be properly challenged.
34. However, the Commissioner also considers that civil servants – particularly senior civil servants – should not easily be dissuaded from providing frank and robust advice to ministers. Civil servants are (or, certainly, should be) well aware that their correspondence could be subject to disclosure.
35. In 2018, the Commissioner was asked to consider a similar case involving the decision to add the word "Digital" to the name of the then-Department for Culture, Media and Sport. In decision notices issued to both the Cabinet Office<sup>2</sup> and the Department for Digital, Culture, Media and Sport<sup>3</sup>, the Commissioner ruled that, notwithstanding the possibility of future inhibition, the information should still be disclosed, noting that:

"the Commissioner considers that there is a public interest in understanding how the process evolved including the factors considered relevant to implementing the name change. The withheld information would provide some useful insight in that regard. Whilst this specific public interest might not be particularly significant in the circumstances, the public interest in withholding the withheld

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258968/fs50699814.pdf>

<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258969/fs50703296.pdf>



information is not stronger, and the public interest in openness and transparency in government should not be underestimated.”

36. Both public authorities appealed that decision to the Tribunal which, having heard evidence from some eminent current and former civil servants, overturned the Commissioner’s decision.<sup>4</sup> In reaching its decision, the Tribunal placed particular emphasis on the fact that the government had put out a press release explaining that the word “digital” was being added to the name of the department to reflect the increasing proportion of its time now being devoted to work in digital sectors of the economy. In the Tribunal’s view, the public interest in disclosure of any previous correspondence discussing a name change was reduced considerably by the clear statement of explanation placed in the public domain.
37. In the Commissioner’s view, the corresponding statement announcing the new name for Highways England does not contain a similarly clear justification.
38. National Highways originally began its life as the Highways Agency – which was an executive agency of the Department for Transport. Following a review of the approach to the strategic road network, the Highways Agency was reconstituted as a company wholly-owned by the Secretary of State for Transport in 2015. Reflecting its new structure, the Highways Agency became “Highways England Company Ltd” – more commonly known as “Highways England.”
39. On 19 August 2021, the then-Secretary of State for Transport tweeted:  
  
“Delighted to appoint Nick Harris as permanent CEO of Highways England as it evolves into National Highways.  
  
“The new name will better suit the org as it continues to lead development of UK's high-speed road standards also used in parts of the Commonwealth.”<sup>5</sup>
40. The tweet contained a link to a press release put out by the newly-renamed National Highways. The release ostensibly covered both the

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2313/Department%20for%20Digital,%20Culture,%20Media%20and%20Sport%20EA-2018-0121%20\(15.11.18\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2313/Department%20for%20Digital,%20Culture,%20Media%20and%20Sport%20EA-2018-0121%20(15.11.18).pdf)

<sup>5</sup> <https://twitter.com/grantshapps/status/1428376881523535879>

name change and the appointment of the new chief executive, but contained very little about why the organisation was being renamed. The only reference it contained said that:

"This comes as Highways England and the Department for Transport announced that Highways England will change its name to 'National Highways', heralding a new era for strategic roads. This reflects the new focus the company has on delivering the government's £27bn strategic roads investment programme, while also continuing to set highways standards for the whole UK."

41. It is not the Commissioner's role to determine whether the government was justified in changing Highways England's name. However, where such a decision has been made, there is a public interest in understanding why the decision has been made and how it was reached – especially given that the name change occurred only 7 years after the previous name change and when, unlike in 2015, the name change was not related to a change in governance, structure or responsibilities.
42. In the Commissioner's view, the average person would struggle to understand, from the public statement alone, why Highways England needed to change its name, or why it was unable to carry out its functions adequately with its present name. There is therefore a stronger public interest in "looking underneath the bonnet" in this case to understand why the government has taken the decision that it has.
43. When the decision was announced, the president of the AA described the change as "baffling,"<sup>6</sup> with a Welsh government spokesman suggesting it would "unnecessarily confuse people as to where responsibility for roads lies – in Wales, with the Welsh government."<sup>7</sup> The response of such stakeholders would suggest that what is in the public domain does not adequately explain the rationale behind the name change.
44. Having viewed the withheld information, the Commissioner notes that there is relatively little that covers the justification itself (as opposed to correspondence covering the technical process of making the change and of managing press coverage). However, in this case, the fact that

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<sup>6</sup> <https://news.sky.com/story/highways-england-to-be-rebranded-as-national-highways-while-still-only-managing-england-roadways-12385635>

<sup>7</sup> <https://www.theguardian.com/politics/2020/oct/20/highways-england-rebrand-accused-of-being-an-offensive-waste-of-7m>

the DfT holds so little relevant information in itself increases the public interest in disclosure of that which is held.

45. The Commissioner also notes that there are several references to estimated costs contained within the withheld information. The sums involved would increase the public interest in transparency.
46. The Commissioner accepts the DfT's argument that disclosure of only a partial picture would be misleading. So as to counter this, the Commissioner is ordering disclosure of all the withheld information (subject to redactions of contact details and the names of junior staff members). The Commissioner considers that, with access to the full set of emails, a reasonable person will be able to follow the evolution of the decision and to place each individual email in its appropriate context. He would also note that it is always open to the DfT to provide additional information should it wish to better-contextualise the information being disclosed.

## Other Matters

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47. The Commissioner notes that the DfT did not seek clarification of the request until 20 working days after it had received the request. He also considers that the original request and the "refined" request seek exactly the same information. The original request sought information "**relating specifically** to the name change". The refined request sought information "**specifically discussing** the change in name." It is not clear to the Commissioner why the DfT had more difficulty identifying correspondence "relating to" the name change than correspondence "discussing" the name change.
48. In waiting until the 20<sup>th</sup> working day to seek a clarification, the DfT effectively awarded itself an additional 20 working days in which to respond to the request. The Commissioner does not consider this to be good practice.
49. The Commissioner's guidance on clarifying requests states that, where a public authority requires clarification in order to identify the information that has been requested, it should seek this clarification "as soon as possible."<sup>8</sup>

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<sup>8</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/interpreting-and-clarifying-requests/#clarify>

## Right of appeal

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50. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.
52. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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