

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2019

Public Authority: Highways England Company Limited

Address: Bridge House
1 Walnut Tree Close
Guildford
GU1 4LZ

Decision (including any steps ordered)

1. The complainant requested information about non-payment of Dartford crossing tolls by foreign registered vehicles. The Highways England Company Limited (Highways England) refused the request under section 36(2)(c) – prejudice to the conduct of public affairs.
2. The Commissioner is satisfied that section 36(2)(c) is engaged and the public interest favours maintaining the exemption. The Commissioner does not require the public authority to take any action.

Request and response

3. On 24 April 2018 the complainant requested the following information:

Request One

Since the removal of the toll booths at the Dartford crossings to 20th April 2018, how many foreign registered vehicles have not paid the tolls?

Request Two

When the booths were removed the issues of non-payment by foreign registered vehicles was raised on local and national media. The Highways Agency stated they would use foreign debt collection agencies to recover the money owed. How many times has this happened since the booths were removed to 20th April 2018.'

4. On 20 June 2018 Highways England responded and provided a link disclosing the information in response to the second request.

(https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/677898/Dart_Charge_Data_Table_Q4_2017.pdf) Highways England explained that it was serious about tackling cases of evasion and used effective penalty and recovery processes.

5. Highways England withheld the information for the first request citing the exemptions at section 36(2)(c) – prejudice to the conduct of public affairs and section 31(1)(d) - prejudice the assessment or collection of any tax or duty.
6. The complainant requested an internal review on 13 July 2018. He disputed that disclosure of the requested information would encourage non-payment of the tolls.
7. Highways England sent him the outcome of its internal review on 22 August. For request 1, it upheld the decision to withhold the information:

'It is evidenced that foreign compliance is improving. I believe there is a risk that disclosing details of the number of foreign registered vehicle that have not paid the road user charge may reverse that trend and encourage further non-compliance by both UK and non-UK registered vehicles.'

8. For request 2, Highways England stated that it had already provided a link to the requested information and believed that the information answered the request.

Scope of the case

9. On 21 June 2018 the complainant wrote to the Commissioner and after the internal review had been completed the case was accepted on 22 August 2018. The complainant wished to continue the complaint about the response to the first request.
10. In its submissions to the Commissioner, Highways England confirmed that it was relying on both sections 36(2)(c) and 31(1)(d).
11. The Commissioner therefore considers the focus of the investigation to be whether Highways England was entitled to rely upon the exemptions at section 36 and 31 to withhold the information for the first request.
12. The Commissioner will first consider if section 36(2)(c) has been cited correctly by Highways England and will only go on to consider section 31 if she considers that Highways England was not entitled to rely upon section 36.

Reasons for decision

Section 36 – prejudice to the conduct of public affairs

13. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –
- (b) 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 purpose of deliberation, or
 - (c) would otherwise prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs.
14. As section 36(2)(c) is worded specifically as “would otherwise prejudice”, it is the Commissioner’s opinion that if a public authority is claiming reliance on section 36(2)(c) of the FOIA the prejudice claimed must be different to that which would fall in section 36(2)(b)(i) and (ii).
15. The Commissioner considers section 36(2)(c) of the FOIA is concerned with the effects of making the information public. It can refer to an adverse effect on the public authority’s ability to offer an effective public service or to meet its wider objectives or purpose. She considers the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example, the diversion of resources managing the effect of disclosure.
16. Highways England confirmed that all information relevant to this case and the application of the exemption was considered by the qualified person, John Hayes MP, the Parliamentary Under Secretary of State for the Department for Transport. The qualified person authorised the use of section 36(2)(c) of the FOIA in this case: *‘in his reasonable opinion, the disclosure of the information could prejudice the effective conduct of public affairs; and that section 36(2)(c) of FOIA was therefore engaged.’*
17. The exemption can be engaged on the basis that the prejudice to public affairs either ‘would’ or would be ‘likely’ to occur. In this case Highways England applied the exemption on the basis that disclosing the information in question would be ‘likely’ to prejudice the conduct of public affairs. This is taken to mean that the qualified person considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk, even if that risk is less than 50%.

18. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
19. Highways England has explained that releasing this information would encourage non-payment of the charge by non-UK drivers:
 - It is evidenced that foreign compliance is improving...there is a risk that disclosing details of the number of foreign registered vehicles that have not paid the road user charge may reverse that trend and encourage further non-compliance by both UK and non-UK registered vehicles.
 - Increased non-compliance may strongly inhibit the ability of Highways England, and companies working on its behalf, to recover debt due to the Department for Transport.
20. Having viewed the withheld information, the Commissioner is satisfied that it is reasonable for the qualified person to have concerns over the release of this information. The Commissioner is also satisfied that the qualified person's opinion is a reasonable opinion to hold.
21. For these reasons, the Commissioner is satisfied that section 36(2)(c) of the FOIA applies in this case. She will therefore now go on to consider the public interest test.

Public interest test

22. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case the harm that disclosing the information would cause is greater than the public interest in its disclosure.
23. The Commissioner's approach to the competing public interest arguments in this case draws 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)¹. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an

¹ EA/2006/0011; EA/2006/0013

important piece of evidence in her assessment of the balance of the public interest.

24. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the information now under consideration, and therefore will give some weight to that opinion, she will reach her own view on the severity, extent and frequency of the inhibitions claimed.

Public interest arguments in favour of disclosure

25. The complainant has argued that releasing information on non-payment by foreign drivers would encourage payment as Highways England uses foreign debt collection agencies to chase the debt. *'It is in the public interest of all those who use the crossings to know the extent of non-payment and what Highways England are doing to recover non-payment debts and how successful they have been in doing so.'*
26. Highways England stated that factors supporting disclosure included:
- That it might add value to information which has already been released
 - The desirability of citizens being confident that decisions are taken on the basis of the best available information
 - The response to new policy initiatives may improve
 - Public debate could be informed by disclosure

Public interest arguments in favour of maintaining the exemption

27. Highways England considered the following arguments to be in favour of maintaining the exemption:
- Releasing details of the number of foreign registered vehicles that have not paid the road user charge may encourage further non-compliance for vehicles registered overseas and at home
 - Disclosure may result in the ability of Highways England to collect the road user charge being adversely affected
 - Releasing data of the monies collected by debt agencies in Europe may encourage further non-compliance for vehicles registered overseas
 - Increased non-compliance may strongly inhibit the ability of Highways England to recover debt. Collection is in the public interest as it helps to reduce congestion by managing demand for

the crossing and income collected from the charge is used to fund transport improvements.

- Overall initial compliance with the scheme is good but that may fall following disclosure
 - The non-disclosure of this information has helped Dart Charge to improve foreign compliance
 - Diversion of resources to manage the effects of disclosure could place a significant burden on staff
28. Overall Highways England confirmed that it considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption

Balancing the public interest arguments

29. The Commissioner has considered both the complainant's and Highways England's public interest arguments.
30. The Commissioner accepts that there are public interest arguments in favour of disclosure. There is a public interest in openness and transparency and in understanding more clearly how many foreign registered vehicles have not paid the tolls.
31. However, the Commissioner notes that considerable information has already been provided to the complainant including the link to the Dart Charge Data Table (see paragraph 4 above) which demonstrates overall compliance (for UK-registered and foreign-registered vehicles) by percentage.
32. The Commissioner considers that there is a significant and stronger public interest in maintaining and improving the level of compliance and accepts that Highways England has concerns that disclosure of the requested information would have an adverse effect on this. There is a greater public interest in allowing Highways England to tackle cases of evasion effectively to ensure that overall compliance with the toll payments are maintained.
33. In light of the above the Commissioner finds that Highways England is entitled to withhold the information to which it applied section 36(2)(c). As the Commissioner finds that Highways England is entitled to rely on section 36(2)(c) she has not gone on to consider Section 31(1)(d).

Right of appeal

34. 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

35. 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.
36. 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
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