

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

Date: 20 April 2016

Public Authority: Merseytravel

Address: PO Box 1976
Liverpool
L69 3HN

Decision (including any steps ordered)

1. The complainant has requested information relating to Liverpool tunnel tolls. Merseytravel refused the request, citing the exemption for prejudice to the effective conduct of public affairs (36(2)(b)(i) and section 36(2)(b)(ii) of the FOIA).
2. The Commissioner's decision is that Merseytravel:
 - was the appropriate public authority to handle the request, that it correctly handled the request under the FOIA and complied with section 1 of the FOIA;
 - that it failed to demonstrate that the exemptions in section 36(2)(b)(i) and 36(2)(b)(ii) were engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant, excluding the names and contact details of junior members of staff.
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 20 September 2015 , the complainant wrote to Merseytravel and requested information in the following terms:

"1. A list of all contacts, with the Government or Government officials after January 2015 which have included any mention or discussion of Tunnel tolls or toll powers.

2. A copy of any documents (i.e. emails received or sent to the Government or Government officials and any agendas or minutes of any meetings with the Government or Government officials) after January 2015, which include any mention of the tolls."

6. Merseytravel responded on 16 October 2015 and confirmed that it was withholding all the requested information under the exemption for prejudice to the effective conduct of public affairs, specifically section 36(2)(b)(i) and section 36(2)(b)(ii) of the FOIA.
7. Following an internal review Merseytravel wrote to the complainant on 18 November 2015. It disclosed a copy of a letter which had been sent to the Chancellor of the Exchequer in relation to the subject of the request and stated that, in relation to the remaining withheld information, it was maintaining its position.

Scope of the case

8. On 7 December 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that his investigation would consider whether Merseytravel was the relevant authority for the purposes of the request, whether the request should have been handled under the EIR and whether the information had been correctly withheld.
10. During the course of the Commissioner's investigation Merseytravel indicated that some of the withheld information contained the names and contact details of junior members of staff. The complainant has confirmed that they are not interested in obtaining this information so the Commissioner has excluded it from the request and from the scope of this decision notice.

Reasons for decision

The relevant public authority

11. The complainant has argued that, as their request sought information held by the Liverpool City Region Combined Authority (the "Combined Authority") it was inappropriate for the request to be handled by Merseytravel.
12. Merseytravel has explained that it is a statutory body established under the Transport Act 1968 established under the Transport Act 1968. It was previously known as the Merseyside Passenger Transport Executive and its function is as a Passenger Transport Executive. Merseytravel constitutes a public authority for the purposes of the FOIA.
13. Merseytravel has confirmed that it was appointed as the Executive Body for the Combined Authority under the Order for the purposes of Part 5 of the Local Transport Act 2008 and Part 6 of the Local Democracy, Economic Development and Construction Act 2009. Merseytravel advises the Combined Authority on professional strategic and operational transport matters, operates and manages the Mersey Tunnels on behalf of the Combined Authority and also is the transport delivery arm for the Liverpool City Region, in addition to having its own distinct legal powers and duties.
14. Merseytravel clarified to the Commissioner that the Combined Authority has no staff and that its statutory officers are appointed from the Constituent Councils of the Combined Authority (Halton, Knowsley, Liverpool, St Helens, Sefton and Wirral) and Merseytravel.
15. Merseytravel confirmed that the request for information in question was received by an FOI Officer of Merseytravel on 20 September 2015 and it was therefore treated as a Freedom of Information request to Merseytravel as a public body. Merseytravel explained that, as it is the executive arm of the Combined Authority, and also employs and fulfils the role of the Section 73 Officer of the Combined Authority, it does and always will hold information relating to the Combined Authority.
16. The Commissioner notes that the complainant directed their request to a Merseytravel email address, however, Merseytravel confirmed that the Combined Authority does not have a dedicated domain name nor does it have its own IT systems. Merseytravel explained that requests for information held by the Combined Authority are normally submitted to one of the constituent authorities or to Merseytravel itself. It confirmed that the only body of the Combined Authority that would hold the requested information is Merseytravel who, as the executive body,

operate and maintain the Mersey Tunnel as defined by the Combined Authority's Constitution¹.

17. Merseytravel has explicitly confirmed to the Commissioner that, even if the request were handled by a different constituent element of the Combined Authority, the request response would have been the same and that all relevant information falling within the scope of the request would have been captured.
18. The Commissioner notes that the complainant explicitly stated in their internal review request that they were seeking information held by the Combined Authority as a public authority in its own right. However, in light of the explanations provided he is satisfied that, for practical and statutory purposes that it was appropriate for the request to be handled by Merseytravel. He considers that Merseytravel might have done a better job of explaining the relevant facts to the complainant, however, the Commissioner has concluded that Merseytravel had responsibility for handling the request for information.

Information Access Regime

19. Merseytravel 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. The complainant directed the Commissioner to an Information Tribunal decision (EA/2009/0001) which they considered provided support for their view².
20. Having viewed the relevant decision, the Commissioner notes that this relates to a request for information about tolling in respect of the prospective building of a new bridge.
21. 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

¹ The Commissioner has had sight of the Combined Authority's constitution and can confirm that this is the case.

²

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i319/MTUA%20v%20IC%20&%20HBC%20%280001%29%20Decision%2023-06-09%20%28w%29.pdf>

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);"

22. With reference to the cited Information Tribunal decision, the Commissioner considers that information relating to the building of a bridge and to tolling is information on a measure (regulation 2(c)) which is likely to affect the elements of the environment referred to in Regulation 2(1)(a) EIR, in particular the land and the landscape. Building a new bridge inevitably changes the landscape and the proposed bridge identified in the request which is the subject of the Tribunal decision would also affect the use of land as it is intended to divert traffic away from the existing bridge and onto the new one.
23. Having considered the request which is the focus of this decision notice and having viewed the withheld information, the Commissioner does not consider that this constitutes or relates to measures which are likely to impact upon the matters identified in regulation 2(a) or 2(b). Whilst he accepts that the definition of environmental information has been widely drawn, he considers that information relating to tolling sits at several removes from the matters identified in regulation 2(1). As he considers tolling information in isolation does not constitute a measure as defined within regulation 2(1)(c), it follows that he also does not consider that it fall within the scope of regulation 2(1)(e).

24. In conclusion the Commissioner is satisfied that the requested information does not constitute environmental information as defined by the EIR and that Merseytravel correctly dealt with the request under the FOIA.

Section 36 – prejudice to the effective conduct of public affairs

25. Merseytravel has withheld the information identified in parts 1 and 2 of the request under section 36(2)(b)(i) and section 36(2)(b)(ii): which state:

"36(2) 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-

(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 purposes of deliberation..."

Reasonableness and Inhibition

26. To engage section 36, the qualified person must give an opinion that the prejudice or inhibition specified in the subsections cited would or would be likely to occur. In addition, the opinion must be "reasonable".
27. In such cases, the Commissioner is primarily concerned with the reasonableness of the substantive opinion and is not explicitly required to assess the quality of the reasoning process that lay behind it. However, the content of the opinion or the submission made to support it will often be relevant to the Commissioner's assessment of whether the opinion is reasonable. Reasonableness, therefore, is not something to be considered in isolation but is bound up with the context and detail of the grounds for engaging the exemption.
28. The Commissioner's guidance states:

"Section 36 depends crucially on the qualified person's exercise of discretion in reaching their opinion. This means that they must consider the circumstances of the particular case before forming an opinion. We recognise that public authorities will tend to develop a general approach to, or policy on, releasing certain types of information, but this must not limit the qualified person's discretion. An opinion formed purely on the basis of a 'blanket ruling' may not be reasonable if it does not take account of the circumstances at the time of the request. The qualified

person should consider the facts in each case, weigh the relevant factors and ignore irrelevant factors in order to reach their opinion.”³

29. In relation to the application of section 36(2)(b)(i) and 36(2)(b)(ii), the Commissioner considers that the qualified person's opinion should be about whether the defined inhibition would or would be likely to occur. 'Would prejudice' means that it is more likely than not (that is, a more than 50% chance) that prejudice would occur. 'Would be likely' is a lower standard; it means that the chance of prejudice must still be significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur
30. Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority.
31. In this case the qualified person is the Merseytravel Board. The qualified person has stated that disclosure of the information "could" inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. The Commissioner understands that Merseytravel is, therefore, relying upon the lower threshold of likelihood, namely that disclosure *would be likely to* result in the defined inhibition.
32. Where an authority is relying upon more than one subsection of section 36(2), as is the case here, the Commissioner considers that public authorities should be clear about which of them the qualified person's opinion relates to. If it is not evident how the provision of advice or the exchange of views would be inhibited, it may be harder to find that the opinion was a reasonable one.
33. In determining whether the opinion in this case is reasonable, the Commissioner has referred to Merseytravel's initial response to the

³ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

request, its internal review response, its record of the qualified person's opinion and its submissions to his office.

34. Merseytravel's submissions to the Commissioner in respect of section 36 are confined to the record of the qualified person's opinion which, in relation to the application of section 36(2)(b)(i) states: *"Disclosure of the information at this stage of the negotiations could inhibit the free and frank provision of advice between all parties and so prejudice the ongoing negotiations. In habiting the provision of advice in this way could impair the quality of decision making by all parties involved."*
35. The qualified person's opinion, in relation to the application of section 36(2)(b)(ii) states: *"Disclosure of the information at this stage of the negotiations could inhibit the free and frank exchange of views between all parties and so prejudice the ongoing negotiations. Inhibiting the provision of the free and frank exchange of views could impair the quality of decision making by all parties involved."*
36. In its initial refusal notice Merseytravel did not cite the specific grounds for engaging the exemptions but simply stated that disclosure would be likely to result in the inhibition identified. In setting out the public interest grounds for maintaining the exemption Merseytravel stated that it was *"...important that a safe space is preserved in order that all parties to the negotiations can express views and deliberate issues. This ensures that all parties are able to fully consider issues, take advice and form opinions in an informed manner. Disclosure of the information at the present time negotiations could jeopardise the ongoing negotiations with Government..."*
37. Merseytravel's internal review does not contain any reference to the grounds for the application of section 36.
38. Having considered the available evidence the Commissioner first notes that the qualified person's opinion is almost entirely generic, essentially defining the reasons for withholding the information using the terms of the exemption. Whilst some reference is made to the context of negotiations and the timing of the request no connection is made between these broad concepts and the specific withheld information. This raises concerns that the information is being sought to be withheld on a general, blanket basis.
39. In relation to the "reasonableness" of the qualified person's opinion in the context of this exemption, the Commissioner's guidance states:
"The ICO is primarily concerned with the reasonableness of the substantive opinion and is not explicitly required to assess the quality of the reasoning process that lay behind it. However, the content of the

*opinion or the submission made to support it will often be relevant to the ICO's assessment of whether the opinion is reasonable. It is in the public authority's interests to provide the ICO with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that we may find that the opinion is not reasonable.*⁴

40. As noted above, where it is apparent that information is being withheld on a blanket basis with no regard to the specific factors which would result in inhibition, it is more likely that the qualified person has not properly considered the relevant facts and that the resulting opinion is not, therefore, reasonable. In this case, the Commissioner considers that Merseytravel has failed to provide sufficient details of the alleged prejudice and failed to demonstrate the likelihood of the inhibition occurring as a result of disclosure. It follows, therefore, that the qualified person's opinion that the exemption is engaged is not properly supported and that it is, therefore, not a reasonable opinion.
41. The Commissioner recognises that, whilst decision-making is in train and conclusions have not been reached, an argument can be made that a safe space is needed for public officials to consider options and negotiate outcomes. However, he considers that, in this case, Merseytravel has not demonstrated that these conditions apply or explained how disclosure of the specific information would be likely to result in the inhibition described in section 36(2)(b)(i) and 36(2)(b)(ii).
42. The Commissioner does not therefore consider that the opinion of the qualified person is a reasonable one as it does not appear to be based upon the specific information which is being withheld.
43. The Commissioner does not therefore consider that section 36(2)(b)(i) or section 36(2)(b)(ii) has been applied correctly in this case.

⁴ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

Right of appeal

44. 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

45. 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.
46. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF