

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

**Decision notice**

**Date:** 10 August 2017

**Public Authority:** Highways England  
**Address:** Bridge House  
1 Walnut Tree Close  
Guildford GU1 4LZ

**Decision (including any steps ordered)**

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1. The complainant has requested information from Highways England (HE) about Special Order movements to Dragon Liquefied Natural Gas (LNG) terminal in 2016. HE withheld the information it holds, citing the exemptions under section 41 (information provided in confidence) and sections 43(1) and 43(2) (commercial interests) of the FOIA.
2. The Commissioner has decided that the exemptions under section 41, 43(1) and 43(2) are not engaged.
3. The Commissioner requires HE to take the following step to ensure compliance with the legislation:
  - Release the requested information that it has withheld, after redacting individuals' names in line with section 40(2) of the FOIA (third person personal data).
4. The public authority must take this step 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 21 September 2016, the complainant wrote to HE and requested information in the following terms:

*"...our client's request is for all information including any correspondence, emails, notes of meetings or conversations held by Highways England relating to any VR1 or Special Order movements to Dragon LNG in 2016."*

6. HE responded on 12 October 2016. It withheld the requested information under sections 41(1)(a) and (b) and 43(1) and 43(2) of the FOIA and provided its arguments for the public interest favouring maintaining the section 43 exemption.
7. Following an internal review HE wrote to the complainant on 21 November 2016. It referred to section 41 and section 43 in this review but confirmed only that it considered section 43(1) and 43(2) had been correctly applied.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 2 February 2017 to complain about the way his request for information had been handled.
9. In its internal review to the complainant, HE confirmed only that it considered section 43 was engaged. However, its submission to the Commissioner, such as it is, makes reference to sections 41(1)(a) and (b) and section 43(1) and 43(2). The Commissioner's investigation has therefore focussed on HE's application of these exemptions to the withheld information.

## **Reasons for decision**

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10. By way of background information, the complainant has referred to a scheme that HE administers on behalf of the Secretary of State for Transport. The scheme is for authorisations (known as Special Orders and VR1s) for the movement of abnormal loads on roads in Britain.

11. The complainant has told the Commissioner that the Department for Transport (DfT) has in place a 'water preferred policy'. He says that, as the name suggests, the intention of the policy is to avoid road transport of large, abnormal loads as far as possible and to use alternative methods of transportation, such as by water. The complainant is acting on behalf of an organisation that operates a vessel that makes movements by water.
12. According to the complainant, applying the policy has obvious benefits for the environment and road users by diverting movement from busy roads to waterways wherever possible.
13. The complainant says that, in the past, the Highways Agency (HE's statutory predecessor) has provided information about applications for Special Orders in response to FOI requests and generally. This provided some reassurance to the public that the statutory scheme and the 'water preferred' policy were being administered properly.
14. In his complaint to the Commissioner, the complainant has also put forward comprehensive arguments as to why he considers sections 41 and 43 cannot be applied to the information he has requested.
15. The complainant's request concerns Special Order movements from the Port of Dover to the Dragon LNG terminal. It is for information such as correspondence, emails and notes of meetings or conversations that relate to Special Order movements to this terminal. The complainant appears to be concerned that an abnormal load or loads was being moved to the Dragon LNG terminal by road, when it/they could have been moved by water in line with DfT's 'water preferred policy'.

### **Section 43 – commercial interests**

16. Section 43(1) says that information is exempt if it constitutes a trade secret.
17. The term 'trade secret' is not defined in the Act. In her guidance, the Commissioner advises that perhaps the most important thing to grasp is that the term can have a fairly wide meaning. It covers not only secret formulae or recipes, but can also extend to such matters as names of customers and the goods they buy, or a company's pricing structure, if these are not generally known and are the source of a trading advantage.
18. The trade secret exemption within section 43 is a class exemption which means that if information is a trade secret it is exempt, whether or not harm results from its disclosure.

19. HE's submission to the Commissioner does not offer any explanation as to why it considers the withheld information is a trade secret and the Commissioner is therefore not persuaded that section 43(1) can be applied to the requested information.
20. Section 43(2) says that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Trade secrets are one example of commercial interests but the concept is far wider. Commercial interest relates to a person's ability to participate competitively in a commercial activity ie the purchase and sale of goods or services.
21. In order for the exemption to be engaged HE would need to demonstrate that disclosing the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties. Section 43(2) is a qualified exemption and is therefore subject to the public interest test.
22. HE has confirmed to the complainant that it holds information falling within the scope of his request. It has provided the information to the Commissioner and she has reviewed it. It comprises separate email exchanges between HE, and two private companies: Dragon LNG and one other which the Commissioner understands to be the haulage company concerned. The information also includes exchanges between those two companies, which the haulage company then forwarded to HE, and one attachment. A small amount of the information is broad financial information. The Commissioner is satisfied that the majority of the withheld information relates to a commercial activity and falls within the scope of the exemption.

*Likelihood of prejudice occurring*

23. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; ie either prejudice 'would' occur or prejudice 'would be likely to' occur.
24. With regard to 'would be likely to prejudice', the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
25. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*

(EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

26. In its internal review to the complainant, HE said that "*releasing the information would be detrimental to the business interests of the haulage company*". The Commissioner understands from this that HE considers that disclosure *would* prejudice a particular third party's commercial interests. It therefore appears to the Commissioner that HE is relying on the second limb of the prejudice test, which places a stronger burden on the authority to demonstrate engagement.

#### *The nature of the prejudice*

27. HE's brief submission to the Commissioner merely refers to the public interest arguments it gave to the complainant, and gives one additional argument for maintaining the exemptions. Other than the reference to the haulage company above, neither HE's response to the complainant nor its internal review provide further explanation as to what the nature of any prejudice might be.
28. HE's submission makes no reference to any specific elements of the withheld information; nor does it identify any specific prejudice to commercial interests which disclosure would cause. No link is made between disclosure of discrete elements of the information and explicit, demonstrable prejudicial effects.
29. The Commissioner is left with the impression that HE has sought to withhold the information on an entirely general basis with no regard for the details of the information or the evidential threshold required to demonstrate that 43(1) and/or 43(2) are engaged.
30. HE's submission to the Commissioner was due on 27 June 2017 and it did not arrive until 25 July 2017 ie HE had an additional four weeks in which to prepare a submission: eight weeks in total. The Commissioner considers that HE therefore had ample opportunity to make a satisfactory submission in relation to its position and that it was made aware of the scope and depth of arguments needed to support its application of this exemption.
31. The Commissioner further considers that, where a public authority has failed to provide adequate submissions, it is not her responsibility to generate arguments on its behalf or to facilitate its application of an exemption. She considers that the duty to provide information under the FOIA or, in cases where information is being withheld, to show that an exemption is engaged, rests with the public authority in receipt of the request.

32. In this case, the Commissioner finds that HE has failed to demonstrate that disclosing the information would prejudice a commercial interest and that sections 43(1) and 43(2) are not, therefore, engaged.
33. As she has concluded that these exemptions are not engaged the Commissioner has not gone on to consider the public interest test with regard to section 43(2).

#### **Section 41 – information provided in confidence**

34. Section 41(1) of the FOIA says that information is exempt from disclosure if (a) it was provided to a public authority by another person and (b) disclosing it would be an 'actionable' breach of confidence (ie the aggrieved party would have the right to take the authority to court as a result of the disclosure and the court action would be likely to succeed). Although section 41 is an absolute exemption and is therefore not subject to a public interest test under the FOIA, the common law duty of confidence contains an inherent public interest test.

*41(1)(a) - Was the information provided by another person?*

35. Some of the withheld information – the majority of which is email exchanges - has been created by HE itself; the remainder has been 'given' to HE by Dragon LNG and the haulage company. The Commissioner is satisfied that the information given to HE by the two companies – directly and indirectly – is information provided by another person.
36. In her guidance on section 41, the Commissioner advises that if disclosing the information a public authority created would reveal the content of the information it obtained from the other person, then the exemption may also cover the material it generated itself. Having reviewed the withheld information, the Commissioner does not consider that the information HE created reveals the content of the information obtained from Dragon LNG and the haulage company.

*41(1)(b) – Would disclosing the information be an 'actionable' breach of confidence?*

37. When determining if disclosure would constitute a breach of confidence, a public authority will usually need to consider:
  - whether the information has the quality of confidence
  - whether it was imparted in circumstances importing an obligation of confidence; and

- whether disclosure would be an unauthorised use of the information to the detriment of the confider.

38. When determining if an action for breach of confidence would be likely to succeed, the authority will need to consider whether there would be a public interest defence to the disclosure.

*Does the information have the necessary quality of confidence?*

39. Information will have the necessary quality of confidence if:

- it is more than trivial; and
- not otherwise accessible.

40. The Commissioner is satisfied that the withheld information is more than trivial. This is because, as part of its submission, HE has provided the Commissioner with additional email correspondence it received from the two companies involved. In one email dated 4 October 2016, the haulage company confirms that all details are commercially sensitive and that it is bound by a non-disclosure agreement from Dragon LNG and another company - the haulage company's client. In an email dated 6 October 2016 Dragon LNG confirms that the information it has given to HE in relation to delivery of particular equipment and associated costs is commercially sensitive and that HE should deal with the information as Commercial in Confidence.

41. With regarding to the information's accessibility, HE's submission does not refer to this. However, given the email correspondence above, the Commissioner assumes that the information is not otherwise accessible; that is, that it is not already in the public domain.

42. On this occasion, the Commissioner is prepared to accept that the information HE is withholding that was given to it by another person, has the necessary quality of confidence.

*Was the information imparted in circumstances importing an obligation of confidence?*

43. The Commissioners' guidance says that there are essentially two circumstances in which an obligation of confidence may apply:

- The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example the wording of a letter); or

- The restrictions on use are obvious or implicit from the circumstances, for example information between a client in therapy and their counsellor.
44. In this case, the Commissioner is prepared to accept the first of these circumstances applies; that is that Dragon LNG and the haulage company have, in the October emails above, attached conditions to subsequent use or disclosure of the information they have provided.
45. The Commissioner has noted an argument that the complainant has put forward; namely that the companies concerned would not have a reasonable expectation of confidence because of the Highways Agency's previous practice of publishing some information in respect of all Special Order applications. However, since the Highways Agency has been superseded by HE the Commissioner is prepared to accept that the information given to HE by another person was imparted in circumstances that imported an obligation of confidence.

*Would disclosure be an unauthorised use of the information to the detriment of the confider?*

46. In her section 41 guidance, the Commissioner advises that if the requested information is commercial in nature then disclosure will only constitute a breach of confidence if it would have a detrimental impact on the confider.
47. It therefore follows that, for commercial information, the authority will be expected to put forward an explicit case for detriment. Usually the detriment to the confider in such cases will be a detriment to the confider's commercial interests.
48. HE has put forward no such case. It has provided the Commissioner only with public interest arguments. One of the arguments put forward for non-disclosure is that the market the companies concerned are in is a competitive market in which they are often bidding for the same jobs as other hauliers.
49. The Commissioner has reviewed the withheld information that is associated specifically with costs. One element of this specific information concerns the likely cost of transporting the abnormal load by water and another element concerns the cost of the particular unit being transported.



50. The Commissioner has noted that in an email from Dragon LNG to the haulage company, dated 13 July 2016, the representative gives the broad figure for the cost of the unit being transported and says "I do not want to give specific commercial information". The Commissioner interprets this as confirmation that specific commercial information has therefore not been provided and is not included in the withheld information. Such information might be the specific cost of the unit or the remuneration either of the third party organisations concerned is to receive for transportation of the abnormal. Disclosing such information could have a detrimental impact on a private company's commercial interests as it would make public particular financial information that would be of value to that company's competitors. This could cause financial loss to the company in the future, if, for example it was to be outbid by a competitor as result of the disclosure.
51. Since information of this nature does not seem to be included in the withheld information, it does not appear to the Commissioner that disclosing any of the information that has been withheld would cause a detriment to Dragon LNG or the haulage company or its client. Furthermore, as above, HE has not put forward a convincing case – indeed, any case, for such detriment. The Commissioner has noted that, in her analysis of HE's application of section 43, HE did not demonstrate that disclosing the information would prejudice the commercial interests of either organisation concerned.
52. The complainant has also told the Commissioner that there has never been any suggestion of detriment to particular parties in the past, despite the Highways Agency's previous practice of publishing information about Special Orders.
53. The Commissioner has therefore not been persuaded that disclosing the information that has been withheld would be an actionable breach of confidence. While the information has a quality of confidence, and has been imparted in circumstances importing an obligation of confidence, scrutiny of the information in question does not lead the Commissioner to believe that the organisations concerned would be subject to detriment if it was to be disclosed.
54. Whilst the Commissioner acknowledges that, since the FOIA came into force, third parties should be aware that any information provided to public authorities can be subject to disclosure, she accepts that in certain cases information should be protected by confidentiality. Clearly, this is the provision which the exemption contained within section 41 provides.

55. However, the Commissioner notes again that HE's submission in relation to potential detriment was completely inadequate. As in her analysis of its application of section 43, HE has not shown that disclosing the information would result in prejudice to the parties concerned. In the absence of any additional detail provided in support of the ascribed detriment in the context of section 41, the Commissioner considers that it has not been shown that disclosure would result in detriment to the confiders. She has, therefore, concluded that section 41 is not engaged in this case.

## Right of appeal

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56. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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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**Information Commissioner's Office**  
**Wycliffe House**  
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