

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2018

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

Decision (including any steps ordered)

1. The complainant requested information on the costs claimed against drivers responsible for damaging road infrastructure by one of Highways England's contractors. Highways England (HE) refused to comply with the request under section 14(1) on the basis that it was vexatious.
2. The Commissioner's decision is that HE is entitled to rely on section 14(1) to refuse to comply with the request.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 5 December 2017, the complainant wrote to Highways England in connection with a particular incident and requested information in the following terms:

"In respect of '1' 04/12/2017 [an issue raised in an earlier piece of correspondence] , I have attached a copy of a statement made on behalf of Highways England and refer you to paragraph 24:

In terms of the operatives' time sheets every month every person completes such time sheets which we have to then send to Highways England

A. Is the above statement true?

the above statement was in respect of a [the name of a contractor] matter, presented to Basingstoke County Court in the name of Highways England against a [named individual]. The incident, our ref [reference deleted] occurred less than 2 weeks after the subject incident [reference for an incident in 2014 deleted].

You advise:

'the information you have been previously advised on is correct'

By whom; are referring to that from Highways England or that from [named contractor]? I suspect the latter but they both cannot be correct and this is my issue – no matter how you look at this, someone is not being forthright and creating an environment in which I am forced to press for information to ascertain who is being candid.

B. please explain the contradictions.

Dealing with this specific incident it occurred in Area 9 on [exact date deleted] 2014 at 03:20 i.e. 5 months after the contract commenced. Let me try and approach this in a manner that will assist us both to understand what is held, what is correct:

C. What do you hold about this incident, what information has [the named contractor] sent you?

You may need operatives names, VRMs etc. If so, please say.

Can I also try to simplify the issues;

D. on [exact date deleted] 2014, what:

- i. was the defined cost of an AIW [Asset Incident Watchman]
- ii. was the TP [third party] claims overhead
 - a) 25.38%?
- iii. was the fee uplift to Highways England
- iv. were Highways England charged for an AIW
- v. should a TP be charged?

On [exact date deleted] 2017, I sent the electronic print of claim, it is apparent Highways England possess a lot of information and [a named employee of the contractor] has stated to a court, in the name of Highway England, that the defined costs and TP Claims Overhead are set / agreed with Highways England.

I have also referred to Annex 19 reports. These apply to the ASC which commenced in Area 9 01/07/2014. The contractor is required to provide a report detailing for each claim:

- the amount claimed from third parties,
- a calculation of Defined Cost (DC) and resulting Third Party Claims Overhead (TPCO)
- the amount recovered,
- an explanation of any differences between any of these amounts,
- and explanation of why any loss greater than Defined Cost has been claimed.

It is evident you hold not just the claim value but also explanation for variances.

Based upon the information in our possess, the Defined cost of an AIW was about £23, the uplift 7.38% (possibly 6.5% at the date of incidents). But what is important is the uplift and on 08/11/2017, [a named employee of the contractor] stated to a Court, on behalf of England Highways that in Area 9 this is 25.38%. a ¼ (25%) of £23 is about £6 so the hourly rate to a TP should be £23+£6 = £29 / hour.

For every TP claim, about 3,300 / annum Highways England should have bene receiving report stating that the calculation (and likely amount recovered) was greater than defined cost has bene claimed.

E. Were Highways England told that [the named contractor] were not using the defined cost process, that a 'loss greater than Defined Cost has been claimed' - on every incident!

Highways England were apparently told that an AIW was charged to them at £70.32 / hour (source – HE General Counsel). But this is false and why it was accepted as accurate of concern.

F. please could you provide an example of an Annex 19 report, ideally for this matter (reference for an incident in 2014 deleted)

Whilst it is evident 1,000's of Third Parties have been overcharged since (at least) 01/07/2014 by use of 1153 and the latest process, is it the case that Highways England have been duped; that [the named contractor] have been misrepresenting recoveries to ensure that their monthly sum payment was not adversely affected?

I have made mention of seeing an FoIA in which it is stated Highways England receive cost /recovery information, on below threshold

matters. That if the recovery exceeds '£x' the amount the contractor receives by way of lumpsum payment is reduced. It was also said this had never been achieved – something is very wrong!

G. is this (or similar) the process in place; does the amount recovered have an effect on lumpsum payments?

[The named contractor] were claiming using 1153 resulting in a charge of £4700 minimum for a cost that should likely not have exceeded £1000. Either the threshold is ludicrously / impossibly high or something is amiss – how could [the named contractor] not have exceeded the recovery threshold?

I have never suggested or sought information [that the named contractor] collect 'on behalf of Highways England', I am seeking the information [the named contractor] state they send you, that Highways England state they receive."

5. Highways England responded on 13 December 2017. It stated that the request was being refused under section 14(1) on the basis that it was vexatious.
6. The complainant requested an internal review on 18 December 2017 but as Highways England had still not conducted a review by March 2018 the Commissioner accepted the case as being eligible for investigation. When contacted by the Commissioner, Highways England maintained its position that the request was vexatious.

Scope of the case

7. The complainant first contacted the Commissioner on 19 December 2017 at which time he had not exhausted HE's internal review process. It was therefore only after sufficient time had been given to HE to conduct such a review that the Commissioner accepted the case as being eligible for investigation.
8. The complainant has explained the background to the request and why, in his opinion, the request has a serious purpose and as such should not be regarded as vexatious.
9. The Commissioner considers that the matter to be decided is whether the request can be refused under section 14(1) on the basis that it is vexatious.

Reasons for decision

Section 14(1) – vexatious requests

10. Section 14(1) of the FOIA states that a public authority is not obliged to respond to a request for information if the request is vexatious.
11. The term 'vexatious' is not defined in the FOIA. The Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests. In short they include:
 - Abusive or aggressive language
 - Burden on the authority
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance
12. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
13. The Commissioner's guidance suggests that if a request is not patently vexatious the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
14. Where relevant, public authorities may also need to take into account wider factors such as the background and history of the request.
15. By way of background, the complainant has a professional relationship with HE as a claims adjuster, challenging claims brought by HE or its contractors against motorists responsible for damaging HE's infrastructure on the road network.
16. HE has provided the Commissioner with its arguments for relying on section 14 and supported these with an example of a separate piece of correspondence from the complainant, together with internal correspondence regarding the impact of the complainant's conduct and details of other requests made by him. In broad terms, HE's arguments are that the request has to be viewed in the context of the complainant's previous communications with HE. This includes the volume of requests and other correspondence received from him, the length and character of that correspondence, the fact that the

correspondence has been submitted through various channels within the organisation, and HE's belief that the complainant is either acting in concert with other individuals or is making requests using pseudonyms.

17. The Commissioner has also provided the complainant with the opportunity to provide arguments as to why his request serves a serious purpose which justifies his persistence in making requests to HE. The complainant represents insurance companies in challenging claims made against their customers by HE, or its contractors. It is the complainant's firm belief that one of HE's contractors overcharges for a particular element of the work required following a road accident, i.e. that cost of a 'watchmen' to attend an incident. A watchman provides the initial response to an incident and is responsible for making sure the carriageway is safe for other motorists and making an initial assessment of the damage caused. The complainant considers this overcharging is deliberate and that HE fails to ensure the contractor is invoicing drivers in accordance with the terms of their contract. The complainant argues that there is a very real public interest in ensuring the motoring public are not overcharged in this way and that, what he believes to be, deliberate wrongdoing on behalf of the contractor and, potentially, HE is exposed. Furthermore he argues that he has been forced to persist with making requests because HE have provided inaccurate responses to past requests.
18. The Commissioner will now consider these competing arguments in more detail.
19. Looking at the actual request of 5 December 2017 the Commissioner notes that it relates in part to an ongoing claim which the complainant is dealing with and that there is no intemperate language. Some elements of it may be considered argumentative and the points are not raised in the most concise manner which distracts from the focus of the correspondence. However the Commissioner finds that in isolation the request could not be considered vexatious.
20. HE has also provided the Commissioner with an additional piece of correspondence from the complainant. This has been provided as an example of the lengthy emails the complainant has sent HE in the past. It is in fact the complainant's request for an internal review of HE's decision to deem his request of 5 December 2017 vexatious. It is clearly therefore not the best example of previous correspondence from the complainant. The Commissioner notes that its tone is stronger than that used in the actual request, but this stops well short of being in any way abusive and the change in tone could be explained by the fact that it was written shortly after the complainant received HE's refusal notice. However the Commissioner does note that whilst the letter is only five pages long it is accompanied by eight appendices and in total runs to 33 pages. Having dealt with previous complaints from the complainant the

Commissioner does recognise that this is often the style of the complainant's correspondence with HE. The letters are disjointed and can go off at tangents. At some points there is a sense that his letters are a form of interrogation. The wealth of detail and length provided in those letters actually cloud the issues raised. The Commissioner recognises that the complainant's intention is to provide evidence in support of the points he wishes to make. However it is questionable whether it is reasonable to expect that HE staff would have the time to devote to properly read such lengthy correspondence.

21. Therefore if the request was seen as a continuation of this pattern of engaging with HE there is an argument that the impact on staff would be distressing and take up a disproportionate amount of their time. HE has provided the Commissioner with a spreadsheet listing 29 requests made by the complainant over the two year period leading up to the request of 5 December 2017. It is understood that since submitting that spreadsheet HE have identified a significant number of additional requests. The Commissioner considers that receiving such a number of requests of this character could become burdensome for the team responsible for dealing with them. The problem is compounded by the fact that, according to HE, the requests are made through a number of its business channels, making it difficult to keep track of his requests and coordinate responses. The burden is also made greater because the requests are primarily concerned with a very narrow topic, i.e. the cost charged by one particular contractor for watchmen to attend road accidents. This means that the same business areas within HE are likely to be involved in providing information to its FOI team on a regular basis.
22. The Commissioner appreciates that the relentless nature of these requests not only places a burden on HE but raises the potential for such requests to become distressing for those staff dealing with them. The Commissioner notes that in his letter seeking an internal review the complainant states that is his intention to seek the information on costs on every claim he is asked to review for his clients.
23. HE has provided the Commissioner with internal correspondence relating to the impact the complainant's conduct was having on one member of the team dealing with the complainant's claim adjustment cases. There is reference to the complainant having emailed that member of staff 58 times over a month and making up to six phone calls a day. Concerns are raised over the complainant's practice of recording phone calls and steps taken by the complainant which HE interprets as attempts to avoid allowing staff to identify who is making an incoming call, thereby preventing that member of staff from screening calls in order to manage their daily workload effectively. It is clear that the member of staff finds the complainant's conduct oppressive and distressing, even if this is not the complainant's intention.

24. There are however other factors that need to be considered when giving weight to the arguments presented above. The correspondence referred to is primarily concerned with ongoing cases which the complainant had with HE. It is understood that there were around fifteen such cases. HE has advised the Commissioner that normally it would not expect this his number of cases to generate that amount of correspondence during the entire life of such claims. Furthermore, although HE accept that an individual case may generate three or four emails, they are usually very short, asking one, or two simple questions. The Commissioner has also taken account of the fact that the individual was a senior member of staff and that they had been designated the complainant's single point of contact for at least some of the issues relating to claims which the complainant was dealing with. Nevertheless the Commissioner does accept that the complainant's request has to be seen in the context of his overall pattern of correspondence.
25. HE has also identified a number of other requests made by other individuals, or, it believes, by the complainant using pseudonyms on the same issues. HE has asked the Commissioner to include these when considering the volume of requests submitted. The Commissioner is prepared to take account of an additional eleven requests. These were made by the complainant's work colleague who the Commissioner is satisfied was acting in collaboration with the complainant. These additional requests were made between January 2016 and the date of the complainant's request.
26. HE has not provided sufficient evidence to fully convince the Commissioner that the other requests it referred to were either submitted by those acting in concert with the complainant, or by the complainant himself using pseudonyms. There are sixty of these requests altogether. They were, on the face of it, submitted from a total of eight individuals over the period between January 2016 and the date of the complainant's 5 December 2017 request. The Commissioner notes that they all seek information on the costs and related matters which interest the complainant. HE has provided examples of a number of these requests which were submitted through the WhatDoTheyKnow website. This website is public and there is the facility for anyone interested in the subject of a request to add comments. The Commissioner notes that some of the requests have been commented on by the complainant. The comments include the complainant's understanding of how HE's contracts work and on occasion suggestions on how the applicant may wish to rephrase a request in order to better target the information they seek. The fact that others have made requests for information similar to that which the complainant seeks does not in itself suggest the two parties are acting together. It could equally be argued that this simply reflects a wider interest in the issue. Therefore although there are some grounds for suspecting the complainant may be acting with others, the Commissioner is cautious of

giving much weight to arguments that the complainant is acting in concert with the other individuals referred to. The Commissioner is however satisfied that the complainant provides encouragement to others who have already made requests.

27. HE clearly suspect the complainant may be using pseudonyms, but has not submitted any evidence which supports its claims.
28. In respect of the forty requests (29 directly from the complainant plus 11 from his colleague) the complainant has argued that he has been forced to persist with making requests because he has no confidence in responses he receives from HE. For example one of his previous requests was for information which he believed one of HE's contractors would have supplied to it. That request was refused on the basis that the information was not held. Later the complainant discovered that it was most likely that this information was held. There is no suggestion that HE deliberately attempted to mislead the complainant, but the handling of that particular request is indicative of the fact that the size and complexity of HE's structure means it can find it difficult to determine exactly what information is held. Therefore the Commissioner accepts that to some extent HE's handling of previous requests may have undermined the complainant's confidence in past responses and that this has contributed to his pattern of request making.
29. The problem is compounded by the fact that the information which the complainant seeks relates to complex, multi-million pound contracts. The interpretation of such contracts can be difficult and there is some potential for confusion on the part of a lay person as to what information HE can be expected to hold and whether what has been provided in response to a request is accurate, or in accordance with the terms of those contracts.
30. In a separate argument, HE has drawn the Commissioner's attention to a website which it is understood the complainant runs. The website is very critical of HE but the criticism is not made in offensive terms. The fact that an individual has created such a website, in part to galvanise support for his belief that one of HE's contractors is overcharging, does not in itself make requests from that person vexatious. It does suggest the importance the complainant places on the issue and the time and resources he is therefore prepared to dedicate to pursuing those issues. It could therefore be seen as indicative of the persistence with which he may pursue the matter through making request.
31. The Commissioner also notes that despite the complainant's vigorous attempts to publicise his concerns it appears none of the major insurance companies, who would have a strong commercial incentive to challenge overcharging, have pursued this matter.

32. It is clear to the Commissioner that the complainant holds the very firm belief that one particular contractors systematically overcharges motorists when making claims for damage the driver caused to the road network. The Commissioner is also satisfied that the request of the 5 December 2017 has to be seen in the context of his campaign to collect information that would substantiate his concerns. That campaign not only includes making information requests but also challenging individual's insurance claims. Regardless of the complainant's motives, this has resulted in a large number of requests being made by him and a colleague which has placed a burden on HE and which the Commissioner is satisfied some staff now find distressing. The Commissioner has also considered whether there are alternative, more appropriate, routes which the complainant could use to make his case.
33. According to the complainant's submission to the Commissioner in January 2016 HE audited the contractor following the complainant reporting his concerns in October 2015. The audit found no significant issues. In June 2017 the complainant met with senior officers from HE and provided them with his evidence that the contractors was not invoicing his clients in accordance with the terms of the contract. The complainant has also reported his concerns to HE's external auditors during a telephone call lasting nearly an hour. When the Commissioner asked HE about these matters it advised her that the concerns had been properly considered and confirmed that a meeting had taken place. It is clear therefore that the complainant has been given the opportunity to challenge HE and its contractors through appropriate channels. This would mean the complainant had less justification for continuing to request information around the contractor's charging regime. However the Commissioner also recognises that the complainant's confidence in HE's ability to address his concerns may have been dented by its failure to provide reliable responses to his requests on at least one occasion in the past.
34. The Commissioner does not know the outcome of HE's investigations, or those of its auditors and the complainant may consider that HE's apparent inaction means that he had no choice but to continue with his campaign and that he therefore had valid grounds for making his request of 5 December 2017. Nevertheless it does appear that the complainant has been provided with the opportunity to pursue his concerns through appropriate and, what one would hope, were more constructive channels. Therefore despite the complainant's sincerity, the Commissioner considers that there is some weight to HE's argument that to continue to pursue the matter through his 5 December 2017 request renders that request vexatious.
35. It is also understood that the complainant has challenged some of the individual claims against his clients in the Small Claims Court. Despite the complainant's argument that such hearings do not provide adequate

time for him to fully present his concerns about overcharging, the Commissioner considers that the court would be an appropriate forum for dealing with these matters on a case by case basis.

36. The complainant has also advised the Commissioner that he is confident he has now amassed the evidence he needs to prove overcharging. It may be that the complainant was not in that position at the time he made his request last December, but certainly it appears he had gathered of great deal of evidence that he believed demonstrated there was substance to his allegations. There is nothing to indicate that HE are persuaded by this evidence. In such circumstances there must come a point where the party making the allegations presents his case to an appropriate independent authority rather than continuing to pursue the matter themselves.
37. In order to decide whether the request of 5 December 2017 was vexatious the Commissioner has weighed the seriousness of the matters which concern the complainant, i.e. the overcharging of motorists. In doing so she has recognised that if such overcharging was occurring it would impact on a many members of the motoring public. The Commissioner acknowledges the complainant has a genuine belief that there has been wrongdoing and believes that he has evidence to prove it. To date however this evidence does not appear to be accepted by HE despite him having been given the opportunity to make his case. In light of this the Commissioner has to consider the value in the complainant continuing to pursue his concerns through his request of 5 December 2017.
38. The Commissioner considers the volume and character of the requests made by the complainant to be burdensome on HE. When seen in the wider context of his other correspondence challenging the level of charges made by the contractor, the Commissioner accepts the potential for the request to cause distress to some of HE's staff. Therefore despite the fact that HE has contributed to the problem by the inaccuracy of at least one of its responses to a previous request, the Commissioner finds the request of the 5 December 2017 was vexatious. HE are entitled to rely on section 14(1) to refuse the request.

Right of appeal

39. 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

40. 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.
41. 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

Rob Mechan
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