

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 October 2020

Public Authority: Highways England
Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested information from Highways England ("HE") relating to the pain/gain share in Areas 9 and 10 from its period of operation to its termination and the reasons for termination. HE responded by citing section 14(2) of the FOIA, that it was a repeat request, and that it did not hold the information. During the Commissioner's investigation HE withdrew its reliance on section 14(2), instead citing section 12 of the FOIA.
2. The Commissioner's decision is that HE has correctly cited section 12 of the FOIA. However, she has concluded that HE has breached section 16 of the FOIA because it cited its reliance on section 12 too late to make any consideration of what advice and assistance it could provide either reasonable or practicable.
3. Despite this breach occurring, the Commissioner does not require any further action to be taken.

Request and response

4. On 5 February 2020 the complainant made the following request for information under the FOIA -

"I have (31/01/2020) been advised that the pain/gain share arrangement extended to Area 10 also. In a 2016 FoIA response [number included] Highways England stated:

- All contractors reconcile their costs annually against their recoveries.*
- If the proportion of traced incidents exceeds expectations an assessment would be made and the Lump Sum payment would be reduced.*
- However, no contractor has ever been in the position where the proportion of traced claims exceeds these assessments and there are various factors for this.*

The main one being not all damage linked to a driver is reported by the driver."

I was subsequently informed a pain/gain share is NOT used by Highways England for Green Claim repairs, that this was a direct result of a challenge by insurers who were not prepared to accept any pain/gain approach in their payment of claims for damage repairs from negligent drivers. Clearly, I was NOT acting under an incorrect premise. In fact, my understanding of the arrangement was correct as at the 2016 date of the FOI response [number included]),.

If your latest response is accurate, the pain/gain share ceased due to intervention by insurers. This intervention must have been after the 2016 FoI response. However, it is also apparent that the process WAS in place for a period yet I have been provided with no information about this.

Please provide for Areas 9 & 10:

- 1. The original pain/gain correspondence, arrangement, contractual records etc. that relate to the pain/gain arrangements*
- 2. When the arrangement commenced*
- 3. When the arrangement concluded – it is evident this was in place at the time of the 2016 FoI response*
- 4. the pain/gain submissions*
- 5. All information relating to the challenge by insurers*
- 6. How the pain/gain share impacted upon insurers*

7. The correspondence between your contractors and Highways England about the concern raised by insurers, the contractor's consideration and the agreement to change the contractually agreed process

In brief, I am seeking al information relating to the pain/gain share in Areas 9 & 10 from its period of operation to termination and the reasons for this cessation."

5. HE has stressed to the Commissioner that it does not believe that any information is held about the pain/gain process before or after Asset Support Contracts came in.
6. HE responded on 4 March 2020 citing section 14(2) and stating that this was a repeat request. HE argued that it had already provided a response concerning this information on 20 September 2019 and it quoted the relevant reference number. This response had explained that the request stemmed from an error that had occurred in an earlier response from HE and a subsequent misunderstanding by the complainant. The information was not held, though HE conceded that this had not been clearly stated in its 20 September 2019 response to the complainant.
7. On the same date the complainant asked for an internal review. He contended that his request had emerged from the previous request of 20 September 2019 referred to by HE, as explained in the previous paragraph. The complainant stated, however, that he had not asked questions 1-7 in his previous request.
8. HE provided a review response on 3 April 2020 in which it maintained its original position. HE stated that the questions had been addressed in its response to the 20 September 2019 request and the subsequent review. It was explained that the pain/gain arrangement had never existed in the Asset Support Contracts. The review however conceded that the fact that the information was not held had not been explicitly stated.
9. The complainant wrote back to HE on the same date to explain that he was seeking information in relation to areas, not contracts, without specifying any time frame.
10. During the Commissioner's investigation, HE conceded that section 14(2) had not been appropriately cited because there was a "*variance in language*", the complainant was seeking areas not contracts, and it had not been explicitly stated by HE that the information was 'not held'.
11. In light of the above, HE wrote to the complainant on 2 October 2020 changing its reliance on section 14(2) to a reliance on section 12 – the cost of compliance exceeding the appropriate limit.

Scope of the case

12. The complainant contacted the Commissioner on 3 April 2020 to complain about the way his request for information had been handled. The complainant also wrote to the Commissioner after HE had changed its reliance from section 14(2) to section 12, indicating that he was not content with this later response either.
13. The Commissioner therefore considers the scope of this case to be whether HE has appropriately cited section 12 and whether HE provided advice and assistance in accordance with its duty under section 16 FOIA.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

14. Section 12(1) of the FOIA states that:

“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

15. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit of 18 hours in respect of HE. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:
 - determining whether it holds the information;
 - locating the information, or a document containing it;

- retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
16. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be '*sensible, realistic and supported by cogent evidence*'.¹

Highways England's view

17. Although HE stated that colleagues were in agreement and had a high degree of certainty that the information being sought was not held, it acknowledged that absolute certainty was required. Therefore HE carried out a key word search as set out below that produced the following returns for the relevant areas -

Area/Contractor	Key word			
	Gain share	Gain	Pain share	Pain
Area 9	2787	38370	1970	12649
Area 10	5382	43907	1671	20543

18. HE therefore reached the conclusion that the amount of documents returned regarding areas 9 and 10 were so numerous as to exceed the appropriate limit. Even narrowing the search down to a single search term would exceed the fees limit.

The complainant's view

19. The complainant's view is that HE cited another exemption to avoid providing the information. He disputes HE's statement that it does not hold the requested information he sought relating to "*pain/gain*". The complainant asked HE what colleagues are in agreement that the requested information is not held and, if names cannot be provided, their positions in HE.

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> (para 12)

20. Similarly he queries the use of the word “*certainty*” suggesting that HE means “*uncertainty*”. The complainant repeats the history of whether the information was held or not held including the response that initiated the ‘error’ which is quoted in his request. The complainant fundamentally disagrees with HE’s assertion that the information does not exist. He is clear that it does exist and that a Tribunal hearing in 2019 heard from a witness who explained the pain/gain share to the court, though the complainant says it was not relevant to the issue then under consideration. However, the complainant subsequently sought that information.

The Commissioner’s view

21. The complainant provided argument to support his belief that the information is held but the Commissioner is not able to consider many of the matters raised with HE concerning evidence previously given in court and technical matters that are the subject of dispute between the complainant and HE. She has confined her decision to whether searching for this information would exceed the appropriate limit.
22. HE has not provided a great deal of argument, aside from the table in paragraph 17. The Commissioner accepts, however, that section 12 FOIA has been correctly cited. She agrees that it is not possible to say with certainty that the requested information is held or not because there is simply too much information to search through to make that determination. The complainant has not limited the timeframe, partly because he is himself unaware of the exact timeframe that would encompass the information, if held. Were HE to review the pain/gain arrangement for Areas 9 and 10 solely under one search term in one area for one minute, it would still exceed the fees limit.

Section 16 – duty to provide advice and assistance

23. Section 16 of the FOIA states:

“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by

subsection (1) in relation to that case."

24. HE explained to the complainant that the large number of documents returned from the searches meant that no advice or assistance that could be provided would enable the request to be reduced to bring it under the appropriate limit.
25. The complainant queried that view, pointing out that limiting the search to *"pain/gain share"* over five years would be likely to reduce the responses. Limiting it to a contractor or an area would likewise reduce the returns. He then suggested that limiting the search to one day and one area would reduce returns even further. The complainant concluded that this was part of a deliberate intention by HE to withhold the information.
26. The Commissioner has concluded that reducing the timeframe and/or area for the search would be likely to mean that the search would fall within the fees limit but it would be unlikely to establish whether the requested information was held or not.
27. In view of the above, the Commissioner finds it difficult to see how advice and assistance could be provided in any meaningful way and does not require HE to take any further steps.

Right of appeal

28. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. 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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