

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

Decision notice

Date: 4 June 2021

Public Authority: Highways England Company Limited
Address: Piccadilly Gate
Store Street
Manchester
M1 2Wd

Decision (including any steps ordered)

1. The complainant has requested a copy of a spreadsheet used by Kier Highways setting out a schedule of rates for Area 3 claims, as well as a description of the rates given to adjustors and a description of the information disclosed about rates.
2. Highways England stated that for the first parts of the request the information was not held and for the descriptors the information was commercially sensitive and should be withheld under section 43(2) of the FOIA.
3. The Commissioner's decision is that Highways England does not hold the information requested at parts (1) and (2) of the request and has correctly refused to provide the information at part (3) on the basis of section 43(2) of the FOIA.

Request and response

4. On 27 April 2020 the complainant made a request to Highways England (HE) relating to Kier Highways in the following terms:

"I understand the schedule of rates is held in excel spreadsheet format, the file for Third Parties is named Area_3_equipment_Defined_Cost_latest_15.xls The schedule is not used

solely for Area 3. I understand Kier Claims Manager (and others) have access to the schedule.

1. Please provide a copy of this document, the one utilised for Highways England claims (above threshold) and all spreadsheets Kier hold relating to DCP costs / prices. The above xls file appears to have been constructed for the 10/2015 process instigated by [names redacted] of Kier Highways.

2. Advise the descriptions of the rates that have been released to adjusters/lawyers associated with the stayed S Wales claims; how they are referred to.

3. With regard to the S Wales data, I am told that I have been the subject of your Authority's semantics when it comes to rates and understand information has been disclosed. I ask to be provided with the description of the information and its source."

5. HE responded on 14 August 2020. For part (1) of the request HE stated that the information was not held and referred to an email sent to the complainant on 30 April 2020 that explained the reasoning for this. For part (2) HE also stated the information was not held as this related to below threshold claims. For part (3) HE explained that the information released by Kier in relation to these cases is the Pricing Schedules to the Area 3 contract in an unredacted form. This is the Pricing Schedule for Target Costs and was found by the Information Tribunal¹ to be commercially sensitive. HE maintained this was still commercially sensitive.
6. The complainant asked for an internal review on 24 August 2020 stating that the information was held. HE responded with the outcome of this review on 22 September 2020. HE reiterated its position that information was not held in relation to parts (1) and (2) of the request.

Scope of the case

¹ [Swift, Philip EA.2018.0104 \(04.12.18\).pdf \(tribunals.gov.uk\)](#)

7. The complainant contacted the Commissioner following the internal review on 22 September 2020 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if HE is correct in stating that no information is held in relation to parts (1) and (2) of the request and whether the information at part 3 has been correctly withheld under section 43(2) of the FOIA.

Reasons for decision

Section 1 – information held

9. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

10. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held (and, if so, whether all of the information held has been provided).
11. During her investigation the Commissioner asked HE certain questions in order to establish whether it held any/all of the information at parts (1) and (2) of the request. HE maintained that it knew it did not hold this information without conducting searches.
12. The matters behind the complainant's request have been documented at length in a number of previous decision notices made by the Commissioner, such as [FS50873250](#) and in Tribunal decisions, most recently [EA/2019/0390](#).
13. HEs position is that the excel spreadsheet referred to in part (1) of the request is not held. The complainant pointed out that the recent Tribunal decision referred to above found that in Area 9 there existed a schedule of rates for people costs that are used by contractors when billing HE for work done i.e. for above threshold claims. That being said, the

Commissioner notes the Judge found that there was no evidence such schedules existed for Area 10.

14. HE had referred to an email that had been sent to the complainant on 30 April 2020. The Commissioner notes that this email stated:

"Kier Highways Ltd have confirmed that the schedule you have referred to (Area_3_equipment_Defined_Cost_latest_15.xls) is outdated. They no longer have a record of it and it is not now used by anyone within the business. Similarly, this document has never been held or used by Highways England.

We have been informed by Kier that the schedule would have contained a list of equipment rates from 2015. Under the terms of the Asset Support Contract (ASC), equipment rates do not fall within the defined cost definition but are market tested. They are therefore a separate, distinct element of a damage claim. The market rates for equipment are calculated using the Civil Engineering and Contractors Association (CECA) Schedule of Equipment Rates, minus 30%."

15. HE has confirmed that the spreadsheet referred to in this email is the one that is referred to in the information request being considered here. HE's position is that this spreadsheet is not held for two reasons: firstly, that this spreadsheet was historically used by Kier but is no longer used; and secondly, that HE never held the spreadsheet at any stage.
16. The Commissioner notes that much of the complainant's arguments relate to the finding that a schedule of rates was found by the Judge in the Tribunal case to exist in relation to Area 9 claims. As already stated, the Judge also found that there was no evidence that the same existed for Area 10 and HE has stated that Area 9 is an anomaly. The Commissioner does not therefore consider these arguments to be particularly relevant to this information request.
17. Regardless of this, the Commissioner considers it is not unreasonable to accept that if a spreadsheet is outdated and no longer in use then it will not be held anymore. The Commissioner notes this spreadsheet was used in 2015 and it is therefore highly likely it will have been superseded (if indeed there is still any version of this still in use). Whether HE would ever have held this spreadsheet if it was created and used by Kier is less certain but on balance the Commissioner accepts that HE does not hold this spreadsheet anymore given its age and the fact that HE has asserted that it never held this.
18. Part (2) of the request related to the rates released to adjusters for stayed South Wales claims. HE has explained to the Commissioner that these claims are 'below threshold' claims and are therefore directly

recovered by the contractor rather than HE. As such HE states it is not involved in the claim.

19. The Commissioner is aware from previous decisions that under HEs Asset Support Contracts (ASC) if the value of the damage is under £10,000 i.e. below threshold, then the service provider is responsible for the damage and the recovery of the costs from the third party.
20. The Commissioner therefore considers that it stands to reason that these rates would not be held by HE as they relate to below threshold claims and it has previously been established that HE does not get directly involved in these claims. In the complainant's own words:

"If the damage is under £10,000, the contractor repairs the damage (using the same people and equipment as deployed for above £10,000 claims), but is not paid by HE, and must recover directly from the Third-Party."
21. Given this position the Commissioner accepts that the information at part (2) of the request is not held by HE.

Section 43(2) – commercial interests

22. Whilst the complainant has not specifically raised the response to part (3) of the request in his request for internal review or his submissions to the Commissioner; instead focusing on the other parts and whether information is held, the Commissioner considers for completeness this should be addressed in this notice.
23. Part (3) of the request asked, with reference to the South Wales data, to be provided with the description of the information that had been disclosed on rates and its source. HE explained to the complainant that the information released by Kier in relation to these cases was the Pricing Schedules to the Area 3 contract in unredacted form and that this information had been considered by the Information Tribunal² to be commercially sensitive.
24. HE maintained that this information is still commercially sensitive and the Commissioner would accept that it has not lost its sensitivity due to the passage of time. The Tribunal found that the information on rates consisted of complex calculations and was clearly commercially sensitive and there was clear commercial prejudice that could be linked to

² [Swift, Philip EA.2018.0104 \(04.12.18\).pdf \(tribunals.gov.uk\)](#)

disclosure. The public interest arguments in disclosure do not appear to have changed substantially since the Tribunal decision and as such the Commissioner does not consider that there is any justification for changing her view and she would maintain this information is exempt under section 43(2) of the FOIA.

Other matters

25. The Commissioner considers it appropriate to point out that she is not an expert in this field and the information being requested is technical in nature. She has considered the way HE has interpreted the request and whether there are other ways the request could be interpreted. In this case she is satisfied the request has been interpreted correctly by HE and the Commissioner has taken a proportionate approach in terms of the time she has spent considering the request and how it was interpreted given the technical subject matter.

Right of appeal

26. 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

27. 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.
28. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
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