

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **2 September 2021**

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) about rates associated with its Area 9 road network contract with Kier Highways Ltd. HE has relied on section 17(6) of the FOIA not to provide a refusal notice. HE says that this is because it had previously refused requests for information on similar matters under section 14(1) as it considered those requests to be vexatious.
2. The Commissioner's decision is as follows:
 - Highways England wrongly categorised the complainant's request of 23 November 2020 as a vexatious request and neither section 14(1) nor section 17(6) are engaged.
3. The Commissioner requires Highways England to take the following step to ensure compliance with the legislation:
 - Provide the complainant with a fresh response to his request of 23 November 2020, including part 4, that complies with the FOIA and does not rely on section 14(1) of the Act.
4. Highways England 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.

Background

5. The matters behind the subject that is the focus of the complainant's request to HE have been discussed at length in a number of previous decisions made by the Commissioner, for example FS50873250¹, and in First-tier Tribunal (Information Rights)('the FTT') decisions, for example EA/2019/0119. As such, the Commissioner does not intend to reproduce that full background and context again here.
6. However, to summarise and bring the situation up to date, the complainant believes that HE is engaged in a fraud against the public in conspiracy with its service providers who are responsible for maintaining and repairing highways infrastructure – principally Kier Highways Ltd. Associated with that concern, the complainant considers that HE holds a schedule of rates relating to damage to crown property (DCP) for work done by Kier.
7. DCP is the process by which HE seeks to recover the costs of damage caused to the highways (usually via road traffic accidents) from the members of the public responsible for that damage.
8. Broadly, costs to the contractor of making repairs estimated in advance of repair to be £10,000 or more ("above-threshold repairs") are paid by HE which then seeks to recover the costs from third parties and their insurers. Recovery from third parties of the costs of repairs estimated at the outset to cost less than £10,000 ("below-threshold repairs") is the responsibility of the contractor which performs the repairs.
9. The complainant alleges that HE contractors charge third parties (and their insurers) higher rates with respect to below-threshold repairs than those same contractors charge HE with respect to above-threshold repairs and that this constitutes fraudulent 'over charging' of those third parties.
10. To that end, the complainant has submitted numerous requests to HE for information on 'DCP rates'. At the point of the current request the Commissioner and the FTT had found that HE did not hold a set of DCP

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617593/fs50873250.pdf>

rates as such rates did not exist. The Commissioner and FTT had also found that information on tendered contract rates that HE *does* hold is commercially sensitive and so exempt information under section 43(2) of the FOIA.

11. At the time of the current request, another FTT appeal concerned with a request the complainant submitted for 'DCP' rates was upcoming: EA/2019/0390. In the course of preparing for that appeal, HE had identified that it did, in fact, hold certain information of some relevance - not the requested DCP rates, but what HE termed 'notional people rates' for Area 9 of its road network. HE described this information as comprising all relevant cost reimbursable people costs, averaged into a small number of rate bands (12 staff and four labour) for ease of management and charging purposes, and to anonymise what individual people are actually paid. These 'agreements' record agreement from time to time of temporary "notional people rates" that Kier charges HE in order to recover its people costs for all cost reimbursable and scheme work under its Asset Support Contract with HE (with such costs being only one component of all costs recovered by Kier).
12. In advance of the FTT hearing, HE provided the complainant with a copy of the 'notional people rate' information for Area 9 it had identified it held.

Request and response

13. Through the WhatDoTheyKnow website the complainant then submitted a request for information to HE on 23 November 2020 in the following terms:

"Highways England periodically agrees and formally signs off a documented summary containing a limited number of notional people rates in Area 9, with its contractor, Kier Highways Limited ("Kier"). In these notional people rates all relevant cost-reimbursable people costs are averaged into a small number of rate bands (12 staff and 4 labour) for ease of management and charging purposes and to anonymise what individual people are actually paid. I ask to be provided from the commencement of the Area 9 contract :

1. The dates of these agreements
2. The documented summaries and
3. The resultant rates, the rate bands
4. Who at Highways England is provided this data and aware of the process - job titles

Ideally, I wish these notional people rates that Kier charges Highways England in order to recover its people costs for all cost-reimbursable and scheme work under the ASC, provided in excel spreadsheet format.

If this process or similar is also conducted for plant and materials, I ask to be provided with this information also.”

14. The complainant did not receive a response to the request and submitted a complaint to the Commissioner.
15. On receiving contact from the Commissioner, HE provided the complainant with an internal review response on 26 January 2021. It confirmed to him that it was relying on section 17(6) of the FOIA not to issue him with a further section 14(1) refusal notice in response to his request.
16. In correspondence to HE on 26 January 2021, the complainant noted that on the same day as he had submitted the current request for information about Area 9, he had submitted a similar request for information about another contractor and Area 10 and HE had provided a response to that request, advising that that information was not held.
17. The complainant continued his 26 January 2021 correspondence with a complicated discussion on the matter of 'rates', asked a series of questions and pointed out that the current request stemmed from the "new information" that HE had provided to him. The Commissioner understands the "new information" to be the 'notional people rates' which is the term used in the complainant's request.
18. In further correspondence to HE on 31 March 2021, the complainant first advised that he was seeking "the DCP rates" not supplied to date. He went on to say that he had anticipated that his 23 November 2020 request would capture 'rates' for 2021. He confirmed he was seeking not just the 'proposed rates' but 'the rates agreed in 2021'. Alternatively, the complainant asked HE to confirm that the rates had not changed since the 2019/20 figures provided. Finally, he noted that he had not received a response to part 4 of his request.
19. HE did not respond to the 26 January 2021 and did not appear to respond to the 31 March 2021 correspondence.

Scope of the case

20. The complainant first contacted the Commissioner on 23 December 2020 to complain that he had not received a response to his request.
21. The Commissioner's investigation has focussed on whether HE can rely on section 17(6) of the FOIA to refuse to issue the complainant with a further section 14(1) refusal notice. In order to determine this, she has considered whether the request can be categorised as a vexatious request.

Reasons for decision

Section 14 – vexatious and repeat requests

22. Section 1(1) of the FOIA provides a general right of access to recorded information that is held by public authorities. However, section 14(1) of the FOIA says that section 1 does not oblige a public authority to comply with a request for information if the request is vexatious.
23. The term 'vexatious' is not defined in the FOIA but the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance and, in short, they include:
 - Abusive or aggressive language
 - Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance
24. 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.
25. The Commissioner's guidance goes on to suggest 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.

26. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
27. In its submission to the Commissioner of 11 August 2021, HE explained that this request is one of many it has received from the complainant on the topic of its contractor - Kier Highways - and the third-party claims process for damage to the strategic road network. Most of these requests have been about the rates Kier charged to third parties or to HE, or for the correspondence HE holds between it and the contractor about those claims.
28. HE went on to say that it has responded to these various requests for rates as appropriate; explaining what information is held but is commercially sensitive or what information is not held. HE noted the Commissioner has made a number of decisions about complaints that the complainant subsequently submitted to her, and that the FTT has also made related decisions, most recently EA/2018/0104 and EA/2019/0119.
29. Moving on to the current request, HE noted that the request is again on the topic of Kier Highways Ltd and third-party claims, although this time the complainant has used the term 'notional people rates' in relation to rates in Area 9. It is HE's view, given the change in terminology, that the complainant made this request having received documents/submissions for the FTT appeal hearing EA/2019/0390 that, as has been noted, was upcoming at the time of the request. [The FTT made its decision in that appeal in March 2021]. HE says that this information ie 'notional people rates' was essentially presented to the complainant as a result of preparations for that upcoming FTT hearing, and that he was therefore already in possession of that information - the notional people rates - at the time of the request.
30. Given this and its previous responses to the complainant in which it had explained that his future requests about the third-party claims process and rates would be treated as vexatious, HE confirmed its position that the current request was vexatious because the complainant was requesting information that HE knew he already possessed. In addition, the complainant was making a request for information that was being dealt with by other means, namely through the upcoming FTT hearing. As a result, the complainant was essentially increasing the burden on HE because HE was addressing the matter of this information, if not the request directly, through the Tribunal process and the complainant was not allowing that process to conclude before making further requests. HE considers that this was a display of unreasonable persistence.

31. HE noted that the complainant also made a request for essentially the same information following the FTT hearing for EA/2019/0390 – this may have been the complainant's correspondence of 31 March 2021, discussed at paragraph 18. HE had provided him with 'people rate reconciliation summary' information as part of its response to that request on 12 April 2021 (its reference 101916). HE's point is that whilst the current request was made before the request in 101916 was addressed, the complainant's progression of the current complaint to the Commissioner, despite the response to 101916, again appears to be unreasonable. This is because progressing the complaint unnecessarily diverts both HE's and the Commissioner's resources as they are being asked (by the complainant) to address a matter that has already been addressed, with the information in question having been provided to him at least twice.
32. HE maintains that the current request was vexatious at the time it was made because the complainant was already in possession of the 'people rates' via the submissions made to the FTT. Responding to this request in any other way would require a further diversion of resources on a matter already being addressed and would not constitute a responsible use of the public money. It was therefore not, in HE's view, in the wider public interest to do so.
33. Finally, HE said that in its opinion that the complainant's requests to it "are a campaign gone to [sic] far". The cycle appears to HE to be an "endless stream" of request, followed by internal review, followed by complaint to the Commissioner and, depending on the Commissioner's decision, an appeal to the FTT. HE says it recognises that the legislation allows this process. However, with this complainant it is not just one or two requests that follow the above cycle, it is almost every single one, with the requests often covering the same subject matter as previous ones. HE considers that this is an abuse of the FOIA. No matter the outcome of any proceedings, the complainant acts, HE says, in an intransigent manner. He simply continues to submit request after request, review after review and so on, on matters that have been addressed or resolved at multiple levels on multiple occasions (and often it has been found that there is no information that can be provided). HE believes that this is the case with the information requested on this occasion – that this request is again part of the "endless stream" of requests from the complainant.

Conclusion

34. The Commissioner has considered the situation as it was at the point of the complainant's request on 23 November 2020 ie the circumstances and background to the request which have been discussed above.

35. As has been noted, at the time of the request an appeal of one of the Commissioner's decisions was upcoming: EA/2019/0390. The request being considered in that case had been for 'DCP' rates for Areas 9 and 10 and the complainant had submitted that request to HE on 11 December 2018.
36. To repeat the events that unfolded, in the course of preparations for that appeal, HE had identified it did hold certain other information that could be categorised as 'rates' – not 'DCP rates' but 'notional people rates'. HE had provided the 'notional people rates' to the complainant in advance of the appeal. HE has advised the Commissioner that the complainant would have received that information on 17 August 2020 when a particular witness statement for the upcoming appeal was filed. Despite having been provided with that information, the complainant subsequently submitted the current request for the 'notional people rates', and associated information.
37. HE has provided the Commissioner with a copy of the 'notional people rates' it sent to the complainant. HE was entitled to simply provide the complainant with the version of these rates that it held at the time of the request of 11 December 2018. However the rates it provided in August 2020 cover the period from 2015 up to 2019/2020 with the document noting that the 19/20 figures had been agreed in January 2020.
38. By the time of his request of 23 November 2020, the complainant had been provided with what was later found to be all the 'notional people rate' information that HE held at that point. And in April 2021 the complainant had been provided with that information a second time in response to a further request he had submitted to HE. On that occasion the information had been updated to include more recent figures. Despite these factors, the Commissioner finds that the 23 November 2020 request cannot be categorised as a vexatious request under section 14(1) of the FOIA, for the following reason.
39. The Commissioner understands that it is HE's view that the 'notional people rate' information it identified it holds is, in reality, not the type of information the complainant is seeking. HE may or may not be right about that. However, given that for a long period HE had confirmed to the complainant and the Commissioner that it held no 'rate' information but had then identified it held this 'notional people rate' information, the Commissioner can understand the possible reasoning behind the complainant having submitted this request. The request is for the rates themselves (despite HE having already given this information to him) but is also for other information associated with those newly identified rates; information that the complainant had not requested before. Part 4 of the request is for the job titles of those at HE who are provided with

the 'notional people rates' and who are aware of the 'notional people rate' process. The complainant also asks if there is a similar ['notional rate'] process for 'plant and materials'.

40. Although HE had already given the complainant the 'notional people rate' information it held, it is conceivable that, given the emergence of this new information, the complainant wanted to make sure HE had given him *all* the information, and/or the most up to date information, it held on these 'notional people rates' and so submitted his request for that information along with requests for new information about those rates. As such, while she fully appreciates the situation is likely to be a frustrating one for HE, the Commissioner finds that the request is not totally without purpose, for the complainant if not for the wider public.
41. The Commissioner has decided that, in the circumstances of this case, the complainant's request of 23 November 2020 cannot be categorised as a vexatious request. However, that does not mean that she will reach the same decision in any future, similar case. The Commissioner considers each complaint on a case by case basis.
42. Finally, the Commissioner again notes the FTT's decision in EA/2019/0390 which was promulgated in March 2021. The FTT found that HE did hold certain information with regard to Area 9 – the 'notional people rates' – but that the information HE had by then already provided to the complainant was, on the balance of probabilities, all the relevant information HE held at that point and that HE did not hold similar 'notional people rate' information for Area 10. As a result of that appeal, his later request for the same information (and the Commissioner's decision in this case), the complainant will have received the 'notional people rate' information that HE held at August 2020 and that it held at April 2021 (for the later request). The complainant should therefore not need to request that information from HE again. And since the FTT has found that HE does not hold 'notional people rate' information for Area 10, the complainant will not need to request that information from HE either.

Section 17 – refusal of request

43. Under subsection 17(5) of the FOIA, a public authority relying on a claim that section 14(1) applies must provide the applicant with a notice stating that fact within 20 working days of receiving the request.
44. However, under section 17(6), subsection (5) does not apply where (a) the authority is relying on a claim that section 14 applies, (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
45. The Commissioner has found that the complainant's request is not vexatious. It follows that she therefore finds that HE incorrectly relied on section 17(6).

Right of appeal

46. 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

47. 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.
48. 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

Cressida Woodall
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