

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2018

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

Decision (including any steps ordered)

1. The complainant has requested information on the rates a particular contractor charges Highways England (HE) for its staff, known as Asset Incident Watchmen (AIW), to attend incidents on the routes it is responsible for. HE have refused the request under section 43(2) of the FOIA on the basis that disclosure would prejudice the commercial interests of both itself and the contractor.
2. The Commissioner's decision is that section 43(2) is not engaged and therefore by failing to communicate the requested information HE has breached section 1(1)(b) of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information on the AIW hourly rates for each of the four areas managed by Kier for the period covered by the request.
4. The public authority must take these steps 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

5. On 23 September 2016 the complainant wrote to HE regarding Keir Highways Ltd (Kier), the shift patterns and coverage of its patrols over the week and how these impacted on the charges levied by Kier. At points 6 and 7 of his letter he requested information of the following description:

“6. I would also appreciate being supplied [with] the actual sums charged, the hourly rate, the fees presented to HE for this specific aspect of the work [i.e. the initial attendance at an incident] undertaken by Kier. I understand that the current rate has been disclosed.

7. I ask that this be for the period 01/01/2014 to present i.e. all rates/arrangements during the past 3 years (almost) and that these are separated by area if they differ.”
6. In the context of the dialogue between HE and the complainant, it is understood that the request to be seeking the rates which Kier charge HE for its initial attendance at incidents where the overall cost of the accident is in excess of £10,000
7. By way of background, Kier is contracted to maintain the highways in 4 of the 14 regions that HE is responsible for. The first maintenance staff to attend an incident are the Asset Incident Watchmen (AIW) who are responsible for making the site safe and clearing the carriageway. The driver responsible for the damage is charged for the cost of the overall repairs involved, of which the cost of the AIW is only one component. Where the overall cost of repair is less than £10,000 Kier recover their costs directly from the driver or their insurers. When that threshold is exceeded Kier bills HE and it is then HE who pursue the at fault driver for the costs.
8. On 25 October 2016 HE responded. It refused to provide the requested information and cited the exemption provided by section 43 – commercial prejudice, as the basis for doing so.
9. The complainant requested an internal review on 22 December 2016. HE sent him the outcome of the internal review on 20 January 2017. HE upheld its original position.

Scope of the case

10. Following the internal review the complainant contacted the Commissioner on 18 May 2017 to complain about the way his request for information had been handled.

11. During various telephone calls and email exchanges which explored the possibility of resolving the complaint informally, the complainant clarified the information he was seeking. In particular during a telephone conversation on 23 October 2017 the complainant was clear that he was simply seeking the hourly rate Kier charged HE for its AIWs' initial attendance at an incident where the overall cost exceeded the £10,000 threshold. He required this information for the period covered by his request, i.e. from 1 January 2014 to 23 September 2016. Following a protracted investigation during which HE claimed variously that it did not hold the requested information, or that the cost of locating and retrieving the information would exceed the appropriate (cost) limit provided by section 12 above which public authorities are entitled to refuse a request, HE reasserted, on 5 March 2018, that it considered the information was exempt under section 43(2). This response was only provided after the Commissioner found it necessary to issue an information notice on HE.
12. In light of the above the Commissioner considers the matter to be decided is whether the information on the AIWs' hourly rates is exempt from disclosure under section 43(2).
13. It should be noted that during the course of the investigation HE seemed to experience problems in collating the requested information. It therefore found it more expedient to obtain the information directly from Kier. However, later HE did confirm in response to the information notice that the rates contained by Kier were accurate and were held by HE at the time of the request.

Reasons for decision

Section 43(2) – prejudice to commercial interests.

14. Section 43(2) states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person including those of the public authority holding the information.
15. It should be noted that the exemption can be applied on the basis that the alleged prejudice either 'would' occur, or that it would be 'likely' to occur. In this case HE considers the prejudice is only 'likely' to occur. This means that although it is not necessary to show the risk of prejudice is more probable than not, there still has to be a real and significant risk of the prejudice occurring. HE's final position is that disclosing the information would be likely to prejudice both its own commercial interests and those of Kier.
16. It should be noted that the Commissioner would not be prepared to accept arguments regarding the prejudice to a third party's interests, in

this case Kier's, unless she was satisfied that the arguments presented by HE genuinely reflected that party's concerns. In this case HE has provided the Commissioner with a copy of a letter in which Kier sets out why it considers the information to be commercially sensitive. Although the letter is very brief, the main argument is dealt with in a one sentence paragraph, the Commissioner is satisfied that the arguments presented by HE reflect Kier's concerns.

17. HE has argued that disclosing the hourly rates for AIW would allow Kier's competitors to understand Kier's cost base and productivity. It is also concerned that disclosure would potentially disclose salary information to the industry. In respect of its own commercial interests HE considers disclosure would undermine its ability to obtain best value for money in future procurement exercises.
18. Both these arguments relate to commercial interests which the exemption is designed to protect. Therefore the Commissioner has gone onto to consider whether the arguments presented by HE demonstrate that the alleged prejudicial outcomes would be likely to occur.
19. The hourly rates Kier charges HE for AIWs is one element of the overall cost of each contract and therefore the Commissioner recognises the potential for such information to be of interest to Kier's competitors. The Commissioner notes that during the investigation HE were asked to provide more details about the level of competition that existed in respect of these highways maintenance contracts. It was also asked to explain how frequently such contracts were tendered for. HE failed to address these points. This weakens HE's position. Nevertheless HE did provide the Commissioner with a rough idea of the value of the contract for one of the areas managed by Kier and, as one would expect, the amount was substantial. It would be naive to think that there would be no competition for work of such value. Furthermore it is obvious that as Kier only holds the contracts for 4 of HE's 14 regions there must exist other contractors competing for the work. The Commissioner accepts that when such a contract comes up for tender there would be competition for it. Even so HE could have strengthened its case had it responded more fully to the Commissioner's enquiries.
20. HE, following consultation with Kier, has expanded on its argument by explaining that the hourly rates relate to specific roles undertaken by the contractor's staff and that it is therefore possible to deconstruct this information by means of tax, national insurance rates and industry norms such as labour constraints, i.e. productivity, and working hours to determine with a degree of accuracy the hourly pay rate of AIWs. It has not however demonstrated how easily or accurately this could actually be done. HE has described the hourly pay rate as being a significant component of Kier's cost base data. Whilst the hourly cost of an AIW is undoubtedly one component of the contractor's cost base, the

Commissioner is not convinced that HE has shown it to be a significant one.

21. Following discussions with HE the Commissioner understood that the hourly rate is not simply based on how much the AIWs are paid. It also reflects some of the other costs incurred in deploying these officers, for example their uniform costs and, what can be described, as back-room costs. The Commissioner considers that the fact the AIW hourly rate is comprised of a variety of different elements will make it more difficult to deconstruct the hourly rate to reveal an AIW's hourly pay rate in the way suggested by HE. The Commissioner also notes that the hourly rate figure on its own would not reveal how Kier was able to provide the AIW service at that price, how it was able to justify that price when negotiating the terms and price of a contract, or justifying the need to increase that cost attributed to AIWs over the term of the contract.
22. The Commissioner has carried out basic internet searches to test whether job adverts for AIWs state a salary range. Although adverts have been found it is noted that no salaries were stated. Nevertheless the Commissioner expects such information would be freely available to applicants and one would expect rival contractors to already have an understanding of the going rate within the industry for such staff in order for them to be able to attract quality staff themselves. Therefore HE has not satisfied the Commissioner that basic salary information is as sensitive as HE suggests.
23. The Commissioner also notes that the hourly rate is considered commercially sensitive because its disclosure would give an insight into Kier's productivity. However when explaining how that hourly rate could be deconstructed to reveal the hourly pay rate for an AIW, their productivity is referred to as an 'industry norm'.
24. The requested information in this case makes up only one small element of the costs that a contractor would have to consider when tendering for such a contract. From discussions with HE the Commissioner is aware of the complexity of the contracts, which set out the methodology for calculating the costs contractors can recover from either HE, or directly from at fault drivers and how these costs are then multiplied by different percentage rates (referred to by HE as 'uplifts' and third party claims overheads'). It is further understood that the value of these percentage rates form part of the contract negotiation and therefore their value and method of calculation may be unique to each contract. Also it is understood that each contract contains arrangements to accommodate increases in cost, including those of the AIWs. It is apparent to the Commissioner that the contracts HE negotiate are very sophisticated. During initial discussions HE focussed on the sensitivity of such percentage rates and on a contractor's tender submissions more generally, rather than the actual hourly rate for AIWs.

25. The Commissioner considers that in such sophisticated contracts there will be many ways in which one contractor will try and distinguish itself from its rivals during a procurement exercise. Such contracts are most unlikely to be awarded on the basis of price alone. Other considerations will include the quality of the contractor's work and their financial stability.
26. It is this complexity of the overall contract, the relative significance of the AIWs hourly rate to the overall value of the contract, together with the fact that the hourly rate is itself a composite of various other costs that leads the Commissioner to find that HE has not demonstrated that there is a real and significant risk that disclosing this information on its own would prejudice Kier's commercial interests.
27. The Commissioner has however gone onto consider whether there is other information already in the public domain that when combined with the requested information would prejudice Kier's commercial interests. This process of piecing nuggets of information together to learn something more meaningful is known as the 'mosaic' argument. In line with her published guidance 'Information in the public domain' the Commissioner would expect a public authority to be able point to specific information in the public domain which, when combined with the requested information, would cause the prejudice claimed. The only additional information referred to by HE is that which it suggests could be used to deconstruct the hourly rate, such as tax rates and industry norms to reveal the hourly pay rate for AIWs. The Commissioner has already dealt with this argument.
28. The mosaic argument is not limited to just the effect of combining the requested information with that in the public domain. It can also be applied to situations where additional information is only known to a limited group of people, so long as those people would be able to combine the requested information with what they already know to learn something prejudicial.
29. Despite HE not directing the Commissioner to any specific information she has considered both whether there is any other relevant information in the public domain and also whether any additional information is likely to become available. The Commissioner is aware of a number information requests that have been made to HE via the Whatdotheyknow website, including those for the rates at which the work of AIWs is charged and the percentage rates that are applied to these. Such requests are often annotated by interested parties and some of those annotations contain various peoples' understanding of the AIW's rates and the percentage rates applied to them. However the Commissioner is not in a position to comment on the accuracy of the figures referred to on that website. It is clear though that there is some public discussion of hourly rates charged for the work of AIWs and an

appetite for information of this type from those who wish to scrutinise the amounts of damages at fault drivers are charged. Furthermore the complainant has directed the Commissioner to a website, 'England's Highways', which appears to campaign for greater transparency in respect of these charges. The Commissioner would wish to add that by making this observation she is not suggesting any criticism of how the contracts are managed or the charges that are made under it. It is simply to make the point that forums exist which would help someone who wished to collate different fragments of information in order to obtain a fuller picture of this element of the contracts. However the mosaic effect is dependent on what additional information is actually available, or very likely to become available. To date, the Commissioner is not satisfied that Kier's rivals would choose to rely on the limited information available from these forums to analyse Keir's pricing structure and HE is clearly prepared to protect any more sensitive information making its disclosure unlikely. Nor is the Commissioner satisfied that disclosing this information would set a precedent which would lead to HE having to make piecemeal disclosures of information allowing a fuller picture of the contract to emerge. Therefore the Commissioner is not satisfied that the mosaic effect can be argued in favour of the requested information being commercially sensitive, particularly in the absence of any such arguments from HE itself.

30. The Commissioner will now consider arguments that disclosing the requested information would prejudice HE's own commercial interests. In its main response to the Commissioner, which was only obtained following the serving of the information notice, HE provided very little explanation of how its own commercial interests would be prejudiced. It said that disclosure may prejudice HE "under the public Contract Regulations 2015 to undertake a fair and transparent procurement exercise in the future". How this would happen is not immediately obvious and without any further explanation from HE the Commissioner cannot accept its argument.
31. When discussing the public interest in maintaining the exemption HE did explain that it had concerns that if it disclosed commercially sensitive information contractors would lose confidence in HE's ability to protect their information. This would make it more difficult for HE to negotiate contracts which represented best value for money. The Commissioner accepts the rationale of this argument. However she is not persuaded that disclosing the hourly rates of AIWs would undermine Kier's commercial interest and it therefore follows that she would not accept that Kier would lose confidence in HE in the way described. Furthermore it is very unlikely that contractors would easily be discouraged from bidding for contracts of the value offered by HE. Therefore the Commissioner is not satisfied that HE's commercial interests would be prejudiced.

32. In light of the above the Commissioner finds that section 43(2) is not engaged. HE are required to disclose the information on the hourly rates for the AIWs for each of the four areas for which Keir holds the contract, for the period specified in the request.

Other matters

33. Although not forming part of the formal decision the Commissioner uses the 'Other matters' section to highlight any issues of concern which came to light during the course of the investigation. In this particular case the Commissioner is concerned with the adequacy of the responses received to her enquiries. Although the Commissioner did receive some detailed responses to some of the questions she posed, these did not appear to represent a co-ordinated response from all the business areas concerned.
34. As well as the application of section 43(2), the investigation explored whether the information was held at all and also whether the cost of collating that information would exceed the cost threshold (appropriate limit) established under section 12. Based on HE's responses the Commissioner was not satisfied that HE did not hold the requested information or by its arguments around the cost of collating such information.
35. Eventually information was provided with the assistance of Kier and there appeared to be a real opportunity that the complaint could be resolved informally. However when these attempts failed the Commissioner had to resort to issuing an Information Notice on 8 February 2018 to clarify HE's position and obtain its final arguments in respect of the engagement of section 43.

Right of appeal

36. 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

37. 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.
38. 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 Mehan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF