

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 23 April 2018

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to HE's Asset Support Contracts (ASC contracts) with a number of different contractors. Some information was provided but other information was withheld under section 43 of the FOIA.
2. With regards to the application of section 43 of the FOIA, the Commissioner is satisfied that this exemption applies and that the public interest in favour of disclosure, in this case, is outweighed by the public interest in favour of maintaining the exemption.
3. During the Commissioner's investigation, the complainant raised concerns that Highways England (HE) holds further recorded information. The Commissioner is satisfied that on the balance of probabilities HE does not hold any further recorded information of the nature specified.
4. The Commissioner does not require any further action to be taken.

## Request and response

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5. On 9 February 2017 the complainant wrote to HE and requested information in the following terms:

“all of the information relating to the issuance, possibly referred to as ‘technical validation clarification’, for successful tenders in respect of [Asset Support Contract] ASC contracts assigned since their introduction.

- The rates stated to be used by each contractor for each contract
- All queries raised
- All responses provided
- All additional queries/responses to conclusion”

6. HE responded on 23 February 2017. With regards to the rates used by each contractor, HE stated that it considered this information is exempt from disclosure under section 43 of the FOIA. In respect of all other elements of the request, HE applied section 12 of the FOIA and suggested that the complainant submit a refined request. HE confirmed that it would be able to provide the following information within the cost limit:

- All final documents for Area 10 only.
- Queries relating to third party claims and Annex 23 for Area 10 only.
- All tender clarification relating to third party claims and Annex 23 for Area 10 only.
- All emails relating to the requested subject for Area 10 only.

7. The complainant responded on 28 February 2017, stating:

“I am seeking amendments and changes to the contract up until Award insofar as Annex 23 / TP pricing / charges are concerned. I am limiting the request.

I note all final documents will reflect every change. This appears to be just what I need – thank you.

I note information for Area 10 only:

1. Queries relating to third party claims and Annex 23 for Area 10 only
2. All Tender Clarifications relating to third party claims and Annex 23 for Area 10 only

3. All emails relating to the requested subject for Area 10 only

If supplying the information for Area 9 exceeds the limit, could you include the 'all final documents' for Area 9 only? I am hopeful they are all in one place i.e. easily accessible and wish to undertake a comparison. If this falls outside the limit, Area 10 only".

8. HE responded on 17 March 2017. With regards to the rates of contractors (requested on 9 February 2017), HE applied section 43 of the FOIA. With regards to all other elements of the request, HE disclosed the requested information.
9. The complainant requested an internal review on 24 March 2017.
10. HE carried out an internal review and notified the complainant of its findings on 25 April 2017. It upheld its previous application of section 43 of the FOIA and informed the complainant that some aspects of his internal review request constituted new requests for information.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 18 April 2017 to complain about the way his request for information had been handled.
12. During the Commissioner's investigation the complainant clarified that he remains dissatisfied for two main reasons:
  - He does not agree that section 43 of the FOIA applies to the withheld information (the rates of contractors, as requested on 9 February 2017).
  - He considers information is missing that falls within the scope of his request dated 28 February 2017. These being appendices to Annex 23 and all correspondence relating to the appendices.
13. The Commissioner's investigation has focussed on these two points.

### **Reasons for decision**

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#### **Section 43 – commercial interests**

14. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority hold it).

15. Section 43 of the FOIA is also subject to the public interest test. In addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of any person, HE should consider the public interest arguments for and against disclosure and demonstrate that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
16. HE has stated that it considers the disclosure of the detailed rates for each contractor would be likely to prejudice the commercial interests of the contractors concerned and HE. With regards to the contractors, HE advised that the withheld information details the methodology used by each service provider; a methodology which has been formulated and derived by the service provider itself, from their knowledge and expertise in the market, and which secured their bid for their contract with HE. If the rates were disclosed this would enable third parties to recreate their methodology and use this information in future bids, putting the existing contractors at a disadvantage and potentially leading to the existing contractors being outbid. It stated that the rates and methodology of each contract are still current.
17. With regards to its own commercial interests, HE argued that disclosure could potentially compromise its ability to achieve best value for money in future competitive tendering processes. This would have a knock on effect on the public purse, potentially leading to losses and could cause reputational damage. It stated that the contracts cover extensive market competition and it considers that it cannot allow risk to this market competition by allowing suppliers detailed rates to enter the public domain. Disclosure would give suppliers a greater understanding of its competitors' commercially sensitive information. This could cause risk in terms of collusion leverage for HE and unrealistic tenders for future tendering processes, resulting in higher value bids and not value for money for the public authority overall.
18. It then referred to the confidentiality clause within each contract, advising the Commissioner that this prevents it disclosing the contractor's rates to third parties.
19. Firstly, the Commissioner does not generally accept that a confidentiality clause in a contract alone is sufficient to prevent the disclosure of information contained within it. If she did, this would be a means by which public authorities could bypass the requirements of the FOIA. The information in question must be commercially sensitive to warrant its non-disclosure and to support the application of the exemption cited.
20. Secondly, the Commissioner expects a public authority to demonstrate in a given case that any arguments it presents stating that disclosure

would or would be likely to prejudice the commercial interests of a third party originate from the third party itself. The Commissioner will not accept mere speculation on a third party's behalf.

21. In this case, the Commissioner asked HE to demonstrate that it had contacted and, then, obtained the views of the contractors themselves. HE simply responded advising the Commissioner that it had nothing further to add to its earlier submissions. And, again it referred the Commissioner to the confidentiality clause in these contracts. It stated that releasing the withheld information would mean that HE is in breach of the contract terms and also, by implication, confirms that each contractor does not wish it to release this information.
22. The Commissioner does not consider a simple confidentiality clause within a contract automatically means that the contractor will object to the disclosure of information under the FOIA. The contractor should be consulted in a given case and explain why it considers the *specific* information is exempt from disclosure under the FOIA.
23. Where a public authority fails to obtain or indeed demonstrate that the views of a third party have originated from the third party itself, the Commissioner would usually take a firm view and say that the exemption cannot be engaged on this basis. However, in this case, she is aware of other requests made by the complainant and others to HE and other public authorities for this type of information and notes on one case she has already considered against Transport for London (TfL) that the representations of three out of four of the contractors concerned were obtained. It is noted that in the main the contractors are different (between the TfL contracts and the HE contracts) but there is one mutual contractor that both the TfL and HE share, Kier Highways Ltd (KHL), and its views on disclosure on the same information were obtained by TfL during its handling of its case.
24. The TfL decision can be accessed via this link:  
<https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2258452/fs50693918.pdf>
25. KHL views have been obtained on another case the Commissioner has considered. She also notes that the work carried by the contractors relevant to both cases is very similar but one substantial difference between them all appears to be their schedule of rates (the withheld information), which appear to have been individually negotiated and set for the areas each contractor covers. It would be illogical to simply disregard the information before her (obtain from other cases or not) simply because HE has failed to approach KHL and its other contractors itself. This is an issue of poor case handling and engagement with the

Commissioner, which will be addressed later in this notice. In these unique circumstances she has therefore decided to proceed to consider the likely prejudice to the commercial interests of the contractors in this case based on the information before her overall.

26. Similar to the decision reached in the TfL case, the Commissioner accepts that disclosure would be likely to prejudice the commercial interests of the contractors concerned and HE and therefore that section 43 of the FOIA is engaged. She will now explain why.
27. The detailed schedule of rates for each contractor is their pricing strategy for the contracts they were awarded, following a competitive tendering exercise. This information represents each contractor's methodology and the rates they are able to offer for various areas of work. The terms for each contract were individually negotiated between the contractor and HE and potentially vary between one another. If this information was disclosed it would enable the existing contractors to compare the HE contracts and the costs agreed across them all and tailor future bids accordingly. It would also provide valuable information to other companies who currently do not hold one of the contracts but wish to bid in the near future when the contracts come up for renewal. It would enable future bidders (whether the existing contractors or not) to tailor their bid accordingly knowing what HE accepted across the board for the previous contracts. This would stifle true competition, potentially lead to a clustering of bids and hinder existing contractors from competing fairly in the future and maintaining any competitive edge they have achieved.
28. Additionally, the Commissioner considers disclosure would be likely to hinder HE's ability to negotiate effectively and secure the best possible deal that is available. It would be likely to receive less competitive bids from those contractors in the market place at renewal, as they would have had prior knowledge of the range of prices and rates previous contractors secured. Future bids would be clustered around what bidders know HE has accepted in the past rather than being truly reflective of what they can actually offer. This would have a negative impact on HE's commercial interests.
29. As the Commissioner is satisfied that section 43 of the FOIA is engaged in this case, she will now go on to consider the public interest test.
30. HE acknowledges there is a clear public interest in the work of the government being closely examined to encourage the discharging of public functions in the most efficient and effective way. It stated that there is an important public interest in the work of public bodies being transparent and open to scrutiny to increase diligence and to protect the public purse. Additionally, it recognised a strong public interest in

releasing information which shows the criteria used when assessing options to illustrate that the processes used are fair and appropriate.

31. However, it considers there are stronger public interest arguments in favour of maintaining the exemption. It advised that the procurement process must be fair and there is a public interest in ensuring that the commercial interests of suppliers are not unduly prejudiced by the release of commercially sensitive information. It stated that it is important to maintain the confidence of its suppliers in order to achieve best value for the taxpayer. It explained that the methodology outlined in the bid is a strategy owned and developed by each consultant. If the methodology was made available to competitors in the market place it would undermine the commercial interests of the consultants when bidding for other contracts by reducing their competitive edge. It also confirmed that disclosure would reveal the details of the successful bids and this would seriously undermine its ability to negotiate the best value for money for the public purse on future contracts as the rates and methodology are still current.
32. The complainant states that the contracts are 'un-policed' and it appears that third parties, those that damage barriers, are overcharged. He states that the process appears "systematic; an institutionalised misrepresentation and exaggeration." He confirms that he has dealt with damage to Crown Property claims since late 2015 and his enquiries have evidenced non-compliance well in excess of the maximum allowed under at least one contract. He states that his experience of dealing with so many claims has evidenced that third parties are over-charged.
33. The complainant believes it is in the public interest to disclose the rates used by the contractors so that these can be compared and scrutinised against the claims and invoices charged. Without this information there is no way of comparing the charges incurred and validating the relevant components with the contractors' schedule of rates. He believes this conduct invites abuse by a contractor.
34. The complainant goes on to say that a 'third party' could be anyone "unfortunate" enough to strike Crown Property, such as a barrier. He states that there are 1000's of such cases each year. Some are over threshold (£10,000 or more) and the rates (defined cost and uplift) are disclosed and fees are disclosed by HE in the bills presented to drivers, fleets and/or insurers. He questions why this information should be kept from third parties on sub-threshold matters (below £10,000) other than to prevent comparison and clearly show non-compliance with the contract. He commented that if contracted rates were secret, or the intention was to keep them secret, HE could have agreed a set of rates for 'above threshold' (their) repairs and another set for below (third



party) invoicing. He states, but, this could have caused similar questions to be raised; why are there two sets of rates for identical works?

35. He states that he has evidence of this conduct (two rates for the same work) of contractor(s) overcharging and believes HE's audits have either failed to identify the non-compliance or turned a blind eye to it. He believes at least one contractor is profiteering aided by HE itself.
36. The complainant also makes reference to much of the withheld information already being available via the claims that are processed and the fees and rates that are discharged as a result of this process.
37. The Commissioner notes that the complainant has concerns that different rates of charges may be being used for sub-threshold claims and she accepts she cannot dismiss such a claim when considering where the balance of the public interest lies. However the Commissioner is of the opinion that it is not her role to determine whether this is indeed taking place and if it is, whether this is due to improper practices, non-compliance with the terms and conditions of the contract, constitutes fraud, evidences that a contractor(s) is/are profiteering inappropriately from their public sector contract or due to another reason. She has also received no firm and definitive evidence of any actual wrong-doing during this investigation.
38. The Commissioner has also been provided with no evidence to suggest that the exact same information to the withheld information being considered here (which is a detailed schedule of rates for each contractor) is publicly available. She notes that some rates and fees will be disclosed as part of the billing/invoice and claims process. However, the Commissioner would regard such piece-meal disclosure as to be on a 'need to know' basis for specific purposes rather than public disclosure under the FOIA to the world at large for anyone to see with very limited restrictions of its use.
39. She notes there are public interest arguments in favour of disclosure of the requested information in this case. She acknowledges the public interest in openness, transparency and accountability and in members of the public having access to information which allows them to see how contracts have been priced, compare these with others and, in this case, potentially assess any charges presented to ensure that these are fair and reasonable. Although she considers that she has not seen herself firm evidence of wrongdoing in the operation of these contracts, the Commissioner also duly notes that the complainant does have real concerns that unfair charging has been taking place and that a contractor(s) is/are benefiting inappropriately from their public sector contract.



40. However, in this case, she has decided that there are stronger public interest arguments in favour of maintaining the exemption. The withheld information is the detailed pricing schedule of each contractor; information which the Commissioner considers is clearly commercially sensitive. The information would be useful to competitors. It would allow competitors (whether each other or those that do not currently have a contract) to work out how the contractors priced their successful bid and reveal information about the methodologies they used. When the contracts come up for renewal and new contracts come up for similar work, competitors could use this information to tailor their bid accordingly. This could lead to less competitive bids being submitted and them being clustered around what they have worked out HE is likely to accept, knowing what it has accepted in the past. Disclosure would be likely to stifle competition, which is not in the public interest and be likely to prejudice the existing contractors' commercial interests and any competitive edge they have worked hard at achieving. Disclosure would also be likely to hinder HE's ability to secure the best possible deal it can at renewal which would have a negative effect on the public purse. Such consequences are also not in the wider interests of the public.

#### **Is further recorded information held?**

41. As stated in paragraph 12 above the complainant considers information is missing that falls within the scope of his request dated 28 February 2017. These being appendices to Annex 23 and all correspondence relating to the appendices.
42. The Commissioner asked HE to address the complainant's concerns on 28 September 2017. HE responded on 27 November 2017 but failed to address this element of the complaint. The Commissioner therefore asked it again to consider whether it holds any further recorded information to that already provided. HE finally responded to this aspect of the complaint on 25 January 2018.
43. HE stated that there are no appendices included for Area 10 in relation to Annex 23. It stated that it has provided all the recorded information it holds falling within the scope of the request, except the withheld information discussed above. It advised that it is worth noting that Annex 23 does say that:

"the following TR430, TR137/HA2 and HA1/Q forms are to be obtained in connection with the duties set out in this Annex".

It confirmed that these forms can be obtained from the Green and Red claims branch and may help the complainant with his enquiry.

44. It confirmed that as there are no Annex 23 appendices there is no related correspondence.
45. HE has explained why no further recorded information is held. The Commissioner is therefore satisfied that, on the balance of probabilities, HE does not hold any further recorded information to that already identified.

### **Other matters**

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46. The Commissioner considers HE's engagement with her during the handling of this case and the poor, limited submissions she has received to be unsatisfactory and of increasing concern. The onus is on a public authority to provide the Commissioner with the necessary information to enable her to reach a decision. This includes providing detailed submissions explaining why a particular exemption is engaged and if necessary contacting relevant third parties about their thoughts on disclosure. The Commissioner has managed to reach a decision in this case based on what has been provided and other information that is available to her. But she wishes to point out that this case is unusual in this regard and it is not for the Commissioner to argue or carry out the necessary work on a public authority's behalf. Future cases will be considered on their own merits and if the necessary information is not supplied, in the level of detail that is required, it is possible that HE will receive adverse decision notices ordering disclosure.

## Right of appeal

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47. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

48. 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.
49. 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

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**