

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 February 2018

**Public Authority:** Transport for London  
**Address:** Windsor House  
42-50 Victoria Street  
London SW1H 0TL

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of the contract between Kier Highways Ltd and Transport for London (TfL). TfL released some of the requested information but withheld some under section 43(2) of the FOIA (prejudice to commercial interests). During the Commissioner's investigation TfL identified that it holds further relevant information which it had not released to the complainant.
2. The Commissioner's decision is that:
  - The information TfL has withheld under section 43(2) is exempt from disclosure under this exemption and the public interest favours maintaining the exemption.
3. The Commissioner does not require TfL to take any steps.

#### Request and response

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4. On 28 September 2016, the complainant submitted the following request for information to TfL, through the WhatDoTheyKnow website:  
*"please provide a copy of the contract with Kier Highways Ltd. I have seen that highways England have done so.*

*are the rates Kier Highways Ltd charging TfL for repairs to highways England the same as the rates Kier Highways Ltd charge third parties such as drivers who hit barriers or lamps etc.? if not, why not - please provide all information you hold about this?"*

5. TfL responded on 18 November 2016. It released the contract in question – the 'Framework Agreement for the London Highways Alliance (South Area) - withholding the Schedule of Rates under section 43(2) of the FOIA.

6. The complainant requested an internal review in the following terms:

*"The £10k threshold applies to work carried out as a result of 3rd party damage. The contractor can seek reimbursement from the 3rd party. The contractor is not obliged to use contractual prices when seeking reimbursement from 3rd parties'*

*\*how do the rates differ.*

*\*what does the contract say about the rates that can be used and how the contractors must conduct themselves*

*\*what is the service information - i am seeking a copy*

*\*what is the claims handling procedure - i am seeking a copy"*

7. TfL provided a review on 7 July 2017. TfL addressed the complainant's more general questions with regards to best value considerations. TfL released to the complainant a 'Service Information (Common)' document for the Central London Highways Alliance Contract (LoHAC), which it said was the same for all four (geographic) Areas (with some personal information redacted).

8. TfL confirmed that it does not hold information on the prices charged to third parties or the process they follow when collecting these charges. This is because the contract does not provide a provision for this.

9. TfL upheld its original position with regards to the information withheld under section 43(2) and confirmed that it considered the balance of the public interest favoured maintaining the exemption.

10. Towards the end of the Commissioner's investigation two things emerged. First, TfL acknowledged that it had overlooked what it has categorised as a new request, which the complainant had submitted when she had requested an internal review, namely "*what is the claims handling procedure - i am seeking a copy*". TfL has confirmed to the Commissioner that it is now processing this request. The Commissioner would treat any complaint arising from TfL's response to this particular request as a new complaint. Consequently, she has not included TfL's response to this request in the current investigation.

11. Second, TfL told the Commissioner that it had identified that it holds other information which it had not communicated to the complainant. This comprises appendices associated, the Commissioner understands, with the Service Information it had released at internal review. In light of the previous paragraph, it appears to the Commissioner that the request: *"what is the service information - i am seeking a copy"*, which the complainant also submitted as part of the internal review, should also have been categorised as a new request. TfL has indicated that it is intending to release to the complainant the information it has identified, with some personal data redacted. Again, the Commissioner would treat any complaint arising from TfL's response to this particular request as a new complaint and she has not included TfL's response to this request in the current investigation.

## Scope of the case

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12. The complainant contacted the Commissioner on 3 July 2017 to complain about the way her request for information of 28 September 2016 had been handled.
13. Having sought clarity on the scope of her complaint on 3 November 2017, the Commissioner's investigation has focussed on whether TfL can withhold the Schedule of Rates associated with the Keir Highways Ltd contract under section 43(2) of the FOIA, and the balance of the public interest.

## Reasons for decision

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### Section 43 – prejudice to commercial interests

14. TfL has withheld the Schedule of Rates associated with the LoHAC contract under section 43(2). Section 43(2) of the FOIA says that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The exemption is subject to the public interest test.
15. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. Firstly, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.

16. TfL has explained that LoHAC is a joint initiative between TfL and London's boroughs. Work under the LoHAC contract is divided between four area-based highways contractors.
17. It has explained in its submission to the Commissioner that the Schedule of Rates that the complainant has requested is a highly detailed breakdown of the rates for the work carried out under the LoHAC contracts and that it differs between the contracts for each of the four areas.
18. TfL says that LoHAC contractors carry out specified core services and for each such service, they are paid an agreed TfL-specific annual Lump Sum. In addition LoHAC contractors may be required to carry out other works, such as re-surfacing schemes. These are not covered by the Lump Sums and the price of these works is calculated by reference to that contractor's Schedule of Rates and Percentage Adjustments ('Uplifts').
19. In its submission to the Commissioner, TfL has argued that its commercial interests, and those of the other contracting public authorities, would be prejudiced if the withheld information was to be disclosed. Disclosure would, according to TfL, reveal the LoHAC contractors' bidding strategy and would be likely to lead to clustering of bids around the sums TfL has demonstrated a willingness to pay. This would give power to the contractors in future contract negotiation.
20. The Commissioner is satisfied that the harm that TfL alleges would occur if the information in this case was disclosed relates to its commercial interests, which is the interest applicable to section 43.
21. Second, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must, be real, actual or of substance.
22. TfL says that disclosing the detailed pricing that has been requested would be particularly likely to have the impact at paragraph 17 because similar contracts are held by TfL and other public authorities. There are four LoHAC contracts covering London, which TfL expects to re-let within the next three to four years. It says the tasks described in the Schedule of Rates (and the factors covered by the Contract Uplifts) are unlikely to change.
23. As referred to above, the London wide contracts are divided into four geographical areas with one contractor each. Each contractor has a separately negotiated 3rd Party Damage Lump Sum, Schedule of Rates

and Uplifts. TfL says that this means that essentially the same contract will be offered four times. When tendered, the bidders are asked to submit a series of Lump Sums, their Schedule of Rates and their Uplifts. Sharing the detailed pricing in the Schedule of Rates would mean the current contractors would know what had been accepted in other areas. This may mean that they do not offer their best price for parts of the works that they believe TfL would be willing to pay more for. Similarly, TfL says that bidders who do not currently hold one of the contracts would be more likely to cluster their bids around the current contract, rather than submit their most competitive offer. This would not only affect TfL, but also the London Boroughs who are party to the contract.

24. Disclosing the Schedule of Rates would, TfL argues, also cause clear prejudice to the contractors when negotiating with third parties. The Schedule of Rates (and the Uplifts) cover services and conditions that would be likely to apply to contracts for highways across the country. The 'commercial edge' of the contractors includes their ability to combine the different pricing elements contained in the requested information. The way they balance their costs against the lump sum and the individual pricing elements requires skill to put forward a competitive bid without exposing the company to unnecessary risk. TfL says this is demonstrated by the variation between bids that are submitted.
25. Finally, TfL has explained that contractors are operating in a competitive marketplace and their ability to negotiate with other parties would be undermined if the rates agreed under the LoHAC contracts were published. Those contractors would also suffer detriment when competing for similar contracts, including the four LoHAC contracts when the current arrangement comes to an end. This is because any entrant to the market would be able to reap the benefits of their investment in their costing model. TfL says that the fact that there are four contracts rather than one makes this different to other London wide schemes as the four contractors are likely to be in competition with one another, as well as with other firms not currently providing services under the contract.
26. The Commissioner accepts that if the Schedule of Rates was released it would, or would be likely to, result in a commercial detriment to TfL, other contracting public bodies and other contractors. TfL and public body contractors may be less able to secure competitively priced contracts in the future. New entrant contractors who would be able to adopt the released costing model in which the established contractors have invested and would perhaps not offer their best price for particular services if they are aware of what TfL is prepared to pay. The Commissioner considers that the second criterion has been met and that there is a causal relationship between the requested information being

released and prejudice to the commercial interest that section 43(2) is designed to protect. She is satisfied that this alleged prejudice is of substance.

27. Regarding the third criterion, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
28. In its submission to the Commissioner, TfL appears to advise that it considers that disclosing the requested information *would* prejudice its commercial interests and those of other contracting public bodies and contractors. In this case, although it may not be possible to confirm that TfL and other contractors would definitely be put at a commercial disadvantage, the Commissioner is prepared to accept that if the requested information was to be disclosed, there may very well be prejudice caused to those organisations' commercial interests.
29. Because the Commissioner has found that the three criteria for prejudice have been met, she finds that section 43(2) is engaged with respect to the request. She has gone on to consider the public interest test with regard to this exemption. Although she has found the section 43(2) exemption is engaged, it may still be released if the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

#### Public interest test

30. As arguments in favour of releasing the requested information, TfL has provided the following:
  - It would demonstrate accountability and enable the public to satisfy itself that best value is achieved through expenditure of public funds. This is in part met through the publication of all expenditure over £250, but there would be some public interest in being able to compare the details of pricing agreed between different public authorities and contractors for similar tasks.

- Disclosure would support fairness in dealings between contractors and third parties who are liable for damage caused to the highway. TfL has referred the Commissioner to a website<sup>1</sup> that appears to be hosted by an independent claims management company. On this website it is argued that disclosing the pricing agreed between contractors and public authorities would allow drivers, fleet operators, insurers and others to compare their bill with a schedule of charges for similar work that a public authority has negotiated. The arguments state that there is a regime of dual charging and that this price discrimination by contractors is unfair. The argument is made that third parties who receive bills for damage to the highway would reasonably believe that the negotiated fees for works agreed by public authorities would apply to them, and that knowledge of the detailed pricing structure would allow third parties to assess whether their bill was reasonable.
- However, TfL notes that the above 'England Highways' website also states that: "Rates are, to a great extent, standard"; and makes reference to a schedule of rates published by The Civil Engineering Contractors Association (CECA). Given that such a benchmark exists it would seem to TfL that third parties do have access to information that would enable them to determine whether the rate presented to them is reasonable.
- The remaining points on [www.englandhighways.co.uk](http://www.englandhighways.co.uk) focus on whether disclosing the requested information would be particularly damaging to any parties' economic interests. The reference to the schedule of rates from the CECA is noted, along with the circulation of knowledge about charging through the process of mergers and acquisitions, joint working and the movement of employees between firms which, presumably, is no different to other industries which also protect and benefit from commercial confidentiality.

31. As arguments in favour of maintaining the exemption, TfL has provided the following:

- There are four LoHAC contracts covering TfL and borough local road maintenance and improvements across London. The contract was developed to deliver a reliable, reputable and cost-effective

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<sup>1</sup> <http://www.englandhighways.co.uk/>

highways service across the capital. The contracts were awarded to four service providers following a competitive tender.

- Transport for London and the LoHAC partner organisations would be likely to suffer damage to their economic interests if detailed pricing was published. The disclosure of such detailed pricing information would reveal the bidding strategies of the successful bidders and would be likely to result in clustering of bids when the contract comes to an end in 2021 with contractors seeking to obtain the most favourable of terms across the four contracts. New bidders who do not currently have one of the LoHAC contracts would be likely to use the previous contracts to set their rates and would be expected to consider the rates as a guide to what TfL and the boroughs would be prepared to pay. TfL does not receive an operating grant and ultimately any failure to obtain the optimum market rate would be met by costs passed on to customers, residents, visitors and taxpayers.
- Disclosure of the rates agreed with the contractors for specific tasks under the LoHAC contracts would be likely to prejudice the commercial interests of the individual contractors.
- Releasing the Schedule of Rates would prejudice the commercial interests of many contractors and would distort competition in that market, which in itself would not be in the public interest.
- To quote from the ICO guidance on s43(2), *"If the commercial secrets of one of the players in the market were revealed then its competitive position would be eroded and the whole market would be less competitive with the result that the public benefit of having an efficient competitive market would be to some extent eroded."* Willem Visser v Information Commissioner EA/2011/0188, (1 March 2012)
- From the same guidance, TfL agrees that; *"revealing information such as a pricing mechanism can, for example, be detrimental to a public authority's negotiations on other contracts and procurements. If an organisation knows how a public authority costs an item or service for example, then it can exploit this for profit or other gain."*

#### Balance of the public interest

32. In its submission to the Commissioner, TfL has acknowledged that it is possible to make the case that disclosure would increase transparency and accountability. However, it argues that the effect of publishing a breakdown of the prices charged under the contract would be likely to



harm the commercial interests of both the contractors and the public authorities engaging their services. This would be likely to lead to increased costs being passed on to customers, residents, council tax payers and visitors. In TfL's view, the public interest in the public authority contracting bodies being able to secure the best value for money is greater than transparency arguments on this occasion.

33. The Commissioner agrees with TfL. She notes that the complainant has not provided any public interest arguments to support her position that TfL should release the withheld information. The Commissioner undertook an internet search which included reviewing some concerns about the Keir Highways Ltd contract published on the 'England Highways' website. Although this search was not exhaustive, it did not surface any issues associated with the Schedule of Rates and the Keir Highways Ltd contract that are of particular concern in this case.
34. While acknowledging the general public interest in transparency, in the absence of any further strong public interest arguments for release, the Commissioner finds that the transparency argument is outweighed by the need for TfL and other bodies' ability to secure the best value for money with their contractors. This ability would be compromised if the Schedule of Rates in this case was to be disclosed. The Commissioner therefore finds that the section 43(2) exemption is engaged and that the public interest favours maintaining the exemption on this occasion.

## Right of appeal

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35. 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)

36. 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.
37. 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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**Information Commissioner's Office**  
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