

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

### **Decision notice**

**Date:** 16 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 on other information requests made to Highways England on sub-threshold claims including steps taken to locate information and conclude no information was held. The request also asked for the fields used by Highways England's contractors when sending information to Highways England. Highways England refused the request as vexatious under section 14(1)
2. The Commissioner's decision is that Highways England was not entitled to refuse to comply with the request under section 14(1) of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Issue a fresh response to the request which does not rely on section 14(1) of the FOIA.
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**

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5. On 18 October 2017, the complainant wrote to Highways England and made a request for information. The request stemmed from historic requests made to Highways England in 2015 and 2016. Highways England responded to these earlier requests by stating that no information was held relating to sub-threshold claims where damage was caused to Crown property. The complainant considered he now had cause and evidence to question the validity of these 'not held' responses from 2015 and 2016. The complainant brought this matter to the attention of the Commissioner who, due to the time that had passed since the initial requests were made and refused, advised the complainant to make a new request for information to Highways England.
6. The complainant's request to Highways England of 18 October 2017 detailed the reasons the complainant disputed the earlier "not held" responses to his requests from 2015 and 2016. He explained that these requests had been about sub-threshold (less than £10,000) claims where damage had been caused to Crown property and that these claims are handled by Highways England's contractors and these contractors seek recovery of the costs themselves. The response from Highways England had been that no information on these claims was held as the contractors handled them completely. The complainant stated that in 2017 a contractor gave evidence in Court that information on all claims, even those sub-threshold, is sent to Highways England on a regular basis. In addition to this, the complainant pointed to a different response to an FOIA request in which Highways England stated this data is used to determine what a contractor recovers each year so as to determine their lump sum payment from Highways England.
7. All of this led the complainant to want to now challenge the earlier "not held" responses to requests relating to information on sub-threshold claims. The new request submitted to Highways England, rather than asking for information on sub-threshold claims which the complainant now believed was held, instead focussed on the reasons why the "not held" responses were made by Highways England. The request asked for:
  - "1. All requests made about the subject (below threshold claims information) by myself and others*
  - 2. all responses*
  - 3. all internal information. This will include the enquiries undertaken to locate the information, the consideration to the requests and the decisions not to provide information that is held i.e. why it was decided to respond 'not held' when in fact the information was in the possession of Highways England*

4. *the schedule of fields, the information, that contractors send Highways England each month under an ASC.*

*To restrict '4' I am prepared to limit this to Area 9."*

8. After receiving no response within 20 working days the complainant requested an internal review on 16 November 2017.
9. Highways England responded on 17 November 2017 and stated the request was being refused as vexatious under section 14(1) of the FOIA. It explained that it had considered the history and context of all of the complainant's requests relating to sub-threshold claims and concluded that the requests were imposing a significant burden on Highways England and were therefore vexatious.

## Scope of the case

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10. The complainant contacted the Commissioner on 20 November 2017 to complain about the way his request for information had been handled.
11. The Commissioner considers the scope of her investigation to be to determine if Highways England has correctly applied the provisions of section 14(1) of the FOIA to refuse this request as vexatious.

## Reasons for decision

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### Section 14 – vexatious requests

12. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.
13. The term 'vexatious' is not defined in the FOIA. The Upper Tribunal (Information Rights) considered in some detail the issue of vexatious requests in the case of *Information Commissioner vs Devon County & Dransfield* (GIA/3037/2011) ("the *Dransfield* case") and concluded that the term could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure*". The Tribunal's decision establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
14. In the *Dransfield* case, the Upper Tribunal also found it instructive to assess the question of whether a request is vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request and (4) harassment of, or distress to,

staff. The Upper Tribunal did, however, also caution that these considerations were not meant to represent an exhaustive list. Rather, the Upper Tribunal stressed the *"importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests"* (paragraph 45).

15. The task for the Commissioner, therefore, is to decide whether the complainant's request was vexatious in line with the approach set out by the Upper Tribunal, and she has therefore taken into account the representations of the complainant and Highways England, as well as the evidence that is available to her.
16. In this notice the Commissioner will also refer to her published guidance<sup>1</sup> in defining and dealing with vexatious requests.

### **The complainant's view**

17. In this case, the complainant has argued that his request relates to a matter of public concern: the charges levied by Highways England's contracted company/companies in respect of repairing road or infrastructure damage caused by a member of the public.
18. Highways England's contracted company/companies can charge a member of the public for repairs to the highway or other infrastructure caused when an accident has taken place. However, the contractor(s) may also charge Highways England itself for the cost of repairs, where the total cost is over a certain amount of money.
19. The complainant wishes to discover detail about the level of charges submitted to members of the public, and those submitted to Highways England. He handles insurance claims for members of the public who have been billed by the contractor(s), and is concerned at a lack of transparency in the level of fees and the actual costs to Highways England of the repairs which it has paid for.
20. These arguments carry across for the majority of the requests the complainant submits to Highways England. However, in this case the request is somewhat different as it is not solely related to sub-threshold

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

claims but also to the responses to previous information requests. As discussed earlier in this notice, the complainant believed there was evidence to question some of the earlier “not held” responses and therefore it was reasonable to ask questions around the earlier responses and the thoroughness of the searches conducted by Highways England; as well as to ask for details of the information that is submitted by the contractors to Highways England now it seemed that this was passed on regularly.

### **Highways England’s view**

21. Following the approach of the First-tier Tribunal in *Gregory Burke v The Information Commissioner* (EA/2015/0050) (“the *Burke* appeal”), the Commissioner has accepted in a number of subsequent cases that it may be appropriate to consider the evidence in context, in order to confirm whether a public authority’s argument for vexatiousness has validity. In other words, where it is relevant to do so, a public authority may take into account the context and history preceding the request. This means that a request may be vexatious when made by one person and not vexatious when made by another person.
22. In this case, Highways England has provided evidence to the Commissioner that, from January 2016 onwards, the complainant submitted to it 24 requests for information/requests for internal review prior to July 2017. The majority of the requests related to overall costs issue or to an aspect of that issue. Highways England has argued, in fact, that the complainant has been making requests about this issue over the course of the last three years. The Commissioner considers it should be noted that the arguments presented by Highways England were identical to those provided in response to another investigation which resulted in a decision notice<sup>2</sup> supporting the use of section 14(1) to refuse the request.
23. Highways England has expressed concern at what it refers to as the ‘scattergun approach’ being adopted by the complainant, which, it explains, has caused difficulty for the authority in managing the volume of queries he has submitted. It explains that he has contacted a number of different individual members of Highways England staff with different requests.
24. In addition, Highways England has noted that the complainant frequently adds comments online to requests from members of the

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<sup>2</sup> FS50703446

public on the What Do They Know website which relate to this issue, encouraging them to press for further details after their requests for information are responded to.

25. In Highways England's view, this is an indication that the complainant may be acting in concert with other requesters.

### **The Commissioner's decision**

26. As set out in the Commissioner's guidance, referenced previously, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.
27. The guidance explains that the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. However, 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.
28. In the guidance, it is explained that a complainant adopting a *scattergun approach* (as stated by Highways England) can be an indicator that a request might be vexatious. However, a scattergun approach is defined as where "*The request appears to be part of a completely random approach, lacks any clear focus, or seems to have been solely designed for the purpose of 'fishing' for information without any idea of what might be revealed.*"
29. The Commissioner does not consider that the complainant's request falls squarely within that definition; however, she has noted that, in her guidance, another indicator of vexatiousness is *frequent or overlapping requests*, defined as being where "*the requester submits frequent correspondence about the same issue or sends in new requests before the public authority has had an opportunity to address their earlier enquiries.*"
30. The Commissioner considers that this applies to this request and will consider the weight of this indicator later on.
31. With regard to the complainant possibly acting as part of a campaign, the Commissioner has again considered her guidance.
32. The guidance explains that if a public authority has reason to believe that several different requesters are acting in concert as part of a campaign to disrupt the organisation by virtue of the sheer weight of FOIA requests being submitted, then it may take this into account when determining whether any of those requests are vexatious.

33. In this case, it is evident that the complainant has encouraged other requesters to persist with their enquiries to Highways England.
34. The Commissioner is also aware that the complainant set up a website before the date of the request, which draws attention to the alleged disparity in the level of costs payable to the contractor(s), and displays comments from dissatisfied persons who have made freedom of information requests.
35. However, the Commissioner's guidance also makes clear that, if the available evidence suggests that requests which may be part of a campaign are genuinely directed at gathering information about an underlying issue, then the authority will only be able to apply section 14(1) where it can show that the aggregated impact of dealing with the requests would cause a disproportionate and unjustified level of disruption, irritation or distress.
36. In other words, even with the presence of indicators of vexatiousness, or an indication of requesters acting in concert, the Commissioner considers that the key question for public authorities to consider when determining if a request is vexatious is whether complying with the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress to the authority.
37. In this case, it is apparent from the evidence presented to the Commissioner that Highways England has dealt with a very large number of requests from the complainant alone.
38. As stated in the Commissioner's decision notice from which the *Burke* appeal stemmed<sup>3</sup>, a *'high frequency and volume of correspondence may further weaken the justification for the continued making of requests'* (paragraph 18).
39. However, the Commissioner goes on to say that *'potentially offsetting the weight of this factor is the seriousness and complexity of the dispute itself and the importance of the requested information.'*
40. The Upper Tribunal in the *Dransfield* case expressed the view that it may be appropriate to ask the following question: *'Does the request have a value or serious purpose in terms of the objective public interest in the information sought?'*

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<sup>3</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042938/fs\\_50548810.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042938/fs_50548810.pdf)

41. The Commissioner is aware that the requests seek to shed light on an area which is of interest to the motoring public, and that the request under consideration in this notice can be said to have some serious purpose and value.
42. Whilst the Commissioner has accepted that Highways England has correctly refused other requests from this complainant as vexatious when they have been on the subject of sub-threshold claims; this request is somewhat different as the complainant initially wanted the Commissioner to assess the validity of the "not held" responses received in 2015 and 2016 following the new evidence he believed called these responses into question. It was only due to the time that had passed that a new request was made to Highways England with the intention of obtaining a response that confirmed if information was held and could be disclosed.
43. Whilst the request that is the subject of this decision notice was not an exact repeat of those made in 2015 and 2016 where it was stated no information was held, the request essentially asks for the 'meta-data' relating to any requests in which it was stated that information was "not held" so that it can be determined how this position was reached given, in the complainant's view, it was now apparent this position was incorrect. In addition to this, as the complainant now believed that Highways England did receive regular information from its contractors, even on sub-threshold claims, he sought information on the fields that are submitted by the contractors but not the specific information that is sent to Highways England, rather the type of information.
44. The Commissioner recognises that the complainant believes there is a value in the information he is requesting, particularly in the disclosure of information which shows that Highways England are not being overcharged for claims and therefore that these costs are not being passed on to insurers and, consequently, drivers. As a general point, the Commissioner would accept this lends some weight to the view that it is reasonable to make requests for information on sub-threshold claims and those over the threshold that are passed to Highways England to recover the costs.
45. As already mentioned, in the other decision notice the Commissioner found that this was not enough to outweigh the excessive burden the numerous, overlapping and persistent requests were having on Highways England.
46. However, in this case the Commissioner takes a slightly different view and must consider whether the request and not the requester is vexatious. Whilst it is on the same subject as many of the other requests submitted to Highways England and it is therefore easy to see



why it was refused as vexatious; the Commissioner considers that the history and context to this request is the key difference. This request is not just repeating and overlapping with other requests for information on sub-threshold claims but is asking for information on how Highways England has reached its previous decisions. There is some crossover with other requests as the request asks for the fields of information that are filled in when reporting back to Highways England, but this is not as detailed as some of the other requests the Commissioner has seen and it still stands alone from these requests as it is focused on other matters.

47. That being said, the Commissioner does note that the wide range of information asked for in this request could be seen to be burdensome as it not only asks for information to assess how Highways England reached its previous decisions but asks for details of all other requests submitted to Highways England that were declined as no information was stated to be held.
48. The Commissioner recognises that the complainant has now set up a website to encourage other people to make information requests to Highways England. This website also contains some criticisms of the operations of Highways England. The Commissioner's view on this is that public authorities should be used to a certain amount of criticism, although there is a limit as to what is acceptable. The Commissioner notes the website is critical of Highways England but she does not consider it has crossed the boundary or being acceptable. The Commissioner understands why encouraging other people to make information requests would be seen as adding to the argument that the requests are causing unnecessary burden on the public authority but she also recognises if this is an issue that is driving individuals to want to seek more information from Highways England then there is clearly some public concern over this matter.
49. The Commissioner must make a decision based on the information request that has been deemed as vexatious and it is clear from her earlier decision notice that where the requests clearly overlap and repeat each other there is a strong case for arguing any purpose or value does not outweigh the burden on Highways England. However, in this case she finds that the serious purpose or value in this request is significant as the information being sought is the meta-data surrounding earlier requests and is required to allow the complainant to ascertain if these requests were properly investigated in light of new information.
50. In her view, the Commissioner does not believe Highways England has demonstrated that this request is unjustified, inappropriate or an improper use of a formal procedure. Therefore, the Commissioner's

decision is that Highways England is not entitled to rely on section 14(1) of the FOIA to refuse to comply with this request.

### **Other matters**

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51. The Commissioner considers that Highways England has shown poor engagement with her office throughout this process in failing to respond to her letter of investigation until served with an information notice ordering it to do so. She expects better and timelier engagement from Highways England in the future.

## Right of appeal

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52. 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)

53. 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.
54. 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**  
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**Information Commissioner's Office**  
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