

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 April 2019

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

Decision (including any steps ordered)

1. The complainant has requested “the defined costs” associated with an invoice relating to an area of the road network that is maintained and improved by a particular contractor appointed by Highways England (HE). HE released some information and its position is that it does not hold the specific information requested. The complainant’s position is that the released information is not what he requested and that HE holds the specific information he requested – “the defined costs” – but is withholding it.
2. The Commissioner’s decision is as follows:
 - On the balance of probabilities HE does not hold information falling within the scope of the complainant’s request of 8 May 2018 and it has complied with section 1(1)(a) of the FOIA.
 - HE has breached section 10(1) with regard to a separate request the complainant submitted on 18 June 2018 as it has yet to comply with section 1(1) with regard to this request.
3. The Commissioner requires HE to take the following step to ensure compliance with the legislation:
 - Provide the complainant with a response to his request of 18 June 2018 that complies with the FOIA.

4. HE 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.

Request and response

5. The complainant says he had submitted the request below to the Government Legal Department (GLD) on 19 July 2017. GLD advised him on 30 August 2017 that it had forwarded the request to HE. The complainant contacted the Commissioner on 25 April 2018 as he said he had not received a response from HE. On 8 May 2018 the Commissioner wrote to HE about the request, and forwarded a copy of the request to it. HE advised that it had no record of having received the request previously.
6. The complainant had requested information in the following terms:

"When responding [to previous correspondence], please can you provide the schedule of defined costs for the Area – the schedule used to build up the invoice."
7. HE responded to the request on 22 May 2018. It released information to the complainant – a scan or 'screen shot' of a cost breakdown document (CBD) relating to a specific highway incident, with personal information redacted. A CBD is the document provided by the supplier (Kier in this case) that sets out the cost of a repair that the supplier has carried out. It is broadly equivalent to an invoice, which is how the complainant has described it in his request.
8. The complainant requested an internal review on 22 May 2018. He said he had not requested *"the invoice"*, he had requested *"the schedule of defined costs for the area"*. In this email the complainant also confirms: *"I am not seeking the invoice, I possess this – without redactions"*.
9. On 18 June 2018 the complainant wrote to HE again. Amongst other enquiries and statements, and relevant to the current request, the complainant asked HE:
 - to supply the schedule of defined costs ie the rates it agreed with Kier in Area 3; the schedule of cost to which it and Kier are working
10. In this correspondence, the complainant also requested the following:

- That HE should provide a legible copy of the CBD for example the original Excel spreadsheet in which it appeared to have been created.
 - That HE should release the information it had redacted from the CBD it had released.
11. On 25 January 2019 HE confirmed to the complainant that it would not conduct an internal review because the complainant had not submitted his request for one through the appropriate channel.

Scope of the case

12. The complainant first contacted the Commissioner on 25 April 2018 to complain about the way his request for information had been handled.
13. The Commissioner's investigation has focussed on whether, on the balance of probabilities, HE holds information falling within the scope of the request for "defined costs" that HE received on 8 May 2018.
14. The Commissioner notes that on 22 May 2018 the complainant confirmed that his request of 8 May 2018 was not for "the invoice" (or CBD) – a version of which HE had provided to him. On 18 June 2018 however, the complainant requested a copy of the CBD in a particular format and requested an unredacted version of this information. In the circumstances, the Commissioner considers these related requests of 18 June 2018 to have been a new request. She has also therefore considered whether HE has complied with section 10(1) with regard to this request.

Reasons for decision

Section 1 – general right of access to information held by public authorities

15. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to him or her if it is held and is not exempt information.
16. More information on the background and context of the current request is available in the Commissioner's decisions in FS50703446 and FS50716692. Both these cases concerned requests the complainant had submitted to HE that concerned – to a larger or lesser extent – the matter of defined costs. In both cases the Commissioner found that HE

was correct to categorise the requests as vexatious requests under section 14(1) of the FOIA.

17. In its current submission to the Commissioner, HE has confirmed that it does not hold the requested information – “defined costs” – as the requested information does not exist.
18. HE says it has received a very large number of requests from the complainant since 2010 in relation to the defined cost in its Asset Support Contracts (ASCs) and third party claims. The current request forms part of a wider series of requests which, HE says, are in essence largely similar or repeated. HE says that on numerous occasions its officers have replied to the complainant’s correspondence advising him that HE does not hold a schedule of rates for third party claims and that the only rates contained in the contract are considered commercially sensitive. HE has subsequently clarified to the Commissioner that the ‘contract’ to which it referred in its submission is the model ASC and also the Area 3 ASC that it holds with Kier.
19. HE has confirmed to the Commissioner that the focus of the complainant’s request is geographical Area 3 (the ‘area’ referred to in the request) – one of 12 road networks that are maintained and improved by contractors HE appoints under ASCs. HE contracts Kier to maintain Area 3. The contractor’s role includes pursuing claims against third parties where there has been damage to a public road. This is referred to as “damage to crown property”, or “DCP”. Where the damage exceeds £10,000, the contractor will bill HE for the repair work, and HE then claims the costs from the third party who caused the damage. Where the damage is less than £10,000, the contractor will claim its repair costs directly from the third party.
20. HE has told the Commissioner that the ASCs are large complex contracts with numerous schedules. In order to provide some clarity for the Commissioner it set out a basic overview of the model *Conditions of Contract for Highways England ASC*, which is publicly available online¹. HE noted that the various ASCs, whilst based on the model documents, may differ in some respects as they have been individually negotiated and varied over time.

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https://webarchive.nationalarchives.gov.uk/20140603121903/http://assets.highways.gov.uk/about-us/procurement-asset-support-contract/ASC_Model_Conditions_of_Contract.pdf

21. HE has explained that the term 'defined cost' refers to a definition in the contract - the contract does not contain a schedule of defined costs; the defined cost is calculated in accordance with the definition. This is based on actual costs incurred by the supplier and there is no pre-set schedule of defined costs, or other schedule, that is used. The definition is contained at clause 11.1 of the above contract and is stated as follows:

"(27) Defined Cost is

the amount of payments due to Subcontractors for work which is subcontracted without taking account of amounts deducted for

- payments to Others and*
- the supply of equipment, supplies and services included in the charge for overhead costs incurred within the Working Areas in this contract and*
- the cost of the components in Schedule 1 for other work*

less

- the cost of preparing quotations for compensation events where the work affected forms part of the Lump Sum Duties and*
- Disallowed Cost."*

22. The *Schedule 1 Conditions of Contract* in the above contract – which the Commissioner has reviewed - contains the 'Schedule of Cost Components' at page 104. HE notes that this schedule does not contain any figures or rates but sets out the costs that may be recovered by the supplier.

23. HE has gone on to explain that the contract's *Pricing Schedule*, including Appendices A, B and C, does include rates. It says these rates are the rates tendered by the supplier during the procurement process. The purpose of these rates is to build the target cost model which is used during the operation of the contract as a basis for calculating the 'pain gain' share. HE has told the Commissioner that it has previously advised the complainant that these rates are exempt from disclosure as the conditions under section 43 of the FOIA (commercial interest) are met. This position was recently upheld by the First Tier Tribunal (Information Rights) ('the FTT') in the complainant's appeal against the Commissioner's decision in a further case relating to the complainant and HE - FS50684021, FTT reference EA/2018/0104.

24. The process for administering Third Party Claims is covered in Annex 23 of the ASC Model Contract.² HE has confirmed that the contract does not contain a schedule of rates for use in conjunction with Annex 23.
25. Paragraph 52 of the FFT decision sets out the Tribunal conclusion that
"... the withheld information does not contain specific DCP rates. We accept Mr Carney's evidence that the withheld information sets out target rates for the main contract as part of the tendering process for ASC Area 10, and is very different from DCP rates which are actual costs charged in emergency situations".
26. The Tribunal confirmed that [while] *"there may be some overlap in the types of items covered, the withheld information would not easily allow DCP rates to be calculated, and would not give an accurate picture. In particular, it would not show clearly how DCP rates charged to third parties are calculated, or whether different rates are charged to third parties directly by contractors"*.
27. HE has noted the FTT summarised at paragraph 53 of its decision that *"Put simply, the withheld information simply does not show what the appellant wants to know about DCP rates"*. HE says this is relevant to the current request as the information requested ie *"When responding, please can you provide the schedule of defined costs for the Area – the schedule used to build up the invoice"* does not exist.
28. HE has concluded its submission by addressing the routine questions that the Commissioner put to it with regard to any relevant information it may hold. Its position is that a search for information was not necessary as the complainant has misunderstood the situation. HE says that the complainant wrongly considers that the Asset Support Contracts that it has with suppliers contain a 'Schedule of Defined Cost' or that HE is in possession of a 'Schedule of Rates'. HE has confirmed that this is not the case. HE says that following several requests of this nature from the complainant, over a number of years, a search was not required. HE confirmed that, in response to the current request, it requested from its supplier (Kier) the defined cost in relation to the particular claim that is of concern to the complainant (and about which

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https://webarchive.nationalarchives.gov.uk/20140603121733/http://assets.highways.gov.uk/about-us/procurement-asset-support-contract/ASC_Model_S_I_Annex_23_Third_Party_Claims.pdf

he had originally contacted GLD) and the information was provided and released to the complainant; namely the CBD referred to in paragraph 7.

29. Finally, HE has confirmed that relevant information has not been deleted or destroyed as it has never been held.
30. The complainant has written to the Commissioner a number of times during the course of this investigation. In this correspondence, the complainant tends to conflate this case with other requests he has submitted to HE and with his other complaints associated with HE that the Commissioner has previously dealt with, is currently dealing with, or may deal with in the future. It results in a muddled picture. Notwithstanding this, the Commissioner has reviewed the complainant's correspondence but has not identified any arguments from the complainant that make a compelling case for HE holding the disputed information; that is, the 'defined costs'.
31. The Commissioner has considered: all the circumstances of this case, HE's submission, the complainant's correspondence, her previous related decisions and a previous decision of the FTT. On the balance of probabilities she is satisfied that HE does not hold the information in question; that is a schedule of "defined costs" that the complainant is seeking. She accepts HE's position that the complainant has misunderstood the situation – ie elements of the ASC, and CBDs and how they are drawn up - and that this information does not exist. As such, the Commissioner finds that HE does not hold the requested information and has complied with section 1(1)(a) with regard to this request.

Section 10 – time for compliance

32. Section 10(1) of the FOIA says that a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of a request.
33. As the Commissioner has discussed, the complainant effectively submitted a new request on 18 June 2018, for an unredacted copy of the CBD in a particular format. The Commissioner notes that the complainant had already informed HE that he had been provided with an unredacted copy of the CBD from another source ie he already holds this information.

34. Nonetheless, in its response of 25 January 2019 HE had responded to the request of 8 May 2018 and advised that it would not provide an internal review. It did not address this further request and, to date, has not provided a response to it. HE has therefore breached section 10(1) with regard to this request.

Right of appeal

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

Website: 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

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