

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2020

Public Authority: Highways England

Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested from Highways England information about DCP ("damage to crown property") rates and related matters. Highways England provided some information to the complainant but stated that it did not hold information about DCP rates. The public authority also cited section 14(2)(repeat requests) to part of the requested information.
2. The Commissioner's decision is that, on the balance of probability, Highways England does not hold information about DCP rates. However, the Commissioner finds that section 14(2) does not apply to this request and that Highways England breached section 10(1) of the FOIA by failing to respond to the request within the statutory timeframe.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. The complainant made the following request to Highways England on 22 February 2019:

"1. I ask to be provided, for Area 10, since the inception of the contract in 2012, the above-threshold (£10,000) rates which you have most recently referred to as a 'Pricing schedule' and/or 'schedule of costs components' but which also have been referred to by various employees as:

- DCP ('damage to Crown property') Rates*
- Defined Costs*
- Nominal Rates*
- Base Rates*

For sake of clarity, it is the schedule of agreed tariffs which are used by your contractors in order to present 'above threshold' claims to Highways England for settlement under the terms of their contractual appointment to undertake such repairs to the public highway.

If, with regard to the contract the above terms are not synonymous.

2. please explain the differences, with reference to exact calculations which lead from one descriptive term to another.

By way of background, In 11/2018 a HE employee stated that the 'DCP' rates, being those list of rates used to calculate claims as presented to HE for direct payment, were not commercially sensitive.

3. Please advise what rates for above-threshold claims are held and describe same.

4. Are rates for incidents where a recovery against a Third Party (driver, fleet or insurer) is identified in any way subsidized or reduced by the lump-sum payment BBMM receives?

a. If yes, what is that subsidy / reduction, how is this calculated and applied.

5. Are rates for Third-Part or culprit-unidentified incidents in any way subsidised / reduced by the lump sum payment BBMM receives?

a. If yes, what is the subsidy / reduction, how is this calculated and applied

6. Is any aspect of emergency incident attendance or repair covered by the lump-sum payment and if so?

a. what aspects"

5. At this point it might be helpful to provide some definitions relevant to this request though relating to a different complaint to the Tribunal¹:

"Contractors are appointed under ASCs [Asset Support Contract] to provide various services to HE regarding the maintenance and improvement of the public road network. The appellant's request relates to geographical Area 10, which is one of 12 road network areas. 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." (paragraph 3)

6. On 12 April 2019 Highways England also explained the following in its late response to the complainant:

"Defined Costs – 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 not (sic) pre-set schedule of defined cost, or other schedule that is used. The definition is contained at clause 11.1 and is stated as follows:

(27) Defined Cost is

- o 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**
- o the cost of the components in Schedule 1 for other work less*
- o the cost of preparing quotations for compensation events where the work affected forms part of the Lump Sum Duties and*
- o Disallowed Cost"*

The response from Highways England provided a response under each of the request headings but reiterated that no DCP rates were held.

¹ [EA/2018/0104](#)

7. The complainant subsequently requested an internal review. Highways England conducted two reviews, firstly a procedural review where it accepted that it had breached the FOIA by responding late to the complainant's request and a second, on 4 June 2019 which covered the more substantive issues, concluding that the original request had been correctly handled. In the review Highways England referred the complainant to the eventual outcome of what it believed to be a similar matter which had been the subject of a decision notice, at that point still under Appeal.
8. The Commissioner does not intend to analyse further the public authority's response to the original request because it has only been reproduced for context and ease of understanding of what Highways England later classed as a new request.
9. On 4 June 2019, the complainant made a request which is the basis of this complaint:

"1. Please provide all information held by your contractor. You have not supplied the information held by BBMM [Balfour Beatty Mott MacDonald].

Please provide this information along with a copy of your request and their response

2. The Judgement [²] to which I referred you was provided by your contractor. It is the document upon which BBMM have been and are relying. It appears BBMM could be approached for the information (and see '1' above).

*Why has this not occurred?
When will it occur?*

3. An issue relating to Area rates is subject to appeal. This request stands on its own Were it not, I feel sure you would have cited duplicity or repetition to exempt a reply. The request differs from others in that it deals with a set of rates stated to a Judge to exist and for above threshold only.

² <http://www.englandhighways.co.uk/15-02-2018-derby-county-court-bbmm-for-highways-england/>

Please explain your stance given, as advised, your contractor states the rates exist. As at '2' above:

*have you approached your contractor for the information?
Please provide a copy of the approach and their reply*

4. There is and must be more to add. A definition is one thing, the 'numbers' are another. You have specifically referred to 'costs' and it must surely be obvious that having agreed a definition, to output a charge, to apply the definition, there must be numbers. It appears Highways England are being deliberately obtuse in their hackneyed referral to the Defined Cost 'definition'. I am aware of the definition, which provides a meaning, I am seeking the applied figures. The act of defining should make something definite, distinct, or clear. Your response appears intended to obfuscate and do anything but make matters transparent.

Please explain the reference to 'costs' and how the definition is applied. Contractors have been invoicing using the methodology since 2012, at the commencement of any contract the compilation of a rate charged was clearly based on something; what?

This is clarified, progressed in point 5:

5. Please explain the calculation, form (sic) where the figures are obtained and how the output (sum) is arrived at.

If you are refusing to do so, as appears to be the case, please confirm asap..."

10. On 5 June 2019 the complainant followed this email with the suggestion that Highways England ask either its contractor for the information or the named witness in the county court judgment referred to in the previous day's request.

11. On 2 August 2019 Highways England responded as follows:

Point one of the request was 'not held'.

Point two of the request – Highways England corrected its previous assertion on 4 June 2019 that it did not hold a copy of the judgment referred to by the complainant. It did, in fact, hold a copy and attached it.

Points three, four and five – Highways England provided some information but said that it considered this part of the request to be both the subject of an Appeal and a repeat request (section 14(2)).

12. On 9 August 2019 the complainant requested an internal review. He pointed out that Highways England had been prepared to revert to BBMM for a copy of the judgment but not the rates he sought.
13. The complainant reiterated his request for "*all information held by your contractor*" and the request and response made to BBMM. Highways England again said that it had made no such request to its contractor and that the information was not held.
14. On 16 September 2019, having heard nothing further, the complainant again sought a review.
15. Highways England provided its review (dated 18 October 2019) on 25 October 2019 because it had been incorrectly assigned to another of the complainant's requests. The public authority maintained its position.
16. The Commissioner wrote to the complainant on 27 January 2020 to suggest that the request centred around the matter of whether Highways England held a schedule of DCP rates and that this issue had recently been the subject of an Information Rights Tribunal which had found that they were not held. The complainant declined to close his complaint.
17. Subsequently, the Commissioner contacted Highways England on 31 January 2020 to ascertain its position.

Scope of the case

18. The complainant had contacted the Commissioner on 12 September 2019 to complain about the way his request for information had been handled. There was some confusion regarding which request was being complained about due to the many and lengthy interactions between the complainant and the public authority.
19. The complainant referred in his complaint to the lack of a review. Once that review had taken place in October 2019, the Commissioner considered the scope of the case to be whether Highways England holds what the complainant describes as DCP rates and whether BBMM is holding the DCP rates on behalf of Highways England. The Commissioner has also considered whether Highways England correctly cited section 14(2) in relation to parts three, four and five of the 4 June 2019 request. Additionally she will look at whether any procedural breaches were made by the public authority.

Reasons for decision

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

20. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled-

(a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

21. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held (and, if so, whether all of the information held has been provided).

22. The complainant rests his argument on interactions he has had with contractors and on the county court case cited in paragraph 9. This court case involved the same area as this request (Area 10) and the same contractor (BBMM). He argues that the court case confirmed that there is a schedule of rates and BBMM uses this schedule to bill the public authority in relation to above threshold only rates. Although he concedes that Highways England may not hold the information, he considers that it is held on its behalf by BBMM. The complainant further contends that the schedule is subsidised which he argues must be part of an agreement. However, Highways England had claimed that there is no subsidy. He argues that this is a contradiction.

23. The complainant followed up what Highways England treated as a new request (4 June 2019) with a long piece of correspondence on 5 June 2019 that presented his view that DCP rates must exist by reproducing vehicle registrations and rates that BBMM charged that are identical, though months apart. He suggests that both the contractor and a named witness who gave evidence in the county court case could be approached for verification.

24. In response to point four of his request, despite claiming that this was a repeated request, Highways England provided the following information:

"However, even where the ASC [Asset Support Contract] specifies that the repair work is to be charged by reference to the Defined Cost plus overhead, there is no schedule of defined costs. Each case is treated on its own merits i.e. the Defined Cost being the cost to the service provider of inspecting the damage and having the repair

carried out.

ASCs require the service provider to undertake repairs and to recover the costs directly from third parties in respect of claims under £10,000. The work involved in an emergency response is determined by the nature, scale and urgency of the incident and repair, and consequently the repair costs are a bespoke calculation.

The schedules of rates specified in the ASCs are not used to work out the Defined Cost, or for assessing the reasonable cost of repair in respect of third party claims, whether above or below £10,000."

25. Highways England's view, as confirmed to the Commissioner, is that this complaint is closely related to the recent Tribunal decision [EA/2019/0119](#). The Commissioner asked Highways England if the following quote related to the same matter, though clearly concerning a different area and contractor:

"21. In the circumstances, the Tribunal found on the balance of probabilities that HE did not hold a set of rates relating to DCP, agreed or otherwise, for work done by Kier in relation to the particular invoice at the date of the request. Kier did not moreover hold such on behalf of HE (there being nothing in the contract indicating that Keir would hold this information on HE's behalf)."

Highways England said that this conclusion was the same for all its contractors, whether it was Kier, BBMM or another contractor. The ASC contract is fundamentally the same for all contractors but there are extra appendices and annexes, depending on circumstances.

26. Highways England stated that the DCP rates/schedule does not exist and consequently cannot be held. Clearly contractors hold their own commercial rates which vary from time to time and differ from one another but these are for their own commercial use and are rates that may or may not be used for other business they have. They are not held on behalf of Highways England. If Highways England did hold these rates they would be likely to be subject to section 43(2) and not disclosed on that basis.

The Commissioner's view

27. The Commissioner has based her decision on a recent Tribunal EA/2019/0119, whilst acknowledging that it concerns a different area and a different contractor. Paragraph 52 of the FTT decision sets out the Tribunal's view:

"[named witness] had at the previous Tribunal hearing [EA/2018/0104] introduced the phrase "DCP rates". Much of the

Appellant's belief that such rates must exist came from the fact that [named witness] had coined this phrase, referring in places in his evidence and letters to contractors, to there being DCP rates. HE's position is that there are no DCP rates and that this had been an unfortunate turn of phrase. It maintains that there is no such schedule or set of rates relating to DCP either held by HE or on its behalf by Kier. The only set of rates as such are the ASC rates (target rates provided during the tender process albeit raised by a set uplift each year)..."(paragraph 14)

28. Additionally the Tribunal accepted that the named witness had written to the contractors using the phrase 'the DCP rates' and asking if they were content for them to be disclosed. The question then arose, why would he do this if they didn't exist? The named witness explained in oral evidence that he had been new to these issues and had made a mistake in the way he had referred to the rates. The Tribunal accepted this explanation as credible and noted that the contractors referred to ASC rates.
29. Similarly, the National Audit Office had been told that DCP rates existed and this had appeared in a meeting note and letter from that Office but the named individual explained that this was a misunderstanding and had been clarified. This was also accepted by the Tribunal.
30. The county court judgment mentioned earlier in this decision notice (paragraph 10) that had referred to the existence of DCP rates involving Area 10 and BBMM was considered not to be sufficiently proximate in relation to Highways England's operations and engagement with its contractors in relation to the request under the Tribunal's consideration to lend weight to the Appellant's arguments.
31. The Tribunal also decided that annexes 19 and 23 of the contract did not provide for contractors to have or to hold on behalf of Highways England a schedule or list of DCP rates.
32. The Tribunal noted that the CEO of Highways England had said in an interview that it had "no visibility" over aspects of the contract's operation. Whilst noting that this was an unusual state of affairs for a public contract it took into account that this was, in effect, the public sector arranging for part of the necessary works on the highway to be conducted by the private sector, using private money. Nothing in this supported the existence or non-existence of the information requested.
33. The Tribunal made it clear that it was not part of its role to decide if information should be held:

"In the circumstances, the Tribunal found on the balance of

probabilities that HE did not hold a set of rates relating to DCP, agreed or otherwise, for work done by Kier in relation to the particular invoice at the date of the request. Kier did not moreover hold such on behalf of HE (there being nothing in the contract indicating that Keir would hold this information on HE's behalf)." (paragraph 21)

34. The Commissioner appreciates that the complainant does not accept the Tribunal's conclusions regarding DCP rates and that he believes that this is a different request about a different area and contractor. She has looked at the county court judgment that was concerned with Area 10 and BBMM but has concluded that she must be guided by an Information Rights Tribunal judgment rather than a county court judgment where the primary concern of the latter was not information rights but a claim for damages. On the balance of probability therefore, the requested information is not held.

Section 14(2) – repeat requests

35. Section 14(2) of FOIA states that:

"Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request."

36. Highways England's view is that the request is the same as a request from the complainant which had been the subject of a previous decision notice by the Commissioner. In other words, it concerns DCP rates. Highways England wanted to postpone any further consideration at that time for reasons that cannot be gone into here.
37. The complainant pointed out that this is not a repeat request. It was not the same request or about the same area or contractor.
38. The Commissioner's guidance³ in this matter sets out the following criteria for section 14(2) to be applied:
- the request is identical or substantially similar to a previous request from the same requester;

³ <https://ico.org.uk/media/for-organisations/documents/1195/dealing-with-repeat-requests.pdf>

- the authority has previously provided the information to the requester or confirmed that it is not held in response to the earlier FOIA request; and
 - a reasonable interval has not elapsed between the new request and compliance with the previous request.
39. Whilst the Commissioner agrees that the request from the same requester is similar regarding the rates it sought, it concerns a different contractor and a different area. Highways England has not previously provided this information as it does not hold it. This had also been previously confirmed but not in relation to this particular request. For these reasons, the Commissioner has not considered whether a reasonable interval has elapsed because she does not consider either of the first two criteria to have been met.
40. Therefore Highways England has incorrectly applied section 14(2) but the Commissioner does not require Highways England to respond in the alternative because she has already determined that the information is not held.

Section 10 – time for compliance

41. Section 10(1) of the FOIA states that:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

42. Highways England breached section 10(1) of the FOIA by responding a month beyond the time for compliance required by the legislation to the complainant's 4 June 2019 request.

Other matters

43. In order to conform with the section 45 Code of Practice, an internal review should take no more than twenty working days to complete and up to a maximum of 40 working days only in exceptional circumstances. The Commissioner considers that it is unacceptable that Highways England provided its review more than forty days after it was requested.

Right of appeal

44. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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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