

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 November 2020

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

Decision (including any steps ordered)

1. The complainant has requested information from Highways England ("HE") relating to third party claims and Corclaim (Shakespeare Martineau LLP). The request had previously been refused as vexatious and was the subject of an earlier decision notice where HE was instructed by the Commissioner to issue a fresh response that did not rely on section 14(1). HE did so, stating that it did not hold some of the requested information and additionally citing section 12 FOIA.
2. The Commissioner's decision is that, on the balance of probability, HE does not hold the information, as stated. HE has also correctly cited section 12 of the FOIA. However, she finds HE in breach of the legislation by not providing advice and assistance in line with its duty under section 16 FOIA.
3. The Commissioner does not require any further action to be taken.

Background

4. HE has provided some background information in order to set this case in context. The complainant's request in September 2018 was originally refused as vexatious. When the complainant went to the Commissioner for a decision, she agreed with the complainant that the request was not vexatious¹. HE subsequently responded to the complainant's request in line with the Commissioner's decision not to rely on section 14(1). That response is the subject of this decision notice.

Request and response

5. On 10 September 2018 the complainant had made the following request for information under the FOIA:

"Your lawyers, Corclaim (Shakespeare Martineau LLP) wrote in respect of Coles v Hetherington in 2014 (see below), seemingly before they were instructed by Kier Highways Ltd and yourselves to pursue claims against drivers, fleets and insurers. Corclaim refer to the process as 'inflating claims'. Highways England and their contractors engage Corclaim who utilise the decision. It appears the moral dilemma is not one that concerns your Public Authority whose role is to serve their public. The article below appears to have been written from the perspective of Corclaim acting for fleet managers. On the one hand, Corclaim act for fleets using the 'Coles' argument. On the other, they engage the same decision when pursuing fleets and their insurers in your name for repairs to Crown Property such as barriers.

1. Please provide all information you possess about the consideration to utilise Corclaim and support their use of a process identified as 'inflating claims for profit' when pursuing drivers, fleets and insurers following damage to Crown Property. Additionally, I ask to be provided:

2. The due diligence process used pre- engagement of law firms by Highways England

3. The due diligence undertaken pre- engagement of Corclaim where HE was required to issue a fresh response to the complainant that did

¹ [FS50803075](#)

not rely on section 14(1).

4. The number of claims involving Court hearings following which Corclaim have remitted monies to Highways England for the past 3 years.

5. In what respect are Corclaim acting for Highways England when:

- o You do not instruct them*
- o You do not pay them*

6. How many highway claims are currently being progressed to Court and of these

7. For how many do Corclaim act?

Your contractors and Corclaim step into the shoes of the Public Authority yet appear to gain all of the benefits without the accountability (for example, they are not subject to FoIA)

What reviews or considerations have been undertaken about the conduct of Corclaim by Highways England:

8. Please provide all information.

The information will extend to:

9. All information resulting from the 'effort' put into reconciling past costs as referred to by [named individual] in 2016, the processes, outcome and simplification that has resulted:

From: [named individual] ***Sent:*** 21 November 2016 17:04 ***To:*** [named individual]

Subject: [References] [named individual], Thanks for your note. I also want to ensure that drivers only pay appropriately for the damage they do to Crown property. I'm sure the current process could be simpler and I know [named individual] and [named individual] will be working to achieve this.

We are certainly putting a lot of effort into reconciling the past costs that you are talking about.

Regards [named individual] Highways England

The above appears at odds with the method of inflating claims described, engaged in your name by your lawyers."

6. On 10 February 2020, subsequent to the Commissioner's decision, HE issued a fresh response. HE stated that it did not hold some of the requested information. It asked for clarification regarding this part of the

request -

"With regard to what considerations have been undertaken, we view considerations as a vague term and will not be able progress this request without clarification of exactly what information you are requesting here bearing in mind that Corclaim are not instructed by Highways England."

HE also cited section 12 with regard to part nine of the request -

"All information resulting from the 'effort' put into reconciling past costs as referred to by [named individual] in 2016, the processes, outcome and simplification that has resulted"

7. The complainant subsequently asked for an internal review on 11 February 2020 but split his internal review request across two email addresses on an FOI request website. This caused some confusion as to how HE was to deal with the review and the COVID-19 lockdown caused a further delay in responding to the complainant. The decision was made to write one review covering the response provided and issue the same document to both website addresses on 10 July 2020.
8. HE confirmed that it was maintaining section 12(1) in its internal review response on 13 July 2020. HE also suggested that in explaining Corclaim's role it had answered the question where it had previously asked the complainant for clarification.

Scope of the case

9. The complainant contacted the Commissioner on 21 April 2020 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of this case to be whether HE is correct when it says that it does not hold some of the requested information, whether it appropriately cited section 12 and whether HE provided advice and assistance in accordance with its duty under section 16 FOIA.

Reasons for decision

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

11. 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.”

12. 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).

13. The Commissioner asked HE a series of questions during her investigation in order to establish whether it held any/all of the requested information.

14. After HE had responded, the Commissioner asked further questions about how it had established that it did not hold information relating to part six of the request.

Highways England’s view

15. Firstly, HE stated that it did not employ Corclaim and that Corclaim are employed by the third party contractor, in this case Kier. HE has no say in what law firms/solicitors that its contractors employ or why they employ them. It is a matter dealt with solely by the private third party company. HE highlighted as an example part one of the request -

“Please provide all information you possess about the consideration to utilise Corclaim and support their use of a process identified as ‘inflating claims for profit’ when pursuing (sic) drivers, fleets and following damage to Crown Property

The due diligence undertaken pre- engagement of Corclaim (part three)

The number of claims involving Court hearings following which Corclaim have remitted monies to Highways England for the past 3 years (September 2015 2018)" (part four)

HE has no control over or sight of this information. The decision who to employ is with the contractor alone and does not fall under its contract with HE. The information is not held either by HE or on its behalf. It is a purely private contract between two private companies.

16. HE also explained that it did not hold information in respect of the due diligence process used pre-engagement of law firms (parts two and three). HE explained to the complainant in its response how the engagement process works and who carries out due diligence. He was asked to contact the Cabinet Office because it completes the due diligence for the frameworks under which HE employ lawyers. However, the Commissioner notes that the question may have been based on the misapprehension that HE engages Corclaim within the context of the request which it states it does not.

17. With regard to parts four and five of the request -

"The number of claims involving Court hearings following which Corclaim have remitted monies to Highways England for the past 3 years (September 2015 - 2018) the answer to the question after is key in explaining why this information isn't held. The question after was In what respect are Corclaim acting for Highways England when:

- *You do not instruct them*
- *You do not pay them"*

HE reiterated that it does not employ Corclaim. It explained that under the Asset Support Contract service, providers are authorised to conduct third party claims below a specified threshold on behalf of HE. Corclaim are instructed by HE's service provider, Kier. In order to explain the question about remitting monies to HE for below threshold claims, the contractor pays directly for the work needed to undertake the repair and then pursues the claim in order to reclaim the money. The money claimed back is not paid to HE, it is paid to the contractor (in this case, Kier) as it is their money that has been spent. As Corclaim acts on behalf of Kier for below threshold claims and does not act for HE on above threshold claims (where HE pursues the claim) no monies from claims involving court hearings and Corclaim have been remitted to HE. This goes directly to the contractor, Kier.

18. Regarding part six of the request -

"6. How many highway claims are currently being progressed to Court..."

HE explained that this part of the request is complicated because the request was originally made in September 2018 and refused as vexatious and no further information gathering was completed on it. The request was for the number of claims "currently" (as at 18 September 2018). When the Commissioner's decision went against HE it was over a year later. As a result HE does not hold the information. When the request was remade "currently" would relate to the situation over a year later and not the original point in time.

19. The Commissioner queried this response, asking if this information was still held and whether it could be located and retrieved, given the formal nature of the court process. HE looked into this further and confirmed that it did not hold the information relating to question six regarding the number of cases being progressed to court. Any quarterly update reports that would have been sent through from the Government Legal Department who represented HE at the time, would have been superseded by the next update and it does not hold a copy of the preceding reports in its records.

20. Part seven of the request -

"7. For how many do Corclaim act?"

HE states that the answer to the seventh question is straightforward because Corclaim does not handle the business of HE under any contract. Corclaim handles the business of Kier in matters pursued in court by Kier. The requested information is not held by HE or on behalf of HE.

21. Regarding part eight of the request -

"Your contractors and Corclaim step into the shoes of the Public Authority yet appear to gain all of the benefits without the accountability (for example, they are not subject to FoIA)

What reviews or considerations have been undertaken about the conduct of Corclaim by Highways England:

8. Please provide all information."

HE argues that no review information is held because no review had ever taken place. HE do not employ Corclaim. Corclaim acts for Kier and Kier's interests, not HE. The same reasoning applies to the "considerations" because Corclaim are not instructed by HE. The internal review had reiterated that the complainant was asking what information was held on a company that HE had no contract with and no responsibility to review or investigate. Therefore, the information is not held.

The complainant's view

22. The complainant maintains that HE has stated that Corclaim were being instructed by Kier and then corrected this and stated that the lawyers were working for HE. The complainant describes this as "odd" for the reasons listed as follows -

- *The lawyers were not returning HE's calls*
- *This obstruction led to an investigation of Kier*
- *I was informed, in an email, that the lawyers had been told to place all matters on hold but had not done so*
- *HE could not explain why their own lawyers were not doing as instructed*

23. The complainant referred to a post by Corclaim that he states has been removed, about which he questions the appropriateness of a public authority engaging in "such conduct". The complainant could find no reference to Corclaim being appointed following due diligence or tender. He suggests that this represents a potential conflict - Kier and its lawyers engaging the same lawyers for the same type of work. The complainant wrote to the lawyers (presumably Corclaim) and asked that it price claims in accordance with the contract and he raised issues about operatives hourly rates being wrong which were not "attended to". Since then, in 2020, he states that HE has "contracts with Kier in an attempt to enable them to pursue claims for more than the original contract permitted" and "Appointed Corclaim to a £3 million contract" which the complainant describes as a conflict. His view is that HE is so compromised that it is "ineffective" and that "Kier Highways dictate processes to Highways England".

24. The complainant contends that information relating to part nine of the request – notably a schedule of damage to crown property (“DCP”) rates should be held. He questions how the “effort” described in the quoted email “*failed to identify contract non-compliance, exaggeration and fraud*”. He also notes the absence of a price list in any asset support contract since 2012 and “*that HE had no agreed rates with their contractors?*” The complainant states that the existence of a DCP price schedule has been confirmed by HE and he wishes to understand “*what was discovered/uncovered as a result of all this effort such that a cornerstone of a contract was (apparently) overlooked*”.

The Commissioner’s view

25. The Commissioner does not propose to consider what may or may not be held at part nine of the request because HE cited section 12 regarding this part of the request.
26. Whether information is held relating to Corclaim largely comes down to whether there is a relationship between HE and Corclaim which would make the likelihood of information being held within the context of this request stronger. HE has clearly stated that there is no relationship and that the relationship is between Kier and Corclaim. HE has no business or contractual reason to hold the requested information relating to the request where it relates to Corclaim. The Commissioner also accepts that HE does not hold the information requested at parts three and six for the reasons HE has provided.

Section 12 – cost of compliance exceeds the appropriate limit

27. Section 12(1) of the FOIA states that:

“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

“(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

28. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

(‘the Fees Regulations’). The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit of 18 hours in respect of HE. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:

- determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
29. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be *‘sensible, realistic and supported by cogent evidence’*.²
30. HE suggested that confining section 12 to part nine of the request was solely because it wished to respond to the complainant where possible -

“All information resulting from the ‘effort’ put into reconciling past costs as referred to by [named individual] in 2016, the processes, outcome and simplification that has resulted...”

The complainant’s view

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> (para 12)

31. The complainant argues that, having failed to establish that this request was vexatious, HE had a second bite of the cherry to avoid disclosure and cited section 12. Some of the complainant's argument is unclear but he wishes to understand the procedure that was being followed, why Corclaim was appointed above any other, the work undertaken and the outcome. He maintains that there are only three parties involved and he names the three individuals. The complainant contends that the request is specific and the location of information straightforward.

Highways England's view

32. HE does not agree and provided a table to the Commissioner setting out what searches it had made and what the numbers of returns were for each. Using search terms – "Shakespeare Martineau", "Corclaim", "Corclaim Kier", "Kier", "Court", "Court Kier" and "Review Kier". The total returns are several hundred thousand on HE's 'Share' system. HE estimates that just taking one minute per document would allow for only 1080 documents to be checked but that this would provide only a cursory review and relevant information potentially being missed. To provide a thorough review would take between 5 and 10 minutes, depending on size. HE calculated that this would reduce the documents to be checked to between 216 and 108.

33. HE provided overall total return numbers for each search term and, more specifically, for the last five years:

"Shakespeare Martineau"	= 513
"Corclaim"	= 239
"Corclaim Kier"	= 213
"Kier"	= 550,189
"Court"	= 580,689
"Court Kier"	= 138,344
"Review Kier"	= 216,209

The Commissioner's view

34. The complainant clearly states that providing this information should have been simple and straightforward. His view is that searches could be confined to a few individuals. However, he asked for "all" the information which meant the use of several search terms in order to cover the scope of the request. Some of these returns will inevitably repeat the same information, some will take a short time, one to five

minutes, others will take over five minutes to check. Taking just the lowest number of returns for the last five years "Corclaim Kier" and estimating five minutes to check each, would take the search almost to the fees limit without having checked returns under any of the other search terms. This part of the request is not specific enough in terms of its timeframe and the phrasing is vague and generalised. The Commissioner agrees with HE that part nine of the request exceeds the fees limit.

Section 16 – duty to provide advice and assistance

35. Section 16 of the FOIA states:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

36. HE explained to the Commissioner that, given the numbers of documents returned by the key word search, it concluded that no advice could be given as to how the scope of the request could be reduced and still provide a meaningful and comparative view of what Highways England holds on this subject. Therefore it applied Section 12 to this part of the request.

37. The Commissioner's view is that the request at part nine was not specific enough to enable HE to keep within the fees limit and respond fully. Whilst HE stated that it could not advise the complainant how the scope of the request could be reduced, both at refusal and review stage, it did not provide any details as to why. Therefore, the Commissioner finds that HE breached section 16 but does not require HE to carry out any steps, as the explanation it provided to the Commissioner about the searches that would be required and that is contained in this decision notice, render any further advice and assistance unnecessary.

Other matters

38. There was a delay in completing the internal review which HE has explained was partly caused by the complainant splitting the review request and the problems caused by the Covid-19 pandemic. However, the delay was significant and the section 45 code of practice recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from the receipt.

Right of appeal

39. 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

40. 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.
41. 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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