Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 October 2020

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

Decision (including any steps ordered)

1. The complainant has requested Highways England (HE) to disclose information relating to the operation of the pain/gain arrangement in all areas and the need for HE's contractors to submit claim costs and recovery costs for reconciliation. Initially HE advised the complainant that the information is not held. However, during the Commissioner's investigation it changed its stance and claimed a late reliance on section 12 of the FOIA.

2. The Commissioner's decision is that HE is entitled to refuse to comply with the request in accordance with section 12 of the FOIA. She has however recorded a breach of section 16 of the FOIA. This is because a late claim was made and HE had not therefore considered its duty to provide advice and assistance and if this was reasonable or practicable to do so.

3. Although a breach of section 16 of the FOIA has occurred, the Commissioner does not require any further action to be taken on this occasion. This is because HE has explained sufficiently to the Commissioner why it is not in a position to offer any practical advice and assistance to the complainant in relation to this request.

Request and response

4. On 24 April 2019, the complainant wrote to HE and requested information in the following terms:

> "I understand there exists a relationship between the amounts charged & recovered by your contractors and the monthly lump-sum they are paid by Highways England; that all contractors reconcile their costs annually against their recoveries. If the proportion of recoveries exceeds expectations an assessment would be made and the Lump Sum payment would be reduced.
> This necessarily relates to sub-threshold (£10,000 matters).
> I ask to be provided all information in respect of this arrangement and it application since 2012 to include, but not be restricted to:
> 1. The areas in which this arrangement exists
> 2. All information about this process; the contract extracts relating to the methodology, the calculation, how it is applied etc.
> 3. What information the contractor is to submit for reconciliation and the description of said data i.e. whether this comprises 'defined costs' (a.k.a. 'base rates' or DCP Rates' of 'notional rates') , the Third Party Claims Overhead etc.
> 4. How Highway England determine the submitted information is correct, true and accurate
> 5. The last submission, reconciliation and assessment for each area
> Specifically, with regard to Area 9:
> 6. The investigation and reconciliation of the figures passed to your Green Claims manager insofar as the submission of figures by Kier Highways was concerned, namely:
> a. Defined cost
> b. TPCO
> c. Total
> d. Recovery
> e. remarks
> Specifically, with regard to HE references: 767 723:
> 7. How the information was reconciled, considered to be accurate prior to disclosure
> 8. The action taken subsequently to determine the accuracy (or otherwise)of the records."

5. HE responded on 14 May 2019. It advised the complainant that it would not be responding to the request because the request was based on an incorrect premise. It explained how the lump sum payment works and that changes are only made for normal annual adjustments such as inflation.

6. The complainant contacted HE on 14 May 2019. He explained that he was requesting information relating to the pain/gain arrangement and the need for HE's contractors to submit claim costs and recovery costs for reconciliation. He referred to a previous FOIA request and a response HE had issued to support this understanding and therefore the basis of his request.

7. HE responded on 12 June 2019. It advised the complainant that the pain/gain share is not for green claim repairs as a direct result of challenge from insurers who were not prepared to accept this approach. It again stated that the lump sum remains unchanged throughout the life of the contract apart from annual adjustment due to indexation, tendered efficiencies and so on.

8. The complainant requested an internal review on 15 June 2019. He stated that he noted the process no longer exists but his request also asked for the requested information going back to 2012. He also stated that HE holds recorded information relevant to his request because the process was in place as at 25 October 2016, as evidenced by a previous FOIA response.

9. HE responded to the complainant's request for an internal review on 20 September 2019. It stated that, in the main, the requested information is not held.

Scope of the case

10. The complainant contacted the Commissioner on 8 October 2019 to complain about the way his request for information had been handled. He stated that he was unhappy with HE's response that the requested information is not held and that it has supplied misleading and false information to him previously.

11. During the Commissioner's investigation it was established that HE could not categorically state that it does not hold the requested information. It advised that it was almost certain that it did not and any recorded information held relating to the arrangement was in connection with other project work not green claim repairs but, to be absolutely certain, it would need to review thousands of records. As the Commissioner was not satisfied that HE could say with certainty that it does not hold the requested information, HE chose to claim a late reliance on section 12 of the FOIA. It stated that the process of locating, retrieving and reviewing all records to see if it holds any recorded information would exceed the appropriate limit prescribed by the FOIA.

12. The Commissioner therefore considers the scope of her investigation to be to determine whether HE is entitled to rely on section 12 of the FOIA in this case and if it is, whether it has provided appropriate advice and assistance under section 16 of the FOIA (as the application of section 12 triggers the duty to provide advice and assistance in accordance with section 16).

Reasons for decision

Section 12 – cost of compliance

13. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations').

14. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for HE is £450.

15. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for HE.

16. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:

- determining whether the information is held;
- 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.

17. 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 Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate must be "sensible,

realistic and supported by cogent evidence". The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

18. Section 12(1) is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.

19. HE informed the Commissioner that the previous FOIA response issued to the complainant in 2016 (referred to in paragraph 8 above) contained an error and from this a misunderstanding had occurred relating to the existence or not of the pain/gain arrangement. It explained that the 2016 response had regrettably described the arrangement when it has never been part of any Asset Support Contract (ASC). It stated that it had only been part of the predecessor managing agent contract (MAC).

20. It went on to explain further that the pain/gain process compares the outturn cost with the target price of a scheme and any over or underspend is divided between the contractor and HE according to a set share formula. The target price is built up based upon the schedule of rates in the ASC provided at tender stage. The outturn cost is built up from the defined cost fee, in effect the actual cost of undertaking the work.

21. HE confirmed that the use of the pain/gain arrangement for third party claim schemes was terminated as a result of insurance companies not being willing to pay gain shares in the MAC's that were used prior to the ASC's. So, from the earliest days of ASC's the pain/gain formula used routinely for most scheme work was not used for third party claims. It advised that the first ASC contract was in 2012 but the last MAC contract ran into 2014. The arrangement is not in any ASC contract and discussions took place in 2010 to 2012 about the arrangement and whether it should be included in the contract or not. The decision taken was that it should not.

22. The Commissioner noted that HE had stated that MAC's were still running post 2012 and asked HE to establish what recorded information it holds relating to these and the pain/gain arrangement, as this would clearly fall within the scope of the request.

23. HE confirmed that due to the above information, its prior knowledge and a review of a sample of documents selected at random, it is fairly certain that no recorded information is held. Any information located about the pain/gain arrangement is for other project work; not third party claims. However, it cannot be absolutely certain about this and to be absolutely

certain it would have to review thousands of documents highlighted by the searches it has conducted.

24. It provided the following results using the key words listed:

	Key word			
Area/Contractor	**Gain share**	**Gain**	**Pain share**	**Pain**
Area 1	6902	38875	3791	18098
Area 3	3909	50563	4243	15557
Area 9	2787	38370	1970	12649
Area 10	5382	43907	1671	20543
Area 13	6312	33025	4226	17705
Kier	5980	60729	4933	20889
Enterprise Mouchel	376	3140	125	1107
EnterpriseMouchel	1444	9084	735	4552
Amey	5677	48655	4359	18111
BBMM	3448	21879	1485	12632
Balfour Beatty Mott Macdonald	2369	17503	957	10598

25. HE stated that Enterprise Mouchel was also known as EM but it has not searched for any records relating to that, as it considers the two references above to Enterprise Mouchel demonstrate that the request is clearly over the cost limit. HE advised that the searches produced a large amount of documents to be checked and there are no other means or search terms which could be used to pinpoint the specific information requested, if indeed held. HE therefore changed its position during the Commissioner's investigation and confirmed that it now wished to rely on section 12 of the FOIA. It stated that it was obvious from the level of returns that the cost to comply would exceed the appropriate limit by a considerable margin.

26. The Commissioner is satisfied that it would exceed the appropriate limit if HE was to retrieve and review each individual document shown in the above searches. The complainant has asked for information relating to the pain/gain arrangement for all areas in which it operated dating back to 2012. The complainant has not asked for the information for one area but all areas where this arrangement existed. HE has explained that it cannot be absolutely certain none of the information relates to the arrangements for third party claims (although it is fairly certain given its knowledge of its cessation and the fact that the majority, if not all, will relate to other project work), the only way it can be certain is to review each and every document located by the above searches. HE has confirmed that there is no other way of searching and locating any relevant information and there is no more concise or direct search terms it could use. There are thousands of documents potentially within scope and it is obvious that it would take HE more than 18 hours to review each and every one to determine if they are relevant to the request or not.

27. The Commissioner is therefore satisfied that section 12 of the FOIA applies to this request.

Section 16 – duty to provide advice and assistance

28. The application of section 12 of the FOIA triggers the duty to provide advice and assistance under section 16. Where reasonable and practicable, a public authority should provide the applicant with appropriate advice and assistance to enable them to make a new, refined request if they so wish. However, the Commissioner accepts that in some circumstances there will be no reasonable or practicable advice or assistance that can be provided. When this happens the public authority should still inform the applicant accordingly.

29. As HE claimed a late reliance on section 12 of the FOIA, it has breached section 16 as it failed to provide appropriate advice or assistance to the complainant or indeed inform him that it is unable to do so. HE has stated that given the large amount of results overall and for individual areas alone, it does not consider it is able to offer any practical advice and assistance on this occasion. It has now informed the complainant accordingly in a revised response.

30. The Commissioner is satisfied that no reasonable advice or assistance can be provided due to the volume of returns for all areas on all search terms. She therefore does not require any further action to be taken.

Right of Appeal

31. 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

32. 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.

33. 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

Samantha Coward
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