

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 January 2020

Public Authority: Highways England

Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant made a request for information relating to green claims. Highways England refused to comply with the request under section 14(1) FOIA as it considered the request to be vexatious.
2. The Commissioner considers that Highways England incorrectly applied section 14(1) 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 complainant not relying upon section 14(1) 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

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

"Your lawyers, Corclaim (Shakespeare Martineau LLP) wrote in respect of Coles v Hetherton 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*
- 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 11 December 2018 Highways England responded. It refused to comply with the request under section 14(1) FOIA as it considers it to be vexatious.
7. The complainant requested an internal review on 14 December 2018. Highways England sent the outcome of its internal review on 15 January 2019. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled as he does not accept that his request is vexatious under section 14(1) FOIA.
9. The Commissioner has considered whether Highways England was correct to refuse to comply with the request by virtue of it being vexatious.

Reasons for decision

Section 14(1) – vexatious request

10. In this case, Highways England had applied section 14(1) FOIA, the Commissioner has therefore considered whether the request has been correctly categorised as vexatious in this case.
11. The term 'vexatious' is not defined in the FOIA but the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance¹ and, in short, they include:
 - Abusive or aggressive language;
 - Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden;
 - Personal grudges;
 - Unreasonable persistence;
 - Unfounded accusations;
 - Intransigence;
 - Frequent or overlapping requests;
 - Deliberate intention to cause annoyance.
12. 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.
13. The Commissioner's guidance¹ goes on to suggest that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.

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

14. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
15. In this case Highways England has explained that its response of 11 December 2018 to the complainant set out the reasons for applying section 14(1) FOIA and included reference to a witness statement provided by Highways England to the First-tier Tribunal (FTT) in respect of another case where Highways England had applied section 14(1) FOIA.
16. The complainant had appealed the earlier application of section 14(1) (a decision upheld by the ICO in decision notice FS50703446²) to the FTT under appeal number EA/2018/0088. The FTT upheld the appeal rejecting Highways England's application of section 14(1) FOIA. However this matter was still in dispute as Highways England had sought permission to appeal the FTT decision to the Upper Tribunal and therefore confirmed that it maintained its position regarding the application of section 14(1) FOIA in this case pending the outcome of its permission to appeal application to the Upper Tribunal regarding the earlier request. It did not provide any new submissions over and above the arguments previously relied upon and directed the Commissioner to its response and internal review in this case and the witness statement submitted at the Appeal relating to an earlier request.
17. In summary, relying upon previous arguments made in relation to an earlier request (dated 25 July 2017), Highways England considers that this request (dated 10 September 2018) is another example of the complainant's repeated and improper use of the formal procedure under the FOIA which Highways England now considers is not only vexatious but has crossed over the line into harassment. It said that this was another request relating to "green claims" namely claims relating to damage to highways caused by an accident or negligent driving.
18. Highways England said that as at 20 July 2018 (not including this request or requests or complaints subsequent to that date), since November 2013 the complainant had made 57 requests for information or internal review.

² <https://ico.org.uk/media/action-weve-taken/decisionnotices/2018/2258618/fs50703446.pdf>

20. In the Appeal, Highways England filed a witness statement in support of its case that the earlier 25 July 2017 request was vexatious. It confirmed it had provided the complainant with a copy of that witness statement. It relied upon the witness statement in support of its position in relation to this request. It confirmed that the witness statement set out the long history of the complainant's requesting. It recorded Highways England's case that the complainant was working in concert with 9 other individuals. The witness statement also argued the complainant's behaviour showed signs of harassment, his requests used an accusatory tone and that this was having a negative impact upon staff as a result. Highways England considered the frequency and complexity of the complainant's requests showed an orchestrated campaign rather than legitimate dialogue.
21. In response to this request, Highways England reaffirmed its position that it considers the complainant is acting in concert with other individuals and therefore this increases the burden that is being imposed upon it in responding to co-ordinated requests relating to green claims.
22. The Upper Tribunal has now refused Highways England's permission to appeal application relating to the earlier 25 July 2017 request. The Commissioner wrote to Highways England on 9 October 2019 to ask it to confirm its position following the outcome of its permission to appeal application. The Commissioner asked Highways England to confirm whether it wished to withdraw its application of section 14(1) FOIA in this case given it had confirmed that it was maintaining the application of section 14(1) FOIA pending the outcome of the permission to appeal application. Alternatively the Commissioner asked Highways England to provide further submissions in this case in support of its application of section 14(1) (not solely relying upon its previous arguments). Highways England confirmed that, "We are still considering the legal arguments in this case, but can confirm we will be responding to this request".
23. Despite numerous chasers, Highways England has yet to confirm its application of section 14(1) FOIA and provide any further arguments in support of its position regarding this request or withdraw the application of section 14(1) FOIA in this case.
24. The Commissioner has therefore made a decision based upon the arguments presented and in the acknowledgment that the FTT decision in the Appeal is non-binding. The Commissioner has addressed the issues regarding her position as to whether other individuals are acting in concert with the complainant at paragraphs 28-34 of her Decision Notice on FS50703446. The Commissioner also issued a Decision

Notice in November 2018 under reference FS50715905³ in which the Commissioner found that a request made by another individual, relating to green claims, was in effect made on behalf of the complainant. The Commissioner upheld the application of section 14(1) FOIA in that case. The Decision Notice post-dated the request relevant to this case but Highways England would have been aware of this decision by the time it provided its response and internal review to this request.

25. An employee of Highways England with responsibility of responding to the complainant's FOI requests provided a witness statement to the FTT in the Appeal explaining the damaging and distressing effect the complainant's requests had had. The Commissioner continues to attach some weight to this first-hand account of the impact the complainant's previous FOI requests have had.
26. However the Commissioner considers that Highways England is a fairly large organisation and whilst it does have finite resources to respond to FOI requests, the Commissioner does not accept that the number of requests made by the complainant from November 2013 to July 2018 was significantly onerous based upon Highways England's current submission. Highways England has referred to 57 requests or internal review requests during this time. So not all of the 57 requests referred to were separate FOI requests in their own right, some were follow up internal reviews. Highways England has not specified how many of the 57 requests referred to were separate requests for information and how many were follow up internal review requests. Having said this, when combined with other requests either effectively made on behalf of the complainant or by individuals with whom he is acting in concert, this would increase the burden imposed.
27. The complainant's requests (either made by himself, others on behalf of him or with whom he is acting in concert) relate to the broad theme of the fairness of the process of recovering costs as a result of damage to the highway (or green claims) which appears to have become a campaign by the complainant. The Commissioner does however accept that the request seeks to shed light on an area which is of interest and relevance to the motoring public.
28. The Commissioner has made her decision in the context of the Information Commissioner v Devon CC & Dransfield⁴ in which the

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2553904/fs50715905.pdf>

⁴ <https://www.judiciary.uk/judgements/info-commissioner-devon-county-council-tribunal-decision-07022013/>

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).

29. Given the lack of any further substantial arguments in this case, the fact Highways England has relied heavily upon its previous arguments presented in the Appeal which were ultimately unsuccessful and the serious purpose and value behind the making of the request, the Commissioner is not satisfied that Highways England has provided sufficient evidence to demonstrate that the request in this case is vexatious under section 14(1) FOIA.
30. The Commissioner would however comment that the intransigent and overlapping nature of the requests could severely limit the real purpose and value, particularly in light of more recent Decision Notices and FTT decisions addressing issues such as what information is held by Highways England regarding this subject area and what information is correctly exempt from public disclosure under section 43(2) FOIA. Neither issue is relevant to this decision but may be relevant to the application of section 14(1) FOIA to any future requests made by the complainant on this subject matter.
31. The Commissioner is however satisfied in this case that the complainant's request cannot be categorised as vexatious under section 14(1) FOIA.

Right of appeal

32. 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-regulatorychamber

33. 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.
34. 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.....

Gemma Garvey
Senior Case Officer

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