

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 February 2021

Public Authority: Highways England

Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. In a multi-part series of requests, the complainant has requested information from Highways England on a variety of matters broadly associated with the National Schedule of Repair Costs scheme. Highways England has refused to comply with the requests under section 12(1) of the FOIA as it considers the cost of doing so would exceed the appropriate limit.
2. The Commissioner's decision is as follows:
 - The cost of complying with the complainant's requests exceeds the appropriate limit under section 12(1) of the FOIA and Highways England is not obliged to comply with it. Highways England met its obligation under section 16(1) and offered the complainant adequate advice and assistance.
 - Highways England breached section 17(5) of the FOIA as it did not provide the complainant with a clear section 12 refusal notice within the required timescale.
3. The Commissioner does not require Highways England to take any remedial steps.

Background

4. The matters that are the subject of the complainant's interest, and which are broadly relevant to this case, have been discussed at length in a number of previous decisions made by the Commissioner, for example [FS50873250](#), and in First-tier Tribunal (Information Rights) decisions, for example [EA/2019/0119](#). As such, the Commissioner does not intend to reproduce that background and context again here.

Request and response

5. Through the WhatDoTheyKnow website the complainant submitted a request for information to Highways England (HE) on 6 November 2019 in the following terms:

"191105 Suspension of the NSORC - National schedule of repair costs for network damage, Green Claims) – pilot outcome
<https://highwaysengland.co.uk/thirdpartyclaims/>

I am seeking the following information:

1. The pre-implementation and ongoing assessment of the benefit to Third Parties and HE

I am particularly interested in the information indicating the recovery rates is £1 in every £5 and how, given HE are bringing claims in-house, the benefit is perceived as being other than for HE and HE alone.

2. Engagement with the insurance industry; information to and from

3. Responses for and feedback against the NSORC; all feedback from those involved. I anticipate personal data will be redacted but the identity of commercial entities will remain

4. Questions raised by all parties (within and without HE) about the process and the responses

5. Examples in Areas 9, 10 & 12 of 'The contractual arrangements between Highways England and its service providers, containing separate regimes for claims above and below a £10,000 threshold, and different pricing methodologies, leading to varying labour and equipment rates and therefore significantly different repair costs being applied to similar repairs'

The defined cost process has been described to us and the Courts as an 'actual cost' or 'base rate' to which an uplift is applied. The defined cost (however it is arrived at) is common to both TP and HE.

6. How could the difference ever be more than the difference between 'fee' to HE and TPCO to a Third Party i.e. no more than 20% approx.. as opposed to the stated 'significant'?

7. How it was determined the costs did not sufficiently reflect the 'open market',

- a. which 'open' market and
- b. the data relating to this

8. Your better understanding of the he requirements which will need to be met to enable a National Schedule to be successfully implemented

9. Your engagement with contractors following implementing NSORC; all information to and from, to this date. This will include all information to and from contractors setting out the suspension of NSORC; notification, feedback, implications How it affects them, their charging and claims), actions and intentions

10. The final assessment of NSORC, all reports and feedback. NORSC explained 'By introducing a national schedule, we had hoped to provide the insurance industry the benefit of the rates that we had been able to secure in a competitive market.'

11. the rates you have been able to secure in a competitive market

I note you will revert to pursuing claims based on the 'actual cost' of carrying out the repairs and will continue to explore options for a transparent and equitable set of rates.

12. What is meant by 'actual cost' and the actual costs of carrying out the repairs in Areas 6, 9 10 & 12 (as at 01/03/2019) and if different, the:

13. 'actuals' for re-pricing any claims that have been priced under the National Schedule of Repair Costs"

6. HE wrote to the complainant on 29 November 2019. HE asked him to clarify parts 4 and 7 of his request. HE then indicated that it considered

it would exceed the appropriate cost limit to comply with the request and asked that the complainant reduce the scope of his request, especially part 9. It suggested that the complainant name the contractors in which he was interested and advised that it could consider providing one quarter's worth of correspondence.

7. In correspondence to HE on 30 November 2019, the complainant queried HE's reference to section 12 of the FOIA and clarified parts 4, 7 and 9 of his request. With regard to part 4, the complainant listed out five types of information he was seeking which included at b) changes to contracts in all Areas. (Areas refer to the geographic regions into which HE's operations are split; they are loosely based on the English regions.)
8. HE wrote to the complainant on 3 December 2019. It explained that it had been trying to reduce the scope of one or two parts of the request with a view to perhaps being able to reply to all the parts of the request within the appropriate cost and time limit under section 12(1). HE went on to address a series of questions the complainant had asked about its reference to section 12(1).
9. HE explained that it had held a face to face meeting to discuss what information it held and where the information would be held, with regard to the "whole request". The meeting was attended by three people: one National Schedule of Repair Costs for Network Damage (NSoRC) specialist, a member of the FOI team and a member of general counsel. HE said this meeting had therefore taken approximately 1.5 hrs, which was 4.5 hours of the 18 hours provided under section 12. HE also noted the information requested in part 12 of the request. HE said it had approached its Area teams for this information and, as there are three Areas, this would take at least another three hours of time. HE advised the complainant that, therefore, determining what information it held that is relevant to part 12 - one of 13 questions - had taken up 7.5 hours of the 18 hours provided under section 12 of the FOIA.
10. In two pieces of correspondence to HE on 3 December 2019 the complainant discussed the information he was seeking, how HE might go about identifying it and appeared to request further information associated with the request. In correspondence dated 19 December 2019 the complainant identified other information that he considered HE's response should cover.
11. The complainant did not receive a response to this correspondence and requested an internal review on 28 April 2020.
12. HE provided an internal review on 29 May 2020. It acknowledged that it should have clearly relied on section 12 of the FOIA at the point of the

complainant's 3 December 2019 correspondence. HE confirmed that it is relying on section 12 to refuse to comply with the request.

Scope of the case

13. The complainant first contacted the Commissioner on 29 April 2020 to complain about the way his request for information had been handled.
14. The Commissioner's investigation has focussed on whether the HE can rely on section 12(1) of the FOIA to refuse to comply with the complainant's requests of 6 November 2019, 30 November 2019 and 3 December 2019. She will also consider whether HE had a duty to comply with section 16(1) and the timeliness of its refusal.

Reasons for decision

Section 12 – cost exceeds the appropriate limit

15. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to him or her if it is held and is not exempt information.
16. Section 12(1) of the FOIA says that a public authority is not obliged to comply with section 1(1) if the authority estimates that the cost of doing so would exceed the appropriate limit.
17. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request; 18 hours work in accordance with the appropriate limit of £450 set out above, which is the limit applicable to HE. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - determine whether it holds the information
 - locate the information, or a document which may contain the information
 - retrieve the information, or a document which may contain the information, and
 - extract the information from a document containing it.

18. When a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations") can be satisfied.
19. The effect of the provisions under section 12(4) of the FOIA and regulation 5(2) of the Fees Regulations mean that a public authority may aggregate the cost of complying with two or more requests if the following three criteria are met:
 - the requests are made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign
 - two or more requests relate, to any extent, to the same or similar information; and
 - the requests were received by the public authority within any period of 60 consecutive working days.
20. Where a public authority claims that section 12(1) of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the applicant refine the request so that it can be dealt with under the appropriate limit, in line with section 16(1) of the FOIA.
21. In its submission to the Commissioner, HE first discusses part 9 of the request. It said it asked the complainant to help it narrow the scope of this part by naming a particular contractor he was interested in and to set out a timeframe (three months) that HE could base its searches on. HE says that, in his response of 30 November 2019, the complainant advised that he wished to include all Areas barring Area 5 and Design Build Finance Operate areas. This would be, in effect, 11 contract areas. The complainant had then set about asking questions about the time range HE had set out, including when HE had first approached a contractor about NSoRC.
22. In addition, HE considered that, given his wide selection of Areas chosen to be in scope of part 9, the scope was still too wide. HE says that it had indicated in its 29 November 2019 correspondence that further reduction in scope may be needed, because it would still have to search for information for his other 12 questions. HE says it therefore did not undertake any searches to check when it first had contact with the contractors because that would add to the workload it had already considered exceeded the section 12 limit.
23. HE says that at this point in its correspondence with the complainant the request had increased from the original 15 points raised (in the 13 part

request) to 27 points. HE acknowledges that five of these further points were due to the complainant's attempt to clarify part 4 but, nevertheless, there had been an increase in the number of questions raised by the complainant despite HE actually trying to reduce the size and scope of the request.

24. Because of this HE says it contacted the complainant again on 3 December 2019 and tried to set out the reasons why section 12 can be applied to requests in general and, more specifically, to this request. It gave examples of the calculations of time taken so far to address aspects of what information may be held, the cost of answering one of the questions raised, and how, despite the topic being NSoRC, the information would not just be held by one team. HE says it did this in the hope that the complainant would submit a fresh request that was reduced in scope.
25. HE notes that on the 3 December 2019 the complainant responded to its email. He continued to refuse to reduce the scope of his request and questioned HE's use of section 12. The complainant raised three further questions. HE acknowledges that one of the questions – which the Commissioner understands to have been: "Why is this scattered?" – may have been rhetorical but HE says that even if this particular question is excluded, the complainant does still ask HE to explain why the information he is seeking is not held in one place. This was despite HE setting this out in its previous email to him. HE notes that in this correspondence the complainant also asks for the date of the meeting HE held to discuss the request and requests the notes from that meeting. The complainant then followed this email with a further email asking why HE considered that only three months worth of information could be provided.
26. At this point, HE notes, the request now comprised 30 points to address; 25 if the five points provided to clarify part 4 were excluded. The original request had 15 points. In the process of trying to reduce the scope and clarify points of the request, the size of the request had actually increased. HE says it decided then that the request was to be refused under section 12. HE notes that this was not confirmed to the complainant until much later in the internal review where HE had acknowledged that it should have confirmed its reliance on section 12 at an earlier point.
27. HE's submission then moves on to demonstrate how it concluded that the request exceeded the section 12 cost limit. Its email to the complainant of 3 December 2019 had given an idea of the calculations behind the time and cost resource needed to even begin to address the request, and one of the questions originally asked. As most of the questions required multiple parties to be involved, even if two people

spent only one hour on each of the original questions searching for the information, that would amount to 30 hours work. That would take the request over the cost limit. However the request increased to 25 points over the course of HE's correspondence with the complainant. Even if the number of people involved in dealing with the request was reduced to one person, that one person spending one hour searching for information on each of the points raised would still take complying with the request over the 18 hour/£450 threshold. HE says it also believes that one hour per part of the request is a very conservative estimate due to the complicated nature of the requests and the information likely to be caught.

28. It appears to HE that the complainant assumes that the information he has requested is in all in one place, but this is not the case. HE says that it advised the complainant of this in its requests for clarification and reduction in scope. These set out the reasons why the complainant needed to limit his request, but the complainant did not action HE's suggestions, but simply questioned them.
29. HE says that given this approach by the complainant it could be argued that the request became a vexatious request under section 14(1) on the basis of intransigence. This point potentially came when the complainant refused to accept HE's advice and assistance and instead chose to maintain his request and even add to it. HE notes that, in addition, the part of the request about NSoRC was received following the decision to withdraw its use of NSoRC. That part of the request could be considered vexatious because of the disproportionate effort involved in complying with that part. In HE's view that particular matter is trivial owing to NSoRC no longer being used at the time of request. (As the complainant had noted in the introduction to his request, HE had suspended the use of the NSoRC while it assessed its options for a different set of repair costs.) HE considers that to comply with that part of the request would mean diverting a disproportionate amount of its resource to answer questions on a subject/process that was no longer in place and, as such, appeared only to be of interest to the complainant himself. However, HE has confirmed to the Commissioner that its final position is that it has refused to comply with the requests under section 12 of the FOIA.

The Commissioner's conclusion

30. The complainant had initially submitted a 13 part request to HE, that comprised 15 points to which the complainant was seeking a response. Perversely, this swelled to a minimum of 25 points following HE's suggestions to the complainant as to how he might *narrow down* the scope of the request.

31. The Commissioner has reviewed the complainant's correspondence with HE. With regard to HE's suspension of the NSoRC, the complainant has requested information on:

6 November 2019

- The pre-implementation and ongoing assessment of the benefits to third parties and HE
- HE's engagement with/correspondence to and from the insurance industry
- Feedback for and against the NSoRC
- Questions from all parties – internally and externally – about the process
- Examples in Areas 9, 10 and 12 of particular contractual arrangements
- How "the difference" could be, as HE had stated, "significant" and not just no more than 20%
- Costs not reflecting the "open market"
- The requirements that would need to be met to enable a National Schedule to be implemented successfully
- HE' engagement with contractors – correspondence to and from – following NSoRC being implemented: notification, feedback, implications, how they will be affected, actions and intentions
- NSoRC's final assessment – reports and feedback
- Rates HE has secured in a competitive market
- How 'actual cost' is defined and the actual costs of carrying out the repairs in Areas 6, 9, 10 and 12 (at 1 March 2019)
- "Actuals" for re-pricing any claims that have been priced under the NSoRC

30 November 2019

- Enquires HE carried out to locate information which gave rise to its belief that section 12 might be engaged
- HE's definition of "open market"
- Why HE was only able to consider providing three months worth of correspondence

3 December 2019

- Information relevant to what parts of the request would not be in the locations described by the complainant and why HE was experiencing difficulty
- Date of meeting at which the request was discussed and notes from that meeting

32. With regard to the first criterion at paragraph 18, the above set of requests were all submitted by one person, the complainant. With regard to the second criterion, the Commissioner is satisfied that the requests are all concerned with broadly the same matter; being initially requests about HE's suspension of the NSoRC before drifting into requests about HE's handling of those requests about HE's suspension of the NSoRC. Finally, the Commissioner is satisfied that the third criterion is met as all the requests were submitted within a 60 day period. As such, HE was entitled to aggregate the series of requests when it was considering its application of section 12(1) of the FOIA.
33. A number of HE staff had spent several hours discussing the parts of the request; whether any relevant information would be held and where it would be held. HE had estimated 7.5 hours of staff time had been spent in total and the Commissioner considers this is a reasonable estimate, given the breadth and complexity of the requests. While the requests may all be broadly concerned with NSoRC, the complainant has requested, amongst other information: assessments, correspondence to and from a range of parties, reports and feedback, examples of contractual arrangements across a number of Areas, cost of repairs in a number of Areas, definitions and notes of meetings.
34. If, as HE has estimated, it then took one person an average of one hour to locate, retrieve and extract information relevant to each of the requests, it would take a further 18 hours to address the 18 requests the Commissioner has listed above (and she notes that HE had identified further questions in the complainant's correspondence that could be categorised as requests for information). This would take the time for complying with the requests to 25.5 hours. But the Commissioner agrees with HE that it is likely to take considerably longer to address some parts of the request. For example the request for examples of contractual arrangements across three Areas, and the cost of repairs in four Areas.
35. By way of one, more detailed, example, HE has provided the Commissioner with further information on the possible costs associated with complying with question 9. This is the part of the request which HE first asked the complainant to reduce in scope by confirming a date and the specific contractors he was interested in. In response the complainant had advised in his correspondence of 30 November 2019 that he was interested in 11 of the Areas that HE operated, and he clarified question 9 as follows:

"Your engagement with contractors following implementing NSORC; all information to and from, to this date. This will include all information to and from contractors setting out the suspension of NSORC;

notification, feedback, implications How it affects them, their charging and claims), actions and intentions.”

36. HE has explained that this extends the request beyond just the central NSoRC team that was implementing the process, to also include the individual Areas, the Green Claims (central) team, and probably General Counsel. That would mean 14 teams would have to complete searches for the requested information. HE says the Area teams have to be approached as they have potentially had feedback on claims they have issued under the (NSoRC) process. If it took one person in each of the 11 Areas only one hour (which HE considers is on the conservative side) to look through the various claims folders for feedback, notification and “implications” 11 hours would have been spent on just that one question.
37. HE acknowledged that it may be the case that all of the Area teams above received the same feedback and correspondence so it may seem excessive to approach all of them. But HE notes that due to the request seeking ‘all information’, all the Areas would be needed to be approached to make sure HE captured correspondence that might only have been received by one Area team. The only way to ensure this would be to ask each Area team to undertake searches of their files.
38. Furthermore, if the other three teams, in addition to the Area teams, also only took one hour to search files, then that would total 14 hours for question 9 alone. That would only leave four hours to search for, extract and check information for relevance with regard to the remaining parts of the request. HE considers that that is not a feasible task when the nature of the other questions and what might be captured is considered.
39. Finally, HE argues that complying with all the parts of the request within the cost limit would only allow 17 minutes per question. As has been explained, question 9 and some of the other questions would have been considered by more than one team, for example questions 2 and 4 would have to be addressed by at the least the NSoRC team and General Counsel, but also potentially by the wider Commercial and Procurement and Green Claims team. This is especially so when the clarification of question 4(b), that broadened the request to include potential changes in contracts of all of the Areas, is considered.
40. Contrary to the complainant’s belief, and as HE advised him, the range of information that the complainant is seeking is not all held by one person in HE; it is held by different teams across the organisation and would require a good deal of HE resource to locate, retrieve and extract. Given the breadth and complexity of this multi-part request, the Commissioner is satisfied that the time HE has calculated it would take

to comply with the requests is credible and that it would take over 18 hours to comply with it. She agrees that it would take at least 25.5 hours and would be likely to take longer than that. The Commissioner has therefore decided that HE is entitled to rely on section 12(1) of the FOIA to refuse to comply with the complainant's requests of 6 November 2019, 30 November 2019 and 3 December 2019.

Section 16 – duty to provide advice and assistance

41. Under section 16(1), a public authority has a duty to provide an applicant with advice and assistance, so far as it would be reasonable to expect the authority to do so. Applied to section 12, section 16(1) creates an obligation for a public authority to provide advice and assistance on how the scope of the request could be refined or reduced to avoid exceeding the appropriate limit. In its correspondence to the complainant on 29 November 2019 and 3 December 2019 the Commissioner is satisfied that HE offered the complainant adequate advice and assistance because it suggested how he might narrow down the scope of his request. As such, the Commissioner finds there was no breach of section 16(1).

Section 17 – refusal of request

42. Under section 17(5) of the FOIA an authority that is relying on a claim of section 12 or section 14 should give the applicant a notice stating that fact. The notice should be given to the applicant within the required timescale, which is promptly and within 20 working days following the date of receipt of the request.
43. The complainant submitted his final requests in the sequence on 3 December 2019.
44. Although it had referred to section 12(1) in its earlier correspondence with the complainant, it was not until its internal review of 29 May 2020 that HE clearly confirmed that it was relying on section 12 to refuse to comply with the requests. As such the Commissioner finds that HE breached section 17(5) of the FOIA in respect of its refusal of the request under section 12.

Right of appeal

45. 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

46. 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.
47. 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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