

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 March 2021

**Public Authority:** Highways England

**Address:** Piccadilly Gate  
Store Street  
Manchester  
M1 2WD

#### Decision (including any steps ordered)

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1. The complainant has requested information from Highways England about costs associated with pricing third party claims. Highways England has categorised the request as a repeat request under section 14(2) of the FOIA and has refused to comply with it.
2. The Commissioner's decision is as follows:
  - The complainant's request is a repeat request under section 14(2) of the FOIA and Highways England is not obliged to comply with it.
3. The Commissioner does not require Highways England to take any remedial steps.

#### Background

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

## Request and response

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5. The complainant submitted a request for information to Highways England (HE) on 25 February 2020 in the following terms:

"...Currently, a number of proceedings issued in the name of Highways England are 'stayed' by South Wales County Courts. Resolving these matters, those we are handling, is straightforward; ask your contractor to act in accordance with the contract, Annex 23 and Appendix A to Annex 23:

reprice the claims using '**actual costs**' (defined costs) and apply the appropriate Third Party Claims Overhead (TPCO) percentage **uplift**.

If Highways England is unable to undertake this, please instruct your contractors to do so. However, it is apparent 'actual costs' are known to you, there are several references on your site at <https://highwaysengland.co.uk/thirdpartyclaims/>

please provide me these 'actual costs', those to which you are referring."

6. HE responded to the request on 31 March 2020. HE refused to comply with the request under section 14(2) of the FOIA as it considered it to be a repeat request. HE provided the complainant with an internal review response dated 7 February 2019. This response was associated with a previous request the complainant had submitted to it on 11 December 2018. In that review response, HE discusses the term 'defined costs', the Pricing Schedule in the Asset Support Contract and the use of the term 'DCP rates' in a particular First-tier Tribunal (Information Rights) appeal hearing. It appears that HE considered that the request of 25 February 2020 was a repeat of the request of 11 December 2018.
7. The complainant requested an internal review on 31 March 2020. He said that his "previous requests" had concerned information about 'defined costs' rather than, in the current request, 'actual costs'. HE provided an internal review on 30 April 2020. It upheld its position; that the request is a repeat request.

## Scope of the case

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8. The complainant first contacted the Commissioner on 5 May 2020 to complain about the way his request for information had been handled.

9. The Commissioner's investigation has focussed on whether the complainant's request is a repeat request under section 14(2) of the FOIA.

## Reasons for decision

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### Section 14 – vexatious and repeat requests

10. Section 14(2) of the FOIA says 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 the previous request and the making of the current request.
11. In her published guidance on section 14(2) the Commissioner advises that, in addition to the above, in response to the earlier request the authority must have either provided the information to the requester or confirmed that it does not hold the information.
12. In an initial submission to the Commissioner, HE noted that this request is one of many it has received from the complainant on the topic of the third-party claims process for damage to the strategic road network, Asset Support Contract detail and the terminology used in those contracts.
13. HE went on say that it has refused other requests from the complainant under section 14(1) of the FOIA (vexatious request) and considers the current request could be categorised as vexatious as well. However it refused this request under section 14(2) as it considered that by doing so it would be possible to conclude matters more easily.
14. Moving on to why it considered the request is a repeat request, HE said that the complainant has here requested the 'actual costs' used in pricing third party claims. HE said the term 'actual costs' is essentially 'the replacement' of the term 'defined cost' which is a definition used within the Asset Support Contracts.
15. HE said through its response(s) to earlier requests it had previously made the complainant aware that there is no list of defined costs, because 'defined cost' is a definition. It said the same is true of 'actual costs'. Actual costs are exactly that – they are the actual costs that the contractor charged/was charged by subcontractors to complete repairs for each incident on the road network. HE noted that the complainant makes the comparison in his request when he says: "provide me the actual costs (defined costs)". HE argued that this demonstrates that the

complainant is aware that the two terms are linked. Because it has previously advised the complainant that there is no schedule of defined costs, or in this case actual costs, HE considered the request to be a repeat request and it refused the request on that basis.

16. HE noted that when it responded to the current request, it had provided the complainant with its review response to his previous request of 11 December 2018. That response had explained that 'defined costs' is a definition and not a schedule of rates. The Commissioner understands HE to be saying that, similarly, the term 'actual costs' is also a definition and not a schedule of rates. This is because the term 'defined costs' and the term 'actual costs' are synonymous.
17. However, after questioning by the Commissioner HE that, although its response to it had discussed 'defined costs', the information requested in the 11 December 2018 request concerns Damage to Crown Property rates rather than 'defined costs'. The complainant also made this point in correspondence to the Commissioner on 6 January 2021. The Commissioner notes that in his request for an internal review to HE the complainant had discussed the matter of 'defined costs' and 'actual costs'. He had not advised HE that his earlier request had concerned Damage to Crown Property rates and that the current request concerns 'defined/actual costs' (and therefore could not be a repeat request).
18. In the circumstances, however, HE provided the Commissioner with a copy of another request the complainant had submitted to it, this time on 29 November 2018 – HE's reference FOI 767 723. That request was as follows:

"Thank you for the information. Could you please clarify the response by providing the following:

1. On what date did you receive the information
2. What further breakdown / information do you receive; date, reference, etc
3. Are you provided a breakdown of the 'DEFINED COSTS', a make-up the total
4. What is your reference for the incident / claim
5. On the date of the loss, 20/11/2016, what is the DEFINED COST of an AIW\*
6. Please confirm the defined cost of an item is the same to Highways England and a Third Party
7. What reconciliation, checking and auditing of the figure occurs?

It may assist to be aware that information was released 05/2018 in respect of defined costs however, the data is for 2014 to 2016 and concludes 11/04/2016, the defined cost being £23.71 / hour."

19. For context, that request had followed on from an earlier request from the complainant on 25 October 2018, which concerned an incident that had occurred in Area 9 of the road network.
20. HE's response to the request of 29 November 2018 is dated 7 January 2019. In that response HE advises that, with regard to part 5 of the request, it does not hold 'defined cost' information.

### *Conclusion*

21. Considering the first of the criteria at paragraph 10, the Commissioner is satisfied that the current request was submitted by the same person who submitted a previous request.
22. Regarding the Commissioner's point at paragraph 11, the complainant's earlier request of 29 November 2018 had included a request for 'defined costs' in relation to Area 9 of the road network and HE had confirmed it did not hold that information.
23. The Commissioner notes that she is not aware that the complainant submitted a complaint to her at that time about HE's response to that request ie he does not appear to have pursued a case that HE *did* hold the 'defined costs' information he was seeking. (If he did submit such a complaint to the Commissioner it was resolved informally as there is no associated decision notice.)
24. During the current case, the complainant sent the Commissioner material associated with matters that arose after he submitted his request of 25 February 2020 and after he received HE's response to that request. The complainant considers that this material is evidence that information about Damage to Crown Property and Asset Support Contract rates exists and that HE holds it. However, this case is considering the matter of 'actual costs'/'defined costs' and not the matter of Damage to Crown Property rates or Asset Support Contract rates. In any case this decision must focus on the situation as it was at the time of the request on 25 February 2020, and up to the point of HE's internal review on 30 April 2020.
25. The Commissioner has next considered the second of the criteria at paragraph 10 - whether the request is identical or substantially similar to a previous request/requests. The current request of 25 February 2020 is for 'actual costs'; the previous request of 29 November 2018 was for 'defined costs'.
26. As well as noting the information he had requested on 11 December 2018 was 'DCP rates' and not 'defined/actual costs', in further correspondence to the Commissioner on 3 February 2021 the complainant provided more argument that his request cannot be

categorised as a repeat request. Some of the complainant's argument is not clear but he seems to be saying that through his request of 25 February 2020 he had not asked for 'defined costs', which he did not need, but had asked for 'actual costs' because this was a (new) term HE had used in other correspondence to him. Presumably his point is that the current request for 'actual costs' is therefore not a repeat of a previous request for 'defined costs'.

27. In his request of 25 February 2020, the complainant has defined the term 'actual costs' in brackets as 'defined costs'. HE has confirmed in its submission to her that the two terms – actual costs and defined costs – are synonymous and that it had explained this to the complainant in its wider correspondence with him. That the complainant includes the phrase "... 'actual costs' (defined costs)..." in his current request suggests to the Commissioner that he must accept that these two terms are interchangeable.
28. The Commissioner has considered the complainant's arguments but she is not persuaded. She is satisfied that the current request for 'actual costs' is substantially similar to the earlier request for 'defined costs'. The terms 'actual costs' and 'defined costs' are synonymous, and the evidence of his current request suggests to the Commissioner that the complainant was aware of this.
29. The Commissioner has finally considered the interval between the two requests and whether that was reasonable. 15 months had elapsed between the request of 29 November 2018 and the request of 25 February 2020. HE has acknowledged the time that passed between the two requests. But it has noted, first, that the term 'actual costs' is a definition and not something that would alter over time. Second, it had provided the complainant with a previous response so that he could refer back to it and note that the situation had not changed.
30. The Commissioner has accepted HE's position; that the terms 'actual costs' and 'defined costs' are (synonymous) definitions and not, for example, a recorded schedule of rates that it is possible that HE could hold. In its response of 7 January 2019 to the request of 29 November 2018, HE had advised the complainant that it did not hold 'defined costs' information. And in its response to that request and its review response of 7 February 2019 to the request of 11 December 2018, HE had explained why it did not and could not hold it.
31. The Commissioner has also noted her decision [FS50741018](#) dated 1 April 2019. This decision concerned another request which she had forwarded to HE on the complainant's behalf on 8 May 2018. That request also included a request for 'defined costs', in relation to Area 3 of the road network. The Commissioner decided that, on the balance of

probabilities, HE did not hold 'defined costs' information. The request that is the focus of FS50741018 pre-dates any of the requests discussed so far. But the Commissioner observes that at the point of his current request of 25 February 2020 for 'actual costs/defined costs' he had received the Commissioner's decision in FS50741018, that 'defined costs' information was not held.

32. The complainant appealed the FS50741018 decision in EA/2019/0119 but the FTT dismissed that appeal in December 2019. So at the point of his request of 25 February 2020 the complainant would have also received the FTT's decision confirming that 'defined costs' information is not held.
33. In view of HE's responses to earlier, similar requests, the Commissioner's decision in FS50741018 and the FTT's decision in EA/2019/0119, the Commissioner considers that a reasonable person would accept HE's explanation that recorded 'actual costs' and 'defined costs' do not exist because these synonymous terms are definitions; they are not a schedule of recorded rates. She considers that a reasonable person would accept that they did not exist at the point of the request of 8 May 2018 in relation to Area 3, the request of 29 November 2018 in relation to Area 9 and could not exist (in relation to any road network Area) at the point of the current request of 25 February 2020.
34. The Commissioner therefore considers that even if the complainant had submitted the current request five or 10 years later, rather than 15 months later, the Commissioner would not consider the longer interval to be reasonable, as the information he has requested would still not exist, for the reasons HE has provided to him and which have been discussed in the Commissioner's and FTT's decisions. As such, the Commissioner is satisfied that the interval between the current request and the earlier request could not be reasonable.
35. With regard to the complainant's request of 25 February 2020, the Commissioner has decided that all the criteria at paragraph 10 have been met: the complainant had submitted an earlier request to HE; HE had confirmed it did not hold the requested information; the current request is substantially similar to the earlier request; and a reasonable interval between the two requests could not elapse. The Commissioner therefore finds that the request can be categorised as a repeat request under section 14(2) of the FOIA and that HE is not obliged to comply with it.

## Right of appeal

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36. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.
38. 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

**Pamela Clements**  
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