

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 January 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 a variety of information all broadly associated with particular contractors of Highways England. Highways England has categorised the request as a vexatious request under section 14(1) of the FOIA and has refused to comply with it.
2. The Commissioner's decision is as follows:
  - The complainant's request is a vexatious request under section 14(1) 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.

### Request and response

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4. In correspondence to Highways England (HE) dated 17 September 2019 and posted on the WhatDoTheyKnow website on 20 September 2019 the complainant requested information in the following terms:

"Please confirm by **close of business today** the following will be addressed in the usual course of business and if so, by what date I

can anticipate a reply. In the alternative, I will present by use of the **Freedom of information Act** (FoIA).

Following our **04/01/2019** conversation, I am seeking all information relating to:

1. Your pre-conversation with me, the preparation for the discussions.
2. Your records of the discussions and subsequent activity stemming from the conversations – about some aspects of which I am more specific (see below).
3. The 'schedule of rates' to be published by Kier.

Our conversation followed a history of exchanges about rates that dates back to late 2016 when you explained [Name redacted] and [Name redacted] were putting a 'lot of effort' into the matter. Then after much correspondence on the subject, 21/06/2017, I met with your former head of Green claims who reported to you. In or after 11/2017, KPMG undertook an audit of Kier. In 09/2018, you provided an update to me about the KPMG audit.

04/01/2019, when we spoke there was no suggestion the 'schedule of rates', which you raised, did not exist.

Indeed, the very **minimum** that was going to happen as a result of the call, certainly as a result of the judgment (vexatious Tribunal finding against Highways England - EA/2018/0088) was that you would "have **a schedule of rates** published by Kier", for transparency.

It is apparent, as at 04/01/2019, Highways England had not decided to cite 'no schedule of rates were held'.

I am seeking all information relating to:

4. You having raised the debate to a level where you can do something about it; the notes / records of having done so.
5. The 8 things you were to go away and have a look at:
  - i. charging separately for planning even though it is part of admin'
  - ii. chares for debris removal instead of £75
  - iii. accident/incident watchmen the HE rate being £23 whereas Third Parties are charged £65. You believed an operative was being

paid £10 to £12 / hour, charged to Highway England at about £23 / hour yet to Third Parties £65/hour for the very same tasks.

iv. the huge uplift put on top of that on the basis that they are working overtime when they are out of hours even though they are on 24-hours (multipliers). Invoicing for costs that are not incurred by Kier but charged irrespective and the misrepresentation to Third parties and the Courts, in the name of Highways England, to secure payments.

v. Balfour Beatty, being number 2 behind Kier in terms of concerns, applying uplifts to repair operatives

vi. using averages including identifying the claimant's storeman

vii. the gap between the over-threshold and under-threshold claims in terms of averages. This related to statements by 3 Kier employees that averages were applied across all claims whereas they are not. There is one process for Third Parties (likely an unjustifiable figure claimed to be an average) and another process for Highways England.

viii. the concept of the use of averages in general rather than actual costs.

. The records following your formative conversations with Kier to address the above.

You were not happy with the uplifts yet these still appear on presented claims using a contract non-compliant process. Additionally, taking what I said at face value, you accepted the statements given to the court were inaccurate at best (you were being polite). You understood the seriousness yet I have seen no change in the process, no effort to address the claims I am considering, priced using the process post-10/2015 by Kier Highways.

I also ask to be provided:

7. Your efforts to have Kier comply with Appendix A to Annex 23; the requests that they do so and their responses, to include why they have not complied since 07/2014

8. The 'deeply flawed' explanations I have received.

9. The basis upon which you consider the charges to be reasonable, warranted and contract complaint i.e. in accordance with Appendix A to Annex 23 and why, as discussed:

10. The explanation / justification for Third Parties not being charged £23.71 (defined cost) plus 25.29% (TPCO) but £65 to £130 / hour.

11. The records following your formative conversations with Balfour Beatty

12. The evidence the cost of these incidents to Highways England is immense.

These costs apparently arise not because of the direct costs of clearing up the incident and dealing with it, but the hidden cost i.e. abortive arrangements for other incidents

13. Contractors, at one point, doing only 30% work as planned:

a. The reasons for this

b. The monthly percentages of planned work completed over the past 2 years and

c. Why, if attributable to incidents, contractors are under resourced to address them

d. In what respect there is 'too much of this' (incidents) such that your traffic officers are struggling.

14. The inappropriate remarks from an organisation the size of Kier and the conversation with them about this – please note my recent SAR will address the personal information.

15. All records of your conversations / exchanges with [Name redacted] and [Name redacted] (who had not covered themselves in glory).

Whilst you explained dealing with one of the less sophisticated ends of the construction industry, I had anticipated this making your Authority's job all the easier.

With regard to our conversation of **15/02/2019**, I ask to be provided:

1. Correspondence relating to the endorsement and /or an approval from various different organisations and stake holders in respect of your new process (NSORC) and those you have found it necessary to just impose it on.

2. Why, in particular with Balfour Beatty, you can demand the costs under the contract but cannot demand to understand how much they actually recovered.

3. The evidence contractors under-recover and how this is:

4. Affected by a percentage of green claim damage where you never catch the culprit. I understand these costs are met by the monthly lumpsum payment. I am seeking all information relating to:

5. The efforts to determine whether Kier were complying with Appendix a to annex 23 and address the allegations of non-compliance

This is the appendix you believed is 'good and should be complied with' as 'it's the contract'. The Appendix has not been complied with in Area 9 since 07/2014 and this was evidenced, at a meeting, corroborated by documentation, 21/06/2017.

There is an obvious concern contractors are subsidising their recovery costs ('losses') by over-charging Third Parties. With regard to Kier and Balfour Beatty (Area 10), it is not accepted that they are under-recovering rather that they are profiting, profiteering. In this respect, contrary to your comments, this is my problem and that of the motorist (or their insurer). As I explained, contractors are not silly when they enter into these contracts, they know what they are doing, they know the rates, they know the figures, percentages. I felt you were being fed a lot of information that people want you to hear.

It appears Highways England have permitted exaggeration and are compromised. It also appears the National Audit Office have been acting upon erroneous information.

I could be no clearer; with regard to Kier, some of their activities are fraudulent. As for Highways England, they are misrepresenting facts, you are not transparent. The processes that are in place are not being complied with, and as I conveyed to you, in order not to comply with them, people are lying to me and they are lying to the courts.

Please also provide information relating to:

6. The decision not to circulate contractors to comply with Appendix A to Annex 23

7. The decision not to return to me in a month
8. The consideration of the open court cases and
9. the decision not to return to me about them

Please note that 'personal Information' may be captured (duplicated) by my Subject Access Request (SAR) of 20/08/2019 in respect of which I anticipate a response at the latest by Monday 23/09/2019 i.e. the calendar month will have expired."

5. HE responded to the request on 31 January 2020. It refused to comply with the request under section 14(1) of the FOIA as HE considered it to be a vexatious request. The complainant requested an internal review on 31 January 2020, and HE provided one on 28 February 2020. It upheld its position.

### **Scope of the case**

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6. The complainant first contacted the Commissioner on 29 February 2020 to complain about the way his request for information had been handled.
7. The Commissioner's investigation has focused on whether the complainant's request is a vexatious request under section 14(1) of the FOIA.

### **Reasons for decision**

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#### **Section 14 – vexatious and repeat requests**

8. Under section 14(1) of the FOIA a public authority is not obliged to comply with a request for information if the request is vexatious.
9. 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 guidance 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
10. 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.
11. The Commissioner's guidance 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 upon it and balance this against the purpose and value of the request. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
12. In its submission to the Commissioner, HE has explained that this request is one of many it received from the complainant on: the topic of the third-party claims process for damage to the strategic road network; the contract detail and terminology in these contracts; and the alleged fraudulent actions of contractors it employs to undertake the maintenance and repair of the network. For the purposes of this request those contractors are Kier and Balfour Beatty Mott Macdonald (BBMM). HE says that most of these requests have been about the rates charged by contractors either to third parties or to Highways England. In HE's view they have always appeared to have had an underlying theme of accusation of fraud or wrong-doing by one or both parties.
13. HE has gone on to say that despite this, these requests for rates have been dealt with through various channels: responses from HE explaining when information is held and when it is not held; responses from HE explaining when information is commercially sensitive; decisions by the Commissioner and through appeals to the First-tier Tribunal (Information Rights) ('the FTT'). HE has referred to the most recent FTT decisions: EA/2018/0104 and EA/2019/0119. HE acknowledges that although the decision in EA/2019/0119 was made after the current request was submitted, it was available to the complainant before he requested internal review.
14. HE notes that the request is made up of 34 different points that the complainant expected HE to address. Points 3, 5i) – viii) and 10, from the first half the request and points 2, 3 and 4, from the second half, are all on the subject of rates/costs of third-party claims or how charges



have been applied for repairs. HE says that given the explanations it has provided to the complainant in the past, the Commissioner's previous decisions and the FTT appeals about these matters, it considers that these points in particular are evidence of unreasonable persistence ie the complainant is going over old ground.

15. HE then notes again that the request was made up of 34 different points/questions. HE says that in some of these questions it is not clear what is being asked for, and points appear to be covered more than once across the 34 points. HE acknowledges that usually in such cases, when a request is not clear, its approach would be to seek clarification from the applicant. But in this case, HE says, the complainant has had ample experience of submitting Freedom of Information requests and he has, in the past, been asked to make his requests as clear and as succinct as possible. HE says that, often, seeking clarification from the complainant results in an even lengthier submission from him. HE therefore deemed that going through the request point by point required disproportionate effort when the outcome was likely to be more questions from the complainant than he had asked originally.
16. HE says that given the complainant's history of submitting requests, and its attempts to advise the complainant to be as clear and succinct as possible, it considered that this request was deliberately lengthy. It is essentially a show of intransigence, in HE's view, as the complainant has ignored its previous requests to him to keep his requests short and to the point.
17. HE has advised the Commissioner that it also considers that the request is vexatious because of the number of points raised and their wide nature. The volume of information that would have had to have been reviewed, looked at for exemption applications and redacted in preparation for release under the Act would therefore have placed a grossly oppressive burden on Highways England.
18. Finally, HE considers the request is also vexatious because through it the complainant makes unfounded accusations and has cast aspersions on named individuals. HE says this is evidenced at point 7 in the first half of the request and at point 5 and further along in the body of the correspondence where the complainant says: "I could be no clearer; with regard to Kier, some of their activities are fraudulent. As for Highways England, they are misrepresenting facts, you are not transparent. The processes that are in place are not being complied with, and as I conveyed to you, in order not to comply with them, people are lying to me and they are lying to the courts."
19. HE considers that this comment has been made without evidence and feels this alone is evidence enough to refuse the request as vexatious.



However, HE has also noted point 15 in the first half of the request. It says this also casts aspersions on two named individuals' ability to do their jobs properly. HE considers this gives added weight to the arguments it has presented above, that the request is vexatious under Section 14(1) of the FOIA.

### *Conclusion*

20. The Commissioner deals with a high volume of complaints from the complainant. She has previously instructed him to send correspondence about specific cases to the relevant case only. As such she has considered this case solely on the submissions the complainant sent to this specific case, and on HE's submission.
21. The Commissioner notes that on 11 January 2021 the complainant sent correspondence to a separate case (IC-44703-Y9Z8) which, at that point, had been concluded through a decision notice and was closed. In that correspondence the complainant asked that the Commissioner consider the points he went on to present where they were pertinent to other complaints of his with which the Commissioner was dealing. These points appeared to focus on the matter of certain information existing and being held. The Commissioner has taken some account of those points, but the current case concerns the matter of vexatiousness, not whether information is or is not held, as such (which would be a section 1 investigation).
22. In correspondence sent to the current case on 11 November 2020, and of some relevance to this case, the complainant has concluded his email by noting four concerns he has about Kier and HE dated July, August, September and October 2020 ie after the date of the current request. He has also noted other allegations about HE and Kier, with links to a website. Clearly the complainant has concerns about practices that he considers Kier (and BBMM) are undertaking though their contracts with HE, as HE has noted in its submission.
23. In a separate email to the Commissioner on 23 November 2020 the complainant says that he is concerned that the Commissioner raises decision notices without "reading facts". The Commissioner has reviewed the complainant's correspondence for facts – or at least clear and compelling arguments - as to why this request cannot be categorised as vexatious, for example because of the value of the information being sought. She has identified very limited such arguments. In amongst a number a number of unfounded allegations that he makes about the Commissioner, the complainant says just that he is simply seeking information that he has been advised does not exist but which he considers *does* exist and is being kept secret from him.

24. The FTT's decision in EA/2019/0119 was promulgated on 12 December 2019. It concerned HE's contract with Kier and upheld the Commissioner's decision that, contrary to the complainant's belief, HE does not hold information on "defined costs" in the form of Damage to Crown Property (DCP) rates for work done by Kier. The FTT was satisfied that such rates do not exist. At the point of the above request on 20 September 2019, the complainant was therefore not in receipt of that FTT decision. As HE has noted however, the complainant was in receipt of that FTT decision at the point that he requested an internal review on 31 January 2020.
25. And at that point the complainant was in receipt of the FTT's decision in EA/2018/0104 which had been promulgated on 2 December 2018. EA/2018/0104 concerned rates that HE does hold and which the FTT found could be withheld under section 43 of the FOIA (commercial interests). There had been some (unintentionally) misleading discussion in EA/2018/0104 about DCP rates which had suggested that DCP rates exist. That appeal's final decision, however, was that the rates that HE holds are not DCP rates but Asset Support Contract (ASC) rates and that these are exempt from disclosure under section 43 of the FOIA.
26. The Commissioner therefore considers that at the point of his request for an internal review ie at the point that the complainant decided to continue pursuing his request of 20 September 2019, the complainant was aware that the information on ASC rates that HE holds is exempt information under section 43 of the FOIA, and that a decision had been made that information on DSC rates does not exist. If the matter of information existing or not existing was the focus of his request – which, in his correspondence of 23 November 2020, the complainant has suggested it was – it is not clear what the complainant was hoping to achieve by continuing to pursue a request that broadly concerned DCP rates and ASC rates, and matters associated with his ongoing correspondence with HE about those rates. At the point of his request for an internal review the complainant will have been aware of the FTT's decision: that DCP rates do not exist. He would have already known that information about ASC rates is exempt information under section 43 of the FOIA.
27. The Commissioner has next considered the volume of requests the complainant had previously submitted to HE about the above matters. In its submission to her, HE has said that the request is "one of many" it has received from the complainant – it has not given more detail about that. The Commissioner notes, however, in EA/2019/0119 the FTT records "...that there was a significant back story including at least 57 information requests made previously by the Appellant, a number of ICO decisions further to these and two First Tier Tribunal decisions (in relation to one of which the HE had been refused permission to appeal

by the Upper Tier Tribunal).” At December 2019 then, the complainant had submitted at least 57 requests to HE. The Commissioner considers it likely that the bulk of these would have been submitted prior to his current request of 20 September 2019, three months before. In other words, by the time of the current request the complainant had already submitted an extremely high volume of requests to HE on broadly the same matter; more than a reasonable person might be expected to submit to one public authority.

28. HE has told the Commissioner that it had previously asked the complainant to make his requests as clear and succinct as possible. The Commissioner considers that is a quite reasonable appeal for HE to make. However, as HE has noted, the current request comprises approximately 30 points, of some complexity, which the complainant expected HE to address.
29. Given the background and context of this request, in the Commissioner’s view the complainant’s expectation was a totally unreasonable expectation. This is because of the length of time the complainant had been corresponding with HE about similar matters, its previous entreaty to him to submit clear and concise requests, the volume of related requests he had previously submitted, the many responses he had already received from HE on those matters, the Commissioner’s decisions in cases about those matters and the two FTT decisions to which HE has referred. The complainant chose to ignore HE’s reasonable advice to submit clear and concise requests and submitted a request that runs over four pages of this decision notice.
30. The Commissioner has also considered the specifics of the request and, in addition, agrees with HE that the request includes negative comments about HE staff and unfounded accusations about HE.
31. To conclude, the Commissioner has considered all the circumstances and she is satisfied that HE was correct to refuse to comply with the complainant’s request. This is because the complainant is demonstrating an unreasonable level of persistence; pursuing, through his request for a review, a matter that a reasonable person would consider to have been concluded though the FTT’s December 2019 decision, if not before. But the request also demonstrates a number of other criteria for vexatiousness: it is a voluminous request that includes unfounded accusations and was the latest in a pattern of frequent requests about similar matters. As such, the Commissioner has decided that the complainant’s request can be categorised as a vexatious request under section 14(1) of the FOIA.

## Right of appeal

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

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

**Pamela Clements**  
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