

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 April 2021

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

#### **Decision (including any steps ordered)**

---

1. In a multi-part request, the complainant has requested information about Highways England's contract with one of its sub-contractors, Kier. Highways England (HE) addressed three parts of the request, withheld information relevant to two parts under section 42(1) of the FOIA (legal professional privilege) and advised that it does not hold the remaining information. In the course of the Commissioner's investigation HE advised that it intended to release the information it had withheld under section 42(1). The complainant considers that HE holds further information that he has requested, and that it has not addressed parts of his request.
2. The Commissioner's decision is as follows:
  - On the balance of probabilities HE does not hold information within the scope of parts 3, 6, 7 and 8 of the request.
  - With regard to parts 1 and 4 of the request HE has not complied with section 10(1) of the FOIA as it has not communicated the relevant information it holds within the required timescale of 20 working days.
  - HE could reasonably have offered the complainant advice and assistance with regard to parts 2 and 9 of the request and, as such, did not comply with its duty under section 16(1) of the

FOIA. However, the Commissioner does not consider it necessary for HE to do so now.

3. The Commissioner requires Highways England to take the following step to ensure compliance with the legislation:
  - If it has not already done so, release to the complainant the information it holds that is relevant to parts 1 and 4 of the request, with personal data redacted in line with section 40(2) of the FOIA.
4. Highways England must take this step 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.

## Background

---

5. The matters broadly behind the subject that is the focus of the complainant's request have been discussed at length in a number of previous decisions made by the Commissioner, for example [FS50873250](#). As such, the Commissioner does not intend to reproduce that wider background and context again here.
6. The Commissioner understands the more specific matter that is relevant here to be HE's Area 9 contract with Kier and a deed of variation to that contract, and to the Area 3 contract with Kier.

## Request and response

---

7. On 2 April 2020 the complainant requested information from HE through the WhatDoTheyKnow website. Because it provides context, the Commissioner has reproduced the introduction to the request in full, as follows:

*"You and your contractors cite the judgement of HH Godsmark [Redacted] ... as and when it suits you without reference to the statement:*

*"It would be odd if a tortfeasor (insurer) was liable to Highways England for diminution in value of a damaged chattel in one sum if sued by Highways England itself and in a different sum if sued by Highways England via BBMM (a contractor)."*

*On 16/03/2020, your General Counsel's Office wrote:*

*'I refer to your emailed complaints dated 25th and 28th February. These complaints concern the methodology used by Kier Highways to price unscheduled damage claims, and what you consider to be their failure to comply with the contract. You refer, in particular, to their failure to comply with Appendix A to Annex 23 of the Area 9 contract. This response is intended to cover both complaints given the similarity of the issues raised.*

*Please note that these provisions ( Appendix A, Annex 23) have been superseded and no longer apply. Kier Highways now price unscheduled damage claims using a fixed schedule of charges, derived from first principles using the Construction Industry Joint Council (CIJC) Working Rule Agreement and Civil Engineering Contractors Association (CECA) Schedules of Equipment Rates. These are both nationally recognised standards.*

*Kier Highways have our agreement to adopt this approach. The invoices they send will now be accompanied by a statement detailing the resources and associated rates which have been applied. Further details concerning these changes will shortly be provided by Kier Highways in their updated guide to insurers.*

*These changes do not affect any cases where legal proceedings have already been issued. These have been priced using the procedure set at Appendix A to Annex 23. This includes the cases before Cardiff County Court to which you refer.*

*On the basis of the above, we do not intend to take your complaints any further. Of course, should you wish to dispute liability or quantum in relation to any claim, you have recourse to the Courts.'*

*I ask to be provided with all information associated with the above:*

- 1. between you and your contractors, relating to the amendment to the contract and*
- 2. the new contractual terms which apply to such claims and the agreed variations of such contracts*
- 3. why it was decided that appendix A should be varied*
- 4. the basis upon which the amendments were made; on whose instigation the discussions, exchanges and considerations and how it can be said Appendix A to Annex 23 no longer applies*
- 5. relating to your belief and that of your contractor that the new provisions can be forced upon insurers*

*6. about the change in pricing to Highways England as a result of this change:*

*a. are Highways England subject to the same process and if so, why this was agreed, if not, why does this not apply to your Authority.*

*This new process sees even higher charges than those used under the 'defined cost' process utilised since 10/2015 by Kier. The new charges are at odds with the NSoRC*

*[Redacted]*

*The NSoRC is stated to be the basis of ascertaining an appropriate charge – your General Counsel's office and CEO both having referred to the NSoRC rates, the methodology, as 'reasonable'.*

*You state that the cases before Cardiff County Court have been priced using the procedure set at Appendix A to Annex 23.*

*7. I am seeking all information in support of your statement; the information you have received, the enquiries you have made, to confirm this stated compliance and*

*8. Why you believe the Appendix A process of 'defined cost' (£) plus 'TPCO' (percentage uplift) has been engaged, how you have identified this and*

*9. From what date Appendix A to Annex 23 was in force in each Area and on what date it ceased to be in effect.*

*The information in my possession indicates the S Wales stayed claims have not been priced in accordance with Appendix A to Annex 23 and i refer you to the evidence I submitted to Highways England in person, 21/06/2017, briefly replicated here:*

*[Redacted]*

*i.e. you possess the knowledge to this effect."*

8. HE responded to the request on 4 May 2020. It relied on section 42(1) of the FOIA to withhold the information requested in parts 1 and 4. HE released the deeds of variation to the Asset Support Contracts (ASC) for Area 3 and Area 9 in response to part 2. With regard to part 9, HE advised that Appendix A to Annex 23 was not part of the Area 3 ASC. It said that Appendix A to Annex 23 in the Area 9 ASC ceased to have effect from 7 January 2019. HE advised it does not hold information relevant to part 3, 5, 6, 7 and 8 of the request.
9. The complainant requested an internal review on 6 May 2020. With regard to HE's response to part 2, he noted that Areas 6 and 8 appeared to have been excluded. With regard to HE's response to part 9, the complainant stated, amongst other points and queries, that: "a) Appendix A may not have been part of the Area 3 ASC but Kier applied the process to Area 9 and all other Areas it managed, to include TfL ..."

10. HE provided an internal review on 12 June 2020. It confirmed that it considered that its response to all parts of the request had been appropriate.
11. However, as a result of the Commissioner's investigation, HE reconsidered its response to the request. It concluded that the information it had withheld under section 42(1) does not engage that exemption and advised the Commissioner that it intended to release this information to the complainant, with personal data redacted under section 40(2) of the FOIA.

### **Scope of the case**

---

12. The complainant contacted the Commissioner on 12 June 2020 to complain about the way his request for information had been handled. In correspondence to the Commissioner dated 11 February 2021, the complainant confirmed that he considered HE had addressed part 5 of his request.
13. The Commissioner's investigation has focussed first, on whether, on the balance of probabilities, HE holds recorded information falling within the scope of parts 3, 6, 7 and 8 of the request.
14. She will also consider the timeliness of HE's response to parts 1 and 4 of the request and whether HE could have been expected to comply with the duty under section 16(1) of the FOIA to offer advice and assistance, with regard to parts 2 and 9.

### **Reasons for decision**

---

#### **Section 1 – general right of access to information held by public authorities**

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 them if it is held and is not exempt information.
16. HE's position is that it does not hold any other information within the scope of parts 3, 6, 7 and 8 of the request. The Commissioner will summarise those parts as follows:
  - Part 3 – information on why it was decided that appendix A should be varied

- Part 6/6a – information about the change in pricing to Highways England as a result of the change
  - Part 7 – information to support HE’s statement on compliance
  - Part 8 – information on why HE believes the Appendix A process of ‘defined cost’ plus ‘TPCO’ has been engaged
17. In its submission to the Commissioner, HE has explained that the reason why this information is not held is that most of the discussions around the Deed of Variation (DOV) were held in face-to-face or telephone discussions. Therefore there is no recorded information associated with these discussions. HE has confirmed that it asked the lawyer who undertook the discussions with Kier that are behind the request, to check for any notes made during these discussions. The lawyer confirmed that there were no such notes ie that no recorded information is held. HE says that other than the emails within the scope of parts 1 and 4 of the request that it intends to release to the complainant following its withdrawal of the section 42 exemption, there are no physical pieces of information to provide on the DOV discussions and its application.
18. In his own submission to the Commissioner the complainant has put forward detailed reasons why information within the scope of these parts of the request would exist. These are largely focussed on his view that there must have been “discussion and debate”. The Commissioner considers that HE’s explanation is more persuasive. She is satisfied that HE has approached the appropriate person (the lawyer involved in the discussions with Kier) who confirmed that most discussions were on the telephone or face-to-face and were not recorded. It is not the Commissioner’s role to consider whether recorded information *should* be held at the time of a request but whether, on the balance of probabilities, it is or is not held.
19. HE has confirmed that it does hold some relevant, recorded information within the scope of parts 1 and 4 of the request and that it will release this to the complainant (with personal data redacted).
20. The Commissioner has considered the circumstances and both parties’ submissions and she has decided that on the balance of probabilities HE holds no information within the scope of parts 3, 6, 7 and 8 of the request and has complied with section 1(1) of the FOIA.

### **Section 10 – time for compliance**

21. Under section 10(1) of the FOIA a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
22. The complainant submitted his request on 2 April 2020. At 29 March 2021 HE had not communicated to the complainant the non-exempt information it holds that falls within the scope of parts 1 and 4 of the request. HE has therefore breached section 10(1) of the FOIA with regard to parts 1 and 4 of the request.

### **Section 16 – advice and assistance**

23. Section 16(1) of the FOIA places a duty on a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.
24. In part 2 of his request the complainant has requested any agreed DOVs to contracts associated with particular claims. HE released the DOVs for the Asset Support Contracts for the Area 3 and Area 9 contracts, describing these as “agreed and executed”. The complainant has told the Commissioner that he is “without [Areas] 6 & 8”.
25. Part 9 of the request concerns the date Appendix A to Annex 23 was in force in each Area and the date on which it ceased to be in effect. HE had advised the complainant that Appendix A to Annex 23 in the Area 9 ASC ceased to have effect from 7 January 2019. The complainant has told the Commissioner that HE’s response “ignored” Areas 6 and 8.
26. HE has advised the Commissioner that it had not considered Areas 6 and 8 when it responded to the request. This is because the complainant had made it clear in his request that it was for information relating to the DOV, which were for Areas 3 and 9. Areas 6 and 8 had been combined into a new Asset Delivery contract – ‘East area’ – in October 2019 and therefore were not subject to the DOV discussions.
27. HE has noted the topic of the request - the Areas subject to DOV - and how question 9 is asked - “From what date Appendix A to Annex 23 was in force in each Area and on what date it ceased to be in effect” – and contests that Areas 6 and 8 could be the subject of question 9. This is because, as above, only Areas 3 and 9 were subject to the DOV. In HE’s view, if the complainant had wanted question 9 to extend to Areas 6 and 8, then he should have referred to those areas specifically.

28. The introduction to the complainant's request concerns only the contract for Area 9 and the associated DOV. Part 2 of the request concerns particular claims and any associated DOV that had been agreed. HE has explained that only Area 9 and Area 3 contracts were subject to DOV and that, consequently, its response addressed only these contracts and it released the DOV for Areas 9 and 3. In the Commissioner's view, it might reasonably be assumed from this response that DOV for Areas 6 and 8 had either not been agreed or were not relevant to this part as they were not Area contracts subject to DOV – which appears, in fact, to be the case.
29. However, with regard to part 2, in his request for an internal review the complainant noted that no agreement appeared to be in place for Areas 6 and 8 yet he understood these Areas' contracts were based on Area 9, including Appendix A to Annex 23. He asked HE to explain why "it" [Areas 6 and 8] appeared to have been excluded. With regard to part 9, amongst other matters, the complainant referred to the Area 3 ASC, the Area 9 ASC and "all other Areas it [Kier] managed".
30. HE did not clearly address these queries in its internal review – it simply indicated that it considered that its original response had addressed [all] the complainant's questions.
31. The Commissioner is aware that HE has received an extremely high volume of often lengthy and complex correspondence, requests and queries from the complainant about broadly the same matter, over a long period. However, the Commissioner considers that it would have been reasonable for HE to specifically address part 2 and part 9 in its review response. It could have briefly explained and clarified to the complainant that Areas 6 and 8 had not been subject to the DOV discussions in question and were therefore not caught by these parts of the request. As such, the Commissioner finds that HE breached section 16(1) of the FOIA in respect of parts 2 and 9.



## 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](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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**