

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 August 2021

Public Authority: Highways England

Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested Highways England (HE) to disclose the Cost Breakdown Document for a list of 15 sub threshold claims. HE refused the request stating that the information is not held and nor it is held by Kier on its behalf.
2. The Commissioner's decision is that HE does hold the requested information for the purposes of the FOIA. She considers the requested information is held by Kier on HE's behalf.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - HE is required to reconsider the complainant's request on the basis that it does hold the requested information and issue a fresh response to the complainant in accordance with its obligations under the 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 1 July 2020, the complainant wrote to HE and requested information in the following terms:

"I ask to be provided for the below 15 claims:

1. The Cost Breakdown Document (CBD)

The CBD will be in their original spreadsheet (Excel) format, with no alteration /amendments of the content and the cells will contain their references to associated/linked workbooks. These 'workbooks' have recently been referred to by your General Counsel, Tim Reardon as a schedule of rates.

2. The associated workbooks/worksheets referenced in each of the CBD's.

3. If the workbooks/sheets are unavailable:

- a. Why they cannot be produced i.e. why they were deleted/discarded
- b. Why they cannot be located
- c. When they were used, the date:
 - i. From and
 - ii. To

The 15 claim references are below, in the following format:

Loss Date

Kier Ref

Invoice number... [the Commissioner has not included the list of 15 claim references]"

6. HE responded on 29 July 2020. It stated that the information is not held because it is not involved in the pursuit of sub-threshold claims.
7. The complainant requested an internal review on 29 July 2020. He stated that HE is involved in the pursuit of sub-threshold claims and irrespective of that, the information is held by Kier on HE's behalf. He refers to the list of 15 claims being subject to legal action, HE being the claimant and its lawyers taking action in its name.
8. As the complainant received no response, he chased HE on 27 August 2020.

9. HE carried out an internal review and notified the complainant of its findings on 28 August 2020. It stated again that it does not hold the information and explained to the complainant why.

Scope of the case

10. The complainant contacted the Commissioner on 29 July 2020 to complain about the way his request for information had been handled. The Commissioner wrote to the complainant on 24 August 2020 and advised him that he needed to exhaust HE's internal review process before the complaint could be accepted for full investigation. The complainant referred the matter back to the Commissioner on 29 August 2020, on receipt of HE's internal review response. At this point the complaint was accepted for full investigation. The complainant disputes the information is not held and believes the information is held by Kier on HE's behalf.
11. The Commissioner considers the scope of her investigation to be to determine whether Kier holds the requested information on HE's behalf and therefore for the purposes of FOIA.

Reasons for decision

12. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled –
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
13. Section 3(2) of the FOIA states, for the purpose of this Act, information is held by a public authority if –
 - (a) it is held by the authority, otherwise than on behalf of another person, or
 - (b) it is held by another person on behalf of the authority.
14. HE confirmed that it does not hold the requested information and does not consider Kier holds the requested information on its behalf. It stated that when the damage repair costs for an incident are estimated to be below £10,000 (sub threshold claims), the contractor conducts the repair but does not receive payment for this work from HE. The contractor instead seeks to recover their outlay from the responsible

third party, or their motor insurer, directly. HE argued that it is not involved in this process. Decisions on settlement and/or litigation are made by the contractor, and any instructions provided to legal representatives on matters of liability or quantum come from the contractor directly.

15. HE explained to the Commissioner that it does not get involved in the processing of sub threshold claims at all; the actual process is carried out by Kier itself. Even if the claims progress to litigation it is Kier that solely deal with such matters; not HE or HE's legal team. Although such litigation will be in the name of HE not Kier. The only time HE would be involved or become aware of an individual sub threshold claim is when it involves a fatality. None of the listed claims in the complainant's request involved a fatality. As it had no involvement in the processing of the listed claims whatsoever, it considers it does not hold the CBD document and neither does Kier hold this information on HE's behalf.
16. The complainant strongly disagrees and believes Kier holds the requested information on HE's behalf and it is therefore covered by the FOIA. He stated that the fact is Kier takes on the role of HE for the purposes of recoveries for sub threshold claims. The information is therefore held for the purposes of the FOIA. He argued that HE "does not wash its hands of these claims...", they are reported on regularly to HE under Annex 19 and this is a requirement. The complainant is of the opinion that the process of administering them is set out in the contract and HE takes an active part in the process of pursuing them.
17. The Commissioner has issued guidance on information held on behalf a public authority. It can be accessed via this link:
[Outsourcing and freedom of information v1.3 - FOIA guidance \(ico.org.uk\)](https://ico.org.uk/outsourcing-and-freedom-of-information/v1.3-foia-guidance)
18. It explains how the definition in section 3(2) of FOIA of information "held by a public authority" includes information "'held by another person on behalf of an authority". Therefore, information that a contractor holds on behalf of a public authority is also in scope of a FOIA request, even if the authority never physically holds it in its own hard copy or electronic files. The guidance explains that a contractor will inevitably generate a large amount of information in the course of running an outsourced service. Some of this will be presented to the authority at some stage, usually as part of reporting against key performance indicators (KPIs). Behind these KPI reports there is likely to be other information that is not necessarily presented to the authority. If the authority receives a FOIA request that relates to that information, the question it has to decide is, how much of this does the contractor

hold purely for their own purposes, and how much of it do they hold on behalf of the authority.

19. The Commissioner considers it is important to establish an objective reason for deciding whether certain information is held by a contractor on behalf of a public authority. The primary source is the contract between the authority and the contractor. As this defines the relationship between, and the responsibilities of, the two parties, it provides an objective, evidence-based approach to resolving the issue. While it is unlikely that the contract will define explicitly what is held on behalf of the authority, it may indicate, for example:
 - what information the contractor is required to provide to the authority for reporting and monitoring purposes,
 - what information the authority has the right to see, and whether there are any conditions on that access, or
 - what happens to information that is in the contractor's possession at the termination of the contract eg whether it remains with the contractor or reverts to the authority.
20. The Commissioner asked HE to provide a copy of the relevant extracts of the contract and to consider whether Kier would provide access to the requested information if it asked for it or whether it would oppose this, relying on a specific element of the contract which indicates that this information is solely for the purposes of Kier. She also asked HE to explain what happens to the requested information and other information in Kier's possession relating to the processing of sub threshold claims when the contract comes to an end.
21. HE complied. It agreed there is nothing explicit in the contract which states that HE cannot request information relating to below threshold claims. It believes under clause 43.1 it may be possible to obtain this information:

"The *Provider* keeps detailed records relating to the Area Network, the Traffic Technology Systems (Midlands) and the Services (including performance levels in the Area Network and the Traffic Technology Systems (Midlands), the Defined Cost of Providing the Services and records relating to Subcontractors) in the format and containing the details and for the period specified in the Service Information. The *Provider* makes the records available to the *Employer* and his representatives (including the *Service Manager*) on request."
22. HE advised that it contacted Kier about this and what information they provide to insurers when they bring the claim against the third party i.e. the insurers client. Their response was:

"We provide a build-up to the claim when we send it to the insurer. We could provide a copy of the build-up to HE if requested and it would be the same information already provided to the insurer."

23. HE went on to explain that the contract does not require the Service Provider (Kier) to hand over information held on below threshold claims to HE when it ends. Only above threshold claims information is required under Clause 23.6.2 of Annex 23. It states:

"The *Provider* retains records of all of the information sent to the *Service Manager* and/or Green Claims Branch together with correspondence with the public, records of work, maintenance carried out and any discussions of maintenance problems with the *Employer* and/or the police. Such records are to be held for a period of not less than six years from the date of issue. Where appropriate the *Provider* passes the records to the Incoming *Provider* in a readily accessible format, including the relevant software licenses as appropriate."

24. HE went on to say that clause 41.3 would allow it to carry out or arrange supplementary audits at any time, to inspect work and materials and generally to investigate whether the Provider is performing its obligations under the contract. However, it would regard this provision to be to ensure Kier is carrying out its obligations under the contract not how they operate below threshold claims processes as it believes this is not a requirement under the contract.
25. HE explained that Kier does provide reports on sub threshold claims but the information this includes is not the CBD documents requested or the information that is contained in them. It is much more high level, consolidated data, such as the number of claims, the amount recovered, amounts outstanding and so on.
26. In conclusion HE remains of the opinion that Kier does not hold the requested information on its behalf. It argued that just because Kier has indicated that they would provide a build-up (breakdown) of the claim if HE asked for it does not mean it holds the information on HE's behalf under the terms of the contract. It argued, in any event, the information it would provide is already provided to the insurer when they submit the claim against them and as such the complainant will already have a copy of the information Kier would provide to HE if it asked for it and therefore the request is essentially for something the complainant already holds.
27. The Commissioner is of the viewpoint that just because HE does not involve itself in the processing of sub threshold claims, because the arrangements are for Kier to solely process these including any that proceed to litigation, it does not necessarily mean that information Kier

holds on such claims is information Kier holds solely for its own purposes. After all Kier is contracted by HE to carry out a service on HE's behalf and just because HE has never asked for access to the requested information before does not mean that it is not held on HE's behalf for HE purposes too and therefore for the purposes of the FOIA.

28. She notes that the contract is not explicit on whether HE is entitled to access the requested information but it is noted that on investigation Kier has said that it would provide it to HE and raised no concerns over doing that or raised any objections saying that such provision of information is not required or is prohibited under the terms of the contract. She also notes that Annex 19 for Area 9 does state that Kier will provide the following information for third party claims handled by the Provider as required by the Employer:

"Report detailing, for each claim, the amount claimed from third parties, a calculation of Defined Cost and resulting Third Party Claims Overhead, the amount recovered, an explanation of any differences between any of these amounts, and explanation of why any loss greater than Defined Cost has been claimed."

HE clearly requires this information to monitor Kier's performance of this element of the contract and the processing of sub threshold claims. It cannot therefore be argued that HE has no involvement in them whatsoever. It does and takes an active interest in these claims.

29. The Commissioner also thinks there is a distinction between the requested information (claim breakdown information) and more widely generated information as a result of the contract (such as Kier's employee information). The Commissioner is of the view that when processing sub threshold claims Kier is acting on behalf of HE. This is particularly highlighted when claims do progress to litigation. The litigation is in the name of HE (although Kier's legal team solely deals with it) not Kier. And, again, just because the requested information is not the usually reported information to HE on sub threshold claims does not automatically mean it is not information HE is entitled to see if it requested to do so.
30. For the above reasons, the Commissioner is not convinced that the requested information is not held by HE. Under section 3(2)(b), the Commissioner considers it is information which Kier holds on behalf of HE.

Right of appeal

31. 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

32. 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.
33. 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

Samantha Coward
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