

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2021

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

Decision (including any steps ordered)

1. In a series of requests, the complainant requested information about 'Varioguard', a type of road barrier. Highways England has aggregated the cost of complying with the most recent request with the cost of complying with earlier requests; requests to which it had responded. Highways England refused to comply with the current request 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:
 - Highways England is entitled under section 12(4) of the FOIA to aggregate the cost of complying with the request of 17 July 2020 with the cost incurred through its compliance with requests of 13 May 2020, 5 June 2020 and 12 June 2020. The Commissioner finds that the cost of complying with the complainant's current request would exceed the appropriate limit under section 12(1) of the FOIA and that Highways England is not obliged to comply with it. In the circumstances there was no breach of section 16(1) (advice and assistance).
3. The Commissioner does not require Highways England to take any remedial steps.

Request and response

4. Following a series of earlier requests and queries that that the complainant initiated on 13 March 2020 and to which Highways England had responded (discussed further below), on 15 July 2020 and 17 July 2020 the complainant submitted the following two requests for information:

15 July 2020:

"Thank you. To enable me to consider the response and in particular the ability to provide the information, please could you:

1. advise whether the redacted cost for the 'light touch' exceeds £450 and if so why.

This appears to be a straightforward 'routine' to run, a query that will return precisely what I am seeking; AI involvement, date of incident (association) the period and charge.

2. Explain assumption regarding inspections – I am not seeking a detailed breakdown
3. Confirm the abstract works (AI account) coded to DCP would encompass above and below threshold works
4. Provide BBMM's schedule of codes for DCP works. I wish to understand whether other codes may make the data more meaningful mindful that temp VRS attracts attendance charges for plant and operatives."

17 July 2020:

"...please provide the specific link/section that relates to the monitoring.

With regard to

'Varioguard is provided as part of incident response to asset damage. The decision for how long it remains in place and the associated cost is determined by Highways England based on the complexity of the work required to effect the repair. This will vary depending on considerations such as, the amount of time required for design checks/design work, availability of materials, resources and network occupancy'

Please confirm whether 'Highways England' (above) you are referring to your contractor or whether Highways England staff, such as HETO, directly undertake the decision and the criteria for same.

It appears Variogurad [sic] is installed and left to accumulate costs without any consideration by Highways England, without any monitoring, causing costs to escalate for:

1. daily hire
2. contractor percentage uplift on charge
3. contractor daily drive-by

Costs which Highways England appear to pay without question.

I am seeking all information that contradicts the above concern (highlighted to your Authority).

since 01/01/2018, what reviews of these ongoing charges presented by contractors have occurred?

How many incidents are currently the subject of Varioguard costs that will be presented to Highways England?"

5. Highways England (HE) responded on 29 July 2020. It advised that it was relying on section 12 of the FOIA to refuse to comply with the above two requests. The reference HE gave to the request of 17 July 2020 is 101271.
6. The complainant requested an internal review on 27 August 2020. HE provided internal reviews of both requests on 25 September 2020. HE explained that it had aggregated the cost of complying with the above two requests with the cost of responding to earlier requests on a similar subject, and that the appropriate limit of £450 had been reached.
7. The complainant confirmed to the Commissioner on 13 March 2021 that his focus is on HE's response to his request of 17 July 2020 only. The Commissioner passed this on to HE and HE confirmed to her that its position remains the same.

Scope of the case

8. The complainant first contacted the Commissioner on 25 September 2020 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on whether HE can rely on section 12(1) of the FOIA to refuse to comply with the complainant's

request of 17 July 2020. She will also consider whether HE could have offered the complainant advice and assistance as required, in certain circumstances, under with section 16(1) of the FOIA.

Reasons for decision

Section 12 – cost exceeds the appropriate limit

10. 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.
11. 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.
12. 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.
13. 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.
14. 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.
15. 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.
16. In its submission to the Commissioner, HE has provided a background and context to the request in question before going on to discuss the specific requests relevant to its application of section 12. It is a complicated situation.
17. HE first reproduced a request the complainant submitted to it on 13 March 2020, as follows:

“With regard to incidents or repairs requiring temporary VRS (for example, parapet damage) and the associated chapter 8 monitoring of same, the information I am seeking is:

1. Your policy and / or arrangements / agreements with contractors for the monitoring of ongoing works and costs; the obligations upon your contractor and yourselves. This will include but not be restricted to:

- a. The requirement of your contractor to keep you advised of the temp' VRS placement and ongoing costs for:
 - i. Varioguard
 - ii. Monitoring
 - iii. administration
- b. The mitigation of temp' VRS utilisation and continuance
- c. Whether there is a threshold or thresholds above which you must be notified or costs are limited
- d. The requirements to monitor Varioguard

2. The number of claims since 01/01/2016 involving Varioguard

3. The amount paid for Varioguard by Area per annum since 01/10/2016

I understand contractors are required to submit costs in electronic format for each claim. However, if the cost of responding to '2' or '3' would exceed the limit, please explain why and progress the remainder of the request.”

18. HE notes that the request did not set out which of HE's Areas was its focus, so the request was allocated to its national team to collate the information from all the Area teams. It became clear, HE says, that it would have been over the cost limit to obtain this information for all the Areas. Therefore, on 9 April 2020 it sought clarification from the complainant on points it was unsure about and asked the complainant to reduce the scope of the request to a specific Area. The complainant clarified points and reduced the scope of the request to Area 10, and Area 9 if time allowed. HE says that, ultimately, time would not allow so it finally provided a response on Area 10 only.
19. As the request was now directed at Area 10, HE says it re-allocated the request to that team for a response. Question 2 about the number of claims since 2016 involving Varioguard included information from an old Asset Support contract (Area 10 moved to an Asset Delivery contract in April 2019). As such, HE says that it would have needed to contact Balfour Beatty Mott MacDonald (BBMM) and ask it to provide the information. As BBMM was no longer under contract with HE the cost to retrieve this information exceeded the cost limit again.
20. On 12 May 2020, HE therefore asked the complainant to reduce the scope of his request further, asking that the scope of question 2 of the request be reduced to information after 1 April 2019 when the Area became Asset Delivery.
21. At this point the complainant HE says the complainant both asked for an internal review *and* limited the scope of his request in the same correspondence. HE acknowledges that, in the circumstances, it overlooked the narrower request and issued the complainant with a section 12 refusal notice – its reference IR 100982. However, on 13 May 2020 the complainant submitted the same narrower scope request to HE through the WhatDoTheyKnow website. That request is as follows:
 - “1. Your policy and / or arrangements / agreements with contractors for the monitoring of ongoing works and costs; the obligations upon your contractor and yourselves. This will include but not be restricted to:
 - a. The requirement of your contractor to keep you advised of the temp' VRS placement and ongoing costs for:
 - i. Varioguard
 - ii. Monitoring
 - iii. administration
 - b. The mitigation of temp' VRS utilisation and continuance
 - c. Whether there is a threshold or thresholds above which you must be notified or costs are limited

d. The requirements to monitor Varioguard”

22. HE logged this as a new request (its reference 101095) and on 4 June 2020 it provided a full response to that request. HE advised initially that it did not take the above two requests into account when it considered aggregating costs for the request of 17 July 2020. However the following requests *were* aggregated.

23. On 5 June 2020, the complainant submitted the following request:

“Thank you for your response. There are some outstanding issues and some clarification required:

What was the process pre 04/2019?

1. How before and after 04/2019, do you, Highways England monitor the installation that is accruing costs on a daily basis? What checking is in place, what responsibility does the contractor have to keep you advised and keep the period of installation to a minimum?

Repairs being carried out ‘as quick as possible’ is informal

2a. Am I correct in assuming there is:

i. No monitoring of the installations current in place or those pre-04/2019

ii. No policy that sets out the criteria for installation of the barrier

iii. No policy that requires a contractor to notify you of the installations, the date they were installed and of the ongoing costs

2b

Is the visual inspection ‘twice in every 24 hours’ an Authority policy (if so, please provide a copy) or established elsewhere.

The ‘Chapter 8’ requirements in the ‘Traffic Signs Manual’, as you may expect, relate to signage as opposed to temp VRS.

2d

See above as the request is seeking the ‘reporting procedure to Highways England about ongoing/accumulation costs i.e. the need to justify, mitigate’

2e

I note payment is made ‘based on records/invoices provided by the M&R to demonstrate the costs incurred’ but the request is seeking the ‘process for establishing necessity/requirement pre-payment of

invoice'; how is established that the Varioguard was required and for the period charged?

3

Is there a threshold or thresholds above which you must be notified or costs are limited? I understand AD has removed the invoice threshold but I am assuming there are estimated costs that give rise to alarm/alert i.e. that Highway England is to be advised of a potential claim in excess of £x? In turn, that the Varioguard potentially giving rise to large costs, this may trigger such an alert.

Is there a threshold or thresholds for such purposes or does the contractor have authority to repair as they see fit, without need to convey cost (or potential cost) pre-issuance of an invoice?"

24. HE provided a response to that request – its reference 101149.
25. HE's submission then returns to its internal review response IR 100982, referred to at paragraph 21. It says that on 12 June 2020 the complainant responded to this correspondence. He referred to HE's explanation as to how it had calculated that the cost limit had been exceeded, having contacted BBMM for a quote on retrieving the information. The complainant asked for all HE's exchanges with that contractor on that matter. On the 2 July 2020 HE says it contacted the complainant and explained that it was going to have to extend the deadline for a response in order to undertake the public interest test associated with the section 43 exemption (commercial interests). On 15 July 2020 HE provided a response to the request, its reference 101173. It released information with redactions under section 40 (personal data) and section 43.
26. HE considers that both of these requests relate back to the original request about Area 10 and Varioguard. It considers they are on the same theme or are materially similar, so they can be aggregated for the purposes of section 12 of the FOIA.
27. Following its 101173 response, but making a reference to its 101149 response, on the 17 July 2020 the complainant submitted the request being investigated in this case. HE says it discussed the 17 July 2020 request with team that provided the previous responses. That team indicated that whilst the information within scope of the 101173 response did not take a large amount of time to search for, when added to the time it took to search for and determine where the information was held for 101149, it was determined that the appropriate limit under section 12 had been reached to answer both of those requests. This was because the team had to contact to several information holders and colleagues in order to answer the questions.

28. HE noted that under section 12, in order to aggregate the time spent on requests, the requests must have been received within 60 working days of each other. It noted that 101149 was received on 5 June 2020, 101173 was received on 12 June 2020 and the request being investigated here (101271) was received on the 17 July 2020. These requests therefore all fall within the allotted 60 working days in which requests can be aggregated. HE said that in addition, and with hindsight, it could also be considered that 101095 may also have been included within the 60-working day period as there was 46 working days between that request being received on 13 May 2020 and the request of the 17 July 2020.
29. Concluding its submission, HE again noted that the requests are all related to Area 10, BBMM and Varioguard, with one response having spawned further requests. HE says that given all the circumstances and the fact that it considered that the appropriate limit of 18 hours/£450 had been exhausted in answering the complainant's previous two (and perhaps three) requests received in a 60-working day period on the same subject, there was no advice or assistance that it could provide to reduce the scope of this request because by that point the cost limit had already been exceeded. HE confirmed that it considered that it was correct to apply section 12 to the request on 17 July 2020.

The Commissioner's conclusion

30. On 22 June 2021, at her request HE provided the Commissioner with further detail on the time it had spent on complying with the two earlier requests, above, that it had discussed in its initial submission.
31. In its further submission, HE told the Commissioner that it estimated that it took 11 hours to comply with request reference 101149 of 5 June 2020. Dealing with this request first involved assessing what was being requested. The correspondence team then had to discuss and request the information from the information holders. The first question (not numbered) and question 1 required that the contract was checked to confirm the answer to the question. Question 2a again required the contract to be checked but also necessitated a review of Chapter 8 of 'Design Manual for Roads and Bridges', referred to in the question, to ensure there was no misunderstanding. HE estimated that two hours were spent on each of these questions. HE estimated that it also spent one to two hours dealing with each of question 2b to question 2e - either checking the contract, checking a previous response because question 2d) was answered in 101095, or the thinking time involved to confirm the process, for example for question 2e).
32. For the final two questions under '3', one numbered and the other not, HE says that approximately one to two hours per question was again

needed. This was because it needed to check the previous response 101095 to confirm the question had been answered there, and to confirm the process, following discussions.

33. Moving on to 101173 submitted on 12 June 2020, HE estimated that it spent four hours gathering the information. This work included the correspondence team assessing what was being asked for, requesting the information from the information holders i.e. those who had corresponded with BBMM, and those information holders locating and extracting the correspondence from their mailboxes.
34. HE noted that, combined, it had spent approximately 15 hours dealing with these two requests. However, in its further submission to the Commissioner, HE also noted that whilst it had not originally listed the request of 13 May 2020 (101095) as being considered as one of the requests being aggregated, it would have required a similar amount of time to deal with as the request of 5 June 2020 (101149) ie 11 hours. This is because these two requests are similar in terms of the number of questions and the information being requested. As 101095 was submitted within the 60 working day time frame, on reconsideration, HE considers that the time spent dealing with the request of 13 May 2020 can also be aggregated with the time spent on the 5 June and 12 June 2020 requests. As such, by the time of the request of 17 July 2020, the time/cost limit had already been exceeded as it had spent approximately 26 hours dealing with three earlier requests. And so its refusal of the 17 July 2020 request.
35. The Commissioner has considered the current request of 17 July 2020 and the three earlier requests that the complainant submitted on 13 May 2020, 5 June 2020 and 12 June 2020. She is satisfied that there is an overarching theme to the requests in that they all request information broadly relating to the same matter, namely Varioguard - albeit obliquely in the case of the complainant's meta-request of 12 June 2020. Since all four requests were also submitted by the same person within a 60 working day period, the Commissioner finds that HE was entitled to rely on section 12(4) of the FOIA to aggregate the earlier requests with the one currently under consideration.
36. Given the volume of questions the complainant has asked in the three previous requests and the complexity of a number of the questions, the Commissioner considers that HE's time estimates for addressing each question are credible. It has estimated that it took one to two hours to address each question – taking the lower estimate of one hour per question leads to 26 hours having already been spent dealing with the complainant's earlier requests on broadly the same subject, before he submitted the request of 17 July 2020 under investigation here. The Commissioner is satisfied that HE is entitled to rely on section 12(1) of

the FOIA to refuse to comply with that request.

Section 16 – duty to provide advice and assistance

37. 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.
38. Since the appropriate time/cost limit had already been exceeded by the time HE received the complainant's request of 17 July 2020, the Commissioner finds that HE could not reasonably have been expected to offer the complainant advice and assistance on refining that request, to bring complying with it within the cost limit. As such there was no breach of section 16(1).

Right of appeal

39. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. 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

Cressida Woodall
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