

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **7 September 2021**

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

Decision (including any steps ordered)

1. The complainant made a request for information relating to damage to Crown property. Highways England has refused to comply with the request under section 14(1) FOIA as it considers the request to be vexatious.
2. The Commissioner considers that Highways England correctly applied section 14(1) FOIA and was not obliged to issue a refusal notice under section 17(6) FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 11 November 2020 the complainant made the following request for information under the FOIA for:

"Your ref: HE 112/006/SG503 My ref Y11C430. This is another matter where we understand Highway England was seeking information from Kier but it has yet to be supplied – after 3 months. It appears your Authority is unable to secure responses from Kier Highways.

In this instance, we have particularly asked why, following damage to 8 beams, over 60 were replaced and charged to Highways England,

seemingly the invoice paid without consideration. It appears Kier are unable to explain this, yet they were paid in full from the public purse.

With regard to our correspondence and the claim for attendance and restoration, please provide:

1. Your approaches to Kier Highways
2. The responses
3. All information held on file about the matter to include pre-payment reconciliation
4. With regard to the costs presented, please provide: a. a copy of the costs breakdown correspondence in excel format – the xlsx file for each element b. the schedule of charges used to compile the invoice, c. all schedules used to populate the breakdowns – the linked workbooks, reference. d. the schedule of rates used for materials
5. original uncompressed images of damage and repair, emailed to me
Please advise:
6. All incidents that have occurred at the location a year before the loss and subsequently in respect of each identifying the: a. date of loss b. date repair was completed
7. Whether the subject repair was undertaken as part of 'planned' works and a. if so, what these planned works entailed, the extent of Traffic management for the works and the cost of same b. if not, why not and
8. When planned works were undertaken, post and pre-date of loss

Note - we have our concerns about Traffic Management and 'planned works' which can be read here

<http://www.englandhighways.co.uk/exagger...>"

5. Highways England did not respond to the request in reliance on section 17(6) FOIA because it is on the same theme, third-party claims/rates, that it has previously refused under section 14(1) as vexatious and has indicated that it will not be issuing further responses to requests made by the complainant on this theme again.
6. On 11 December 2020 the complainant requested an internal review. On 14 January 2021 Highways England provided the complainant with the internal review. Highways England confirmed that a response would not be issued under section 17(6) as it had already confirmed that requests

made by the complainant relating to third-party claims process and rates would be viewed as vexatious under section 14(1) FOIA.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner has considered whether Highways England was correct to refuse to comply with the request by virtue of it being vexatious under section 14 FOIA and whether Highways England was not obliged to issue a refusal notice under section 17(6) FOIA.

Reasons for decision

Section 14(1) – vexatious request

9. In this case, Highways England has applied section 14(1) FOIA, the Commissioner has therefore considered whether the request has been correctly categorised as vexatious in this case.
10. 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 guidance¹ 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;

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

- Intransigence;
 - Frequent or overlapping requests;
 - Deliberate intention to cause annoyance.
11. 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.
 12. 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 on it and balance this against the purpose and value of the request.
 13. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
 14. Highways England argued that this request is another made by the complainant on the topic of Kier Highways and third-party claims. Although Highways England considers this time the complainant appears to be making the allegation that both Highways England and Kier are engaged in fraudulent activity by claiming for costs that aren't attributable to the repair that has resulted from the third-party damage. It argued that this is demonstrated by the title of his request 'Kier Claim Overstatement & Silent After Authority Pays in Full' and by the reference to an article at the end of his request. Highways England considers that this alone could be reasonable grounds to refuse the request given one of the factors that allows requests to be considered vexatious is unfounded accusations.
 15. Highways England said that the request makes completely unsubstantiated accusations against the public authority or specific employees. As such it feels this request falls squarely into this bracket especially when considered in light of the complainant's previous correspondence with Highways England on the topic. Prior to making this request on the 11 November 2020, Highways England had already refused at least 3 other requests where the Kier third-party claims process, rates were the subject matter or an unfounded accusation had been made namely request references 100848, 101124 and 101445. It confirmed that the response to request and internal review 100848 set out Highways England's position on requests which make unfounded

accusations in particular, would be treated as vexatious and the internal reviews for both 101124 and 101445 set out why no response had been received in relation to the original request, which was the reliance on section 17(6) because it had previously indicated that requests about the third-party claims process especially for the Kier ASC's would be treated as vexatious. Given that the request received on the 11 November 2020 is of a very similar nature to that received in 101445 its position on this request was to be the same as 101445.

16. Furthermore Highways England did not view the requesting of this information via FOIA as an appropriate use of the legislation. The information the complainant is requesting is part of a claims process which whilst is a business process is not deemed 'business as usual' in the sense that it can be responded to within the Highways England procedures for 'business as usual' correspondence. Information about claims can take much longer to work through and once it has been and claim made everything the complainant requires to make a counter claim is provided to him in a claims pack. If he disagrees with the costs submitted the appropriate route to challenge this is via the courts and not through FOIA, he is in essence using the legislation to circumvent the due process of the claims courts. The continued submission of these types of request does not help either party because Highways England is either unable to provide the information at that time or refuse the request. The complainant then does not get the response he hoped for when making the request, so follows the FOIA complaints process through to the end culminating with a Tribunal.
17. All of this process takes up the resources of both sides which is unnecessary given that as indicated earlier all the information the complainant needs regarding the claim will be provided to him in due course, albeit not as quickly as he would like it. To continue this approach is not sustainable and it should be pointed out that the Green Claims team has already tried to set up a reasonable format of keeping him informed of updates on the claims he handles by providing a monthly status report for them. We are therefore trying to be helpful on these matters but these requests and complaints up to the ICO and Tribunal continue to be made, which continues to take up resources for something that already has its own form of due process.
18. As such even if you set aside the underlying unfounded accusation made within the request, Highways England's position on this request by the complainant is that because it is on the same subject, namely the third-party claims process, which is already subject to another form of due process, continuing to address requests on this subject in any other way is not sustainable nor would it be a responsible use of the

public money needed to do so and therefore is not in the wider public interest.

19. The Commissioner referred Highways England to a recent First-tier Tribunal decision on a previous appeal (EA/2019/0390) made by the complainant on a similar subject matter in which it was determined further information was held by Highways England and so may shed some serious purpose or value in the request in this case. The Commissioner therefore asked whether this decision altered its application of section 14(1) to this request. Whilst Highways England acknowledges the findings of the appeal it does not agree that the information found to be held in that case, namely notional people rates, constitutes a schedule of rates as the complainant claims there is. In any event the complainant has a copy of these notional people rates as they were provided to him prior to the tribunal and, additionally, the Tribunal did find that no other schedule of rates for DCP work is held, it only found that these 'notional people rates' were in its opinion to be what the complainant had been trying to obtain in some part by his requests. Highways England's position remains the same that schedules of rates for DCP works are not held, in this case regarding Kier operated areas, and that the tendered ASC rates are commercially sensitive as was found in another previous appeal - EA/2018/0104. As this has been indicated to the complainant on numerous occasions and he is still making requests regarding this it is Highways England's belief that requests for this information are now vexatious.
20. The Commissioner considers that the complainant is using FOIA requests to make unfounded accusations and to circumvent the appropriate route to challenge the costs submitted in the claims court. FOIA is not the appropriate route to pursue these matters given the volume of requests previously made and the Tribunal decision in EA/2019/0390 in which the Tribunal found that no other schedule of rates for DCP work is held other than the 'notional people rates' provided and in EA/2018/0104 in which it was determined that the tendered ASC rates are commercially sensitive.
21. For these reasons the Commissioner is satisfied in this case that the complainant's request is vexatious under section 14(1) FOIA.

Section 17(6)

22. Section 17(6) of the FOIA allows a public authority not to issue a refusal notice when both the following conditions are met:
 - The public authority has already given the same person a notice explaining that a request is vexatious; and
 - it would be unreasonable to expect it to issue another one.
23. The Commissioner will usually only consider it unreasonable to expect a public authority to issue a further notice when it has previously warned the requester that it will not respond to any further vexatious requests on the same or similar topics.
24. In this case Highways England has confirmed to the Commissioner and the complainant that a response would not be issued under section 17(6) as it had already previously confirmed that requests made by the complainant relating to third-party claims process and rates would be viewed as vexatious under section 14(1) FOIA.
25. In this case the Commissioner consider Highways England was not obliged to issue a response under section 17(6) FOIA as it had already notified the complainant that requests relating to third-party claims process and rates would be viewed as vexatious and it would not therefore have been reasonable to expect Highways England to issue another notice in response to this request.

Right of appeal

26. 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

27. 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.
28. 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.....

Gemma Garvey
Senior Case Officer

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