

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 October 2021

Public Authority: National Highways

Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has submitted a seven part request for information to National Highways (formerly Highways England). National Highways advised the complainant that it does not hold the requested information and that its response had fully addressed his request.
2. The Commissioner's decision is as follows:
 - It has become apparent that the National Highways has failed to obtain the correct objective reading of the request. In line with the duty under section 16(1) of the FOIA, it would have been reasonable for National Highways to offer the complainant advice and assistance in order to help him describe all the requested information. Because it did not do so, National Highways did not comply with section 16(1).
3. The Commissioner requires National Highways to take the following step to ensure compliance with the legislation:
 - National Highways must offer the complainant appropriate advice and assistance so as to enable him to clarify all parts of his request; setting out what it needs from the complainant in order to identify the recorded information the complainant expects National Highways to hold.

4. National Highways 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.

Request and response

5. Through the WhatDoTheyKnow website the complainant submitted the following request for information to National Highways (NH) on 9 October 2020:

"Re Case No: [Redacted] IN THE COUNTY COURT AT CARDIFF
HIGHWAYS ENGLAND COMPANY LTD & Insurers
Following hearings on 19th, 20th May 2020 and 16th July 2020, 21st
August 2020, HIS HONOUR JUDGE HARRISON Approved Judgement

Please confirm whether the following will be addressed in the usual course of business or if the request for information will be treated as a FoIA request. You will be aware that we have about 20 Cardiff claims stayed in respect of which Highways England is the claimant and Kier your contractor.

With regard to the above judgement, your own quantity surveyor coming to a conclusion that the sums claimed were too high and the Judge remarking that 'simply allowing claimants to set their own market for cases of this sort might be regarded as undesirable', please would you provide me with the following information, referenced in the judgement:

1. The names/definitions for the various rates that exist or existed in respect to ASC's.

Para. 6(iv): 'For repairs valued in excess of £10,000 Highways England are charged by Kier using contractually agreed rates':

2. These 'contractually agreed rates for repairs over £10,000

Para.7 regarding 'claims worth less than £10,000'; they (Kier / Highways England) have valued the diminution by reference to rates other than those agreed between themselves and Highways England for repairs in excess of £10,000

3. These (other than agreed) rates used for the valuation

I believe the above rates, used to promote claims in respect of which Highways England is the claimant, are 'held on behalf of' your Authority, mindful Highways England has approached Kier for DCP rates to address a FOIA request previously and these have been obtained, disclosed or explanations provided.

Para. 36. Mr Cairns 'evidence was to the effect that the costs calculated for the purposes of the claim did include uplifts for which he was unable to find authority within the contract'.

4. The uplifts applied and Highways England sought and
 - a. how the uplifts were calculated, achieved; percentage etc.
 - b. the authority for these (if one exists) or
 - c. confirmation there is no authority

I note 'the lower rates are relevant' (para. 37), but the TPCO can be added (para.38). This is a situation, conveyed in Appendix A to Annex 23, our correspondence has reflected for the past years but which Kier, Highways England and Corclaim ignored. The process also satisfies HHJ Godsmark's judgement; the rates to you and a Third-Party should be the same.

Para. 38 also explains that 'lower rates' plus TPCO is a calculation that 'could readily be made by the parties':

5. Please explain how such calculation could 'readily be made' and provide all information relating to the process of undertaking the calculation i.e. provide all information that enables me to make this calculation.

In the absence of a schedule of DCP rates, undertaking said calculation appears impossible..

6. The Third Party Claims Overhead for Area 6&8 (Norfolk)

7. Since the commencement of Area 3, 6&8 and 9 Kier contracts, the uplifts or multipliers Kier operatives (formerly known as AIW's) are or were paid for attending emergency incidents during anti-social hours and provide:

- a. Anti-social hours – the times
- b. The uplifts charged to a Third-Party
- c. The uplifts charged to Highway England"

6. Unprompted, the complainant wrote to NH on 23 October 2020, as follows:

"I am seeking the contractually agreed rates for repairs valued in excess of £10,000 Highways England are charged by Kier a.k.a. DCP rates - those associated with claims presented to drivers, fleets, hauliers or their insurers as a result of incidents (unplanned occurrences)."

7. Correspondence between the complainant and NH followed and on 19 November 2020 NH responded to the request. NH advised that it does not hold the requested information and that elements of the request had been covered in its responses to separate requests the complainant had submitted to it.
8. The complainant requested an internal review on 3 December 2020. He disputed that NH does not hold the requested information and said that NH had not addressed "each of the points raised".
9. NH provided a review on 6 January 2021. It confirmed that it does not hold the information requested on 23 October 2020. NH advised that it considered its response of 19 November 2020 had addressed the points the complainant had raised.

Scope of the case

10. The complainant contacted the Commissioner on 6 January 2021 to complain about the way NH had handled his request.
11. The Commissioner's investigation has focussed on whether NH failed in its duty under section 16(1) of the FOIA to offer the complainant advice and assistance in order to help him describe all the information he is seeking.

Reasons for decision

Section 16 – advice and assistance

12. 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.
13. Under section 1(3) of the FOIA, where a public authority (a) reasonably requires further information in order to identify and locate the information requested, and (b) has informed the applicant of that

requirement, the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

14. Section 16(1) of the FOIA places a duty on a public authority to offer an applicant advice and assistance as far as it would be reasonable to expect the authority to do so. That duty extends to occasions when a request is not clear enough to adequately describe the information sought by the applicant in such a way that the public authority can conduct a search for it. In these cases, public authorities may ask for more detail to enable them to identify the information sought.
15. In its submission to, and subsequent discussion with, the Commissioner NH has maintained that it considers it was reasonable for it to interpret the complainant's correspondence of 23 October 2020 to be a clarification/narrowing of the entire request, not just one part of it (part 2). As such, it considered its response of 19 November 2020 addressed the request in its entirety.
16. However, the Commissioner referred NH to the complainant's request for an internal review in which he noted that NH had not addressed each of the points he had raised. She also asked the complainant to identify which points it was that he considered NH had not addressed. The complainant confirmed that he had been referring to the [remaining six] points in his original request of 9 October 2020.
17. So it was, that on 21 October 2021 NH and the Commissioner reviewed the seven parts of that request. It became apparent that, from the way the parts are framed, NH was not clear exactly what recorded information the complainant was seeking. For example, some of the parts of the request could have concerned "above threshold rates", other parts could have concerned "below threshold rates" - NH was not sure and, for the reason discussed above, it had not considered six of the parts previously.
18. Given the technical nature and complexity of the matter that appears to be the focus of the request (and which appears to be similar to the matter considered in numerous related FOI complaints that the complainant has brought to the Commissioner), and the complicated way in which some parts of the request have been framed, the Commissioner did consider it appropriate for her to suggest possible interpretations of the request.
19. NH disagrees but the Commissioner considers that the complainant's clarification of 23 October 2020 was likely to have been (and, in fact, was) a clarification of just one part of the request – part 2. In addition, the complainant advised NH in his request for an internal review on 3 December 2020 that it had not addressed each part of his request. This

should, in the Commissioner's view, have prompted NH to check with the complainant what parts he considered it had not addressed and to provide a response to these following its review. But, as above, NH was not obliged to provide a response to the parts of the request until the information had been adequately described and NH was clear what was being requested.

20. The Commissioner has therefore decided that NH has not complied with section 16(1) on this occasion. This is because NH failed to offer the complainant reasonable advice and assistance to enable him to describe the information being sought in such a way as to enable NH to search for it. Nor did NH confirm the scope of the request with the complainant ie whether he was still expecting to receive a response to all seven parts of the request, following his correspondence of 23 October 2020 and 3 December 2020.
21. As discussed above, a public authority cannot carry out a search for requested information if it does not understand what recorded information is being sought.
22. As a result of this notice, NH may consider it helpful, for example, to suggest its interpretation of each part of the request to the complainant and invite him to confirm whether or not that interpretation is correct. Where NH's interpretation is correct, NH will then be able to provide a response to that part that complies with the FOIA. Where NH's interpretation is not correct, the Commissioner reminds the complainant to describe the recorded information he expects NH to hold clearly and concisely. NH will then be in position to provide a response to that part without any further delay.
23. The Commissioner is aware that the complainant has submitted numerous requests to NH, many of which are multi-part, convoluted and unclear. The Commissioner reminds the complainant that she has published guidance for applicants on how to word a request in order to get the best result¹. The complainant may find this guidance helpful if he chooses to continue to submit FOIA requests in the future.

¹ <https://ico.org.uk/your-data-matters/official-information/>

Right of appeal

24. 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

25. 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.
26. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF