

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 September 2021

Public Authority: Highways England

Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested information about rates associated with a contract Highways England had with Balfour Beatty Mott Macdonald for Area 10 of the road network. Highways England has advised that it does not hold the requested information.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, Highways England does not hold the information the complainant has requested, and its response complied with section 1(1)(a) of the FOIA.
3. The Commissioner does not require Highways England to take any steps.

Background

4. The matters behind the subject that is the focus of the complainant's request to Highways England (HE) have been discussed at length in a number of previous decisions made by the Commissioner, for example

FS50873250¹, and in First-tier Tribunal (Information Rights)('the FTT') decisions, for example EA/2019/0119. As such, the Commissioner does not intend to reproduce that full background and context again here.

5. To summarise and bring the situation up to date, the complainant appears to believe that HE is engaged in a fraud against the public in conspiracy with its service providers who are responsible for maintaining and repairing highways infrastructure– principally Kier Highways Ltd. To that end, the complainant considers that HE holds a set of rates relating to damage to crown property (DCP) for work done by Kier.
6. DCP is the process by which HE seeks to recover the costs of damage caused to the highways (usually via road traffic accidents) from the members of the public responsible for that damage.
7. Broadly, costs to the contractor of making repairs estimated in advance of repair to be £10,000 or more ("above-threshold repairs") are paid by HE which then seeks to recover the costs from third parties and their insurers. Recovery from third parties of the costs of repairs estimated at the outset to cost less than £10,000 ("below-threshold repairs") is the responsibility of the contractor which performs the repairs
8. The complainant appears to contend that HE contractors charge third parties (and their insurers) higher rates with respect to below-threshold repairs than those same contractors charge HE with respect to above-threshold repairs and that this constitutes fraudulent 'over charging' of those third parties.
9. To that end, the complainant has submitted numerous requests to HE for information on 'DCP rates'. At the point of the current request the Commissioner and the FTT had found that HE did not hold a schedule of DCP rates as such rates did not exist. The Commissioner and FTT had also found that information on tendered contract rates that HE *does* hold is commercially sensitive and so exempt information under section 43(2) of the FOIA.
10. At the time of the current request, another FTT appeal concerned with a request the complainant submitted for 'DCP' rates was upcoming: EA/2019/0390. In the course of preparing for that appeal, HE had identified that it did, in fact, hold certain information of some relevance - not the requested DCP rates, but what HE termed 'notional people

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617593/fs50873250.pdf>

rates' for Area 9 of its road network. HE described this information as comprising all relevant cost reimbursable people costs, averaged into a small number of rate bands (12 staff and four labour) for ease of management and charging purposes, and to anonymise what individual people are actually paid. These 'agreements' record agreement from time to time of temporary "notional people rates" that Kier charges HE in order to recover its people costs for all cost reimbursable and scheme work under its Area 9 Asset Support Contract ('ASC') with HE (with such costs being only one component of all costs recovered by Kier).

11. In advance of the FTT hearing, HE provided the complainant with a copy of the 'notional people rate' information for Area 9 it had identified it held.
12. On 23 November 2020, the complainant submitted a request to HE for the Area 9 'notional people rates' and associated information. The complainant submitted a complaint to the Commissioner about HE's response to that request, which has been handled separately.

Request and response

13. Through the WhatDoTheyKnow website the complainant submitted another request for information to HE on 23 November 2020 in the following terms:

"I understand the contactor had a schedule of rates, standard charges, albeit referred to under various names.

The system adopted under the ASC was for BBMM to group together all the cost components, average them across the workforce and produce average rates for several different staff and labour grades. These averaged rates were then charged on an hourly basis against whatever cost code the operatives were working on. This was then termed the Defined Cost of labour.

That is to say, the 'defined cost' was the product of a definition (setting out what could be claimed, what would make up the total) but that the rate was a specific figure.

I am seeking the averaged rates for Area 10 for the last 4 years BBMM was appointed.

These are rates changed to Highways England for DCP works over £10,000. Below this threshold, BBMM engaged CECA."

14. On 22 December 2020 HE responded. It advised it does not hold the information the complainant had requested.
15. The complainant requested an internal review on 22 December 2020. Included in a convoluted discussion about 'rates' the complainant asked if the HE contractor could hold the requested information on HE's behalf.
16. HE provided an internal review on 25 January 2021. It upheld its position. HE advised that the subject of the request has been covered at length in previous requests and that it would consider relying on section 14(1) (vexatious request) with regard to any future requests on this topic.

Scope of the case

17. The complainant contacted the Commissioner on 25 January 2021 to complain about the way HE had handled his request.
18. The Commissioner's investigation has focussed on whether, on the balance of probabilities, HE holds information within scope of the complainant's request.

Reasons for decision

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

19. 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.
20. As noted, in 2020 HE had provided the complainant with 'notional people rate' information it had identified it held in respect of its Area 9 contract with Kier Highways Ltd. Based on its internal review response, submission to her, and a telephone discussion she had with HE on Tuesday 17 August 2021, the Commissioner understood that the current request was for that same 'notional people rate' information in respect of HE's Area 10 contract with Balfour Beatty Mott Macdonald (BBMM).
21. On that basis, on 19 August 2021 the Commissioner contacted the complainant and invited him to withdraw his complaint, since the FTT had found in March 2021 that HE does not hold 'notional people rate' information for Area 10.

22. In a response dated 19 August 2021 the complainant declined to withdraw and disputed that his request was for 'notional people rate' information. In his correspondence, the complainant referred to a witness statement made by an individual for the FTT hearing EA/2019/0390. He clarified that his request was based on information given by that witness and was for the "averaged" rates that the witness had referred to in their statement.
23. The Commissioner passed the complainant's correspondence of 19 August 2021 to HE and, on 2 September 2021, had a further discussion with HE about the points that the complainant had raised.
24. HE advised the Commissioner that the FTT witness statement to which the complainant had referred was given by an individual who, although now employed by HE, was providing evidence to the FTT from the perspective of BBMM, his previous employer. In his statement, the witness stated that he was giving his statement in order to explain how BBMM charged HE for certain repairs while he was the Commercial Director for Area 10 at BBMM.
25. The witness explained that the system BBMM adopted under its ASC with HE was for BBMM to group together all the cost components, average them across the workforce, and produce average rates for several different staff and labour grades. These averaged rates were then charged on an hourly basis against whatever cost code the operatives were working on. The statement goes on to discuss this process in more detail.
26. HE confirmed to the Commissioner that the above Area 10 'rates' that BBMM produced and that the witness had discussed in his statement had not been 'agreed' with HE [which is not to say that HE disagreed with them], that HE did not hold that 'rates' information and neither would BBMM have held that information on HE's behalf. HE confirmed that that it holds no "DCP rates", that the tendered contract rate information it holds is exempt information under section 43 of the FOIA and that while it holds 'notional people rate' information for Area 9, it holds no such information, or any other rate information, for Area 10.
27. HE also observed that, while its position is that it does not hold the requested 'rates' information referred to by the individual in their witness statement, HE's Area 10 contract with BBMM has now expired in any case.

Conclusion

28. In a separate case - IC-48280-N2N3² – the Commissioner had found that certain information the complainant had requested, a cost breakdown document – was held by Kier Highways Ltd on HE's behalf. As such, the Commissioner had decided that HE held that information for the purposes of the FOIA. HE has confirmed, however, that it disputes the Commissioner's finding in IC-48280-N2N3 and that it is satisfied that BBMM did not hold the information in the current case on HE's behalf. HE has confirmed that BBMM held the information for its own purposes and not as part of its contract with HE or as any part of that contract's requirements.
29. The Commissioner is satisfied that the requested information and circumstances of the current case are different from the earlier case. Having considered the submissions and explanations provided by both the complainant and HE and having taking account of her previous decisions and those of the FTT, the Commissioner's decision in this case is that, on the balance of probabilities, HE does not hold the information that the complainant has requested and has complied with section 1(1)(a) of the FOIA.

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/4017864/ic-48280-n2n3.pdf>

Right of appeal

30. 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

31. 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.
32. 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
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