

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 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 Highways England's handling of particular requests for information. Highways England has categorised the request as a vexatious request under section 14(1) of the FOIA and has refused to comply with it.
2. The Commissioner's decision is as follows:
 - The complainant's request is a vexatious request under section 14(1) of the FOIA and Highways England is not obliged to comply with it.
 - Highways England breached section 17(5) of the FOIA as it did not issue its refusal notice to the complainant within the necessary timescale.
3. The Commissioner does not require Highways England to take any remedial steps.

Request and response

4. On 10 October 2019 the complainant wrote to Highways England (HE) and requested information in the following terms:

"20/07/2019 Highways England provided a statement of truth cataloguing the receipt of 175 FoI requests or reviews since 2013, for information relating to Damage to Crown Property (DCP) rates; the pricing of attending incidents and addressing reinstatement following damage caused by Third Parties.

It is my understanding the response to each was the:

- information is HELD and
- the records are 'commercially sensitive' i.e. disclosure was refused or
- the requester was deemed vexatious i.e. disclosure was refused

However, post 11/2018, Highways England state the rate-related information is NOT held i.e. they are effectively stating every response was inaccurate. This despite the above-referenced statement of truth conveying:

'As far as am aware, it is also not the case that HE has inadvertently provided inaccurate information — as the Tribunal would expect from a public authority, we strive to ensure that we are accurate in all aspects of our approach to the FOI regime, including in responding to requests, conducting internal reviews and in dealing with the ICO'

The information I ask to be provided is that related to the Authority striving to provide accurate responses pre-11/2018:

1. All requests made by Highways England's FOIA department and the responses they received when presenting the 175 rate-related requests to others within the Authority to enable an answer to be issued. This will include the deliberations and enquiries where Public Interest Tests' (PIT) were progressed and
2. all directions the Authority issued in respect of rate-related requests, for example, those emanating from the Authority's General Counsel's department."
5. The complainant requested an internal review on 8 November 2019 as he had not received a response to his request.
6. HE responded to the request on 28 February 2020. It refused to comply with it under section 14(1) of the FOIA as it considered the request to be vexatious.

7. HE also provided an internal review on 28 February 2020, acknowledging that it had not responded to the complainant's request within 20 working days of receiving it.
8. The complainant did not request an internal review of HE's substantive section 14(1) response and his subsequent complaint to the Commissioner has been accepted without one, on this occasion.

Scope of the case

9. The complainant first contacted the Commissioner on 28 January 2020 to complain about the way his request for information had been handled.
10. The Commissioner's investigation has focussed on whether the complainant's request is a vexatious request under section 14(1) of the FOIA. She has also considered the timeliness of HE's refusal.

Reasons for decision

Section 14 – vexatious and repeat requests

11. Under section 14(1) of the FOIA a public authority does not have to comply with a request for information if the request is vexatious.
12. 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 guidance 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
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance
13. 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.

14. 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.
15. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
16. In its submission to the Commissioner, HE has first noted that the request is one of many it has received from the complainant on the theme of 'rates'. HE acknowledges that this request is not specifically asking, in the way his other requests have done, for rates it holds for costs for third-party claims. Complaints about HE's handling of previous such requests have been dealt with at appeals to the First-tier Tribunal (Information Rights) ('the FTT') - EA/2018/0104 and EA/2019/0119. But HE notes that the current request is for all the correspondence out of and into HE's Freedom of Information team (FOI Advice) about 175 rate-related requests for information. The requested information is to include deliberations and enquiries about consideration of the public interest test and any directions issued about rate-related requests. HE says it therefore considers that the underlying theme of the complainant's current request is again rates.
17. HE then turns to the first of the complainant's questions, which concerns 175 requests HE has received over a number of years. HE says that the complainant is essentially seeking all the information its FOI Advice team holds on these requests, and that this is a substantial volume of information. HE notes that information that has previously been withheld under section 43 of the FOIA (commercial interests), which the FTT upheld in EA/2018/0104, is likely to be contained within this correspondence. The correspondence would also contain personal information. All of the information requested would therefore have to be reviewed to identify any information that would need to be withheld and redacted. Given the considerable volume of information likely to arise from this request, HE says it considers that preparing the information for disclosure would place a grossly oppressive burden on it and the request is therefore vexatious.
18. Linked to its view that the theme of the request is rates, HE says it believes that the request is also an example of 'fishing' for information and especially, fishing for information on rates. HE considers that this is evidenced by the fact that the request is for the information about responses HE has already issued "that enabled them to be provided". By this the Commissioner understands HE to mean that in its view the complainant is seeking information that would illuminate how and why

HE had responded to particular requests in the way that it did. It appears to HE that the complainant is requesting this information in the hope that information that was previously withheld under section 43 would be presented to him, or that the request is a way of revisiting past requests in another way. HE considers that this, in itself, would be likely to fall into the category of unreasonable persistence “further down the line”. This is because even if the request was re-worded, the fact would remain that the focus of the complainant’s request – rates - had been addressed previously by requests and decision notices.

19. HE concludes its submission by noting that overarching all of its reasoning above is the fact that previous internal reviews, investigations and the FTT appeal EA/2018/0104 have found that information on tendered contract rates is commercially sensitive under section 43 of the FOIA. In HE’s view, the complainant’s request appears to be futile. Whilst the complainant may not have intended as such, HE considers it would be a waste of its resources to compile the information in order to comply with the request. This is because of the previous scrutiny already carried out on requests for the tendered contract rates.

Conclusion

20. The FTT appeal decision in EA/2019/0119 noted that at that stage, ie December 2019, the complainant had submitted at least 57 requests for information to HE, all broadly on the matter considered in that appeal. That matter was 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. This is often referred to as Damage to Crown Property (“DCP”).
21. The FTT decision explained that different contractors are responsible for maintaining and improving 12 different areas of the strategic road network. The contractors in six of these areas operate under a contract known as an Asset Support Contract (‘ASC’). These are contracts by which HE procures services from its contractors associated with maintaining and improving its road network.
22. The earlier FTT appeal decision in EA/2018/0104 from November 2018 had upheld the Commissioner’s decision that ASC rates could be withheld from disclosure under section 43 of the FOIA. When undertaking work under their contracts with HE, contractors – Kier in the case of EA/2018/0104 - would use the ASC rates to work out an estimate on a particular job. By reference to that, the contractor would decide whether it fell above or below a particular cost threshold. Above the threshold then the contractor carries out the repairs, charges HE and then HE recovers the cost from the insurers of the driver. Below the

threshold then the contractor carries out the repair and pursues recovery from the drivers' insurers directly themselves.

23. EA/2019/0119 again concerned HE's contract with Kier and upheld the Commissioner's decision that, contrary to the complainant's belief, HE does not hold information on "defined costs" in the form of DCP rates for work done by Kier, as such rates do not exist. The judge explained and accepted that when HE had referred to and discussed "DCP rates" at the previous FTT hearing – EA/2018/0104 - this had been done by mistake and had simply been an unfortunate turn of phrase.
24. The complainant submitted his current request to HE on 10 October 2019, prior to the decision in EA/2019/0119 being made on 12 December 2019. The request is broadly associated with HE having first advised that it holds DCP rates and then advising that it does not. EA/2019/0119 clearly explains the matter of DCP rates and confirms why HE does not, in fact, hold such rates for work done by Kier, namely because DCP rates do not exist. Had the complainant submitted his request after receipt of EA/2019/0119, the request would have been quite clearly vexatious, in the Commissioner's view. This is because the complainant would have been continuing to pursue and keep 'live' a matter – the matter of DCP rates - quite clearly explained and concluded through the FTT's decision. The request would have been evidence of unreasonable persistence and, perhaps, a deliberate attempt to cause annoyance.
25. However, the request was submitted *before* the decision in EA/2019/0119. But it was submitted after the EA/2018/0104 decision, dated 2 December 2018. As noted, EA/2018/0104 concerned rates HE holds which the FTT found could be withheld under section 43. And as has also been noted, there had been some (unintentionally) misleading discussion in EA/2018/0104 about DCP rates. That appeal's final decision, however, was that the rates that HE holds are ASC rates and that these are exempt from disclosure under section 43 of the FOIA.
26. The complainant introduces his request of 10 October 2019 by appearing to conflate ASC rates (which do exist) and DCP rates (which it was subsequently found do not exist). He seems to suggest in his request that it is information on DCP rates that is being withheld under section 43. But the Commissioner accepts that, due to the discussion in EA/2018/0104 being a little unclear, at the point of his request the complainant may still have been under the impression that: information on DCP rates existed; that HE had indicated that it holds such information; and that it had then advised that it does not. However, it was information on ASC rates that HE holds, and it was this information which was found to engage section 43.

27. It appears that, through his request, the complainant is seeking the deliberations that informed HE's responses and internal review responses to "175 requests" for information about rates, that HE had received before November 2018. HE has conjectured that the complainant is seeking this information in the hope that information that was previously withheld under section 43 would be presented to him, or that the request is a way of revisiting past requests in another way.
28. The Commissioner notes that in EA/2019/0119 the complainant states that he had never been seeking ASC rates. She therefore considers it more likely that through his request the complainant was hoping that information about DCP rates will be released, and that the request is a way of revisiting past requests about DCP rates in another way. As will later be confirmed, DCP rates do not exist, but the Commissioner will accept that, at the point of his request, the complainant was still of the view that they did.
29. The Commissioner has therefore considered the burden that complying with the request would cause to HE, and whether that burden is proportionate to the request's value. As noted above, the process of redacting information can be claimed as part of the burden under section 14(1).
30. HE has advised that a substantial volume of information is caught by the request – which covers the period from 2013 to November 2018 - and that information such as commercially sensitive information and personal data would need to be redacted from it. The complainant has noted that HE had advised that it had managed 175 rate-related request responses and reviews. If it took HE 30 minutes to review each piece of material associated with each of these – email correspondence for example - and redact information from it, this work would take HE 87.5 hours. At 15 minutes per item, it would still take almost 44 hours.
31. But even if it took far fewer than 44 hours, the Commissioner would still find that the burden of undertaking the redaction work would be disproportionate to the request's value. This is because, in her view, the complainant was continuing to seek information on DCP rates. If the information, once redacted, was released to him, it would not provide him with information about DCP rates. It would provide him with information about ASC rates which the complainant will go on to confirm – in the EA/2019/0119 appeal – that he has never been seeking. As has been noted previously, DCP rates do not exist. HE will have been aware of that at the time of the request, even if the complainant was not. HE would therefore have known it would be preparing information for release that would not address what it knows, from his previous requests to it and the EA/2018/0104 appeal, is the focus of the complainant's interest ie DCP rates. The requested information is

therefore of very little value to the complainant and it certainly does not have any value to the wider public.

32. In addition, redacting commercially sensitive information from the requested information would be likely to leave the complainant no further enlightened as to HE's reasoning behind its responses to the requests in question. The complainant has also requested related information emanating from HE's general counsel. Legal advice could be withheld under section 42 of the FOIA and therefore this could also be redacted. In the Commissioner's view, the complainant would finally be presented with information that would be of very little, if any, use to him. Particularly since, as discussed, the information released would concern ASC rates and not DCP rates.
33. To conclude, the Commissioner has considered all the circumstances and she is satisfied that HE was correct to refuse to comply with the complainant's request. It can be categorised as a vexatious request under section 14(1) of the FOIA because of the disproportionate burden that complying with it would cause HE.

Section 17 – refusal of request

34. Under section 17(5) of the FOIA a public authority that is relying on section 14 to refuse a request must give the applicant a notice stating that fact promptly and within 20 working days following the date of receipt of the request.
35. In this case, the complainant submitted his request on 10 October 2019, and HE did not give him a notice stating its reliance on section 14(1) until 28 February 2020. HE therefore breached section 17(5) on this occasion.

Right of appeal

36. 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

37. 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.
38. 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

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