

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 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 from Highways England about a claim. Highways England relied on section 17(6) of the FOIA not to provide the complainant with a section 14(1) refusal notice. This is because it had previously refused requests for information on similar matters under section 14(1) as it considered those requests to be vexatious.
2. The Commissioner's decision is as follows:
 - The request is vexatious and, under section 17(6) of the FOIA it would be unreasonable to expect HE to issue a further refusal notice in relation to this request.
3. The Commissioner does not require Highways England to take any further action.

Request and response

4. Through the WhatDoTheyKnow website the complainant submitted a request for information to HE on 24 September 2020 in the following terms:

""Your Ref: 112/008/SG297 Our Ref: X02A574/PBS DoL
10/08/2018 2 I refer to my repeated requests for information since
11/2018 that has yet to be provided in the usual course of
business. I am therefore forced to engage the FoIA. Please provide:

1. all information relating to the estimate submitted and Kier Highways costs breakdown in a spreadsheet i.e. Excel format to include a. the costs supplied to date b. and the components/costs giving rise to the 'estimate' (which appears precise)
 2. All correspondence between HE and Kier since the loss date until today
 3. When the works were completed
 4. How much you have paid Kier and on what date
 5. The pre-payment reconciliation of the charges
 6. The structure reference and its history to include all inspections reports and all attendances and repairs at the location
 7. The images – original and uncompressed. Those provided have been altered, resized. Please advise who undertook the alteration - the file names of many contains the word 'resized'.
 8. the road conditions on the date of the loss
 9. the litter/debris & gully clearance schedule agreed between Kier and HE for the location/contract - how often this was to be undertaken
 10. the litter/debris & gully clearance attendances at the location and associated records at from a year before the loss date to the present"
5. When he did not receive a response to his request, the complainant requested an internal review from HE on 23 October 2020. HE acknowledged this correspondence but did not provide a substantive response.
6. On receiving contact from the Commissioner, HE provided the complainant with a response to his request on 5 February 2021 - its reference FOI 101445. HE first apologised for not providing a review response. HE then confirmed to the complainant that it was relying on section 17(6) of the FOIA not to issue him with a further section 14(1) refusal notice in response to his request. This is because it had relied on section 14(1) to refuse previous, similar, requests that the complainant had submitted.

Scope of the case

7. The complainant first contacted the Commissioner on 11 January 2021 to complain that he had not received a response to his request. He remained dissatisfied once HE had responded and confirmed its position.
8. The Commissioner's investigation has therefore focussed on whether HE can rely on section 17(6) of the FOIA to refuse to issue the complainant with a further section 14(1) refusal notice. In order to determine this, she has considered whether the request can be categorised as a vexatious request.

Reasons for decision

Section 14 – vexatious and repeat requests

9. Section 1(1) of the FOIA provides a general right of access to recorded information that is held by public authorities. However, section 14(1) of the FOIA says that section 1 does not oblige a public authority to comply with a request for information if the request is vexatious.
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 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
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. In its submission to the Commissioner, HE has first noted that this request is another request from the complainant on the subject of Kier Highways Ltd and the third-party claims process for damage to the strategic road network. It has noted too that that matter has been considered extensively in numerous complaints from the complainant to the Commissioner, which have resulted in decisions by the Commissioner and appeal decisions by the First-tier Tribunal (Information Rights).
15. Moving on to the current request, HE says that it appears that the complainant is making the allegation, at question 7 especially, that there is fraud occurring. HE has explained that the photographs referred to in question 7 had been compressed to allow them to be sent as part of the claim pack. However, in HE's view the complainant appears to accuse Kier and Highways England of altering the images, beyond simply compressing them to allow them to be sent to him as part of the claims pack. HE considers this alone is evidence enough to refuse the request given that the making of unfounded accusations is one of the factors that allows requests to be considered vexatious.
16. HE argues that this request falls squarely into this bracket, especially when considered in light of the complainant's previous correspondence with HE on the topic. These types of accusation of fraud have been addressed in its previous responses to requests that the complainant has made. As an example, HE has referred to the request it considered under its reference FOI 100848 which it had categorised as a vexatious request. The Commissioner's decision in IC-45775-M1Q0¹ upheld HE's position. HE has also referred to another request from the complainant that it refused under section 14(1) under the reference FOI 101124 and also the request handled under its reference FOI 101315. The latter request concerned correspondence from Kier with the complainant suggesting that images had been altered. HE says that its response to that request included confirmation from Kier that it did not and could not alter the images.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/2620374/ic-45775-m1q0.pdf>

17. HE has noted that in its response to the complainant in FOI 100848 it had made the complainant aware that future requests of that nature, namely on the subject of Kier and the third-party claims process for the strategic road network Areas that Kier operates under contract to Highways England, would be considered to be vexatious requests and that a refusal notice might not be issued in line with HE's right under section 17(6) of the FOIA. That response had been provided to the complainant on the 15 May 2020.
18. HE says that since that response was provided, the complainant has submitted at least three other requests, including the current request, that allege fraud without any evidence. Despite HE having explained to the complainant that no fraudulent alteration of images was possible, HE says that the complainant continues to submit requests which include an underlying accusation of fraud taking place. It appears to HE that in the current request the complainant indicates that he considers his client is being charged for damage that they did not cause in their incident.
19. In HE's view, as with many of his requests the complainant appears to be using the FOIA as means to challenge the sum being claimed for third party damage. HE says it has indicated many times previously that it considers that this an abuse of the legislation. This is because the third-party claims process has a challenge process of its own. As part of the claims process the complainant is provided with a claims pack which includes everything he needs to make a counter claim. If the complainant disagrees with the costs submitted, the appropriate route to challenge this is via the courts and not through the Freedom of Information Act. It is HE's belief that the complainant is using the FOIA legislation to circumvent the due process of the claims courts.
20. It is also HE's position that by requesting this information, the complainant is fishing for information on which to base "a counter offer of the repair costs issued for their own commercial gain whereby the adjuster or adjusting company will receive a percentage of the monies they are able to reduce the final amount paid in relation to a claim by." HE argues that, as indicated above, if the complainant believes the claim amount presented is unfair then he should not use the FOIA to request associated information from HE in order to either present a lower settlement offer or to pursue a judgment through court, which is the appropriate route to take.

Conclusion

21. The Commissioner is satisfied that the complainant's request in this case can be categorised as a vexatious request under section 14(1) of the FOIA. Given the background and context, the Commissioner agrees with HE that the complainant's request again implies that HE is carrying out fraud. In its suggestion of such fraud, the request is similar to at least one previous request refused under section 14(1), namely IC-45775-M1Q0. As such, under section 17(6) of the FOIA HE could not reasonably have been expected to issue the complainant with a further section 14(1) refusal notice.
22. But even if the Commissioner did not agree the request was vexatious because of the complainant's unfounded suggestions of fraud, she would still find that section 14(1) is engaged. When the complainant did not receive what he considered to be a timely 'usual course of business' response to his claim-related correspondence to HE, he cited the FOIA in order to trigger that response. The Commissioner has noted her decision in another of the complainant's complaints against HE that the Commissioner considered, in which she found section 14(1) was engaged – IC-76731-R6H7. As in that case the Commissioner agrees with HE that the complainant is wilfully using the FOIA legislation to circumvent the claims court and the proper third party claims challenge process; the Commissioner assumes in order to oil the wheels of his own commercial business. That is an abuse of the FOIA legislation.

Section 17 – refusal of request

23. Under subsection 17(5) of the FOIA, a public authority relying on a claim that section 14(1) applies must provide the applicant with a notice stating that fact within 20 working days of receiving the request. However, under section 17(6), subsection (5) does not apply where (a) the authority is relying on a claim that section 14 applies, (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request. The purpose of section 17(6) is to reduce further still the burden on public authorities from having to respond to persistent vexatious requests – especially given the abuse of the process, in this case.
24. The Commissioner has found that the complainant's request is vexatious and is similar to previous requests he submitted to HE and which HE refused under section 14(1). It follows that she therefore finds that HE was entitled to rely on section 17(6) when it refused to issue the complainant with a further section 14(1) refusal notice.

Right of appeal

25. 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

26. 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.
27. 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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Wycliffe House
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