

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 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 from Highways England about one of its contractors: Kier Highways Ltd. 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.
3. The Commissioner does not require Highways England to take any remedial steps.

Background

4. The matters behind the subject that is the focus of the complainant's request have been discussed at length in a number of previous decisions made by the Commissioner, for example [FS50873250](#), and in First-tier Tribunal (Information Rights) decisions, for example [EA/2019/0119](#). As such, the Commissioner does not intend to reproduce that background and context again here.

Request and response

5. Through the WhatDoTheyKnow website the complainant submitted a request for information to Highways England (HE) on 8 December 2019 in the following terms:

“All exchanges with EM HIGHWAY SERVICES LIMITED, now Kier KIER HIGHWAYS LIMITED Company number 05606089 for Area 9 leading up to the contractor's appointment insofar as charging third parties above and below threshold claims are concerned; rates, methodologies etc.

And, all audits, reviews and findings about Kier Highways Areas from 01/01/2014 to the present date to include consideration and implementation of charging methodologies and cost calculation above and below threshold. The development of a methodology providing clarity and traceability of staff costs on green claims.”

6. HE responded to the request on 10 January 2020. It refused to comply with the request under section 14(1) of the FOIA as HE considered it to be a vexatious request.
7. The complainant requested an internal review on 10 January 2020, and HE provided one on 6 March 2020. It upheld its position.

Scope of the case

8. The complainant first contacted the Commissioner on 3 March 2020 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on whether the complainant's request is a vexatious request under section 14(1) of the FOIA.

Reasons for decision

Section 14 – vexatious and repeat requests

10. 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.

11. 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
12. 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.
13. 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.
14. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
15. In its submission to the Commissioner, HE has explained that this request is one of many it has received from the complainant on the same topic. That is the matter of the third-party claims process for damage to the strategic road network, contract detail and terminology in those contracts, and the alleged fraudulent actions of contractors HE employs to maintain and repair the network. For the purposes of this request that is Kier.
16. HE notes that, despite that, it has dealt with these requests for information about 'rates' in various responses; explaining what is held but is commercially sensitive or what is not held. HE has noted that the Commissioner has made decisions in other complaints the complainant has brought to her about similar matters, and that the First-tier Tribunal (Information Rights) ('the FTT') promulgated related decisions in EA/2018/0104 and EA/2019/0119.

17. HE has told the Commissioner that its refusal of the current request was based mainly on the volume of documents that would have to be reviewed for exemptions and redacted in preparation for disclosure. HE considered that this process would place a grossly oppressive burden on it. This was based on the fact that the second part of the request alone was asking for all audit, reviews and findings about all 'Areas', not just Area 9. That is a contract Kier has operated since 2014.
18. HE says that, to put this into context, Kier has operated five areas in that time, of which Area 9 was one. Therefore, to comply with just the second part of the request, all of the relevant information for those five areas would have to be reviewed and prepared for disclosure. HE considered that that alone would be too burdensome a task to fulfil. And moreover, the points the complainant has raised have already been addressed at length at other times ie through previous requests and responses to those requests, and through decisions by the Commissioner and the FTT. HE argues that having to comply with the breadth of this request is not practical or a good use of its resources.
19. HE notes that, in addition, the first part of the request concerned all exchanges with the contractor prior to its appointment in Area 9, about third party costs/claims for above and below threshold claims. HE says that matter has already been addressed previously at various levels of scrutiny ie through decisions by the Commissioner and FTT decisions. HE argues that the fact that the complainant is asking for this information again here is a further example of unreasonable persistence. It appears to HE that the complainant is going back over old ground. In HE's view the complainant is also trying to reopen an issue addressed multiple times by HE, the Commissioner and the FTT and that this adds further weight to HE's belief that the request is vexatious.
20. Finally, HE notes that the FTT found in EA/2018/0104 that information that HE holds on Asset Support Contract (ASC) rates is exempt information under section 43 of the FOIA. As with the arguments put forward regarding the second part of the request, HE says that the amount of information that it would have to review in order to redact exempt information, in preparation for disclosure, would add a further burden on HE. HE says that given that this subject has been covered previously, undertaking this work would be an even less practical use of its resources.

Conclusion

21. The Commissioner deals with a high volume of complaints from the complainant. She has previously instructed him to send correspondence about specific cases to the relevant case only. As such she was prepared to consider this case solely on any submission the complainant

sent to this specific case, and on HE's submission. Other than stating that he considers that HE is operating a "blanket ban" against him, the complainant did not send to this case any arguments to support a position that this request is not a vexatious request or that the information he is seeking has a wider value.

22. The Commissioner notes that on 11 January 2021 the complainant did send correspondence to a separate case (IC-44703-Y9Z8). In that correspondence the complainant asked that the Commissioner consider the points he went on to present where they were pertinent to other complaints of his with which the Commissioner was dealing. These points appeared to focus on the matter of certain information existing and being held. The Commissioner has taken some account of those points, but the current case concerns the matter of vexatiousness not whether information is or is not held (which would be a section 1 investigation).
23. The Commissioner has first considered whether this request can be categorised as vexatious because the burden of complying with it is disproportionate to the request's value. As has been noted, the process of redacting information can form part of that burden. However, the Commissioner considers there to be a high threshold for refusing a request on such grounds. This means that an authority is most likely to have a viable case where:
 - the requester has asked for a substantial volume of information AND
 - the authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO AND
 - any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
24. However, the Commissioner must also take account of the public interest of the information being requested. On that matter, she notes the Upper Tribunal (UT) decision in GIA/2782/2017. The UT noted that a compelling public interest in information's disclosure does not automatically 'trump' any consideration of the resource burden involved in complying with that request, such that the request cannot under any circumstances be regarded as vexatious. All the circumstances of each request need to be considered.
25. The Commissioner has first considered the volume of information requested. In the first part of his request the complainant has requested all exchanges/correspondence with Kier about rates that it

charges third parties, and the methodologies behind those rates, in relation to Area 9 and up the point of its appointment.

26. In the second part of his request the complainant has requested:

“all audits, reviews and findings about Kier Highways Areas from 01/01/2014 to the present date to include consideration and implementation of charging methodologies and cost calculation above and below threshold. The development of a methodology providing clarity and traceability of staff costs on green claims”

This includes information on all five of the Areas that Kier has operated over a five year period, not just Area 9.

27. The Commissioner asked HE for further detail on the volume of information caught by the request. In response, HE noted that in the first part of his request, the complainant asks for all exchanges with Kier prior to its appointment in Area 9. HE considers that this is essentially a request for its exchanges during the tender process for the contract. HE says it has reviewed the Area 9 tender folder and within that folder alone there are 610 documents/e-mails and folders. HE acknowledges that not all of these will concern Kier/EM Highways (as Kier was previously known) but argues that if one third are related to Kier, that makes nearly 200 documents, e-mails and folders. In addition, some of the folders are 'zip' folders with multiple documents within them. HE therefore estimated that for the first part of the request alone there are approximately 300 items to review for relevance and check for exempt material.

28. In the second part of his request HE noted that the complainant asks for all audits, reviews and findings on Kier since 1 January 2014. HE says it has done an initial search using the key words of 'Kier', 'Audit' and 'Green Claims'. The number of documents returned is nearly 8000. HE notes that this is just from one part of its information management system that it has reviewed. HE has explained that there is an area for corporate assurance that needs special permissions to access and further documents are likely to be located there. It says that all the information returned from searches would have to be checked for relevance, otherwise the 'All' element of the request may not be satisfied.

29. Having considered the further detail HE provided, the Commissioner is satisfied that the complainant has requested a substantial volume of information. The request is for all correspondence with Kier, in relation to Area 9, about rates and methodologies, and all audits, reviews and findings about Kier for five areas over a five year period. HE has considered the volume of information it would need to review and has

estimated that it is at least approximately 8,300 – and that is before all the potential areas where relevant information may be stored have been reviewed. Given the breadth of the request and the time period involved, the Commissioner considers HE's estimate is credible.

30. Second, the Commissioner has considered HE's concerns about any potentially exempt information within the requested information. Again, she asked HE for further detail on this point. The information requested in the two parts of the request either directly concerns rates that Kier charges or is likely to include information about those rates. HE had advised that the FTT decision in EA/2018/0104 [from 2018 and which the complainant is in receipt of] found information about ASC rates that HE holds is exempt information under section 43 of the FOIA, which concerns commercial interests.
31. HE has provided the Commissioner with examples of information caught by the request which it considers would be exempt from disclosure. The examples contain information that HE considers would, at the point of the current request, still be commercially sensitive and so exempt under section 43 of the FOIA. Two of the examples also contain personal data, which HE considers would be exempt under section 40(2) of the FOIA.
32. Having reviewed the examples that HE has provided, the nature of the request and the past FTT decision, the Commissioner is satisfied that HE's concerns about potentially exempt information are valid.
33. Finally, given the nature and breadth of the requested information, the Commissioner is satisfied that any potentially exempt information will be scattered throughout the requested material and will not be straightforward to isolate.
34. The Commissioner has considered whether carrying out the work to redact information from the substantial volume of material likely to fall within scope of the request is proportionate to the request's value ie the degree of wider public interest in the information. The public interest in HE demonstrating that it is open and transparent has been met, in the Commissioner's view, through information that HE has released in response to previous requests from the complainant on broadly related matters.
35. However, the complainant has not made a case for the value of the specific information they have requested. HE's contract with Kier is clearly of much interest to the complainant. But the Commissioner has not been persuaded that the requested information is of sufficient wider public interest to warrant the time HE would need to spend reviewing and redacting the material in order to comply with section 1(1) of the FOIA. Based on the volume of material HE has so far identified as falling

within the scope of the request, if it took HE 30 seconds to review and redact one document, the work to prepare information for release would take 69 hours as a minimum. The Commissioner has therefore decided that complying with the request would be a disproportionate and oppressive burden for HE and that the request can be categorised as a vexatious request under section 14(1) of the FOIA.

36. In addition, the Commissioner is further satisfied that the request is a vexatious request under section 14(1) because, at the point of the request, the complainant was aware – from the 2018 FTT decision in EA/2018/0104 - that information about ASC rates would be very likely to be exempt from disclosure. HE has indicated that it considers that, at the time of the current request, information within the requested information would still be exempt from disclosure under section 43, and also section 40.
37. The complainant will also have been in receipt of the decision in EA/2019/0119 at the point that he submitted his request for an internal review. It was decided in EA/2019/0119 that information about any type of 'rates' other than ASC rates did not exist. Despite this, complainant made the decision to submit and continue to progress another request for information – and a wide ranging request at that – which would include material about ASC rates. The complainant may also have been hoping to be provided with information about other rates that he considers exists but which the FTT found in EA/2019/0119 did not. The Commissioner therefore agrees with HE that through the request the complainant was also demonstrating unreasonable persistence. He was revisiting matters that had already been comprehensively considered through HE's responses to previous requests from the complainant, through the Commissioner's decisions and through FTT decisions.
38. Having considered all the circumstances, the Commissioner finds that HE is entitled to rely on section 14(1) of the FOIA to refuse to comply with the request in this case

Right of appeal

39. 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

40. 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.
41. 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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