

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 December 2017

Public Authority: Highways England

Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested information relating to third party claims costs. Highways England withheld the requested information under section 43(1) and (2) FOIA.
2. The Commissioner considers that Highways England has incorrectly applied section 43(1) and (2) FOIA to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 43(1) and (2) FOIA.
4. The public authority must take these steps 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. On 2 March 2017 the complainant requested information of the following description:

"How do the claims costs and overheads differ by contractor, date and area in the United Kingdom"

This was a follow up to a previous request made on 3 October 2016.

6. On 7 June 2017 Highways England responded by reiterating a previous response which had been sent to the earlier 3 October 2016 request. It explained that "We cannot disclose the actual rates, as this is commercially sensitive information. We can confirm, however, that fee percentages do vary, to a degree, with each of our service providers on each of our contracts. To explain further, the nature of Highways England's contracts for service providers is such that these are let at a variety of points in time and so the contracts made are not identical across all providers and areas at any given point in time, which could affect the cost base and approach of the provider."
7. The complainant requested an internal review on 8 June 2017. Highways England sent the outcome of its internal review on 27 June 2017. It confirmed that it was withholding the information under section 43(1) and (2) FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 7 June 2017 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether Highways England was correct to apply section 43(1) and (2) FOIA to the withheld information.

Reasons for decision

Section 43 – commercial interests

10. Section 43(1) FOIA says that information is exempt if it constitutes a trade secret.
11. The term 'trade secret' is not defined in the Act. In her guidance, the Commissioner advises that perhaps the most important thing to grasp is that the term can have a fairly wide meaning. It covers not only secret formulae or recipes, but can also extend to such matters as names of customers and the goods they buy, or a company's pricing structure, if these are not generally known and are the source of a trading advantage.
12. The trade secret exemption within section 43 FOIA is a class based exemption which means that if information is a trade secret it is exempt, whether or not harm results from its disclosure.

13. Highways England said that the information requested is methodology considered by Keir Highways to be a Trade Secret. It said that this methodology is owned by Kier and is used in winning bids. It said that it asked Kier to provide a brief summary of their arguments which it would forward to the ICO. Despite asking for these third party submissions a number of times, Highways England has failed to forward these to the ICO.
14. Based upon Highways England submissions to the Commissioner, she does not consider that it has sufficiently explained why the withheld information is a trade secret. The Commissioner is therefore not persuaded that section 43(1) FOIA can be applied to the requested information.
15. Section 43(2) FOIA says that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Trade secrets are one example of commercial interests but the concept is far wider. Commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services.
16. In order for the exemption to be engaged Highways England would need to demonstrate that disclosing the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties. Section 43(2) FOIA is a qualified exemption and is therefore subject to the public interest test.
17. Highways England has confirmed to the complainant that it holds information falling within the scope of his request. It has provided the information to the Commissioner and she has reviewed it. It contains particular contractual terms relating to the provision of service. The Commissioner is satisfied that the withheld information relates to a commercial activity and falls within the scope of the exemption.

Likelihood of prejudice occurring

18. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged;
i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.

19. With regard to 'would be likely to prejudice', the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
20. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
21. In its submission to the Commissioner, Highways England said that "Disclosing this information would prejudice the commercial interests of Keir and would allow Keir's competitors to use the same methodology when submitting tenders to HE or similar organisations." The Commissioner understands from this that Highways England considers that disclosure *would* prejudice a particular third party's commercial interests. It therefore appears to the Commissioner it is relying on the second limb of the prejudice test, which places a stronger burden on the authority to demonstrate engagement.
22. Highways England's brief submission to the Commissioner merely refers to the public interest arguments it gave to the complainant, and doesn't really touch on why it considers the exemption to be engaged apart from that quoted at paragraph 26 above. The public interest arguments are dated 14 December 2016 which predates the request dated 3 March 2017 (although the Commissioner is aware that this request followed a previous similar request made back in October 2016). Highway England said that the public interest arguments were conducted in December 2016 for a similar FOI request in relation to agreed rates. It used the same public interest test conducted on 14 December 2016, as this request was in relation to the same subject i.e. rates and costs, and the arguments for withholding the information were the same. The Commissioner is concerned with the approach taken by Highways England as requests should be dealt with on a case by case basis, with thought given to the timing of the request and any change in circumstance. However as the Commissioner must first consider whether or not the exemption is engaged, only if it is engaged must the Commissioner proceed to consider the public interest arguments.
23. Other than this, Highways England's response to the complainant nor its internal review provide further explanation as to what the nature of any prejudice might be.

24. Highways England's submission makes no reference to the specific withheld information; nor does it identify any specific prejudice to commercial interests which disclosure would cause. No link is made between disclosure of the information and explicit, demonstrable prejudicial effects.
25. Again, as in previous case reference FS50666011¹ the Commissioner is left with the impression that Highways England has sought to withhold the information on an entirely general basis with no regard for the details of the information or the evidential threshold required to demonstrate that 43(1) and/or 43(2) FOIA are engaged.
26. Highways England's submission to the Commissioner was due on 7 August 2017 and it did not arrive until 22 August 2017. As the submission was particularly brief, the Commissioner wrote back to Highways England on 29 August 2017 asking for further detail to support its position. On 6 September 2017, Highways England confirmed that it had written to the third party contractor whose commercial interests it considers would be prejudiced to obtain their submissions in support. Despite two further letters from the Commissioner dated 5 October 2017 and 9 November 2017 no further detailed arguments have been provided. The Commissioner considers that Highways England therefore had ample opportunity to make a satisfactory submission.
27. The Commissioner further considers that, where a public authority has failed to provide adequate submissions, it is not her responsibility to generate arguments on its behalf or to facilitate its application of an exemption. She considers that the duty to provide information under the FOIA or, in cases where information is being withheld, to show that an exemption is engaged, rests with the public authority in receipt of the request.
28. In this case, the Commissioner finds that Highways England has failed to demonstrate that disclosing the information would prejudice the commercial interests of its third party contractor and that section 43(2) FOIA is not therefore engaged.
29. The Commissioner has not therefore gone on to consider the public interest test with regard to section 43(2) FOIA.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014667/fs50666011.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@hmcts.gsi.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

Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF