

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 8 April 2021

**Public Authority:** Highways England  
**Address:** Piccadilly Gate  
Store Street  
Manchester  
M1 2WD

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about Area 9 and Area 10 of the Strategic Road Network from Highways England (HE). HE stated that it did not hold the information relating to Area 10 and refused under section 41(2) to confirm or deny whether it held the information relating to Area 9.
2. The Commissioner's decision is that, on the balance of probability, HE does not hold the requested information relating to Area 10. She has also decided that HE was entitled to rely on neither confirming or denying whether it holds the requested information relating to Area 9. However, HE has breached section 10(1) of the FOIA in that it failed to provide a valid response to the request within the statutory timeframe of 20 working days.
3. The Commissioner does not require the public authority to take any further steps.

#### **Request and response**

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4. On 25 November 2019 the complainant wrote to HE and requested the following information under the FOIA:

*"I am seeking all information relating to:*

*Area 9*

*The audit /investigation/enquiries of Area 9 / Kier Highways Ltd. following my meeting with Highway England 21/06/2019 progressed, in part, by KPMG under 'Project Verde'. The information will extend, but not be restricted to, exchanges with KPMG and the contractor also all draft reports received."*

*Area 10*

*The audit/investigation/enquiries of Area 10 / Balfour Beatty Mott MacDonald (BBMM) subsequent the judgement of HH Godsmark, Case No: C08YP765 and the contradictions arising/conveyed. The information will extend but not be restricted to, exchanges with the contractor following my attempts to obtain information from BBMM.*

*You may wish to cross-reference this to FoI 100162 'Area 10 BBMM Above Threshold Rates & Subsidy'."*

5. On 4 January 2020 the complainant wrote to HE saying it had not responded to his request and therefore asked it to conduct an internal review.
6. On 23 January 2020 the Commissioner wrote to HE about this matter. It was reminded of its obligations under section 10 of the FOIA and was asked to respond to the complainant's request within 10 working days.
7. On 6 February 2020 HE responded to the request. With regard to the information about Area 9, it neither confirmed nor denied holding the information, citing section 41 of the FOIA as its basis for doing so. With regard to the requested information about Area 10, HE confirmed that no information within the scope of this part of the request was held.
8. The complainant replied to HE on the same day and asked it to conduct an internal review of its handling of his request. He stated that there was an intention by HE to keep secret any rate-related information and that this had occurred since the commencement of the Area 9 contract. The complainant said that the request was made based upon his meeting with HE and a conversation with KPMG on 15 November 2017, and he provided an online link with further details. He said that he therefore does not believe that it is unreasonable for him to be provided with this information that he contends addressed the failings identified.
9. HE conducted a review of its handling of the request and wrote to the complainant on 24 April 2020 maintaining its original decision. HE did acknowledge that its timeliness in responding to the request was outside

the statutory 20 working day deadline and that it had therefore breached the requirements of section 10 of the FOIA and apologised for that reason.

## Scope of the case

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10. The complainant contacted the Commissioner on 7 January 2020 about the delayed response from HE. He later complained about the response itself and the way his request for information had been handled.
11. The complainant said that he believes the information he requested regarding Area 10 is held because HE was provided with a copy of the 'judgement months ago' and has more recently been approached by BBMM for a statement in respect of the issues. He also stated that he himself had instigated the audit that HE were neither confirming nor denying was held.
12. The Commissioner considers that the scope of this case is whether HE holds the information requested in relation to Area 10 and whether HE is entitled to neither confirm nor deny whether it holds the information relating to Area 9.

## Reasons for decision

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

13. Section 1(1) of the FOIA states that:

*"Any person making a request for information to a public authority is entitled-*  
*(a) To be informed in writing by the public authority whether it holds information of the description specified in the request,*  
*and*  
*(b) if that is the case, to have that information communicated to him."*

14. This analysis concerns the second part of the request -

*"Area 10*

*The audit/investigation/enquiries of Area 10 / Balfour Beatty Mott MacDonald (BBMM) subsequent the judgement of HH Godsmark,*

*Case No: C08YP765 and the contradictions arising/conveyed. The information will extend but not be restricted to, exchanges with the contractor following my attempts to obtain information from BBMM.*

*You may wish to cross-reference this to FoI 100162 'Area 10 BBMM Above Threshold Rates & Subsidy'."*

15. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held (and, if so, whether all of the information held has been provided).
16. During her investigation the Commissioner asked HE certain questions in order to establish whether it held any/all of the requested information. However, HE maintained that it knew it did not hold this information without conducting searches.

### **The complainant's view**

17. The complainant does not accept that HE does not hold the requested information regarding Area 10. He puts his request in context by explaining that he had become aware of a judgment in court that was chiefly relevant due to evidence given by a witness for HE/BBMM. The complainant provided the Commissioner with an analysis of matters arising from the judgment concerning damage to crown property rates ('DCP rates') and whether they are held or not.
18. The complainant states that he had provided a copy of the judgment to which he referred in his request to HE and that HE had more recently approached BBMM for a statement in respect of the issues. On this basis, he believes information is held by HE.

### **HE's view**

19. HE summed up its position by stating that the complainant had been "*quite prescriptive in his request*". HE saw the scope of the request to be any information held about the audit/investigation/enquiries of Area 10/BBMM subsequent to the Godsmark judgment and the contradictions arising/conveyed. This part of the request also extended to exchanges with the contractor (BBMM).
20. HE states that there has been no audit/investigation or enquiries to the relevant parties subsequent to the Godsmark judgment. HE made the observation that it is the complainant who perceived contradictions and that HE does not, and has therefore not sought to enquire about them.

Nothing had taken place so there was nothing to provide. The same is true of exchanges with BBMM who were not contacted by HE. None of the requested information regarding Area 10 is held. HE suggested to the Commissioner that the complainant based his request on information he thinks is held by HE but which it does not hold.

### **The Commissioner's view**

21. The Commissioner acknowledges that the complainant has provided reasons why he believes that this information is held. However, much of his argument revolves around a longstanding view regarding 'DCP rates' which has been considered in several ICO decision notices, at appeal (EA/2019/0119), and in an upcoming appeal to the Information Rights Tribunal. The ICO's position rests on the last appeal decision – EA/2019/0119 that 'DCP rates' are not held.
22. In any case, this argument is not relevant to the matter the Commissioner is considering here. She is solely considering the information requested subsequent to the referenced county court judgment. In other words, information that might be held as a result of that judgment. The Commissioner has considered both sides of the argument but has concluded that there appears to be no proof that the information requested (leaving aside matters linked to but not part of the scope of this request) and therefore has concluded, on the balance of probability, that this information is not held by HE.

### **Section 41(2) – Would confirmation or denial give rise to an actionable breach of confidence?**

23. This part of the Commissioner's analysis concerns the first part of the request -

"Area 9

*The audit /investigation/enquiries of Area 9 / Kier Highways Ltd. following my meeting with Highway England 21/06/2019 progressed, in part, by KPMG under 'Project Verde'. The information will extend, but not be restricted to, exchanges with KPMG and the contractor also all draft reports received."*

24. Section 1(1)(a) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held. This is known as 'the duty to confirm or deny'.
25. Section 41(1) says that information is exempt if it was obtained by the public authority from any other person (including another public authority) and disclosing it would constitute an

actionable breach of confidence by that or any other person.

26. When determining if disclosure would constitute a breach of confidence, a public authority will usually need to consider:
- whether the information has the quality of confidence
  - whether it was imparted in circumstances importing an obligation of confidence; and
  - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
27. However, under section 41(2) a public authority is not obliged to confirm or deny that it holds information if doing so would constitute an actionable breach of confidence.
28. It is not necessary for the Commissioner to know whether information is held or not held in this context but she does need to determine whether it would have been obtained from a third party by HE, if it was held.
29. The exemption does not cover information that has been generated by the authority itself. The information must have been given to the public authority by another person.

*"In this context the term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity."*<sup>1</sup>

30. The Commissioner is satisfied that if this information was held, it would be information provided by any other person, the auditor, and be likely to contain information provided by third parties.
31. The Commissioner is also satisfied that the information, if it was held, would have the necessary quality of confidence. Information will have the necessary quality of confidence if it is more than trivial and is not otherwise accessible. Clearly any audit would be more than trivial. The Commissioner is also satisfied that, aside from the complainant's own

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

views, there is no information in the public domain that would indicate whether what he has requested is held or not held.

32. Any audit relies on an obligation of confidence. Audit information is considered to be provided in confidence and kept confidential by auditors and the organisation that commissioned the audit unless an agreement has been reached to disclose some or all of the information. Unauthorised release of any such information has the potential to cause reputational damage to any audited organisation and the auditor.
33. Section 41 is an absolute exemption which means that there is no public interest test to be carried out under FOIA. However, a public authority will need to carry out a test to determine whether it would have a public interest defence for a breach of confidence, even when it is relying on neither confirming or denying whether the information is held.
34. The Commissioner would like to emphasise that the matter of whether this information is held or not is irrelevant to her consideration. She has only considered whether HE has a duty to confirm or deny whether it holds the requested information. From arguments provided by HE to the Commissioner, which she accepts but is unable to reproduce here, the Commissioner is satisfied that HE would not have a public interest defence to any breach of confidence proceedings which may arise from a confirmation or denial that the information is held.

### **Section 10 – time for compliance**

35. Section 10(1) of the FOIA states that:

*“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”*

36. The complainant made his request on 25 November 2019 but HE did not respond until 6 February 2020, over a month late. In doing so, HE breached section 10(1) of the FOIA.

## Right of appeal

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37. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**