

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 2021

Public Authority: Highways England

Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested from Highways England (HE) the rates used to calculate the National Schedule of Repair Costs (NSoRC) and related matters. HE provided some information but withheld part of the information under section 43(2)(commercial interests). After the Commissioner began her investigation and the complainant provided further clarification of his complaint, it became clear that he was seeking information that HE stated it did not hold.
2. The Commissioner's decision is that HE has correctly cited section 43(2) and that, on the balance of probability, it does not hold part of the requested information. However, she has found HE to be in breach of section 10(1) by failing to respond to the complainant's request within the statutory timeframe.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 12 August 2019, the complainant wrote to HE and requested information in the following terms:

"I refer to the information you have provided at: <https://highwaysengland.co.uk/thirdparty...> in which it is stated: The National Schedule of Repair Costs have been derived from competitively tendered rates from across England. In arriving at the National Schedule of Repair Costs we have taken in to account other information available to us to ensure that they can be substantiated as being reasonable costs.'

I ask to be provided:

1. All rates and other information used to calculate and/or substantiate the schedule provided 24/06/2019.

The online schedule of rates has changed since they were first posted and now display a new set of charges 'Version 1.1 from 23 July 2019'.

I ask to be provided:

2. All information giving rise to the discovery the original rates were incorrect and

3. All rates and other information used to calculate and/or substantiate the schedule appearing 'Version 1.1 from 23 July 2019'

I ask to be provided:

4. All information about the rates you, the Authority, will be (sic) pay; whether they are identical rates to those a Third Party is to be charged and if not, how this differs and why."

On 13 August 2019 the complainant added this to his request –

"Please could you also provide the following information:

5. all exchanges with your contractors regarding the new process."

5. The complainant sent chaser emails several times but HE did not respond until 11 November 2019 due to confusion with another request. The response from HE was as follows –

Part 1 – Information released in part. The rates used to develop the National Schedule of Repair Costs (NSoRC) were withheld under section 43(2) as commercially sensitive.

Part 2 – It was explained by HE that the data was not held at granular level during analyses. The initial NSoRC which had been published in June 2019 was not considered incorrect. The costs were issued as a pilot to engage the industry with a view to obtaining feedback. Aspects of the NSoRC were amended following analysis with additional data. These reviews were regularly exercised which meant that the specific information requested could not be provided since updates at this granular level were not routinely kept and/or that the requested data is commercially sensitive.

Part 3 – As request part one, and information was attached. The tendered rates used to develop NSoRC were withheld under section 43(2).

Part 4 – Tendered rates with service providers were withheld as commercially sensitive. This included the variance with the NSoRC since it could be used to determine the commercially sensitive rates.

Part 5 of the request was not responded to.

6. The complainant requested a review on 13 November 2019.
7. A review was carried out on 16 December 2019. HE provided some additional information which was available to the complainant by other means (section 21) in the form of links. The review stated that part four had not had a clear response. HE therefore explained that the rates that existed are the tendered contract rates which were withheld under section 43(2) and that no other rates existed. HE acknowledged that it had not included an additional request made on 13 August 2019 because it had been sent on a separate email to the original. However, it was suggested that it was the same as a later request that had been made by the complainant and invited him to come back if he accepted that this was the case and was content with that response.
8. A clarification was sought by the complainant and provided by HE on 4 February 2020.

Scope of the case

9. The complainant contacted the Commissioner on 14 January 2020 to complain about the way his request for information had been handled. The Commissioner later asked the complainant exactly what the nature of his complaint was. The complainant explained to the Commissioner that he did not accept that HE had provided him with the information he sought in relation to parts one and four of the request. He stated that he was seeking DCP rates which he doesn't accept are commercially sensitive, not pre-planned scheme rates. He did not require the Commissioner to investigate HE's response to part three of his request as it postdated the original NSoRC and the timeframe made it less relevant. The Commissioner notes that the only part of the request that HE had stated was 'not held' was updates to the NSoRC held at a granular level. However, the complainant confirmed to the Commissioner that he did not want part two investigating as he felt this part of the request had been addressed by HE.

10. Due to the phrasing of the request, HE had not stated that DCP rates were 'not held' in its refusal notice or in the review because it did not know they were being sought by the complainant until this was clarified during the Commissioner's investigation.
11. The Commissioner considers the scope of the case to be whether any information is held by HE under parts one and four of the request beyond what was released or withheld under section 43(2). The complainant also required the Commissioner to investigate HE's citing of section 43(2). She has done so, though it appears that the complainant believes the rates he is seeking to be part of what was withheld as commercially sensitive information whereas HE's view is that, if he is seeking DCP rates, it does not hold this information.

Reasons for decision

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

Parts one and four of the request

12. 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."

13. 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).
14. HE, in answering the Commissioner's questions, sought to explain why it did not hold DCP rates or a schedule of DCP rates. The Commissioner notes that the acronym refers to "damage to crown property". Part of a contractor's role is to pursue claims against third parties where there has been damage to a public road. If it is under £10,000 the contractor

claims the costs directly from the third party. If it is over that figure, the contractor bills HE which claims costs from the third party.

15. The complainant has requested this information many times before in differently worded requests. HE states that it has dealt with them in the same manner and reiterated that neither HE nor its contractors hold DCP rates or a schedule of DCP rates.
16. HE underpins its argument by explaining that EA/2019/0119 which was a First Tier Tribunal (FTT) Appeal had found that this information was 'not held' by HE. HE acknowledges that the Tribunal decision had not been made when the request that is the subject of this decision notice was sent to HE but that the decision had been made by the time the complaint was made to the Commissioner. HE's view is that, the Commissioner and the FTT had already reached a conclusion on DCP rates and found that they were not held.
17. In EA/2019/0119 the Tribunal said that,
"... 'defined costs' in the form of DCP rates did not exist. There were said instead to be the ASC rates in the contract (that is pricing schedules, rates tendered by the supplier during the procurement process to build a target cost model). This position was, it was argued, recently upheld by the First Tier Tribunal in EA/2018/0104. It was held in that decision by the Tribunal (who had seen the withheld information) that these were ASC rates and could not be interpreted as 'DCP rates'." (paragraph 12)
18. The Tribunal reflected on the reasons why there had been confusion over what the appellant in that Appeal sought. The Tribunal accepted that an employee of HE had mistakenly referred to 'DCP rates' in the earlier Tribunal decision EA/2018/0104 but that it was just an unfortunate turn of phrase. The Tribunal in EA/2019/0119 noted that none of the contractors referred to 'DCP rates', only referring to ASC rates. The Tribunal was invited to look beyond these words to the actual contractual terms and documentary evidence and find, on circumstantial grounds, that DCP rates existed. However, none of the grounds amounted to enough circumstantial evidence to suggest that DCP rates existed and it was not within the Tribunal's jurisdiction to decide if information (in this case, DCP rates) should be held. The Tribunal found, on the balance of probabilities, that HE did not hold a set of rates relating to DCP, agreed or otherwise, for work done.
19. The Commissioner revisited the same ground in [FS50821725](#) and [FS50873250](#). The matter of DCP rates was also referred to more recently in [IC-44703-Y9Z8](#), and [IC-43232-D3Y7](#).

20. The Commissioner notes that the matter of whether HE holds DCP rates has been thoroughly examined in several decision notices and was also the subject of a Tribunal decision EA/2019/0119. Therefore, on the balance of probability, the information requested at parts one and four of this request is not held.

Section 43(2) – commercial interests

Parts one and four of the request

21. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
22. HE has provided the Commissioner with the withheld information in the form of excel spreadsheets.
23. The Commissioner has defined the meaning of the term “commercial interests” in her guidance on the application of section 43 as follows:

“...a commercial interest relates to a person’s ability to participate competitively in a commercial activity”¹

Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.

24. This exemption is subject to the public interest test which means that, even if the Commissioner considers the exemption to be engaged, she then needs to assess whether it is in the public interest to release the information.
25. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

exemption is designed to protect. Any prejudice that results must also be real, actual or of substance.

- Thirdly, there is a need to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, whether disclosure would or would be likely to result in prejudice or there is a real and significant risk of the prejudice.

26. The term "would...prejudice" means that prejudice is more probable than not to occur (ie a more than a 50 per cent chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).
27. To meet the threshold of "would be likely to prejudice" is a lower threshold. This means that there must be more than a hypothetical or remote possibility of prejudice occurring. There must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50 per cent.
28. HE explained to the Commissioner that the rates for the National Schedule were derived by looking at the Civil Engineering Contractors Association (CECA) rates, the Construction Industry Joint Council (CIJC), rates and the tendered contract rates (the pricing schedule for target costs for schemes) in combination. CECA and CIJC rates are already in the public domain but this was not made clear to the complainant in the refusal notice. However, they were provided at the time of the internal review.
29. The tendered contract rates or pricing schedule for target costs for schemes was withheld as commercially sensitive.
30. The Tribunal in EA/2018/0104 concluded that the exemption was engaged and that the withheld information affected the commercial interests of the contractors in preserving confidentiality of the rates they submitted during the tender process and HE's commercial interests in ensuring an effective tender process. The Tribunal found that there was "*real prejudice*" that was "*causally connected to the disclosure*"² (the target rates during the tendering process), describing the rates as

² Paragraph 42

"*complex calculations based on each contractor's methodology*"³. The Tribunal's opinion was that disclosure was prejudicial to the commercial interests of the contractors concerned because of the unfair advantage to competitors from disclosure. It pointed to the weakened negotiating position of contractors if private clients knew the rates offered to HE. There was also the commercial prejudice to HE itself if the tendering process was disrupted. The Tribunal concluded:

"...we are satisfied that disclosure of the withheld information would be likely to give competitors of the five contractors involved a clear commercial advantage in future HE tenders, and this would cause commercial prejudice to both the five contractors and to HE."
(paragraph 43)

31. The Commissioner accepts, in line with the Tribunal in EA/2018/0104, that the exemption at section 43(2) is engaged at the lower level of prejudice.

Public interest test

32. The Commissioner agrees that the exemption is engaged but section 43(2) is a qualified exemption. She also needs to consider whether it is in the public interest to withhold the requested information. It may be in the public interest to disclose the requested information, even if it does prejudice HE and its contractors' commercial interests.
33. HE did not conduct a public interest test due to the previous FTT ruling EA/2018/0104 that had found that this information was commercially sensitive and that it was not in the public interest to disclose the information. HE argues that the complainant was aware of this ruling and that it had been explained in many responses to his requests in the past. HE referred the Commissioner to the decision notice FS50684021 which led to the ruling in EA/2018/0104 for its public interest arguments in this case.

Public interest arguments in favour of disclosure

34. The Tribunal had accepted that there is a general public interest in transparency in respect of government contracts, accountability in respect of public funds and how they are spent. There is also public

³ Paragraph 41

interest in charges if it causes difficulties with insurance claims or if there was evidence that third parties are potentially being overcharged.

Public interest arguments in favour of maintaining the exemption

35. The Tribunal concluded that the public interest arguments put forward by the appellant were not significantly furthered by the information that had been withheld.

Balance of the public interest

36. The Commissioner accepts the view of the Tribunal in EA/2018/0104, that the public interest in withholding the information is substantial. Its conclusions stated that there needs to be an effective tender process for major contracts, a process which maintains competition between bidders to ensure best value for money for tax payers, and that any prejudice to HE's commercial interests was not in the public interest.

Section 10 – time for compliance

37. Section 1(1) states that a public authority should confirm whether it holds relevant recorded information and, if so, to communicate that information to the applicant.
38. Section 10(1) of the FOIA requires that a public authority complies with section 1(1) promptly and, in any event, not later than 20 working days following the date that a request was received.
39. The complainant made his request on 12 August 2019. Despite several chaser emails, HE did not respond until 11 November 2019 due to confusion with another request. This meant that, rather than the 20 working days allowed by the legislation, HE was two months late in providing a response. Therefore HE breached section 10(1) of the FOIA.

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Right of appeal

40. 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

41. 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.
42. 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
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