

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 24 February 2021

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

Decision (including any steps ordered)

1. The complainant has requested information from Highways England about damage to crown property (DCP) rates and related matters. Highways England provided some limited information to the complainant but mostly stated that it did not hold the information the complainant requested.
2. The Commissioner's decision is that, on the balance of probability, Highways England does not hold information about DCP rates or information relating to Highways England's attempts to secure information from Balfour Beatty. Highways England has therefore complied with its obligations under section 1(1) of the FOIA and the Commissioner does not require the public authority to take any further steps.

Request and response

3. On 23 July 2019 the complainant made a request to Highways England in the following terms:

"1. I am seeking the schedule of Damage to Crown Property (DCP) rates for the above threshold works held and used by BBMM when pricing DCP matters in Area 10. The schedule of rates was used in the ASC pre-04/2019 when the contract concluded. This is the schedule of DCP rates

by which BBMM charge / charged Highways England where incident costs exceed £10,000, a schedule of rates that are apparently subsidised by the lump-sum payment.

2. Please ensure the date the schedule was produced and the period to which it relates is provided. It would assist to be advised when and how often the schedule is revised.

3. The subsidy should also be explained, to the extent that I am able to reverse engineer the charges and establish the actual rate i.e. cost pre-subsidy.

BBMM clearly possess the schedule; it is used to bill Highways England. BBMM has declined to provide the schedule in the course of ordinary business but has referred to in Court. I understand you are seeking a copy of HH Godsmark's judgement in which the schedule is specifically referenced. <http://www.englandhighways.co.uk/15-02-2018-derby-county-court-bbmm-for-highways-england/>

Please also provide all information relating to:

A. your attempts to secure the information from BBMM to date; approached and responses on the subject fo [sic] the schedule – what is held, how and seeking a copy of them.

B. Investigation of the rates having been stated to exist

C. Enquiries of the statements (to HH Godsmark) that the rates are subsidised

D. The subsidy; whether this does, in fact, apply – this should be confirmed by the response to '3' above

E. Please also provide BBMM's responsibilities under the Act; their obligations, that Balfour Beatty is permitted contractually to respond substantively on such requests without client instruction and the instructions sought/provided to date."

4. Highways England responded on 25 October 2019. For 1 and 2 Highways England stated the information was not held. For 3, Highways England stated there was no subsidy. For A-E Highways England stated the information was not held. Finally, for E Highways England provided the relevant sections from the contract.
5. The complainant requested an internal review on 16 October 2019 and Highways England conducted an internal review, responding on 2 December 2019 upholding its response.

Scope of the case

6. The complainant contacted the Commissioner on 19 December 2019 to complain about the way his request for information had been handled.

7. The Commissioner considers the scope of her investigation to be to establish if Highways England has complied with the provisions of section 1 of the FOIA by stating it does not hold the information requested at parts 1 and 2 of the request.

Reasons for decision

Section 1 – information held

8. 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."

9. 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 the information is held (and, if so, whether all of the information held has been provided).
10. For clarity the information that Highways England has stated is not held in parts 1 and 2 is the schedule of Damage to Crown Property (DCP) rates for above threshold works held and used by Balfour Beatty Mott MacDonald (BBMM) when pricing DCP matters in Area 10. The complainant considers this schedule of rates, if held, would have been used in the Asset Support Contract (ASC) pre-2019 when the contract concluded. The complainant further confirmed this is the schedule of DCP rates by which BBMM charged Highways England where incident costs exceeded £10,000.
11. The information in parts A-E that Highways England also stated was not held was in relation to attempts by Highways England to secure information from BBMM. The basis of Highways England's explanation as to why the information at A-E is not held is that it has never approached BBMM to obtain this information. Highways England argues these requests have been made under the assumption by the complainant that Highways England has taken these actions or should have taken these actions but it maintains this is not the case.

12. Highways England argues that the question at A is about their attempts to secure the information from BBMM to date and, as no attempt has been made in relation to this there is nothing to provide and no information is held. The question at B is about an investigation of the rates having been stated to exist, again no investigation has been instigated so there is nothing to provide and no information is held. Highways England states the same is true for C. For D Highways England states this was answered at part 3 of the request where they stated no subsidy exists so no information is held. Finally, in relation to E Highways England provided the information held.
13. Highways England argues that the wording of the requests A-E dictates the responses. In A-C the information asked for relates to actions that simply have not taken place and therefore no information is held. Similarly D asks for information relating to a subsidy that does not exist so no information can be held on this.
14. Whilst the explanations from Highways England are not extensive the Commissioner is of the view that they do not need to be in the circumstances. She accepts the requests are asking for information that does not exist as Highways England states it has never sought this information from BBMM and she has no reason to dispute Highways England representations on this.
15. Turning to the information at parts 1 and 2 of the request the Commissioner considers it relevant to point to another decision notice FS50873250 which addressed the issue of DCP rates and BBMM. In that case as in this case the complainant's arguments centred on a county court case¹ involving Area 10 and BBMM. The complainant considers this demonstrates that the court confirmed there is a schedule of rates and BBMM uses this to bill Highways England in relation to above threshold claims. The complainant further argues that even if Highways England does not hold the information it is held on its behalf by BBMM and the schedule is subsidised – Highways England disputes this and states there is no subsidy.
16. The decision notice referred to above goes into more detail on the county court case which the Commissioner does not intend to repeat here.
17. As in the previous case the Commissioner draws from the Information Tribunal in reaching her decision. In the case EA/2019/0119 the Tribunal

¹ [180215 Derby County Court BBMM for Highways England - England Highways](#)

asserted that a witness at a previous hearing had introduced the phrase 'DCP rates'. This Tribunal concerned Area 9 and a different contractor than BBMM but there are clear parallels that can be drawn.

18. Highways England continues to state there are no DCP rates and there is no schedule or set of rates relating to DCP and that this is all down to an unfortunate turn of phrase by the witness in the Tribunal. The Tribunal did accept that the named witness had written to the contractors using the phrase 'the DCP rates' and asking if they were content for them to be disclosed. The named witness explained in oral evidence that he had been new to these issues and had made a mistake in the way he had referred to the rates. The Tribunal accepted this explanation as credible and noted that the contractors referred to ASC rates.
19. Similarly, the National Audit Office had been told that DCP rates existed and this had appeared in a meeting note and letter from that Office but the named individual explained that this was a misunderstanding and had been clarified. This was also accepted by the Tribunal.
20. The Tribunal also found that the county court judgment that had referred to the existence of DCP rates involving Area 10 and BBMM was considered not to be sufficiently proximate in relation to Highways England's operations and engagement with its contractors in relation to the request under the Tribunal's consideration to lend weight to the Appellant's arguments. The Tribunal also decided that annexes 19 and 23 of the contract did not provide for contractors to have or to hold on behalf of Highways England a schedule or list of DCP rates.
21. The Commissioner appreciates that the complainant does not accept the Tribunal's conclusions regarding DCP rates and that he believes that this is a different request about a different area and contractor. She has looked at the county court judgment that was concerned with Area 10 and BBMM but has concluded that she must be guided by an Information Rights Tribunal judgment rather than a county court judgment where the primary concern of the latter was not information rights but a claim for damages. On the balance of probability therefore, the information at parts 1 and 2 of the request is not held.

Right of appeal

22. 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

23. 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.
24. 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

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