

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 December 2021

Public Authority: National Highways Limited

Address: Bridge House
1 Walnut Tree Close
Guildford
Surrey
GU1 4LZ

Decision (including any steps ordered)

1. The complainant has requested the redacted element of email addresses within material disclosed to him by National Highways Ltd (NH) – formerly Highways England. NH has withheld this information under section 40(2) of the FOIA as it considers it to be the personal data of third persons.
2. The Commissioner's decision is as follows:
 - The disputed information is exempt from disclosure under section 40(2) of the FOIA.
3. The Commissioner does not require NH to take any remedial steps.

Request and response

4. On 2 April 2020 the complainant wrote to NH and requested information in the following terms:

"You and your contractors cite the judgement of HH Godsmark [Redacted] as and when it suits you without reference to the statement:

"It would be odd if a tortfeasor (insurer) was liable to Highways

England for diminution in value of a damaged chattel in one sum if sued by Highways England itself and in a different sum if sued by Highways England via BBMM (a contractor)."

On 16/03/2020, your General Counsel's Office wrote:

'I refer to your emailed complaints dated 25th and 28th February. These complaints concern the methodology used by Kier Highways to price unscheduled damage claims, and what you consider to be their failure to comply with the contract. You refer, in particular, to their failure to comply with Appendix A to Annex 23 of the Area 9 contract. This response is intended to cover both complaints given the similarity of the issues raised.

Please note that these provisions (Appendix A, Annex 23) have been superseded and no longer apply. Kier Highways now price unscheduled damage claims using a fixed schedule of charges, derived from first principles using the Construction Industry Joint Council (CIJC) Working Rule Agreement and Civil Engineering Contractors Association (CECA) Schedules of Equipment Rates. These are both nationally recognised standards.

Kier Highways have our agreement to adopt this approach. The invoices they send will now be accompanied by a statement detailing the resources and associated rates which have been applied. Further details concerning these changes will shortly be provided by Kier Highways in their updated guide to insurers.

These changes do not affect any cases where legal proceedings have already been issued. These have been priced using the procedure set at Appendix A to Annex 23. This includes the cases before Cardiff County Court to which you refer.

On the basis of the above, we do not intend to take your complaints any further. Of course, should you wish to dispute liability or quantum in relation to any claim, you have recourse to the Courts.'

I ask to be provided with all information associated with the above:

1. between you and your contractors, relating to the amendment to the contract and
2. the new contractual terms which apply to such claims and the agreed variations of such contracts
3. why it was decided that appendix A should be varied
4. the basis upon which the amendments were made; on whose instigation the discussions, exchanges and considerations and how it can be said Appendix A to Annex 23 no longer applies

5. relating to your belief and that of your contractor that the new provisions can be forced upon insurers
6. about the change in pricing to Highways England as a result of this change:
 - a. are Highways England subject to the same process and if so, why this was agreed, if not, why does this not apply to your Authority.

This new process sees even higher charges than those used under the 'defined cost' process utilised since 10/2015 by Kier. The new charges are at odds with the NSoRC

[Redacted]

The NSoRC is stated to be the basis of ascertaining an appropriate charge – your General Counsel's office and CEO both having referred to the NSoRC rates, the methodology, as 'reasonable'.

You state that the cases before Cardiff County Court have been priced using the procedure set at Appendix A to Annex 23.

7. I am seeking all information in support of your statement; the information you have received, the enquiries you have made, to confirm this stated compliance and
 8. Why you believe the Appendix A process of 'defined cost' (£) plus 'TPCO' (percentage uplift) has been engaged, how you have identified this and
 9. From what date Appendix A to Annex 23 was in force in each Area and on what date it ceased to be in effect.
- The information in my possession indicates the S Wales stayed claims have not been priced in accordance with Appendix A to Annex 23 and i refer you to the evidence I submitted to Highways England in person, 21/06/2017, briefly replicated here:
[Redacted]
i.e. you possess the knowledge to this effect."

5. NH's response to that request led to a complaint to the Commissioner which was concluded through the decision notice IC-43306-K9X3 ¹on 20 April 2021. In that decision, the Commissioner instructed NH to release to the complainant the information it holds that falls within scope of parts 1 and 4 of the request as above, with personal data redacted.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619697/ic-43306-k9x3.pdf>

6. On 25 May 2021 NH released the information previously withheld, with personal data redacted. This included the prefixes of email addressees with the domain name element being disclosed.
7. The complainant wrote to NH on 25 May 2021. He did not consider the withheld element of the email addresses to be personal data and wished for this information to be disclosed to him.
8. NH responded on 26 May 2021. It confirmed that it was withholding that information under section 40(2) as it considered it to be personal data.

Scope of the case

9. The complainant contacted the Commissioner on 7 June 2021 to complain about the way his request for unredacted email addresses had been handled.
10. The Commissioner's investigation has focussed on whether NH can withhold an element of the email addresses within scope of parts 1 and 4 of the request under section 40(2) of the FOIA.

Reasons for decision

Section 40 personal information

11. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

² As amended by Schedule 19 Paragraph 58(3) DPA.

Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.

14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

15. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. NH has provided the Commissioner with a copy of the information it is withholding. It is associated with NH staff and those of one of its contractors: Kier. The information comprises names and contact details ie phone numbers and the pre-fixes of email addresses. As noted, the domain name element of the email addresses has been released. It is the remaining email information that is the focus of the complaint – the prefix ie the element that is an individual's name.
20. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to NH and Kier staff. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

23. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

24. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

26. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

27. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"³.

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

28. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
29. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

30. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
31. In his correspondence to NH of 25 May 2021 the complainant did not explain what his particular interest was in the prefix element of the individuals' email addresses. However, it appears from that correspondence that the complainant considered that NH had treated him less favourably because it had released full email addresses to another individual (an MP) in other circumstances. In response, NH had explained to the complainant that that disclosure had occurred because of a problem with its redaction software.
32. The evidence suggests to the Commissioner that the complainant was seeking the full email addresses for no other reason than because he considered NH had treated him less favourably. The complainant has not presented the Commissioner with any, more compelling, interest he may have in the disputed information; that is, individuals' names.

33. As such, the Commissioner considers that whatever legitimate interest there may be in the withheld information is the complainant's alone. It is his own private interest and has no wider public interest.

Is disclosure necessary?

34. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
35. NH had explained to the complainant the reason why full email addresses had been disclosed to another individual previously and the Commissioner has no reason to doubt that explanation. He considers that that explanation satisfies whatever legitimate interest the complainant has in the disputed information. The complainant considered he had been treated less favourably; NH explained why that was not the case.
36. As such, the Commissioner is satisfied that disclosing the personal data of third persons to the world at large under the FOIA is not necessary to meet the complainant's interest.
37. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).

Fairness and transparency

38. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
39. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
40. The requirement for transparency is met because as a public authority, NH is subject to the FOIA.

The Commissioner's view

41. The Commissioner has therefore decided that NH was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

42. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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

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