

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

### **Decision notice**

**Date:** 23 November 2021

**Public Authority:** National Highways

**Address:** Piccadilly Gate  
Store Street  
Manchester  
M1 2WD

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

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1. The complainant has requested National Highways (NH) to disclose information relating to a claim dating back to 2014. He also requested certain information about all claims above £10,000 since 2014. NH refused to comply with the request in accordance with section 14(1) of FOIA.
2. The Commissioner's decision is that NH is entitled to rely on section 14(1) of FOIA. She therefore does not require any further action to be taken.

#### **Nomenclature**

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3. National Highways was formerly known as Highways England and at the time this request was made, and responded to, it was still Highways England. Reference is made to Highways England in the request itself but throughout the remainder of the decision notice the public authority will be referred to as National Highways (NH).

#### **Request and response**

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4. On 24 November 2020, the complainant wrote to NH and requested information in the following terms:

"Subject: Highways England FoIA re Payments & Information Your Ref: HE112/003/SG148 Our ref: X07B860

By way of background, to assist with the ease of directing this request and locating the information, the above references are for a 2014 incident. The claim is for over £66,000. The costs were not provided to HE by Kier Highways for years. Yet, other than as a favour, there appears no reason why this claim was met from the public purse, why Kier Highways were compensated by taxpayers and in turn, why Highways England are 'troubled' by it.

It appears Highways England have simply paid something upon a commercial basis (?) which cannot be validated (because it fell outside the contractual process), in turn that the loss cannot be proved to reflect the reasonable costs of repair and so is not recoverable from a third party.

Your contractor has written about this claim:

'Please find attached final costs together with supporting documentation.

In this instance, the final costs are approximately double the estimated costs, and we are submitting these later than the usual 4-month deadline.'

The above is somewhat understated; the claim being in 2014, it appears the costs were unavailable until 2018, possibly 2019. Indeed, the day after writing as above, Kier wrote:

'Please accept my apologies as we appear to have made a mistake in calculating this final account. Please may we withdraw this claim in order to re-submit at a later date.'

I am reviewing another Kier matter (our ref. X09C464) for over £17,000 which was retained by Kier Highways, not submitted to Highways England. The explanation provided by 'your' lawyers is:

'The claim was priced outside the timeframe of the TR430 scheme and was no longer an option.'

Whilst my suspicion is that the above statement is false, that the claim fell below £10,000 using 'mates rates' (those to HE) and when re-priced using TP rates, was substantially over, the 'time frame' exclusion has been cited as though final. Seemingly, a claim over £10,000 'priced outside the time frame' cannot be pursued with Highways England. However, we are presented the subject bill.

Once again I am presented a contradiction that necessitates the use of FoIA as HE fail to address requests in accordance with your 'business as usual' policy; it appears I am treated prejudicially.

I am seeking:

1. The information in support of meeting this claim; why it was paid. The value suggests it is outside of a handler's authority i.e. there will exist exchanges questioning and supporting the conduct.

2. the TR430 scheme information; all information relating to Kier contracts, in Areas 3 and 9 that set out the requirement to submit information, how, the penalties and exemptions. This will include:

a. the section of the contract that deals with submission of costs, invoices or claims associated with DCP works, the 'time limits' etc.

I anticipate some information will be held in Annex 23 'Where the actual cost of the relevant repair exceeds £x within 'y' days of becoming aware of the incident the Provider issues a completed form TR430 to the Service Manager'. I am seeking the information for Areas 3 and 9 and any changes since the commencement of the contract. I recall, as an example, the threshold changing from £5,000 to £10,000 and subject the date this occurred, there may well exist an amendment to the contract.

b. the process of a contractor 'withdrawing' a claim.

c. Changes to the agreement, variations, over the years

d. The TR430 forms (copies of, the versions) used from 01/2014

3. The TR430(s) for this claim displaying version number and

a. Accompanying correspondence with date of submission/receipt

4. The date payment(s) of the invoice(s) was made and

a. in what sum(s)

It is possible a payment was made and that there have been amendments, credits or further invoices raised over time. I am seeking all – the complete payment/refund history.

I note, by reference to Annex 23 of the Area 9 ASC:

'Should the Provider be unable to complete all the details in form TR430 at the time required the Provider completes such details as he is able. The Provider submits any outstanding information within 30 days of completing the repair to the Green Claims Branch in order to update the TR430 form.'

The subject incident occurred 07/2014. The repair was completed in late 2014. The costs do not appear to have been unavailable for years after completion.

In July 2016, two years after the incident, Kier wrote to you:

'Apologies for the considerable delay with this claim, the operations team have provided a small section of the paperwork to our team, however we still have a long way to go with the rest of the paperwork and reconciling all of the costs to ensure everything is accurate.'

21/05/2017, almost 3 years after the incident, Kier wrote:

Apologies for the late reply, I am very sorry that we haven't been able to get a final cost for this claim over to you as yet, this one has been a bit of a nightmare for us to deal with due to the issues mentioned below and our current high workload and low staffing levels.

I've discussed this claim with [DCP manager] and myself and [redacted] will put together a final cost for you based on the information we have currently, I'm afraid that due to the age of the incident and the difficulties we've had it won't be perfect, but we'll do our best to provide you with as much information as possible!

Your handler was mangamous:

'Hey, that will be absolutely fine. I think we can let off one problematic claim given all the hard work you've done through the years.'

5. I am seeking all information about the billing process; the continuity. I wish to confirm my understanding (below) is correct.

- a. How is the bill received from Kier
- b. What is the route it follows
- c. What is the checking process pre-payment
- d. At what stage is it passed to Green Claims

6. With regard to this claim I am seeking:

- a. the continuity and
- b. any examination / authorisation pre-payment
- c. When and how were HE first made aware of this matter – the information you received - what information, correspondence and costs accompanied the original approach from Kier, the notification?
- i. I anticipate receiving all information to and from TR430 @ highways.gsi.gov.uk or the point of contact from 2014 forward

The TR430 form (V4.11) states: Important - This form must be used when reporting damage to crown property. If it is not possible to complete the form within the time limit specified in the Contract, such information as is available should be sent to: TR430 @

highways.gsi.gov.uk and the additional information sent as soon as possible thereafter

- d. the notes and / or recommendations etc.
- e. the reconciliation of the charges and payments have occurred since the claim was first notified
- f. the information supplied at every stage, for example the 'as much information as possible' referred to (21/05/2017 – above).
- g. it is evident information was provided piecemeal. I am seeking the information supplied and accompanying information with the date it was received together with responses from Highways England.

I am also seeking the following information:

7. Since 2014, how many Kier claims, over £10,000, received outside of the deadline have been paid by Highways England

- a. what are the values of same?
- b. how many remain open i.e. unpaid by a Third Party
- c. how many have no Third Party to claim from

I would appreciate the above in spreadsheet format – all information your record about this aspect of claims.

I understand performance targets for each of the Service Providers are in place, within their respective contracts, to monitor both performance and revenue.”

- 5. NH responded on 5 May 2020. It refused to comply with the request in accordance with section 14(1) of FOIA.
- 6. The complainant requested an internal review on 5 May 2020.
- 7. NH carried out an internal review and notified the complainant of its findings on 15 September 2020. It upheld its previous application of section 14(1) of FOIA.

## **Scope of the case**

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- 8. The complainant first contacted the Commissioner on 3 August 2020 to complain about the way his request for information had been handled. At this time, the complainant's internal review request had not been completed. The Commissioner wrote to NH on 1 September 2020 to request that the review be completed in 10 working days. NH complied and issued its final response on 15 September 2020. The complaint was then accepted for full investigation.

9. The Commissioner considers the scope of her investigation to be to determine whether NH is entitled or not to rely on section 14(1) of FOIA.

## **Reasons for decision**

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### **Section 14(1) – vexatious request**

10. Section 1(1) of the FOIA provides a general right of access to recorded information that is held by public authorities. Section 14(1) of the FOIA states that section 1 does not oblige a public authority to comply with a request for information if that request is vexatious.
11. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that “vexatious” could be defined as the “manifestly unjustified, inappropriate or improper use of a formal procedure”. The Upper Tribunal’s approach in this case was subsequently upheld in the Court of Appeal.
12. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
13. Dransfield also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: “...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests.” (paragraph 45).
14. The term ‘vexatious’ is not defined in the FOIA. The Commissioner has identified a number of ‘indicators’ which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests. In short they include:
  - Abusive or aggressive language
  - Burden on the authority
  - Personal grudges

- Unreasonable persistence
  - Unfounded accusations
  - Intransigence
  - Frequent or overlapping requests
  - Deliberate intention to cause annoyance
15. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
  16. The Commissioner's guidance suggests that if a request is not patently vexatious the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this, the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
  17. Where relevant, public authorities may also need to take into account wider factors such as the background and history of the request.
  18. Section 14(1) may also be applied where a public authority can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the public authority. However, the threshold for refusing a request on these grounds is high. A public authority must be able to demonstrate that the complainant has asked for a substantial volume of information, has real concerns that it contains potentially exempt information and it cannot easily isolate this from information that could potentially be disclosed.
  19. NH has argued in this case that compliance with this request would impose a grossly oppressive burden on it as a public authority due to a) the volume of information which falls within the scope of the request and the task of redacting exempt information, and b) the overall burden this request and others of a similar nature are placing on its resources.

### **NH's position**

20. NH confirmed that this request is one of many it has received from the complainant on the theme of the third-party claims process and the information NH holds between it and the contractor about those

claims. It stated that it has received at least 11 of these types of requests from the complainant prior to the one being considered here. It stated that it has highlighted on numerous occasions to the complainant that FOIA is not the appropriate means of challenging the sum being claimed and it is an abuse of the legislation. It explained how the information he is seeking is part of the claims process and whilst it is a business process it is not deemed 'business as usual' in the sense that it can be provided to him within NH's service standards for 'business as usual' correspondence. Information about claims can take much longer to work through and once it has been and a claim made everything the complainant requires to make a counter claim is provided to him in a claims pack. If the complainant disagrees with the costs submitted the appropriate route to challenge this is via the courts and not through FOIA.

21. NH claimed that in essence the complainant is trying to circumvent the due process of the claims court. It stated that the continued submission of these types of requests does not help either party because NH is either unable to provide the information at the time or has to refuse the request in accordance with the legislation. This then leads to the complainant requesting an internal review, referring the matter to the ICO and then the First-tier Tribunal ('the Tribunal') as he has not received the response he had hoped for. This entire process for each request of this nature takes up valuable resources, both at NH, the ICO and the Tribunal, which NH considers is unnecessary given that the complainant will receive all the information he needs regarding the claim at the relevant time, albeit not as quickly as he would like.
22. NH advised that it cannot allow these requests and the process they always follow to continue. It is not sustainable or an appropriate use of their resources. It added that the Green Claims Team has already tried to set up a reasonable format of keeping the complainant informed of updates on the claims he handles by providing a monthly status report for them. It commented that it is therefore trying to be as helpful as possible on these matters but these types of requests and complaints to the ICO and Tribunal continue to be made, which continues to take up substantial resources for something that already has its own form of due process.
23. In addition, it argued that due to the volume of information that would fall within the scope of the request the task of preparing that information for disclosure (i.e. redacting exempt information) would be overly oppressive. For the specified claim alone there are 74 documents within the claim folder and 31 of those documents have 1 or more attachments, with the final number of attachments being 112. There are therefore 186 documents within scope which need to



be redacted prior to disclosure. NH said it would take on average 10 minutes per document to consider what redactions are needed and to then redact. Some would take less but some would take more, so it has used 10 minutes per document as a realistic estimate. NH confirmed that it would therefore take 30 hours to prepare the information for disclosure, which would place an oppressive burden on NH.

24. NH provided the Commissioner with a copy of sample documents which were used for this estimation. It explained that the majority of redactions would be for personal data (section 40). However, there are some documents that would be covered by legal professional privilege and therefore exempt under section 42 of FOIA. Additionally some of the documents contain commercially sensitive information and so redactions would also have to be made under section 43 of FOIA.
25. NH acknowledged that the complainant had made a information request relating to this claim in December 2019. When asked if some or all of this information had already been prepared for disclosure, NH responded that it had. But the information request from December 2019 was not finalised until June 2021, so the burden still existed to the extent claimed at the time this request was made. It said if it had to take any time off this estimate for what information it had already prepared by the date of this request, it would be 2 to 3 hours.
26. NH also advised that the complainant has asked for information that is already in the public domain and he is aware that it is. It refers to the element of the request where he asked for contract information for two areas that Kier operates – Area 9 and 3. It stated that this information was provided to another applicant via the What Do They Know Website. It was not disclosed to the complainant directly but the complainant commented on this other request, which indicates that he is aware of what was requested and that the contract information was published. NH argued that this is further evidence of vexatious behaviour because it is not necessary to request this information and waste NH's resources addressing it again.

### **The complainant's position**

27. The Commissioner has received a number of submissions from the complainant but none of these touch on the request being considered here or NH's application of section 14(1) of FOIA. The submissions are closely connected and relate to DCP rates and one of his Tribunal hearings where it was found that further information was held (notional people rates). But they do not address this request specifically and how it has been handled.

28. The only directly relevant comments he has made are those contained in an email to the Commissioner on 15 September 2020, when he referred the matter back to the ICO for further investigation on receipt of NH's internal review response. He stated that NH has cited section 14(1) of FOIA and he considers this is inappropriate, incorrect and intended to obstruct him. He went on to say:

*"The request is specific, about an incident which I am reviewing costs for. The public purse has been prejudiced for no good reason. I do my utmost to extract information on claims during the handling process this relatively rare use of FOIA for a specific claim demonstrates this is not a vexatious approach. the request should also be considered in conjunction with the 12/11/2019 Tribunal hearing and that I believe a party tampered with the CBD to obstruct me, to pervert the course of justice."*

### **The Commissioner's position**

29. The Commissioner asked NH to confirm how many similar requests the complainant had made relating to specific claims and the claims handling process prior to the request being considered here. NH reviewed its records and confirmed at least 11. The Commissioner does not consider this to be a 'rare' use of FOIA to address a specific claim, as the complainant has alleged. NH has stated that it has received at least 11 other requests of a similar nature before. This demonstrates a clear tendency to try and use FOIA to obtain information which would otherwise be provided via the normal claims process, albeit not as quickly as the complainant would like, and to challenge the handling of the claim itself.
30. The Commissioner considers the complainant is using FOIA to try and circumvent the appropriate route to challenge the costs submitted in the claims court. She does not consider FOIA is the appropriate route to pursue these matters given the volume of requests the complainant has previously made and the significant burden this is placing on NH's time and resources. She notes that NH has tried to put a system in place to update the complainant regularly on the claims he is involved in and which are outstanding. Despite this, the complainant continues to make requests for information relating to specific claims and the claims handling process because he is unhappy with the time they take to process and in his view the delay in providing relevant information. He often then requests an internal review, a section 50 complaint to the ICO and refers the matter to the Tribunal. Such requests are creating a considerable amount of work for all parties involved and for NH (as it is NH's resources we are considering here) placing an unjustified and unreasonable burden upon its resources.

31. Turning now to the time it would take to redact exempt information from the various documents that would fall in scope, the Commissioner notes that 27 to 28 hours (the initial 30 hour estimate minus the 2 to 3 hours NH felt could be deducted for the information it had already prepared by the date of the request in connection with an earlier request the complainant had made for the same claim and four others), is not overly oppressive when compared to some other complaints she has previously considered of this nature (where section 14(1) of FOIA has been claimed for the task of redaction). However, it is still a considerable way over the cost limit of 18 hours, which is used to consider section 12 of FOIA complaints. It is also not the sole reason NH is relying on for the application of section 14(1).
32. The Commissioner considers the arguments presented relating to the burden the complainant's requests are placing on NH as a public authority (the continuation of requests for claims information and the process of redaction for this particular request) when combined are sufficient to engage section 14(1) of FOIA in this case. She is of the view that 27 to 28 hours of work to prepare information for disclosure is still significant and a burden on resources, particularly when this is coupled with the evidence presented by NH of a continuation of information requests relating to specific claims and the claims handling process.
33. For the above reasons the Commissioner is satisfied that section 14(1) of FOIA applies in this case.

## Other matters

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34. The Commissioner notes that NH took just over four months to respond to the complainant's internal review request. As the section 45 code of practice recommends, internal reviews should be completed within 20 working days of receipt. This can be extended to 40 working days if the request is particularly complex or voluminous. The Commissioner considers a total of four months is excessive. She would therefore like to remind NH of the requirements of the code and the benefits of adhering to it.
35. The Commissioner would also like to draw the complainant's and NH's attention to section 12 of FOIA. NH confirmed that it would apply section 12 of FOIA in the alternative, if it was decided that section 14(1) could not apply. Although this does not form part of her decision, the Commissioner has noted that there is a strong case for a successful section 12 application if it were found at the Tribunal that section 14(1) does not apply.

## Right of appeal

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36. 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)

37. 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.
38. 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

**Samantha Coward**  
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