

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2022

Public Authority: Surrey County Council

Address: Woodhatch Place

11 Cockshot Hill

Reigate

Surrey

RH2 8EF

Decision (including any steps ordered)

1. The complainant has requested information about charges for repairing damage to council highways and property. Surrey County Council ('the Council') said that it did not hold some of the information. It also said that it had already disclosed some of the information specified in the request to the complainant.
2. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold the information requested in parts 4B, 2a, 2B and 2C of the request. However, the Council has not demonstrated to him that it has carried out adequate searches for the information requested in parts 5B and 5C of the request. Therefore, on the balance of probabilities, the Commissioner is not satisfied that the Council has identified all information held within the scope of those parts of the request. The Council also breached sections 1 and 10 of FOIA by failing to respond to the request within 20 working days.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - The Council must issue a fresh response to parts 5B and 5C of the request, following searches aimed at identifying all the information held within their scope. It should confirm or deny whether it holds information described in parts 5B and 5C of the request and, in

relation to any information which may be held, either disclose it or issue a valid refusal notice.

4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Background

5. This request relates to the arrangements for the recovery of the costs for damage caused to highways and street furniture owned by the Council, from third parties responsible for that damage.
6. The complainant had made a previous request for information about the matter on 25 November 2020, and the Council's response to that request forms the basis of the FOIA request which is the subject of this decision notice.

Request and response

7. On 28 June 2021, the complainant wrote to the Council and requested information in the following terms:

"I am seeking clarification [regarding the previous request for information dated 25 November 2020] and information:

4. The basis upon which Kier Highways Ltd is to charge at-fault Third Parties. You state 'We do not hold this information and it is not held on our behalf.'

A. Please explain why it is not held on your behalf; the contractor is acting in your name, undertaking a council responsibility.

B. Please also provide your audits of the contractor insofar as repair works/costs are concerned. The audits I anticipate addressing:

5. The protection the council put in place to prevent Third Parties being overcharged i.e.

A. Your extract from the contract in the attached document states 'costs' may be pursued.

I am seeking all information the Council possesses relating to your ensuring road users, Third Parties are:

B. being presented 'cost' and no more. The charges presented are at odds with 'costs'.
C. Being afforded the opportunity to carry out the works.
It does not appear protection stated is effective

8. You state 'Kier recover reasonable costs and any third party would be able to request a breakdown of costs incurred. There are no "specific" rates as each site will be different'. The above audits will address whether the Council has satisfied themselves the rates are reasonable and how.

A. Please explain the statement: There are no "specific" rates as each site will be different:

- a. It appears each site will have specific rates
- b. To what sites are you referring

The above statement is at odds with Kier's application of the KSoR (Kier Schedule of Rates) which are 'specific' rates utilised at 'all sites'

- c. Please ensure the information provided address this incongruity.

With regard to:

2. the schedule of costs for works on the highways i.e. staff, operatives, plant and materials charged to the Council and. Whether the Council is charged, for any works, by Kier Highways by using CECA rates

A. in what respect is confirming whether CECA rates are utilised, a set of rates in the public domain, commercially sensitive.

a. Please address the request for this information i.e. confirm or deny I note the 'commercial interest' exemption applied to the rates Kier Highways charge the Council. The information I am seeking is:

B. whether Kier Highways utilise the same rates when billing the Council or a Third party for incident attendance and damage repairs.

C. If not, why not

It would be odd if a Third party was liable to Surrey County Council for diminution in value of a damaged chattel in one sum if sued by the council itself and in a different sum if sued by the council via Kier Highways i.e. it would be odd if there were two schedules of rates being utilised for the same works, varying subject to who is to receive the bill; a TP or the council.

D. is the situation 'odd'; I await the relevant information".

8. The Council replied on 12 August 2021. It responded to each question. Where recorded information had been requested, it said that the information had already been provided to the complainant or that the Council did not hold it. It also said that in view of the number of similar requests the complainant had submitted, on a subject which it said was

of little wider public interest, it was considering applying section 14 (vexatious or repeated requests) of FOIA to refuse any further, similar requests for information that it received from him.

9. The complainant wrote to the Council on 15 August 2021, stating that his requests were not vexatious. He requested an internal review of the Council's handling of this request.
10. The Council wrote to the complainant on 8 October 2021. It stated that it had nothing further to add to its previous response and recommended the complainant refer his concerns to the Commissioner if he remained dissatisfied.

Scope of the case

11. The complainant contacted the Commissioner on 11 October 2021 to complain about the way his request for information of 28 June 2021 had been handled.
12. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA. FOIA is concerned with transparency and provides for the disclosure of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.
13. Having considered the request, the Commissioner told the complainant that he did not consider that all of the questions in the complainant's correspondence were valid requests for information within the meaning of section 8 of FOIA. This was because some were requests for the Council to give its opinion or for it to provide an explanation, rather than asking for recorded information.
14. As the Council did not apply section 14 to refuse this particular request, the application of that section has not been considered in the Commissioner's investigation.
15. The complainant has not expressed any disagreement with the scope of the investigation.
16. The analysis below has therefore considered whether, on the civil standard of the balance of probabilities, the Council holds the information described in parts 4B, 2a, 2B and 2C of the request. It has also considered whether the Council has complied with the duty under

section 1 of FOIA in respect of parts 5B and 5C of the request. The Council's delayed response has also been considered under section 10 of FOIA.

Reasons for decision

Section 1 – General right of access

17. Section 1(1) of FOIA states:

"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."

18. The Commissioner has sought to determine whether, on the balance of probabilities, the Council holds the information described in parts 4B, 2a, 2B and 2C of the request. Those requests, and the Council's response, are as follows:

"4. The basis upon which Kier Highways Ltd is to charge at-fault Third Parties. You state 'We do not hold this information and it is not held on our behalf.'

...

B. Please also provide your audits of the contractor insofar as repair works/costs are concerned. The audits I anticipate addressing:"

[Council's response: "No recorded information held as no such audits have taken place"]

...

With regard to:

2. the schedule of costs for works on the highways i.e. staff, operatives, plant and materials charged to the Council and. whether the Council is charged, for any works, by Kier Highways by using CECA rates

...

a. Please address the request for this information i.e. confirm or deny

[Council's response: "We hold the schedule of rates in the Contract

We have previously confirmed to you that the responsibility for carrying out the repairs and obtaining payments from third parties is the responsibility of Kier under the contract and we do not hold this information"]

I note the 'commercial interest' exemption applied to the rates Kier Highways charge the Council. The information I am seeking is:

B. whether Kier Highways utilise the same rates when billing the Council or a Third party for incident attendance and damage repairs.

[Council's response: "We have previously confirmed to you that the responsibility for carrying out the repairs and obtaining payments from third parties is the responsibility of Kier under the contract and we do not hold this information"]

C. If not, why not

[Council's response: "See above"]".

19. The Council has explained to the Commissioner that it paid a fixed annual lump sum to Kier Highways, for Kier Highways to manage damage and repair incidents on the highways. As a result, the Council was not exposed to any of the detail around individual pricing for either common repairs that were carried out, or specific repairs. Furthermore, the Council stated:

"In terms of auditing, the Council Officers who oversaw this had a remit to review repairs from a quality management perspective including ensuring attendance was made within the stated timescales and where needed (not all incidents require repairs) follow up repairs were completed in line with the agreed specification(s). They had no need and were not tasked to review prices/costs."

20. The Council shared with the Commissioner an extract of the contract under which Kier Highways agreed to provide damage and repair services on its behalf. This corroborated its explanation that Kier Highways was contracted to provide an overall "cover" service, paid for by the Council by way of an annual lump sum.

21. From the information provided to him, and on the balance of probabilities, the Commissioner is satisfied that the Council does not hold the requested information because it pays for an overall cover service on an annual basis. It does not reimburse Kier Highways for work done on a case-by-case basis. As such, there is no requirement for it to hold information on individual costings.

22. Turning to whether the Council has disclosed to the complainant all the information it holds in respect of parts 5B and 5C of the request, those requests, and the Council's response, are as follows:

"5. The protection the council put in place to prevent Third Parties being overcharged i.e.

A. Your extract from the contract in the attached document states 'costs' may be pursued.

I am seeking all information the Council possesses relating to your ensuring road users, Third Parties are:

B. being presented 'cost' and no more. The charges presented are at odds with 'costs'.

C. Being afforded the opportunity to carry out the works.

[Council's response: "You have been supplied with the recorded information held"]".

23. The Commissioner notes that the request referred to the information previously disclosed to the complainant, and that it sought to "drill down" further into that response. With that in mind, the Commissioner asked the Council to explain what information had previously been disclosed and why it was satisfied that it did not hold any further, relevant information which it could provide in response to this, refined request.

24. In response, the Council simply said:

"For the question 5B and 5C, please see attached the previous request response sent to [the complainant]. This information should cover where we have said the information had already been provided."

25. The Council provided the Commissioner with a copy of a contractual clause which it had disclosed to the complainant in response to his request of 25 November 2020. The clause states that the service provider (ie Kier Highways) may come to an agreement with third parties regarding who is to carry out certain repairs. It does not address point 5B of the request, which asked for information on ensuring that

third parties are only charged at cost. Furthermore, the Council did not comment on its reasons for believing this to be the entirety of the information it held on the matter nor did it give any assurance to the Commissioner that this was indeed the case.

26. The Commissioner is further concerned that the Council prefaced its response to him with a statement that the member of staff who had dealt with the previous request had left "...so I have had to provide you with the information I have managed to be provided by Highways and on the case". The Commissioner is not satisfied from its response that the Council engaged properly with his investigation as regards parts 5B and 5C of the request. The Council's response was confined to referring him to its previous response, and not, as he had requested, to considering whether the response of 25 November 2020 was sufficiently complete as to render its response to 5B and 5C of the current request, correct.
27. As the information previously disclosed to the complainant does not cover all of the information specified in parts 5B and 5C of the request, and the Council has not given the Commissioner any assurance, with supporting reasons, that this is the entirety of the information it holds, the Commissioner is not satisfied that it has complied with section 1(1)(a) in respect of parts 5B and 5C.
28. The Commissioner therefore requires the Council to take the steps in paragraph 3.

Section 1 – general right of access
Section 10 - time for compliance

29. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
30. Section 10(1) of the FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
31. In this case, the complainant submitted his request on 28 June 2021 and the Council responded on 12 August 2021, 33 working days later. Council therefore breached sections 1(1) and 10(1) by failing to respond to the request within 20 working days.
32. The Commissioner has made a note of this delay for monitoring purposes.

Right of appeal

33. 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

34. 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.
35. 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 Bracegirdle
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SK9 5AF