

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

Date: 13 September 2021

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

Decision (including any steps ordered)

1. The complainant has requested schedules of DCP (damage to crown property, now known as damage to the Strategic Network) rates from Highways England (HE), matters relating to them, and a county court case. HE refused to provide the information citing section 14(1) – vexatious request.
2. The Commissioner's decision is that HE has cited section 14(1) appropriately.
3. The Commissioner does not require HE to take any steps.

Request and response

4. On 28 August 2020 the complainant made the following request for information under the FOIA -

*"I refer to my request at DCP rates & Their Description
<https://www.whatdotheyknow.com/request/d...> in respect of which I*

await the outcome of the IR in respect of the 14/08/2020 response.

The following results form (sic) the response and mindful your Authority has a habit of considering such clarification or explanation a new request, I have commenced this new submission / thread as to not confuse. With regard to 'DCP rates & Their Description', you state

'In compliance with a Court order for disclosure, the information released by Kier and their representatives in relation to these cases is the Pricing Schedules to the Area 3 contract in an unredacted form.'

You explain this is the 'confidential' information, also referred to as 'ASC Rates'. I am not seeking and have never sought this schedule of rates. The following should be addressed by my IR request:

Your General Counsel has more recently acknowledged that, contrary to previous statements the ASC schedule is the only schedule of costs, there exists at least one other schedule of rates, a price list that has thus far been withheld and is claimed to be unavailable. This schedule of DCP rates features in claims before the S Wales Court yet, by reference to your response, was not disclosed to the Court and/or legal representatives for the defendant.

Your General Counsel acknowledged that the reference I presented was, in fact, a schedule of rates, within 2 days of my disclosure - <http://www.englandhighways.co.uk/200430-...> . I then presented further similar examples of schedules of rates utilised by Kier These further references were from the same source as the first and therefore also likely to be accurate.

Your General Counsel wrote 08/07/2020 ' We are looking into the existence or otherwise of the document Area 9 DCP 35010.' I did not receive an update as promptly (within 2 days) and despite this assurance enquiries were in hand and an FOIA request for information relating to said references, I have yet to receive further comment or information about same.

Please:

- A. list all schedules of rates relating to DCP works held by Highways England or Kier Highways Ltd since 01/07/2014 and*
- Ai. which are still held*
- Aii. which were disposed of and on what date*
- Aiii. why they were disposed of and why copies cannot be recovered.*

*B. explain why these were not disclosed to the S. Wales Court
C. provide the exchanges between HE and Kier to locate the various schedules and
D. provide the explanation supplied for the disposal of all or any when:*

*1. you are aware of the interest in rates and have been since 2013
2. matters involving said schedules were and are before the Court
3. there is a need to retain such information, if only for accounting purposes
4. the schedules were being used in or after 2019 i.e. recently (you have failed to state when the acknowledged schedule was said to have been deleted)
5. the schedules are electronic i.e. it is reasonable for them to be retained or be recoverable*

6. in accordance with a Tribunal Ruling, these rates were to be disclosed ~

- 13/12/2018 – APPEAL: EA/2018/0088 04/10/2019

E. if and schedules have been disposed, please describe all attempts to recover a copy

With regard to the 04/10/2019 finding, dismissing your appeal (EA/2018/0088), I again ask to be provided the rates that were to be released i.e. that you comply with the Tribunal finding."

5. HE replied on 28 September 2020, refusing to respond to the request and citing section 14(1) FOIA. It stated that it had previously repeatedly addressed issues concerning the provision of schedules of rates held for damage repair work. It also referred to an Information Rights Tribunal decision dated, 12 December 2019, that found that no such schedule of rates was held. Additionally HE said that the complainant had previously requested information disclosed to Cardiff County Court and that he had received a full response to this.
6. The complainant asked for an internal review on the same day.
7. HE provided an internal review on 26 October 2020 in which it maintained its original position, that the request was vexatious.

Scope of the case

8. The complainant contacted the Commissioner on 3 November 2020 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be HE's citing of section 14(1) and whether this was a vexatious request.

Reasons for decision

10. The analysis that follows looks at vexatiousness and considers whether this particular request can be deemed to be vexatious.
11. 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.
12. 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.
13. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
14. 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)
15. 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
16. 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.
17. 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.
18. Where relevant, public authorities may also need to take into account wider factors such as the background and history of the request.

Highways England's view

19. HE set this request in context to the Commissioner by explaining that it had received many requests from the complainant on the theme of rates and, in particular for rates regarding costs for third party claims and the third party claims process. These requests have been dealt with in numerous previous FOI responses, internal reviews, ICO decision notices and Appeals. HE referred the Commissioner to EA/2018/0104 and EA/2019/0119.¹

¹ [Information Tribunal > Search \(tribunals.gov.uk\)](https://www.tribunals.gov.uk/search)

20. In addition to these requests and complaints dealt with under the FOI legislation, HE explained that the complainant had had frequent past and ongoing dealings with other areas of HE about the third party claims process and alleged wrong-doing by HE and/or their contractors. In this case it is Kier Highways. These have been considered and addressed by HE or by independent authorities when refusing this request.
21. HE's position on this request is that it is on the same subject, namely rates, as those that have been addressed previously at all levels of the legislative process from initial response all the way up to Tribunal. Given the level of investigation that has already occurred and the findings of those investigations, the complainant's continued requests about this subject are futile. Addressing each of the points raised in this request, again with the same responses as previously provided, HE contends that responding to this request can't be viewed as a justified use of HE's resources.
22. HE also argues that the complainant has essentially taken an entrenched position on this subject and is making these requests based on his refusal to accept that the information he is seeking is not held, despite the findings of previous proceedings.
23. Additionally, continuing to address requests on this subject in any other way is not sustainable nor would it be a responsible use of the public money needed to do so and therefore it is not, in HE's opinion, in the wider public interest.
24. HE suggests that the request is making an unfounded allegation of wrongdoing by apparently accusing HE of deleting information intentionally to prevent it from being disclosed. HE states that this is not the case because, as the investigations into this information have found, the information was never held in the first place. HE maintains that a similar accusation was dealt with by the ICO in 2019 that found no such wrong doing had occurred and provided the relevant documents. As such, these continuing unfounded accusations are a further demonstration of requests being made in a vexatious manner.
25. Although HE had responded to the Commissioner on 4 August 2021, she had further questions that arose from that response and she wrote again to HE on 18 August 2021. The Commissioner asked HE questions about the scope of the request and whether it still maintained its citing of section 14(1).
26. HE confirmed on 29 August 2021 that it maintained the citing of section 14(1) despite the judgment handed down in EA/2019/0390 that HE held

some information which related to Area 9 in the form of 'notional people rates'.

27. HE suggested to the Commissioner that a request needs to be considered as a whole and not broken down into "*potential areas for consideration*" as individual parts. The Commissioner understands HE to mean that it has refused the request under section 14(1) because there are parts that it considers vexatious and it does not need to consider any parts that may not be vexatious for that reason.
28. As regards the scope of this request, it is HE's opinion that the request covers all the areas that Kier has operated a contract for it. The complainant mentions Areas 3 and 9 in his request. The complainant then goes on at point A of the request to ask for a list of all schedules of rates relating to DCP works held by HE or Kier Highways Ltd since 1 July 2014. No specific area is defined and he is aware that Kier operated six areas not just Areas 3 and 9. Even if the complainant was not referring to all six areas he definitely included Area 3 because he asks why they were not disclosed to a court case in South Wales concerning Area 3.
29. Apart from Area 9, Kier has operated Areas 1, 3, 6, 8, and 13 in the timeframe 2014 to the request date. HE considers that the complainant is seeking information relating to areas operated by Kier rather than a specific area, such as Area 9. The judgment which was made after this request – EA/2019/0390 did not relate to Areas 1, 3, 6, 8 or 13 but did consider Area 9. HE also pointed out to the Commissioner that the complainant already possessed the 'notional people rates' for Area 9 as its submissions to the Tribunal which included this information were made on 17 August 2020.
30. HE notes that Area 9 is the only area where these 'notional people rates' were developed; no other Kier area has anything similar nor any schedules of DCP rates at all and the complainant has been told this on numerous occasions, including at Tribunal. HE stresses that the judgment in EA/2019/0390 makes reference to the balance of probabilities being that there is nothing else (beyond the 'notional people rates') for HE to provide and that HE was to be praised for being open and forthcoming and that if anything else was held it would have been provided in the lead-up to the Tribunal. The complainant held the information at the time of this request.

31. HE then moved on to consider Area 3. HE stated that FTT case EA/2019/0119² found that HE did not hold any rates for Area 3. It considers that the complainant is *"going back over old ground"*. The judgment was handed down in December 2019 and HE considers that this demonstrates his unreasonable persistence.
32. There are no records of the complainant making a request for rates for Areas 6 and 8 though HE has responded to requests from other requesters via a website on which the complainant has made comments to the effect that he questions HE's 'not held' responses. HE provided the Commissioner with a relevant link to support its view. HE argues that this shows he is unreasonable persistent, *"if not intransigent where he is entrenched in his belief that something exists despite previous responses to the contrary"*.
33. HE cannot find a record of a request from the complainant for Areas 1 and 13 but maintains that HE has provided previous responses to him where it has said that it does not hold a schedule of rates for DCP work beyond the 'notional people rates' in Area 9 which were unique to that area. Again, HE views this as intransigence because the complainant continues to make requests for information he believes should be held or explanations of the DCP process despite having been told that it is not held.
34. The remainder of the complainant's requests are for the disposal or retention of schedules of rates. HE argues that there were no schedules held in the first place and therefore nothing to dispose of. The complainant was in possession of the 'notional people rates' at the time of his request which dated back to 2014/15 which suggested that no disposal had occurred. The remainder of the disposal questions in the request are considered to be a waste of HE's resources, given its previous explanations to the complainant that the information is not held. HE states that the complainant is seeking the same information from a different angle.
35. HE concludes its submission to the Commissioner by classifying the request as vexatious, despite the post-request findings of the FTT in EA/2019/0390 that some information relevant to this request regarding Area 9 was held. The scope of the request is wider than this, potentially

² [Information Tribunal > Search \(tribunals.gov.uk\)](https://www.tribunals.gov.uk/search)

all areas Kier has operated in and, in particular Area 3 which had already been the subject of EA/2019/0119.

The complainant's view

36. The complainant has provided a great deal more argument than HE to the Commissioner and this is a characteristic approach. His overarching view is that HE holds DCP (damage to crown property) rates and have admitted such in response to a non-FOIA request about a file name. He contends that HE is avoiding the subject of this request, the subsequent file name because HE is concerned about self-incrimination. His opinion is that schedules of rates exist and that the associated workbooks (spreadsheets) containing those rates populate what he describes as the "ultimate 'invoice'". The complainant states that Tribunals have been misled by HE's witness who he quotes from their witness statement³ as follows:

"... In the course of the further investigation that has been undertaken in relation to this appeal, I understand that something of which I was not previously aware has come to light – namely, that Highways England periodically agrees and formally signs off a documented summary containing a limited number of notional people rates in Area 9, with its contractor, Kier Highways Limited ("Kier")

The complainant provided a statement which he states sets out the rates held with further details contradicting HE's 'not held' stance.

37. The complainant says that the request relates to a court matter where, he maintains, that the defendants and the Judge were kept from the rates, despite a disclosure order. However, this is a county court judgment that cannot be considered here. He believes that the rates held extend to Area 10 where averages were used to populate spreadsheet invoices and he supports his view with a statement from an HE employee.
38. The complainant suggests that it is HE that is vexatious, though a public authority cannot be deemed as such. He provides the context within which he made the request. For years HE responded to rate related FOIA requests by saying 'held' but commercially sensitive. In 2018 the complainant explains that a Tribunal found his request not to be

³EA/2019/0390, paragraph 21 - [Information Tribunal > Search \(tribunals.gov.uk\)](https://www.tribunals.gov.uk/search)

vexatious and required HE to release the rates. HE then said the rates were not held. The Commissioner agreed with HE and further Tribunals were also convinced. However, the complainant argues rates do exist and have been provided.

39. The Commissioner does not propose to outline the way in which sub-£10,000 claims are recovered as this has been set out in several previous decision notices. The complainant's view is that HE is "indifferent" to these matters and whether the repair costs are properly incurred. His estimation is that Kier Highways recovered "*inflated costs*" for which it had "*no contractual authority*". He would like to get to the "*true figures for adjustment purposes*". The complainant has always contended that these rates are held and he supports his opinion by stating,

"Who in their right mind would appoint a sole supplier in a contract for hundreds of millions of pounds and not care what they charged when it came to performing their duties?"

40. The complainant provided the Commissioner with further details regarding Area 9, Area 10 and previous court decisions. He says that he has been provided with some rates which he suggests negates any suggestion that they do not exist. The complainant supports his argument by providing the outcome of EA/2019/0390 where he was provided with an Excel spreadsheet of 'people rates' (HE describes this as "People Rate Reconciliation Summary") which were disclosed on the day the judgment "*went against*" HE. They relate to Area 9 from January 2016. The complainant says that these are the HE/Kier agreed rates for DCP (unplanned) and ASC (planned) works he had been seeking for years.
41. The complainant suggests that the non-disclosure of these rates flies in the face of open government and transparency. He does not accept that the internal review was unbiased and based solely on the facts of the case. The complainant considers that the Commissioner has inappropriately supported HE in taking the least line of resistance though has conceded that,

"DCP rates exist for Area 9, as this was Judge Cragg's finding in EA/2019/0390".

The complainant believes that this should be considered alongside the many inaccurate statements which have been made by HE since 2019 where HE has stated that it does not hold rates. For these reasons the complainant does not expect the ICO to make derogatory references or statements about the multiple requests he has made as he has been

proved right. The complainant argues that he has been forced to use the FOIA and to use the perseverance and tenacity that led to the disclosure of rates.

The Commissioner's view

42. The first point to be made is that the Commissioner is not considering here whether the requested information is held or not held, though clearly some of the history and context of what information is held by HE in relation to this request is relevant to section 14 being cited. Although this is very much the issue for the complainant, the Commissioner is only able to consider whether the request is vexatious.
43. Secondly, the Commissioner would like to note that the request is confusing and consequently the extent of its scope, ill defined. This can be problematic and the Commissioner recognises the sometimes complex nature of the information being requested and the fact that she is not an expert in this field. HE should perhaps have tried to clarify the scope fully but it has had many requests over a long period of time from the complainant that lack focus in this way. However, she has taken a proportionate approach and, whilst there might be different interpretations of the request, the Commissioner believes that HE understood certain parts of the request and considered them vexatious.
44. Additionally, the Commissioner needs to consider the situation at the time the request was made. At the time the request was made, HE had repeatedly told the complainant that it did not hold the rates he had requested. Subsequent to this request, it had been established that rates (people costs) were held for Area 9 and disclosed to the complainant but that there was nothing further to disclose. The Tribunal in EA/2019/0390 accepted that there was nothing equivalent in use in Area 10⁴ though that did not form part of this request. Area 3 had been considered prior to this request and a Tribunal had decided that the requested rates were not held.
45. In a sense, events have now superseded the request. It could be argued that a level of persistence meant that the complainant had had information disclosed to him that it had been stated was 'not held'. It could also be argued that, although the complainant had received the 'notional people rates' before he made this request, the Tribunal had not

⁴ EA/2019/0390

yet made its decision and the outcome was still unknown. Nonetheless, both that appeal and more recent appeals have characterised the complainant as *"overzealous and almost obsessive in his pursuit of HE over the issue"* ⁵.

46. The Commissioner has concluded that the request has to be considered in its entirety. She might not have agreed with HE that the request was vexatious, had the request simply been for rates connected with Area 9 given the (at the time of the request) yet to be concluded Tribunal case. However, she accepts that the complainant was unreasonably persistent and intransigent in requesting information about Area 3 where it had already been established in EA/2019/0119 that the information was not held, some eight months before the request was made.

⁵ Ibid, Paragraph 41. Also EA/2020/0321 and EA/2020/0322 (paragraph 85).

Right of appeal

47. 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

48. 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.
49. 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

Janine Gregory
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