

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2018

Public Authority: Transport for London

Address: FoI@tfl.gov.uk

Decision (including any steps ordered)

1. The complainant has requested information about The London Highways Alliance Contract (LoHAC). Specifically, he requested information such as the schedule of rates, lump sum arrangements and percentage adjustments (uplifts) for the four regions. TfL disclosed some information but withheld the remainder, citing section 43 of the FOIA.
2. The Commissioner's decision is that TfL is correct to rely on section 43 of the FOIA for the non-disclosure of the remaining withheld information. However, she has noted that TfL failed to respond to the complainant's request within 20 working days of receipt. The Commissioner has therefore found TfL in breach of section 10 of the FOIA in this case.
3. The Commissioner does not require any further steps to be taken.

Request and response

4. On 21 June 2016, the complainant wrote to TfL and requested information in the following terms:

"From the date the contract with your contractors in the regions (Central, South & North) commenced, to the present, I ask to be provided all versions of:

 1. The contract uplifts
 2. Contract uplift explanations
 3. Colour Banding – working time restrictions
 4. Annex F (work ordered by the project manager)
 5. The AVP – Ad Valorem Percentage

Please ensure that the information clearly indicates to which region the information relates and the contractor for that region at the specific time.

With regard to PAF (Price Adjustment Factor), I understand that when HMWC contract was let April 2007 the schedule of rates was fixed and PAF was brought into the contract to capture any inflation to the cost. I anticipate being provided the PAF values and publication dates.

6. I ask to be provided the schedule of rates which it appears will date from 2007 and confirmation they remain in force to this date, or the most recent rates and date of issue.”

5. On 1 September 2016, the complainant also requested:

“1. Do TFL pay for debris clearance if the driver / culprit is unidentified? What is the policy and how has it changed since contract commencement?

2. What do TFL pay for AIW staff attendance (vehicle and staff) and on what basis i.e. how much per hour since the contract commenced and is this a fixed rate at contract commencement with a fee on top that is adjusted each year for inflation. If so, please confirm and provide details, if not, please supply the relevant process.

3. Do TFL pay multipliers for AIW staff?

a. If so, on what basis – call out, out of hours (what hours), minimum charge etc.?

4. What sum is paid to KHL by way of lump-sum to cover attendance to clear debris, gully clear, litter-pick etc. where there is no culprit i.e.:

a. What is the lump sum payment

b. What proportion of this is allocated (exactly or otherwise) to such activity / staff (AIW).”

6. TfL responded on 12 July 2017. In respect of the first request, TfL provided some information but refused to provide the remainder citing section 43 of the FOIA. Regarding part 4 of this request, TfL confirmed that it does not hold the requested information. In relation to the second request, TfL provided some information but refused to disclose the remainder, again citing section 43 of the FOIA.

7. The complainant requested an internal review for both requests on 1 August 2017.

8. TfL carried out an internal review and notified the complainant of its findings on 31 August 2017. It stated that it upheld its original position for both requests.

Scope of the case

9. The complainant first contacted the Commissioner on 1 August 2017 when he copied the Commissioner into his correspondence to TfL requesting an internal review. At this time the complaint was not eligible for investigation, as the internal review process had not been exhausted. The case was allocated to a case officer on 20 September 2017 and by this time the internal review had been completed and the complaint was eligible for full investigation.
10. The complainant raised no concerns about TfL's handling of part 4 of his first request in his request for an internal review or complaint to the Commissioner. The Commissioner's investigation has therefore been limited to considering the application of section 43 of the FOIA to the remaining withheld information. The Commissioner understands the withheld information consists of the following for all four areas (Central, South, North East and North West) of the LoHAC contract:

- Uplifts.
- Schedule of rates.

The withheld information also consists of the following but only for the contract with Kier Highways Ltd (KHL) for the south area (this formed part of the second request and the second request was limited to TfL's contract with KHL only):

- Lump sums.

11. The Commissioner has also considered whether there has been any procedural breaches of the FOIA in this case.
12. TfL clarified during the Commissioner's investigation that it does not in fact hold the requested information for part 5 of the complainant's first request or his request for PAF (Price Adjustment Factor) information for the current contract. It stated that it should have informed the complainant of this at the time it handled this request and apologised that it did not. It went on to explain that the LoHAC contract period for 2013 to 2021 does not have AVP (Ad Valorem Percentage) or PAF. These items were included in the previous contract during the period 2007 and 2013 but are not included in the current contract which is the

basis of the complainant's requests. For background, it said the AVP was a percentage rate, similar to the uplifts, that was added to the price charged for work carried out under the contract which preceded LoHAC. The AVP related to the cost of design.

13. In relation to questions 2 and 3 of the complainant's second request (which was limited to TfL's contract with KHL only), TfL wished to clarify further that the information it holds about the multipliers (question 3) is answered by reference to the redacted copy of the LoHAC uplifts document which was disclosed to the complainant in response to his first request. However, having re-read the contract rates, although staff rates are listed, it notes now that there is not a fee specified for AIW staff (question 2). This should have been identified from the outset and stated in its initial response to the complainant. TfL interpreted this question to effectively be a request for specific information in KHL's schedule of rates, which was requested under part 6 of the complainant's first request. As stated above in paragraph 10, the schedule of rates for KHL (and all other contractors) has been withheld under section 43 of the FOIA.

Background

14. The LoHAC is a joint initiative between TfL and London's boroughs. Work under the LoHAC contract is divided between four area based highways contractors. The contractors for each area are as follows:
 - Northwest area – Conway Aecom (a joint venture between FM Conways and Aecom)
 - Northeast area – Ringway Jacobs
 - Central area – CVU (a joint venture between Colas, Volker Highways and URS)
 - South area – KHL
15. The agreement includes both local and TfL road maintenance and improvement works. TfL has stated that the saving to London boroughs and TfL from LoHAC have been estimated as being up to £450 million over the eight years of the contracts. Essentially, the LoHAC contractors carry out specified core services and for each such service they are paid an agreed TfL specific lump sum. In addition LoHAC contractors may be required to carry out other works, such as re-surfacing schemes, which are not covered by the lump sums and the price of works is calculated by reference to the contractor's schedule of rates and percentage adjustments. TfL confirmed that the withheld information demonstrates

a significant divergence between elements of pricing, reflecting the bidding strategies of the respective contractors.

16. TfL went on to explain a little about each element of the withheld information.

The uplifts

17. TfL advised that the uplifts are an element of the price of work carried out under the contract and these are applied in specified circumstances. For example, there are separate uplifts applicable for works carried out on the TfL Road Network (rather than a borough road) and for works that are required to be done at night. The uplifts are a percentage multiplier which forms part of the negotiated agreement. It confirmed that it has disclosed the descriptions of what is covered by the uplifts to the complainant but withheld the specific uplift percentages.
18. The uplifts are specifically priced items in the contracts. Unlike a unit price in the schedule of rates, which is used to calculate the contract price for particular works which do not form part of the lump sum core services, the uplifts are a percentage multiplier applied to the overall schedule of rates price of those non-lump sum works.

Schedule of rates

19. These are the highly detailed breakdown of rates for the work carried out by each contractor under the LoHAC and the schedule of rates for each contractor and therefore each area differ.

Lump sum (as stated above, this element of the request was limited to the contract with KHL only)

20. A series of lump sums are negotiated with the contractor to cover the core services. For KHL service 24 can be used for incidents such as those described in the request. KHL's schedule of rates also show that there is provision for an optional lump sum for work under service 16 – street cleaning (sweeping and litter picking) and a requirement to price a lump sum for works under service 17 – street cleaning (including gulley cleansing; excluding sweeping and litter picking).

Reasons for decision

21. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of a public authority and/or a third party.

22. This exemption is also subject to the public interest test. So, in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of TfL and/or a third party, TfL must also consider the public interest arguments for and against disclosure and demonstrate in this case that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
23. TfL explained that it felt disclosure would be likely to prejudice the commercial interests of the contractors concerned and its own commercial interests. Three of the four contractors provided submissions or explained to TfL why it viewed the remaining withheld information to be commercially sensitive.
24. In terms of TfL's commercial interests, it confirmed that there are four LoHAC contracts covering London, which it expects to re-let within the next three to four years. This essentially means that the same contract will be offered four times and each will be individually negotiated with interested bidders. The tasks described in the schedule of rates and the factors covered by the contract uplift and lump sums are unlikely to change from those seen in the current contracts and those that will be put out for re-let in three to four years' time. If the remaining withheld information was disclosed, it would mean that the individually negotiated prices for each of the current contracts would be available to the world at large. Current contractors would then know what had been accepted in other areas and be in a position to compare their contract, the terms and costs secured with the others. When the contracts come up for renewal the current contractors would then be in a position to tailor their bids accordingly, potentially leading to them not offering the best price for the works knowing how much TfL has been willing to pay in the past across London.
25. Similarly, it stated that bidders who do not currently hold one of the contracts would be more likely to cluster their bids around the current contract, rather than submitting their most competitive offer. It stated that this would not only negatively impact upon TfL and its commercial interests but also the London Boroughs who are party to the contract.
26. With regards to the current contractors themselves, disclosure would be likely to prejudice their ability to negotiate with other third parties. It confirmed that the schedule of rates and uplifts cover services and conditions that would be likely to apply to contracts for highways across the country. Therefore, disclosure would be likely to lead to other clients comparing their own very similar contracts with the contractors to the four LoHAC contracts. It could damage current relationships if it is felt

they are not getting as good a deal and would hinder the contractors' ability to compete fairly for these contracts come renewal.

27. TfL went on to say that the contractors' 'commercial edge' includes their ability to combine the different pricing elements contained in the withheld information. The way they balance their costs against the lump sum and the individual pricing elements requires skill to put forward a competitive bid without exposing the company to unnecessary risk. It stated that this is demonstrated by the variation between the bids submitted.
28. It said that contractors are operating in a competitive marketplace and their ability to negotiate with other parties would be likely to be undermined if the rates agreed under the LoHAC contracts, the uplifts and lump sum arrangements were disclosed. It stated that those contractors would also be likely to suffer detriment when competing for similar contracts, including the four LoHAC contracts when the current arrangement comes to an end, as any entrant to the market would be able to reap the benefits of their investment in their costing model. TfL advised that the fact that there are four contracts rather than one makes this different to other London wide schemes as the four contracts are likely to be in competition with one another, as well as with other firms not currently providing services under the contract.
29. The Commissioner is satisfied in this case that section 43 of the FOIA is engaged. She will now explain why.
30. The remaining withheld information consists of a detailed pricing schedule for each contractor, details of uplifts and lump sum arrangements for KHL. These costs have been individually negotiated between the current contractor and TfL and vary across the four LoHAC contracts. If this information was disclosed it would enable the existing contractors to compare the four contracts and the costs they have agreed and tailor future bids accordingly. It would also provide valuable information to other companies who currently do not hold such contracts but wish to bid in the near future when the contracts come up for renewal. It would enable future bidders (whether the existing contractor or not) to tailor their bid accordingly knowing what TfL accepted previously over the four contracts. This would hinder TfL's ability to negotiate effectively and secure the best possible deal that is available. Disclosure would also hinder the existing contractors from competing for future contracts in a fair and unbiased environment and potentially enable their competitors to successfully outbid them at future tenders having had prior knowledge of the prices and costs that secured previous and existing contracts.

31. As the Commissioner is satisfied that section 43 of the FOIA is engaged, she will now go on to consider the public interest test.
32. TfL refer to various arguments the complainant has presented as to why it is in the public interest to publish the requested information. It stated that accountability is a strong argument for the release of information that enables the public to satisfy themselves that best value is achieved through the expenditure of public funds. TfL advised that this is in part met though the publication of all expenditure over £250.00 but admitted that there would be some public interest in being able to compare the details of pricing agreed between different public authorities and contractors for similar tasks.
33. It stated that the complainant felt disclosure would support fairness in dealings between contractors and third parties who are liable for damage caused to the highway. It would allow drivers, fleet operators, insurers and the company for which the complainant works for to compare their bills with a schedule of charges for similar work that a public authority has negotiated. TfL advises that the complainant refers to a regime of dual charging and this price discrimination by contractors being unfair. The complainant is of the view that knowledge of the detailed pricing structure for the contractors concerned would allow third parties to assess whether their bill is reasonable. To this, TfL commented that a schedule of rates is published by The Civil Engineering Contractors Association (CECA) and therefore it seems a benchmark already exists publically that allows third parties to compare the rates presented to them to determine whether these are reasonable.
34. However, in this case TfL considers the public interest rests in maintaining this exemption. It stated that disclosure would be likely to damage its own commercial interests and those of the current contractors. Disclosure would reveal the bidding strategies of the successful bidders and would be likely to result in clustering of bids when the contracts come to an end, with contractors seeking to obtain the most favourable terms across the four contracts. New bidders would be likely to use the previous contracts to set their rates and would consider the rates as a guide to what TfL and the boroughs would be prepared to pay. It stated that it does not receive an operating grant and ultimately any failure to obtain the optimum market rate would be met by costs passed on to customers, residents, visitors and taxpayers.
35. TfL quoted from the Commissioner guidance on section 43(2) of the FOIA:

“If the commercial secrets of one of the players in the market were revealed then its competitive position would be eroded and the whole

market would be less competitive with the result that the public benefit of having an efficient competitive market would be to some extent eroded." Willem Visser v Information Commissioner EA/2001/0188 (1 March 2012).

It stated that the same guidance also stated that:

"revealing information such as a pricing mechanism can, for example, be detrimental to a public authority's negotiations on other contracts and procurements. If an organisation knows how a public authority costs an item or service for example, then it can exploit this for profit or other gain."

36. TfL concluded its consideration of the public interest test by saying that, although the complainant has made the case that disclosure would increase transparency and accountability, the effect of publishing a breakdown of the prices charged under the four contracts would be likely to harm the commercial interests of both the contractors and the public authorities engaging their services in a way that would be likely to lead to increased costs being passed on to customers, residents, council tax payers and visitors. It commented that the suggestion that details of pricing are already well known in the industry, and the references to the CECA fees being available on payment, works both ways and would appear to mitigate the concern that a fleet owner, insurer or the company for which the complainant works for might receive a bill for damage to the highway and not have a benchmark to assess it against. Additionally, TfL stated that if a LoHAC contractor did pursue a fleet owner or company for unreasonably high costs, then a court will ultimately reduce the amount claimed. Therefore, because of the potential cost to the public purse and the likelihood of prejudice to TfL's and the contractors' concerned commercial interests when bidding for similar contracts, it considers the public interest supports maintaining the application of the exemption.
37. The Commissioner recognises the public interest in openness, transparency and accountability and in members of the public having access to information which allows them to see how contracts have been priced, compare these with others and, in this case, potentially assess any charges presented to ensure that these are fair and reasonable. The Commissioner also notes the various issues the complainant has raised with regards to his belief that unfair charging has taken place and therefore in his view it seems contractors are benefiting more than they should out of these contracts.
38. There is always a strong public interest in knowing how public funds are spent and allowing members of the public access to information to

enable them to scrutinise such spending and evaluate whether the best value for money is being achieved.

39. However, in this case, the Commissioner has agreed that the remaining withheld information is commercially sensitive to both TfL and the respective contractors. The withheld information consists of detailed pricing structures on which the current contracts were agreed. If this information was to be disclosed, it would be likely to hinder both TfL's and the contractors' concerned ability to compete fairly and competitively in future bidding rounds. Disclosure would erode true and fair competition and this is not in the interests of the wider public. If future bids were tailored towards the withheld information TfL would be hindered from negotiating and securing the best possible terms available. This could have a negative impact on the public purse and this is not in the public interest.
40. For the above reasons, the Commissioner is satisfied in this case that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exemption.

Procedural breaches

41. The Commissioner notes in this case that TfL failed to respond to the above requests within 20 working days of receipt. In fact TfL took 12 months to respond to the first and 10 months to respond to the second. Such delays are excessive and unacceptable regardless of the extent of a request, how voluminous or complex it may be.
42. Section 10 of the FOIA clearly states that public authorities shall respond promptly to requests and no later than the 20th working day from receipt. Clearly, TfL breached section 10 of the FOIA in this case for both requests.

Right of appeal

43. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

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