

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2018

Public Authority: Highways England
Address: Bridge House
1 Walnut Tree Close
Guildford
Surrey GU1 4LZ

Decision (including any steps ordered)

1. The complainant has requested information from Highways England about the level of charges which are payable to its contracted company or companies in respect of repairs to the road or other infrastructure following an accident.
2. The Commissioner's decision is that Highways England has correctly refused to respond to the request under section 14(1) of the FOIA – vexatious requests.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 25 July 2017, the complainant wrote to Highways England and requested information in the following terms:

"I ask to be provided from 01/07/2014 in respect of Areas with Appendix A to Annex 23 and damage to Crown Property:

- 1. The Defined costs, those referred to in Appendix A to Annex 23 of the contract*
- 2. The Third party claims overhead*

3. *all information that relates to how the above are to be applied to claims*

4. *confirmation that the charge to Highways England comprises:*

a. the defined cost (at '12 above)

b. a fee uplift

I do not accept that the above is commercially sensitive."

5. Highways England responded on 23 August 2017 stating that it considered the request to be vexatious under section 14 of the FOIA.
6. The complainant requested an internal review. Highways England did not carry out an internal review, despite being reminded by the Commissioner that it is considered good practice to do so. The Commissioner therefore accepted the case for investigation without internal review.

Scope of the case

7. The complainant contacted the Commissioner on 29 September 2017 to complain about the way his request for information had been handled.
8. The Commissioner wrote to Highways England to ask it carry out an internal review, as requested by the complainant, on 14 October 2017 and again on 14 November 2017, and subsequently accepted the case for investigation after receiving no response.
9. The Commissioner considers that the scope of the case has been to investigate whether Highways England was correct to refuse the request of 25 July 2017 under section 14(1) of the FOIA – vexatious requests.

Reasons for decision

Section 14 – vexatious requests

10. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.
11. The term 'vexatious' is not defined in the FOIA. The Upper Tribunal (Information Rights) considered in some detail the issue of vexatious requests in the case of *Information Commissioner vs Devon County & Dransfield* (GIA/3037/2011) ("the *Dransfield* case") and concluded that

the term could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure*". The Tribunal's decision establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

12. In the *Dransfield* case, the Upper Tribunal also found it instructive to assess the question of whether a request is vexatious by considering 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 of, or distress to, staff. The Upper Tribunal did, however, also caution that these considerations were not meant to represent an exhaustive list. Rather, the Upper Tribunal stressed 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).
13. The task for the Commissioner, therefore, is to decide whether the complainant's request was vexatious in line with the approach set out by the Upper Tribunal, and she has therefore taken into account the representations of the complainant and Highways England, as well as the evidence that is available to her.
14. In this notice the Commissioner will also refer to her published guidance¹ in defining and dealing with vexatious requests.

The complainant's view

15. In this case, the complainant has argued that his request relates to a matter of public concern: the charges levied by Highways England's contracted company/companies in respect of repairing road or infrastructure damage caused by a member of the public.
16. Highways England's contracted company/companies can charge a member of the public for repairs to the highway or other infrastructure caused when an accident has taken place. However, the contractor(s) may also charge Highways England itself for the cost of repairs, where the total cost is over a certain amount of money.

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

17. The complainant wishes to discover detail about the level of charges submitted to members of the public, and those submitted to Highways England. He handles insurance claims for members of the public who have been billed by the contractor(s), and is concerned at a lack of transparency in the level of fees and the actual costs to Highways England of the repairs which it has paid for.

Highways England's view

18. Following the approach of the First-tier Tribunal in *Gregory Burke v The Information Commissioner* (EA/2015/0050) ("the *Burke* appeal"), the Commissioner has accepted in a number of subsequent cases that it may be appropriate to consider the evidence in context, in order to confirm whether a public authority's argument for vexatiousness has validity. In other words, where it is relevant to do so, a public authority may take into account the context and history preceding the request. This means that a request may be vexatious when made by one person and not vexatious when made by another person.
19. In this case, Highways England has provided evidence to the Commissioner that, from January 2016 onwards, the complainant submitted to it 24 requests for information/requests for internal review prior to making this request on 25 July 2017. The majority of the requests related to the same overall costs issue that is the subject of this request, or to an aspect of that issue. Highways England has argued, in fact, that the complainant has been making requests about this issue over the course of the last three years.
20. Highways England has expressed concern at what it refers to as the 'scattergun approach' being adopted by the complainant, which, it explains, has caused difficulty for the authority in managing the volume of queries he has submitted. It explains that he has contacted a number of different individual members of Highways England staff with different requests.
21. In addition, Highways England has noted that the complainant, prior to the date of this request, frequently added comments online to requests from members of the public on the What Do They Know website which relate to this issue, encouraging them to press for further details after their requests for information are responded to.
22. In Highways England's view, this is an indication that the complainant may be acting in concert with other requesters.

The Commissioner's decision

23. As set out in the Commissioner's guidance, referenced previously, section 14(1) is designed to protect public authorities by allowing them

to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.

24. The guidance explains that the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. However, 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.
25. In the guidance, it is explained that a complainant adopting a *scattergun approach* (as stated by Highways England) can be an indicator that a request might be vexatious. However, a scattergun approach is defined as where "*The request appears to be part of a completely random approach, lacks any clear focus, or seems to have been solely designed for the purpose of 'fishing' for information without any idea of what might be revealed.*"
26. The Commissioner does not consider that the complainant's request falls squarely within that definition; however, she has noted that, in her guidance, another indicator of vexatiousness is *Frequent or overlapping requests*, defined as being where "*the requester submits frequent correspondence about the same issue or sends in new requests before the public authority has had an opportunity to address their earlier enquiries.*"
27. The Commissioner considers that this applies to this request and will consider the weight of this indicator later on.
28. With regard to the complainant possibly acting as part of a campaign, the Commissioner has again considered her guidance.
29. The guidance explains that if a public authority has reason to believe that several different requesters are acting in concert as part of a campaign to disrupt the organisation by virtue of the sheer weight of FOIA requests being submitted, then it may take this into account when determining whether any of those requests are vexatious.
30. In this case, it is evident that the complainant has encouraged other requesters to persist with their enquiries to Highways England.
31. The Commissioner is also aware that the complainant set up a website before the date of the request, which draws attention to the alleged disparity in the level of costs payable to the contractor(s), and displays comments from dissatisfied persons who have made freedom of information requests.

32. However, the Commissioner's guidance also makes clear that, if the available evidence suggests that requests which may be part of a campaign are genuinely directed at gathering information about an underlying issue, then the authority will only be able to apply section 14(1) where it can show that the aggregated impact of dealing with the requests would cause a disproportionate and unjustified level of disruption, irritation or distress.
33. In other words, even with the presence of indicators of vexatiousness, or an indication of requesters acting in concert, the Commissioner considers that the key question for public authorities to consider when determining if a request is vexatious is whether complying with the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress to the authority.
34. In this case, it is apparent from the evidence presented to the Commissioner that Highways England has dealt with a very large number of requests from the complainant alone, together with requests for information about substantively the same issue from other requesters, within the last 18 months. In some cases, the requests have led to information being provided.
35. As stated in the Commissioner's decision notice from which the *Burke* appeal stemmed (FS50548810, 15 December 2014²), a '*high frequency and volume of correspondence may further weaken the justification for the continued making of requests*' (paragraph 18).
36. However, the Commissioner goes on to say that '*potentially offsetting the weight of this factor is the seriousness and complexity of the dispute itself and the importance of the requested information.*'
37. The Upper Tribunal in the *Dransfield* case expressed the view that it may be appropriate to ask the following question: '*Does the request have a value or serious purpose in terms of the objective public interest in the information sought?*'
38. The Commissioner is aware that the requests seek to shed light on an area which is of interest to the motoring public, and that the request under consideration in this notice can be said to have some serious purpose and value.

² https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042938/fs_50548810.pdf

39. As section 14(1) of the FOIA is an absolute exemption, the Commissioner's role in considering the application of it to this request does not require her to carry out a public interest test as such, but rather to weigh the purpose and value of the request against the burden on the authority in complying with it.
40. In this case, taking into account the history and context of the request as shown by the evidence provided by the public authority, she considers that the burden on the authority in complying with the request would be disproportionate.
41. She has therefore determined that Highways England was correct to refuse to respond to the request under section 14(1) of the FOIA, and does not require it to take any steps.

Other matters

42. Timeliness/poor engagement: while there is no statutory obligation for a public authority to conduct an internal review under the FOIA, the Commissioner considers that it is best practice to do so. In this case, Highways England did not conduct an internal review. The Commissioner considers that Highways England has shown poor engagement with her office throughout this process, both in failing to respond to her request to carry out an internal review, and in failing to respond to her letter of investigation until served with an information notice ordering it to do so. She expects better and more timely engagement from Highways England in the future.

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

Alun Johnson
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