

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 July 2018

Public Authority: Government Legal Department
Address: One Kemble Street
London
WC2B 4TS

Decision (including any steps ordered)

1. The complainant has requested information about the schedule of defined costs following a collision on the M4 Eastbound on a specific date. The Government Legal Department (GLD) has stated that it does not hold the requested information.
2. The Commissioner's decision is that on the balance of probabilities, GLD does not hold the requested information. Having failed to respond to the request for information within the statutory time frame of 20 working days, the Commissioner considers that GLD has breached section 10 of the FOIA. She does not require GLD to take any steps.

Request and response

3. On 19 July 2017, the complainant wrote to GLD and requested information in relation to a specific collision on the M4 motorway. His request was for the following information:

"When responding, please can you provide the schedule of defined costs for the Area – the schedule used to build up the invoice."
4. The complainant set out that if the request was not handled in the course of usual business then it constitutes a request under FOIA.
5. Although the Commissioner notes that GLD may have been dealing with the request as business as usual, it is for a public authority to determine whether the correspondence constitutes a request under FOIA and handle it as such. GLD did not address the request under FOIA until clarification was sought. Accordingly, GLD failed to respond to the request within the statutory 20 day time limit.

6. GLD sought clarification of the request on 25 October 2017. The complainant responded on the same date as follows:

"...please can you provide the schedule of defined costs for the Area – the schedule used to build up the invoice. These are the DEFINED COSTS or BASE RATES Kier agreed with your client to compile an invoice. I believe these will (or should) be in GLD's possession to enable the charges raised to be confirmed pre-settlement and to enable meaningful, justifiable recovery. This is particularly important in light of the issues with Kier Highways invoicing."

7. On 22 November 2017 GLD advised the complainant that it did not hold the requested information.
8. Following an internal review requested on 22 November 2017, GLD wrote to the complainant on 15 December 2017 and maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 25 October 2017 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of the investigation is to determine whether, on the balance of probabilities GLD held the requested information at the time of the request.

Reasons for decision

11. Section 1(1) of the FOIA states that:

"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."

12. In scenarios where there is some dispute between the public authority and a complainant as to whether the information requested is held by the public authority, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of proof -

i.e. on the balance of probabilities in determining whether the information is held.

13. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
14. GLD has set out to the Commissioner that the information requested forms part of a larger contract document which belongs to Highways England, GLD's client. GLD has set out that this is not a document which the client would routinely or normally provide to GLD.
15. In providing a submission to the Commissioner, GLD explained that it contacted its client to ask whether the requested information had been provided to GLD, even if this were in relation to any other cases. GLD has confirmed that its client's position was that whilst it might have sent the "odd extract" from the document, it had *"certainly never sent the whole thing or the schedule of rates."*
16. In its submission, GLD has explained that all casework pertinent to this request would be held by a specific team and that this was the focus of its searches.
17. GLD then carried out extensive searches involving the one team which deals with this specific work area, in order to identify whether or not it held the particular contract. These searches included relevant folder content on a shared drive. The searches produced no information falling within the scope of the request.
18. GLD has explained that 'Green claims' are legal claims made by Highways England, usually to recover the costs of repair to the highway resulting from property damage caused by a member of the public. The request relates to a 'Green Claim'.
19. In such cases, Highways England routinely provides GLD with detailed costs information. This information is provided in order to support the claim for recovery of those costs and is usually disclosed to insurers/loss adjusters.
20. Those detailed costs had in this case, been provided to the insurer. However, the scheduled of defined costs is not normally provided to GLD and it would not expect to hold this information.
21. It is GLD's position that having been told by the client that the requested information would not have been sent to GLD and having

checked undertaken comprehensive and relevant searches, it was reasonable and proportionate to end its search at that point.

22. It is GLD's position that it does not hold, and has never held and would not expect to hold information falling within the scope of this request. It asserts that its searches have been reasonable and proportionate.
23. In the particular circumstances of this case, the commissioner agrees with GLD that its searches were reasonable and proportionate and that they would have been likely to produce any information falling within the scope of the request; which they did not. She considers that on the balance of probabilities, GLD does not hold the requested information.

Other matters

24. The Commissioner notes that in responding to her request for a submission in this case, GLD has taken the opportunity to set out that underlying this request for information is a solicitor/client relationship and that legal professional privilege is not waived. It has asserted that even if it were the case that it held the requested information, it would be held on behalf of its client, Highways England, and as such would not be held for the purposes of the FOIA.

Right of appeal

25. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.
27. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF