

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2019

Public Authority: Highways England (HE)

Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested Damage to Crown Property (DCP) Rates for Areas 9 and 10 for a particular contract. HE confirmed that it did not hold the requested information under section 1(1)(a) FOIA.
2. The Commissioner considers that on the balance of probabilities, there is no recorded information held by HE under section 1(1)(a) FOIA falling within the scope of the request.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 11 December 2018 the complainant requested information of the following description:

"Damage to Crown Property a.k.a. DCP Rates for Areas 9 and 10 from inception of the current contract to the present date, being the schedule of costs referred to at paragraph 14 of the attached witness statement, confirmed under Oath by [named individual] at the First Tier Tribunal Information Rights appeal hearing on 21 November 2018 as not being commercially sensitive.

This request replaces any outstanding earlier requests relating to costs now that the precise nature of available information has been clarified by [named individual]. I am seeking to avoid any ambiguity in what I

am seeking, by clarifying my request and using exact nomenclature adopted by yourselves."

5. On 10 January 2019 HE responded. It denied holding the requested information.
6. The complainant requested an internal review on 11 January 2019. HE sent the outcome of its internal review on 7 February 2019. It confirmed that the Pricing Schedule is considered commercially sensitive (but this does not fall within the scope of this request) and upheld its original position that a schedule of defined costs for Areas 9 and 10 was not held.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner has considered whether any recorded information is held by HE under section 1(1)(a) FOIA relevant to the scope of the request.

Reasons for decision

9. Section 1(1)(a) of FOIA states that, "Any person making a request for information to a public authority is entitled – to be informed in writing by the public authority whether it holds information of the description specified in the request". Section 1(1)(b) of FOIA states that, "If that is the case, to have that information communicated to him".
10. HE explained that in simple terms, the subject matter of this request concerns issues that arise when members of the public damage highway infrastructure (i.e. "third party claims" previously referred to as "damage to crown property") for which HE is responsible for example, a car crash that damages a motorway barrier. However following the creation of HE as the strategic highway company the strategic road network was transferred to HE in its capacity as a limited company. Therefore, the network is no longer Crown property and it is moving away from it being described as such.
11. Under HE's Asset Support Contracts (ASC) these claims are mainly dealt with in two ways:

1. if the value of the damage is under £10,000 then the service provider is responsible for the damage and the recovery of costs from the third party.
2. if the value of the damage is over £10,000 the service provider carries out the repair, but HE pursues the claim.
12. Under HE's Asset Delivery (AD) contracts, the repairs are carried out by the service provider and the claims are managed and pursued by HE.
13. Where the repairs are carried out by third party service providers, there is often an apparent difference in the amount claimed for work that may appear similar for a number of reasons, including but not limited to:
 - the costs claimed are actual costs for carrying out the repair work which are impacted by factors such as the location, time, nature and scale of the incident;
 - there are some costs that HE does not pass onto a third party;
 - third parties are entitled to an uplift;
 - when the repair is carried out; and
 - larger works may be carried out in a planned and more efficient way benefitting from economies of scale.
14. The difference between the treatment of these two scenarios is readily explicable. Nonetheless, the complainant has wrongly extrapolated from that difference a belief that HE is engaged in a fraud against the public, in conspiracy with its service providers responsible for maintenance and repair of relevant highways infrastructure.
15. HE confirmed that all of the above has been clearly explained to the complainant not least recently in a witness statement given by [named individual], and filed by HE in appeal proceedings with the reference EA/2018/0104 (the "Appeal") in the First Tier Tribunal (the "FTT"), and evidence given by [named individual] before the FTT at a hearing that took place on 21 November 2018 (the "Hearing").
16. With reference to the complainant's request dated 11 December 2018, it explained that:
 - Paragraph 14 of [named individual's] witness statement (referred to in the request) does not refer to any "schedule of costs".
 - The request seeks disclosure, by reference to the witness statement, of "DCP Rates...being the schedule of costs". HE

clarified that the Witness Statement does not refer to any "schedule of costs". It said that in any event, "DCP Rates" is the shorthand used by [named individual] in the witness statement to refer to two documents, apparently obtained by the complainant from relevant service providers. These documents (referred to, on this occasion, and for ease, as the "Contractor Documents") were provided by the complainant to the FTT in the Appeal.

- The above was explained by [named individual] in the course of his cross-examination by the complainant's representative at the Hearing. The complainant did not attend the Hearing so was not present when this evidence was given.
 - Since the Hearing, the above has again been explained to the complainant by the Lead Information Rights Officer at HE, in her response, dated 7 February 2019, to the complainant's request for an internal review and again by [named individual] himself, in an email in reply to the complainant dated 21 March 2019.
17. HE explained that the complainant has misunderstood the position, and as a result the request was (and remains) entirely misconceived.
 18. The complainant's misunderstanding includes his suggestion, in the request, that [named individual] "confirmed under oath" the "DCP Rates" requested "as not being commercially sensitive". What [named individual] confirmed at the Hearing was his understanding that, since the Contractor Documents were in the complainant's possession, the relevant service providers obviously did not regard them as commercially sensitive.
 19. In short, [named individual] did not refer to "the schedule of costs" the complainant has asked for, [named individual's] references to the "DCP Rates" in the witness statement are references to documents already in the complainant's possession (i.e. the Contractor Documents), and the only thing [named individual] has "confirmed...as not being commercially sensitive" is his view as to those documents.
 20. HE confirmed that the information the complainant has requested does not therefore exist. Given that HE does not possess the information requested, it could only confirm that it did not hold recorded information falling within the scope of the request.
 21. The complainant asked the Commissioner to take into account a letter from the Government Legal Department to the ICO regarding a separate matter of complaint which he considers demonstrates a schedule of rates exists. The Commissioner has viewed this letter and does not

consider that this confirms the information requested on 11 December 2018 is held.

22. Based upon HE's submissions that the complainant's request is based upon a misunderstanding, the Commissioner is satisfied, on the balance of probabilities, that recorded information is not held under section 1(1)(a) FOIA.

Right of appeal

23. 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@justice.gov.uk

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

24. 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.
25. 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.....

Gemma Garvey
Senior Case Officer

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Cheshire
SK9 5AF