ico. Information Commissioner's Office

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **12 May 2021**

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

Decision (including any steps ordered)

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1. In a two part request, the complainant requested from Highways England communications its Green Claims team has had with Kier, one of its contractors. Highways England categorised the first part of the request as originally framed as a vexatious request under section 14(1) of the FOIA and refused to comply with it. Once the complainant had refined this part of the request, Highways England complied with that part but did not address the second part of the original request. The complainant considers that Highways England holds further information within the scope of part 1 of his request and noted that he had not received a response to the second part.

2. The Commissioner's decision is as follows:

   - With regard to part 1 of the request, Highways England has breached section 1(1) of the FOIA as it has not released to the complainant some of the information it holds – email domain names - or addressed another element within scope of this part – attachments to emails. However, other than the domain names and the attachments, on the balance of probabilities Highways England does not hold any other relevant information.

   - With regard to part 2 of the request, Highways England has complied with section 1(1) of the FOIA as the Commissioner is

satisfied, on the balance of probabilities, that it does not hold the requested information.

- Highways England breached section 10(1) of the FOIA as it did not fully comply with section 1(1) with regard to both parts of the request within 20 working days.

3. The Commissioner requires Highways England to take the following steps to ensure compliance with the legislation:

- Provide the complainant with a response to the email attachment element of the request for correspondence between Highways England's Green Claims team and Kier that complies with the FOIA.
- If it has not already done so, release the 'domain' element of the above email correspondence that it has previously redacted.

4. Highways England must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. In correspondence to Highways England (HE) dated 12 December 2019 the complainant requested information in the following terms:

> "[1] Despite requests / assurances, I have been unable to illicit information for Highways England in the course of usual business regarding the below matters. Indeed, in at least one instance I have been assured you were approaching the contractor for information whereas a recent enquiry suggests not. This is obviously concerning given that Highways England seemingly seek interest on claim values.
>
> I am therefore left with no alternative but to seek all correspondence between Highway England and Kier highways by use of FoIA in respect of the following:
>
> 1. HE112/003/SG148 My ref: X07B860
> 2. HE/112/006/SG337 My ref: X02A607
> 3. HE112/009/SG1119 My ref:X01A304 please also supply all information relating to the application of NSoRC rates and consideration of same in this matter
> 4. HE 112/010/SG504 My ref: W10D000

5. HE112/009/SG830 My Ref: W11D370

[2] With regard to Kier Highways, please provide any and all correspondence concerning what appears to be routine failure to provide information and the agreement for them to do so both with regard to the current contract and when their areas become AD contracts."

6. HE responded to the request on 15 January 2020. It did not differentiate between the two parts of the request and categorised the request as vexatious under section 14(1) of the FOIA because the request [as phrased] covered a "vast amount of documentation". HE said that reviewing and redacting this information would be a grossly oppressive burden.

7. The complainant requested an internal review on 15 January 2020, clarifying the nature of some of the information he was seeking, as follows:

> "The information is the exchanges between your Green Claims Department and your contractor. These are exchanges I am told have occurred and in respect of which you are awaiting responses..."

8. HE provided a response to the refined request on 4 February 2020. It disclosed relevant information, with some personal data redacted under section 40(2) of the FOIA. However, HE did not provide a response to part 2 of the original request.

9. Following intervention by the Commissioner, HE asked the complainant to clarify part 2 of the request on 5 February 2021, which he did on 6 February 2021. HE then provided a response to this part on 8 March 2021, advising that it does not hold the requested information.

Scope of the case

10. The complainant first contacted the Commissioner on 5 February 2020 to complain about the way his request for information had been handled.

11. In correspondence to the Commissioner the complainant told her that he was dissatisfied with HE's original reliance on section 14(1). The Commissioner acknowledged that he had disputed HE's reliance on section 14(1) in his request for an internal review on 15 January 2020. She noted, however, that at that point he did also clarify his request and confirm that he was only seeking correspondence associated with HE's

Green Claims team. HE had then complied with the more focussed request and released relevant information to the complainant.

12. In the Commissioner's view, which she put to the complainant, had the complainant not clarified the request but maintained his view that part 1 of his original request of 12 December 2019 was not vexatious and that HE should comply with that part of the request as framed, then a section 14(1) investigation would have been appropriate if the matter had generated a complaint to the Commissioner.

13. The complainant disagreed but the Commissioner is satisfied that, in the circumstances, an investigation into HE's original reliance on section 14(1) with regard to part 1 of the request is not appropriate or an efficient use of her resources.

14. The Commissioner's investigation has focussed on whether HE has complied with section 1(1) and section 10(1) of the FOIA with regard to both parts of the request.

Reasons for decision

Section 1 – general right of access to information held by public authorities

15. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.

16. In part 1 of his request the complainant has requested communications HE's Green Claims department had with Kier about specific claims.

17. In its submission to the Commissioner, HE has told her that, for each claim noted in the request, it had searched for relevant information in the relevant claim file. All information and correspondence about claims that HE is handling is stored in relevant files in its management system, SHARE. HE says that there is no other location where information in the scope of this request would be held and that the Green Claims caseworker saves all their correspondence with the contractor on their cases into these files. HE has confirmed that the information that it identified on the relevant files has been provided to the complainant, with only personal data redacted.

18. In correspondence to the Commissioner the complainant has told her that the correspondence he has received from HE indicates that there is

other information/correspondence that is "missing". The complainant provided the Commissioner with links to correspondence on the WhatDoTheyKnow website which he described as examples of "missing" information. The Commissioner reviewed these pages and has not been able to identify such evidence.

19. The complainant also sent the Commissioner a 54 page document called 'Binder 1'. This comprises some of the complainant's correspondence with HE about the request, information that the complainant himself holds and the information that HE released to the complainant that the complainant has annotated. The information that is correspondence between HE and the complainant does not fall within the scope of the request and so the Commissioner has not considered it. Of relevance to this case, the complainant notes that certain emails between HE and the other party appear to follow on from earlier emails that were not released; that information in his "file" is not included in the released material; that certain emails refer to attachments that were not released; and that the 'domain' element that had been redacted from email addresses cannot be considered to be personal data.

20. Addressing the domain names first, in a conversation with the Commissioner on 11 May 2021 HE confirmed that it now intends to disclose the domain names that are relevant to the complainant's request.

21. In the above conversation HE and the Commissioner also discussed the attachments associated with particular emails. HE explained that it had considered that, through his request, the complainant was seeking evidence of the nature of the relationship between HE's Green Claims team and Kier. As such, HE says it did not consider that the attachments to emails were 'correspondence' or within scope of the request. However, the Commissioner advised that the attachments to emails are part of those emails, are therefore part of the correspondence requested and that HE should have addressed this element of the correspondence in its response. HE accepted this view.

22. In the conversation on 11 May 2021 the Commissioner and HE reviewed the entirety of the complainant's annotated material in 'Binder1'. To summarise, HE explained that although the complainant may hold particular information in his own files that he expects HE also to hold and to have released, in fact HE does not hold this information in its own relevant files. In another instance where the complainant noted that an "original email" was missing, HE noted that this email – dated 30 December 2014 – had in fact been released. And finally, HE confirmed that other information that the complainant considers should have been released is not correspondence between HE's Green Claims team and Kier and therefore is not within scope of the request. HE concluded its

discussion with the Commissioner by confirming that, other than the domain names and the email attachments, it has released all the other relevant information it holds that is not personal data.

23. The Commissioner has carefully reviewed the complainant's supporting material, she has considered HE's submission and discussed the request and HE's handling of it with HE. She is satisfied that HE has conducted adequate searches in the appropriate claims files, and she accepts HE's explanation of the information it holds and has released. Other than the domain names and attachments, the Commissioner is satisfied, on the balance of probabilities, that HE has released all the information it holds that is relevant to part 1 of the request (that is not personal data) and holds no further relevant information. However, the Commissioner has decided that HE breached section 1(1) of the FOIA in respect of the domain name and email attachment information.

24. In part 2 of the request, which he clarified on 6 February 2021, the complainant confirmed to HE that he is seeking any correspondence it had with Kier in which Kier's "routine" failure to provide information is discussed and in which it is agreed that Keir can "routinely fail" to provide information.

25. In its response to this request, HE advised the complainant that it had searched its records and established that it does not hold the requested information. It advised that this is because there is no agreement in place for Kier to routinely fail to provide information. Finally, HE confirmed that the only correspondence with this contractor about the five cases listed in the complainant's request – which included instances where the claims team had contacted Kier for updates on claims information – had already been provided to the complainant in response to his clarified request of 4 February 2020.

26. In its submission to the Commissioner, HE has confirmed that it does not hold the requested information first, because there is no agreement – contractual or otherwise - for a "routine" failure to occur. HE also notes that it is the complainant's perception that there is a "routine failure" to provide information but that this is not the case in reality. There is therefore no correspondence to provide on this matter because it is not occurring. HE advised that the only correspondence of some relevance – although not within scope of part 2 of the request - are emails from the Green Claims caseworkers in which they request updates on particular claim information. It noted that these emails had been released to the complainant in response to part 1 of his request. HE's submission concluded by stating that it does not hold the specific information requested in part 2 and that this had been confirmed by the Head of Green Claims and the General Counsel team.

27. HE holds emails relating to specific instances when its Green Claims team has contacted Kier for an update on one of the claims listed in part 1 of the complainant's request. It has released these to the complainant. However, and as has been noted, the clarified request of 6 January 2021 concerns the complainant's perception of a "routine failure" by Keir to provide claims information and the agreement with HE that it can routinely fail to provide information. To that degree, the request is a qualified request. To hold relevant information HE would have to have discussed Kier's "routine failure" and have made such an agreement with Kier ie that Kier can routinely fail to provide claims information to it. HE does not consider that Kier does routinely fail to provide information – so would not have had email correspondence with Kier about that matter. Similarly, HE has not made any agreement with Kier that it can routinely fail to provide information and so does not hold any information about such an agreement.

28. The Commissioner agrees with HE's reasoning and given its qualified nature, she is satisfied that HE does not hold the information requested in part 2 of the request, clarified on 6 February 2021. The Commissioner finds that HE has complied with section 1(1)(a) of the FOIA in respect of part 2.

Section 10 – time for compliance

29. Under section 10(1) of the FOIA a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.

30. The complainant submitted his request on 12 December 2019. With regard to part 1 of the request HE has not released some of the relevant information it holds – the 'domain' element of email addresses - and it has not addressed the attachments to the relevant emails it released, which HE now accepts should be included in the request for 'correspondence'. HE therefore breached section 10(1) in respect of this information.

31. Under section 1(3) of the FOIA, where a public authority reasonably requires further information in order to identify and locate the information requested, and has informed the applicant of that requirement, the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

32. With regard to part 2 of the request, submitted on 12 December 2019, HE did not provide a response to this part within 20 working days; not seeking to clarify it until 5 February 2021. HE therefore breached section 10(1) of the FOIA in respect of that element of the request.

Right of appeal

33. 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

34. 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.

35. 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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