

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 June 2021

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

Decision (including any steps ordered)

1. The complainant has requested Highways England (HE) to disclose the information upon which it relied to negate a previous FOIA response in 2016 (part one of the request) and any information about the termination of the pain/gain process being due to insurers' unwillingness to pay the relevant costs (part two of the request). It responded by saying that the 2016 response was an error and apologised to the complainant for this. Later it stated that it holds no recorded information.
2. During the Commissioner's investigation HE adopted the Commissioner's interpretation of the request and what recorded information could potentially fall in scope and conducted searches of its records. For part one of the request, HE disclosed all the recorded information it holds, except third party personal data in accordance with section 40 of the FOIA and an excel spreadsheet under section 43. For part two, it advised the Commissioner that it does not hold the requested information.
3. For part one of the request, no further concerns were raised by the complainant (any further correspondence has not been relevant to this request), so the Commissioner has not investigated further.
4. For part two of the request, the Commissioner is satisfied that, on the balance of probabilities, HE does not hold any recorded information.

5. In terms of procedural matters, the Commissioner has recorded breaches of section 1 and 10 of the FOIA.
6. The Commissioner does not require any further action to be taken.

Request and response

7. On 8 October 2019, the complainant wrote to HE and requested information in the following terms:

"Please provide elal information upon which you are relying to negate the original request (2016), the response, to include the detail about the pain/gain process and the termination of this due to insurers unwillingness to meet the costs ."
8. The complainant received no response. He therefore chased HE on 9 November 2019.
9. The Commissioner wrote to HE on 17 March 2020 and requested that it respond to the complainant's information request in accordance with the FOIA in the next 10 working days.
10. HE responded on 27 March 2020. It explained how the 2016 response the complainant had referred to described a process that has never been part of any Asset Support Contract (ASC) and how the description of this procedure had been provided in error in 2016. It stated at this stage it was not feasible to fully understand how this error arose except to say that it is clearly an error and it apologises for communicating this and for any misunderstanding that has arisen as a result.
11. The complainant responded on 28 March 2020. He stated that he understood relevant individuals and departments within HE are consulted when HE receives an information request. He confirmed that he requires the original approaches and responses from 2016. He also stated that he disagreed that the description of the pain/gain share approach had been provided in error. Instead it was his understanding that since at least 2012 ASC's were the norm and the pain/gain inclusion was causing much confusion.

Scope of the case

12. The complainant contacted the Commissioner on 28 March 2020 to complain again about the way his request for information had been handled. He stated that he was unhappy with the delay in HE responding and felt it was withholding information.
13. As the complainant had waited some time for HE to respond to the request, the Commissioner decided to accept the complaint for full investigation without the need for an internal review.
14. This investigation is not concerned with whether the statement in the 2016 response is correct or not, or whether the pain/gain arrangement exists or not. This investigation is to establish what recorded information is held by HE falling within the scope of the specific wording of the request as outlined in paragraph 7 above. The Commissioner wrote to the complainant on 4 November 2020 to outline what she understood to be the scope of the request and the recorded information (if held) it encompasses. The complainant responded on 6 November 2020 to confirm that he agreed with the Commissioner's interpretation. It was agreed that there are two aspects to the request:
 - 1) All information upon which HE is relying to negate the original request (2016), the response, to include the detail about the pain/gain process and;
 - 2) The termination of this due to insurers unwillingness to meet the costs.

In terms of 1) it was agreed that this would include the 2016 responses, consultation with departments and staff at the time of dealing with that request discussing the request and the recorded information held. Any consultation that has taken place on which the revised statement about the pain/gain arrangement was made i.e. documents which discuss the arrangement at that time and why the 2016 response was incorrect.

With regards to 2), any recorded information that is held which contains reference to the termination of the arrangement being due to insurers' unwillingness to meet the costs.

15. There was some disagreement between the Commissioner and HE over what type of recorded information would fall within the scope of the complainant's request if it is held. HE felt that the complainant was moving away from what he actually requested/wanted to asking for new information. HE however ultimately agreed that the 2016 responses, the FOIA file, consultations with departments and staff at the time of dealing with the 2016 request and this one, their responses and the information

they provided would fall in scope if indeed it is held. Additionally any recorded information which details the termination of the pain/gain arrangement being due to the insurers' unwillingness to meet these costs.

16. HE went away and conducted searches of its records based on the agreed scope of the complainant's request and identified some information relating to bullet point 1) of paragraph 14 above. It issued a fresh response to the complainant and disclosed all the recorded information it identified relating to this element of the request, with the exception of some personal data contained in emails in accordance with section 40 of the FOIA and an excel document within an attachment to one email under section 43 of the FOIA. It confirmed that this excel document has already been considered in conjunction with one of the complainant's earlier requests and the First-tier Tribunal agreed it was commercially sensitive and exempt from disclosure under section 43 of the FOIA. It was also considered again more recently by the Commissioner in her decision notice of 21 February 2021 and section 43 of the FOIA was upheld. It is noted that this decision notice is now subject to appeal. With regards to bullet point 2) of paragraph 14 above, HE advised the Commissioner that it does not hold any recorded information.
17. On receipt of this information, the complainant emailed HE (11 March 2021) and forwarded a copy of this email to the Commissioner. None of the issues he raised in this email are relevant to this request. The Commissioner considers this request is limited to the recorded information on which HE relied to negate the 2016 FOIA response and any of this information which details the pain or gain process and the termination of it due to insurers' unwillingness to meet the costs. The email is raising concerns over the existence of the pain or gain share and how the complainant believes the information disclosed supports that it does exist. He asks for additional information (what reconciliation occurred, the parameters of the reconciliation, terms of reference and threshold, what cost figures were utilised and so on) which is not within the scope of the request being considered here.
18. The complainant has raised no concerns over the application of section 40 or 43 of the FOIA and he has raised no valid concerns that further recorded information is held to the extent that they are relevant to the scope of this request and this investigation.
19. The Commissioner has received a number of other emails from the complainant on this case reference. But none relate to this specific request and how it has been handled. They are all about rates and the very recent First-tier Tribunal decision on this issue.

20. The Commissioner therefore considers the scope of the remainder of this investigation to be to determine:
- (a) whether any recorded information is held addressing bullet point 2) of paragraph 14 above (the termination of the arrangement being due to insurers' unwillingness to meet the costs); and
 - (b) whether there have been any procedural breaches of the legislation.

Reasons for decision

Does HE hold any recorded information relevant to part 2) of paragraph 14?

21. HE confirmed that searches were undertaken by its Head of Claims for any recorded information of this description and no information was located. The Head of Claims searched the document repository system using key words to try and locate information. It argued that the Head of Claims had the most knowledge of this sector and subject and therefore was the most appropriate person to complete the search due to their closeness and overall oversight of this area of work.
22. The Commissioner challenged HE a little further, commenting that if a clause was removed from these contracts due to issues the insurers raised, it would appear reasonable to expect some recorded information to be held. For example, records of the insurers raising concerns, possibly discussions with them and the contractor over that and internal discussions within HE. The Commissioner asked HE to explain why this type of recorded information is not held.
23. HE responded, advising the Commissioner that the searches were undertaken by the most appropriate person; the person with the most knowledge and expertise. It commented that discussions around the removal of the pain/gain share from the contracts occurred when the first ASC contracts were being developed. Therefore, the discussions more than likely took place sometime before 2012 because this is when the first ASC contract came in and once agreed for one contract it would have been applied to all subsequent ones. It clarified that searches returned a nil result so the Head of Claims was asked to conduct searches too (being the most likely person to locate the information if it is held). Their searches also returned a nil result. HE advised that the only knowledge it has on this subject is anecdotal, passed on by those who were in the organisation at the appropriate time but have now subsequently left.

24. The FOIA team at HE carried out fresh searches of the document repository system at a very high level in order to capture all possible recorded information, using the terms 'insurers painshare' and 'insurers gainshare' and no information was found regarding these discussions.
25. HE commented on the age of the information and that it was being asked to search for records that are at least 7 years old. It stated that its record management policy dictates that older information will be deleted/destroyed from physical and electronic records. It was agreed that the pain/gain share process was to be removed from ASC contracts prior to 2012 and it subsequently was. It argued that it was likely deemed sufficient that any discussion or information, if written down or ever held, was no longer required because the fact that it was not in the contracts going forward was record enough.
26. HE made one final comment that had this information been held it would have disclosed it to the complainant. It would not have been in HE's interests to withhold the information (if it was held) under any form of exemption, as it recognises that anything it is able to provide is helpful in trying to resolve the complainant's various challenges on the matter.
27. The Commissioner has challenged HE on this issue and ensured that fresh searches of all relevant records have been carried out to determine that no recorded information is held. Given the age of the information it is possible that any recorded information that was held has now been destroyed or deleted in accordance with HE's records management policy. The Commissioner has received no evidence to the contrary and therefore she has concluded that, on the balance of probabilities, HE holds no recorded information falling within this element of the complainant's request.

Procedural matters

28. As HE did not adopt the same interpretation of the request as the complainant and the Commissioner until part way through the Commissioner's investigation, it failed to search and identify the recorded information it did hold and provide what the complainant was entitled to receive under section 1 of the FOIA within 20 working days of the request. The Commissioner has therefore recorded a breach of section 1 and 10 of the FOIA against HE.

Other matters

29. The complainant is reminded to refrain from sending emails which are not directly relevant to the request under consideration. In this case the complainant has sent several emails relating to DCP rates, a recent

First-tier Tribunal decision and the alleged conduct of Kier Highways, all of which are not relevant to the specific request which was under consideration here. The complainant has been asked to direct only specific and relevant information to a given case and separate communications for each request referred to the Commissioner using the individual case references provided.

Right of appeal

30. 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

31. 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.
32. 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

Samantha Coward
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