



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2019/0390V**

**Before**

Judge Stephen Cragg Q.C.

**Heard via the Cloud Video Platform on 1 and 2 March 2021**

**Between**

**PHILIP SWIFT**

**Appellant**

**and**

**(1) INFORMATION COMMISSIONER**

**(2) HIGHWAYS ENGLAND**

**Respondents**

The Appellant represented himself

The Commissioner was not represented

Highways England were represented by Ms Michalos QC

## **DECISION AND REASONS**

### **DECISION**

1. The appeal is allowed but no further action is necessary.

### **MODE OF HEARING**

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. Mr Swift joined the hearing by telephone only. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an agreed open bundle of evidence comprising 400 pages, and further additional documents and submissions.

### **BACKGROUND**

4. On 11 December 2018 the Appellant requested information of the following description from Highways England (HE): -

"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. Clearly, that request needs some explanation given that there is a reference to a paragraph in a witness statement in a previous FTT appeal hearing. Thus, in a witness statement dated 28 August 2018 and made in relation to a different appeal involving the same parties to this appeal, Mr Patrick Carney (who I will name as he is a witness in this appeal also) stated the following at paragraph 14:

14. By analogy with the service provided by a plumbing business, ASC Rates set out charges related to the instalment of a complex system of plumbing as part of a major construction project in a planned way with economies of scale, whereas DCP Rates set out the standard charges for fixing a burst pipe: inevitably, the rates charged are very different as are the calculation methods and the variable involved.”

6. DCP stands for ‘Damage to Crown Property’. ASC stands for ‘Asset Support Contract’. Further context to the request is that the strategic road network for which HE is responsible is around 4,300 miles long and is made up mainly of motorways, trunk roads and the most significant A roads. This is divided into twelve numbered areas, each of which is the responsibility of third-party contractors (such as Kier and Balfour Beatty Mott MacDonald) who have tendered for the work. The request in issue here relates to Area 9 (West Midlands) and Area 10 (which covers Cheshire, Merseyside, Greater Manchester and South Lancashire).
7. As explained further below, the information sought relates to the way that contractors are paid for repairs to the motorway network when it has been damaged by road users. The reference to a previous Tribunal is a reference to the case of *Swift v IC and Highways England* (EA/2018/0104) (4 December 2018), which is referred to below (see paragraph 10 – in paragraph 15 of the long quotation there), and which related to Area 10. The case of *Swift v IC and Highways England* (EA/2019/0119) (12 December 2019) which related to the Appellant’s request for a ‘schedule of defined costs for Area 3’ will also be referred to later.
8. On 10 January 2019 HE responded. It denied holding the requested information. The Appellant requested an internal review on 11 January 2019. HE sent the outcome of its internal review on 7 February 2019 and upheld its original position that a schedule of defined costs for Areas 9 and 10 was not held.

9. In relation to the law, I note that by Section 1(1)(a) FOIA, “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”.

## DECISION NOTICE

10. The Appellant complained to the Commissioner that information had not been disclosed to him. In her decision notice of 27 September 2019, the Commissioner sets out a little more about the background to the request as explained to her by HE: -

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”).

...

17. HE explained that the complainant has misunderstood the position, and as a result the request was (and remains) entirely misconceived.

...

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.

11. On the basis of this explanation, the Commissioner concluded ‘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’.

## THE APPEAL AND RESPONSE

12. The Appellant’s appeal is dated 15 October 2019.

13. His appeal starts by saying: -

My Request was for the price list (rates) contractors use to bill following their attendance upon and reinstatement of our highways. These incidents are typically collisions, spills and fires. I have long sought Damage to Crown Property (DCP) information; the schedule of rates used by Highways England contractors, when billing the Authority and drivers, fleets, hauliers or their insurers (Third Parties).

14. The Appellant's Grounds of Appeal comprise some 40 or so unnumbered paragraphs, which rehearse some of the efforts that the Appellant has gone to, to uncover the rates which he believes exist. However, the appeal boils down to the Appellant's assertion that in fact "A schedule of rates exists in the Areas".

15. The Commissioner's response was to support the decision notice: -

The Commissioner remains satisfied that, on the balance of probabilities, the requested information by the Appellant is not held by HE. The Commissioner submits that HE provided lengthy submissions during the investigation that cogently explained its position. As part of its submission HE stated:

"In short, Mr Carney did not refer to "the schedule of costs" the complainant has asked for, Mr Carney'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 Mr Carney has "confirmed...as not being commercially sensitive" is his view as to those documents."

The Commissioner also submits that HE's explanation of why they believe the misunderstanding has occurred is clear and reasonable and that the Appellant has not provided any evidence to the contrary to persuade the Commissioner otherwise. Paragraphs 10-21 of the DN.

22. Furthermore, as part of their submission, HE explained to the Commissioner that the Appellant believes that HE is engaged in a fraud against the public in conspiracy with its service providers who are responsible for the maintenance and repair of highways infrastructure. HE maintains that these serious allegations are made without foundation and that all attempts to clarify matters with the Appellant have failed.

16. In relation to the previous Tribunal decision to do with Area 3 (as referred to above), HE made an application to the Registrar and then to a judge to the effect that the current request was so similar to the request in the previous case, that the appeal should be struck out. Both the Registrar and the Judge (on 9 March 2020) declined to strike out the appeal. It was pointed out that this FTT is not bound by the previous FTT decision, and that it was possible that the factual position had changed since the previous case. I would also note that this case concerns Areas 9 and 10, and the previous case concerned Area 3. It became clear in the course of the appeal hearing that different procedures might apply in different areas.

17. There were also directions given by the Registrar on 9 June 2020, in which the parties were reminded that: -

The sole issue in this appeal is whether Highways England on 11 December 2018 held information which falls into the scope of Mr Swift's request made on that date.

### THE APPEAL HEARING

18. The appeal hearing was notable because HE fielded six live witnesses to answer the Appellant's questions. All of the witnesses had prepared witness statements for this hearing. HE's skeleton argument and submissions relied upon these witnesses to establish the case (as set out in the skeleton argument) that: -

The Appellant has fundamentally misunderstood the way these contracts operate; a price list of rates to be charged, agreed in advance simply does not exist in the way he seems to think.

19. **Patrick Carney** is currently Head of Commercial Delivery for the hand back – by contractors, to HE – of responsibility for Design, Build, Finance and Operate Contracts for the management and maintenance of the strategic road network in England. He told the Tribunal that he was the person with an overview of the matters with which the Tribunal is concerned. Mr Carney had given evidence at the previous tribunal hearing referred to above.

20. Mr Carney summed up his understanding of the background to this case as follows: -

16. Mr Swift and Highways England have been in dispute for a number of years over Mr Swift's requests to be provided with information relating to repair costs estimated in advance of repair to be £10,000 or more ("above-threshold repairs"). Under an ASC, the costs to the contractor of making such repairs are paid by Highways England (which then seeks to recover them from third parties and their insurers). Recovery from third parties of the costs of repairs estimated at the outset to cost less than £10,000 ("below-threshold repairs") is the responsibility of the contractor which performs the repairs.

17. Mr Swift contends that Highways England contractors charge third parties (and their insurers) higher rates with respect to below-threshold repairs than those same contractors charge Highways England with respect to above-threshold repairs; and that this constitutes fraudulent 'over-charging' of those

third parties. It has been repeatedly explained to Mr Swift that this is not the case.

18. In this appeal, as in a previous, very similar appeal (EA/2019/0119), Mr Swift contends that Highways England holds information that, if disclosed (he says), would ‘prove’ his allegations about fraudulent over-charging. The Request refers to the so-called “schedule of costs” (for each of two areas of the strategic road network (“SRN”) for which Highways England is responsible, known as Areas 9 and 10, in this particular instance), recording agreements (Mr Swift believes, incorrectly), between contractors and Highways England, setting the “schedule of rates” that, over time, contractors will charge Highways England for the costs of making repairs.

19. Mr Swift contends that each so-called “schedule” contains the information that will confirm that Highways England is charged less by contractors than third parties are, in respect of the same work, and that this difference in charges is what constitutes the over-charging or fraud in which he alleges contractors are engaged, and Highways England are complicit.

20. Highways England categorically denies Mr Swift’s allegations. It has never denied, and indeed it has explained many times, to Mr Swift, that there is a difference between what contractors charge Highways England, and what contractors charge third parties. However, that difference is rationally explained by a fundamental difference in the way these charges are calculated.

21. In simple terms, the difference is explained by economies of scale achievable by contractors when charging Highways England for above-threshold repairs together with the fees and overheads contractors are (or have been) entitled to charge, when recovering costs of below- threshold repairs.

21. In essence, Mr Carney confirmed that no further information was held by HE and said that HE had done its best to provide as much information as possible. However, Mr Carney had one important caveat to that. As he explains in his witness statement: -

42. In the course of the further investigation that has been undertaken in relation to this appeal, I understand that something of which I was not previously aware has come to light – namely, that Highways England periodically agrees and formally signs off a documented summary containing a limited number of notional people rates in Area 9, with its contractor, Kier Highways Limited (“Kier”).

43. In these notional people rates all relevant cost reimbursable people costs are averaged into a small number of rate bands (12 staff and 4 labour) for ease of management and charging purposes and to anonymise what individual people are actually paid.

44. However, these agreements do not constitute a “schedule of rates” or a “schedule of costs”. They record agreement from time to time of temporary “notional people rates” that Kier charges Highways England in order to recover



its people costs for all cost reimbursable and scheme work under the ASC (such costs being only one component of all costs recovered by Kier).

22. This was important in this case because the Appellant had specifically made a request in relation to Area 9. The Appellant's case as put to Mr Carney that this was exactly what his request was about, in relation, at least, to people costs.
23. Mr Carney's response, as reflected in his witness statement, was that these rates were temporary and changed from time to time. They were not part of the contract with Kier but provided guidance to Kier as to the costs that HE would likely accept. He said that the final decision would be made at the end of the contract on the so-called Defined Costs, to which Kier was entitled, and that might not match the figures in the notional people rates. On that basis, Mr Carney's view was that these figures did not constitute a 'schedule of costs' as requested by the Appellant, but in any event, they had been provided as an annex to Mr Ash's statement (see below). He confirmed that there were no such figures for Area 10 where a different system was used.
24. Mr Carney confirmed that so far as he knew there was no profiteering or fraud taking place under the procedures, and that HE was not aware or embarrassed by, such practices so that it was withholding information which it knew it held.
25. **Liz Herridge** is the Director of Network Claims & Transformation for HE. Amongst other things, she is responsible for the handling of claims for the recovery of the costs of repairing damage to the strategic road network (SRN) in England for which HE is responsible. She was able to provide general information about the making of claims and the approval of claims 'costs packs' but was unable to assist with issues relating to schedules of costs or their origin. She had no knowledge as to how Kier prices its claims to HE.
26. **Greg Barnes** is the Commercial Director at Kier with responsibility for Kier's strategic highway contracts, including all commercial activities on the Area 9 Asset Support Contract ("ASC"). He said that Kier and Highways England entered into the ASC for management, operation, improvement and repair of Area 9 in 2014. Essentially, Mr Barnes was explaining how things worked from the Kier side of the contract and what information he was aware of.

27. He explained that Kier did use the People Rates that Mr Carney and Mr Ash had referred to as a guide for its costs for work in Area 9. He said that there were not similar schedules for things like the use of machinery and plant. In Area 10 similar People Rates were not used. He confirmed that for 'below threshold' work, there were different schedules used by Kier for making claims from insurance companies but these were not shared with HE, and he confirmed that Kier did not hold any relevant documentation on behalf of HE. In his statement Mr Barnes says that: -

10. The people charges applied are intended to recover the Defined Cost of the people in question. Under the ASC, the Defined Cost of those people are the actual costs incurred, by Kier, in relation to each of them. Those costs are however variable over time and subject to change. Under most of its ASCs, Kier continually reviews the actual cost of its people resource and unilaterally updates the charges accordingly, as and when appropriate. Highways England then periodically audits the rates Kier charges, to satisfy itself with the broad principles involved in the latest updating(s) of people charges. Historically, this has been done differently in Area 9 than in other Areas for which Kier has been responsible – see further below.

11. Schedule 1 of the Conditions of Contract provides a full description of the cost components that can be recovered by way of people charges under the definition of Defined Cost. Those charges are made up of about two dozen variable cost components. See pages 1 to 5.

12. Charges are initially set by making an assessment of those variables to come up with a notional charge which is then subject to ongoing change. These are the rates at which Kier charges Highways England for its people (not just for above threshold repairs, but for all work performed under the ASC).

13. The variable elements of people charges include payments to people for absence due to sickness and holidays and payments made in relation to people for things like travel, subsistence and lodging, protective clothing, medical aid, or the cost of safety training for example.

14. Due to the variable nature of this cost it is impossible to fix a rate and any charges can only really be considered over a long period of time typically 12 months. The total cost is not actually complete until the contract ends. At the end of the contract term, the parties then work together to reconcile the true people charges against the sums charged to and paid by Highways England, with a balancing payment then made for any under- or over-recovery.

28. **David Ash** is a quantity surveyor ("QS") employed by HE as Regional Commercial Manager supporting the West Midlands Area (Area 9). He explained the procedure in relation to Area 9 but also exhibits the 'people rates' referred to above by Mr Carney. In his statement he says the following: -

10. My review of hourly rates billed by Kier for relevant personnel – i.e. “people rates” – is informed by my work in auditing those rates on a regular basis since the inception of the Area 9 ASC. The purpose of this people rates reconciliation exercise is to establish values which represent what is called, in the contract with Kier (the “ASC”), the “Defined Cost” of people (as laid down in a “Schedule of Cost Components”, or “SOCC”), based on an examination of actual people costs incurred undertaking contract activities. The SOCC, as its name suggests, is a schedule of categories of costs, not a schedule of specific sums. “Actual people costs” in this context is not simply whatever sums Kier has itself paid – it is cost correctly incurred by Kier, in line with the SOCC (that is, in line with the permissible categories of costs, not specific sums – which, as I say, the SOCC does not record), and subject to audit by Highways England.

11. The agreed people rates are used consistently across all services in the contract which are reimbursed on a defined cost basis, including those services required by the contract to be delivered as cost reimbursable, schemes to replace life expired assets, or enhance the Area network, and Green Claims against third parties for damage to the Area network.

29. He goes on to explain how the people rates have developed over the years and that HE ‘needs to be assured that the people rates being charged by Kier are a fair reflection of Kier’s actual costs. Kier has provided a ‘vast’ amount of anonymised data for the purpose of developing the rates which ‘detail the way in which Kier propose to charge people rates under the Area 9 ASC in the period up to their next review’. Mr Ash uses a spot-checking methodology to review the information sent. He states that: -

The outcome of my review is a set of people rates that I am prepared to recommend that Highways England agree to pay, for all work performed by Kier in Area 9 under the ASC – that is to say, both scheme work, and repair work.

30. Annexed to his statement are fairly straightforward rates for staff and labour for those employed by Kier (as opposed to agency personnel) which appear to be updated once every year or two – there are four tables covering January 2016 to the present day.

31. In evidence Mr Ash said that the rates are a representation of the defined costs of the contract. All ASC work is covered by these rates. The background data he had referred to in his statement contains data for defined costs which is then bundled up into a series of bands for staff and operatives.

32. In relation to other costs a similar system is not used. Plant is charged at CECA minus 30%, and that is now included in the contract, and other aspects are paid at the costs rates claimed by Kier.
33. Mr Ash accepted that Mr Barnes was correct when he said that Schedule 1 of the Conditions of Contract provides a full description of the cost components that can be recovered by way of people charges under the definition of Defined Cost.
34. **Brian Read** has been national Head of Commercial Modelling at Highways England and Senior Departmental manager in the Highways England Procurement Directorate since he joined, HE in 2019. He had previously worked for BBMM which were the contractors for Area 10 and made his statement ‘primarily in order to explain how BBMM charged Highways England for such repairs during my time as Commercial Director for Area 10 at BBMM (which continued down to the end of the ASC in April 2019), and, in so doing, to confirm that there was no such “schedule of costs” as requested by the Appellant’. He also said that there were no “standard charges” at which BBMM charged HE for making such repairs.
35. He concluded that BBMM recovered its costs of above-threshold repairs in accordance with completely standard, costs-reimbursable methodology, and did not agree a schedule of rates with HE, applicable when charging for above threshold repairs.
36. Finally, Paul Brown was, at relevant times, HE’s Service Delivery Manager for Area 10. He also confirmed that there was no ‘schedule of costs. He set out the way in which costs were audited and concluded that: -

26. Changes to the people rates charged from time to time under the ASC in Area 10 were not reconciled during the life of the ASC. The Audit was intended to enable the Final Account to be agreed.

27. The role of the Audit, its complexity, and the length of time it took to complete were all largely a reflection of the fact that there was no “schedule of costs” in Area 10 recording the pre-agreed rates at which BBMM would charge Highways England – for any of the work it did under the ASC, not just above threshold repairs.

## DISCUSSION

37. My task is to consider this matter afresh. In doing that I have to consider information which was available at the time the Appellant's request was made, and at the time the decision notice was prepared, but was not available to the Commissioner.
38. HE's case is that the figures disclosed by HE for Area 9 and exhibited to Mr Ash's statement are not within the scope of the Appellant's request. Ms Michalos QC on behalf of HE submitted that it was clear what the Appellant was asking for. He wanted the defined rates whereby Kier and BBMM knew what they could charge for various aspects of work carried out, and which were used to decide how much should be paid for the contract.
39. However, HE said that the information now disclosed in Mr Ash's statement and discussed in evidence is not the information the Appellant has asked for. All it consists of is notional, temporary, guidance which changes for time to time as decided by Kier, for example, and as audited by HE. It is not contractual and is not part of the contract. That is because the contracts are costs based: that is, Kier and BBMM are entitled to be paid what they have claimed for the cost of the contract. They are not tied to any 'rates' which have been agreed in advance. All the figures do, as Mr Ash says in relation to Area 9, is to set out the 'rates that I am prepared to recommend that Highways England agree to pay'.
40. The Appellant objects to this portrayal of his request. He says that the figures produced by Mr Ash are exactly the information he has been requesting and which he has always said existed.
41. I am aware that there is a long history to this matter, and that there is a degree to which the Appellant has been overzealous and almost obsessive in his pursuit of HE over the issue. I am also aware that the Appellant has made unfounded allegations of fraud and corruption which must be very wearing and unpleasant for HE and its staff.
42. However, it does seem to me that however HE describes the figures that Mr Ash has produced, they fall within the scope of the request that the Appellant has made. In reaching that conclusion I do take into account the Appellant's submission that these

are the type of figures that he has been requesting: he is entitled to express that view and he does so genuinely in my opinion.

43. I take into account fully that contracts are paid on a costs basis and that, as set out by Mr Ash, the schedules he has exhibited are revised from time to time and are the 'rates that I am prepared to recommend that Highways England agree to pay.' But that does not take away from the fact that these are schedules of rates for people costs which are used by contractors (as guidance if nothing else and even if they do not reflect the final amount that will be paid) when billing HE for work done.
44. On that basis it seems to me that the Appellant was correct when he asserted that HE held further information that had not been disclosed.
45. However, having heard the evidence from a range of witnesses from and for HE I am satisfied, on the balance of probabilities, that there is nothing else for HE to disclose. The evidence was that no other aspect of the contracts relating to Area 9 have schedules such as those which set out people costs, such as the costs for plant or materials.
46. The evidence was also that there was nothing equivalent in use in Area 10. I am confident that if similar schedules to those produced by Mr Ash had been available then HE would have made that clear in this appeal. I also note that the Appellant now has the benefit of the oral and written evidence of Mr Read and Mr Brown as to the system in operation in Area 10. I would note that I accept the evidence that they gave about this.
47. Indeed, I would make a point of praising HE's witnesses for being open and forthcoming and there was not even a hint that there has been any attempt to hide anything from the Appellant. Although it was unusual to call so many witnesses to attempt to establish that no further evidence was held, in my view HE was right to do so and to be as open with the Appellant as possible.
48. In addition, although it might have happened sooner, HE is to be commended for providing the information exhibited to Mr Ash's statement when it became clear in the preparation for this case that it was in existence. If the Appellant was right and HE and its employees are engaged in some sort of fraud or corruption, then the logic would be that HE would not have disclosed this list, especially as its view – genuinely held in my

judgment- is that the material does not fall within the Appellant's request. I have disagreed with HE on the point as to whether the information is within the scope of the request, although I understand and have set out its point of view.

49. On that basis it seems to me that I am unable to agree with the Commissioner that HE was correct when it said there was no further information held within the scope of the request. There was, it has now been exhibited to Mr Ash's statement, and the Appellant now has it.

50. However, other than that, having heard and accepted the evidence of six witnesses for HE, I am satisfied on the balance of probabilities that no further information is held within the scope of the Appellant's request beyond that information exhibited to Mr Ash's statement.

#### CONCLUSION

51. In those circumstances, the correct decision is that the appeal is allowed but, as the relevant information has now been disclosed to the Appellant, no further action is required by HE.

**Stephen Cragg QC**

**Judge of the First Tier Tribunal**

**12 April 2021.**

**Amended pursuant to rule 40 on 27 April 2021**