**FIRST-TIER TRIBUNAL**
**GENERAL REGULATORY CHAMBER**
**(INFORMATION RIGHTS)**

**Appeal Reference: EA/2020/0321**
**& EA/2020/0322**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**
**(SITTING AS A JUDGE OF THE FIRST-TIER TRIBUNAL)**
**TRIBUNAL MEMBER R TATAM**
**TRIBUNAL MEMBER D COOK**

**Between**

**PHILIP SWIFT**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**First Respondent**

**HIGHWAYS ENGLAND**

**Second Respondent**

| | |
|---|---|
| For the Appellant | in person |
| For the Commissioner | no appearance |
| For Highways England: | Ms C Ivimy |

**DECISION AND REASONS**

Decision

The appeal is dismissed for the reasons set out below

## Preliminary matters

*Abbreviations*

| | |
|---|---|
| ASC | Asset Support Contract |
| DCP | Damage to Crown Property, now Damage to the Strategic Network |
| DN1 | First decision notice number IC-45200-HG47 dated 13 October 2020 |
| DN2 | Second decision notice reference IC-37934-M7T7 dated 14 October 2020 |
| FOIA | Freedom of Information Act 2000 |
| First Request | Request made by the appellant to HE on 24 April 2019 |
| HE | Highways England (now Highways England Company Limited) |
| MAC | Managing Asset Contract (predecessor to ASC) |
| Second Request | Request made by the appellant to HE on 5 February 2020 |

## Mode of hearing

1. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Appellant joined the hearing by telephone only. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way, and no objections were made to that.

2. The Tribunal considered an agreed open bundle of evidence comprising 375 pages, and skeleton arguments from the Appellant and the Second Respondent.

## Introduction

3. This decision relates to two joined appeals, EA/2020/0321 and EA/2020/0322. Both arise out of two requests relating to Highways England ("HE"; now Highways England Company Limited) contractual arrangements for repairs to the strategic road network resulting from damage caused by third parties.

4. The first appeal, EA/2020/0321, relates to a request made on 24 April 2019 ("the First Request"). The relevant decision notice ("DN1") is dated 13 October 2020, reference IC-45200-HG47. The second appeal, EA/2020/0322, relates to a request

made on 5 February 2020 ("the Second Request"). The relevant decision notice is dated 14 October 2020, reference IC-37934-M7T7.

5. The Information Commissioner ("the Commissioner") concluded in both Decision Notices that HE was entitled to rely on s. 12 of the Freedom of Information Act 2000 ("FOIA") to refuse the request. She found that HE had breached s. 16 FOIA in respect of the first notice but did not require any steps to be taken. The Commissioner has not participated in these appeals.

**Background**

6. We consider that it is helpful at this stage to set out in some detail the nature of the context in which the requests were made.

7. HE is responsible, amongst other things, for operation, improvement, maintenance, renewal and repair of England's strategic road network which is around 4,300 miles long and is made up mainly of motorways, trunk road, and the most significant A roads. This is divided into twelve numbered areas, each of which is the responsibility of third-party contractors "the Contractors" who have tendered for the work.

8. The Contractors are, under the arrangements with HE, contracted to operate, improve, maintain renew and repair relevant roads which includes repairing highways after an event in which they are damaged by third parties, most often as a result of road traffic incidents. These were known as DCP (Damage to Crown Property, now Damage to the Strategic Network) repairs. How the Contractors are paid for these repairs varies primarily according to whether the estimated cost is over or under £10,000

**9.** Broadly, the Appellant's belief is that the Contractors have been overcharging third parties' insurers for repair costs and/or have been supplying incorrect or false information to HE in the case of in below-threshold DCP claims in order to increase profits. He has over the past 5 years or so, made numerous FOI requests in order seeking to establish the truth of these allegations.

**The Requests**

10. We consider it is necessary to set out the First Request in full:

> **I understand there exists a relationship between the amounts charged & recovered by your contractors and the monthly lump-sum they are paid by Highways England; that all contractors reconcile their costs annually against their recoveries. If the proportion of recoveries exceeds expectations an assessment would be made, and the Lump Sum payment would be reduced.** [our emphasis]
>
> This necessarily relates to sub-threshold (£10,000 matters).
>
> I ask to be provided all information in respect of this arrangement and it application since 2012 to include, but not be restricted to:

1.The areas in which this arrangement exists

2.All information about this process; the contract extracts relating to the methodology, the calculation, how it is applied etc.

3.What information the contractor is to submit for reconciliation and the description of said data i.e. whether this comprises 'defined costs' (a.k.a. 'base rates' or DCP Rates' of 'notional rates'), the Third-Party Claims Overhead etc.

4.How Highway England determine the submitted information is correct, true and accurate

5.The last submission, reconciliation and assessment for each area Specifically, with regard to Area 9:

6.The investigation and reconciliation of the figures passed to your Green Claims manager insofar as the submission of figures by Kier Highways was concerned, namely:

a. Defined cost

b. TPCO

c. Total

d. Recovery

e. remarks

Specifically, with regard to HE references: 767 723:

7.How the information was reconciled, considered to be accurate prior to disclosure

8.The action taken subsequently to determine the accuracy (or otherwise) of the records.

11. On 14 May 2019, HE initially refused the First Request on the grounds that it was based on an incorrect premise in that the lump sum arrangement referred to in the first paragraph did not exist. The Appellant replied, referring to a 2016 FOI response from HE (numbered FOI 743,153: "the 2016 FOI response") which was in the following terms:

> All contractors reconcile their costs annually against their recoveries. If the proportion of traced incidents exceeds expectations an assessment would be made, and the Lump Sum payment would be reduced. However, no contractor has ever been in the position where the proportion of traced claims exceeds these assessments and there are various factors for this. The main one being not all damage linked to a driver is reported by the driver.

12. There was then further correspondence between HE and the Appellant in which HE sought to explain the contractual position in more detail, in an email of 12 June 2019.

13. The Appellant sought an internal review on 15 June 2019. That review is dated 20 September 2019 sought to correct a misunderstanding, stating in terms that the extract from the 2016 FOI response was incorrect and should not have sent to him. The review then goes on to say:

> It is not practical for Highways England nor our contractors to establish a precise number of damage incidents on our network and hence the proportion of incidents caused by traced and un-identified drivers. While some un-identified driver damage incidents can be obvious, many others by their nature are not and the damage to the asset may not be established until sometime after the event. Un-identified driver damage incidents tend to be those causing the least obvious damage to both our asset and also the vehicle involved as evidenced by the fact the vehicle has driven way from the scene and off the network unnoticed.
>
> The Lump Sum in ASCs generally remains unchanged throughout the life of the contract apart from annual adjustments due to indexation and other factors (eg tendered efficiencies, etc.) or very occasionally if there is a significant change to the contract that is negotiated between the two parties requiring an adjustment to the contracted Lump Sum.
>
> In respect to schemes work New Engineering Contract (NEC) Option C Target Price with a pain/gain share is used by Highways England in ASC's for most scheme work.
>
> This is not used for Green Claim repairs in the more recent Asset Support Contracts. This was a direct result in previous Manging Agent Contracts of challenge by insurers who were not prepared to accept any pain/gain approach in their payment of claims for damage repairs from negligent drivers. NEC Option E cost reimbursable (or Defined Cost-plus Fee) approach is therefore used for DCP repair work.
>
> So, for clarity there is not an annual review of Lump Sums related to Green Claims in ASC. In addition, the use of pain/gain arrangement is for scheme work and is not used for Green Claim repairs and has not been used since prior to 2015.
>
> **We apologise for the error in Highways England Ref: FOI 743,153 and any resultant misunderstanding of the how the ASC worked in this respect. We trust this clarifies this aspect.** [our emphasis]

14. The Appellant then made two further requests arising out of the information provided in response the First Request. One, dated 8 October 2019, sought further information in relation to the alleged error in the 2016 FOI response, but it is not the subject of these appeals.

15. The Second Request was made on 5 February 2020. After summarising the 2016 FOI response, it states:

> I was subsequently informed a pain/gain share is NOT used by Highways England for Green Claim repairs, that this was a direct result of a challenge by insurers who were not prepared to accept any pain/gain approach in their payment of claims for damage repairs from negligent drivers. Clearly, I was NOT acting under an incorrect premise. In fact, my understanding of the arrangement was correct as at the 2016 date of the FOI response 743153).

If your latest response is accurate, the pain/gain share ceased due to intervention by insurers. This intervention must have been after the 2016 FOI response. However, it is also apparent that the process WAS in place for a period, yet I have been provided with no information about this.

Please provide for Areas 9 & 10:

1. The original pain/gain correspondence, arrangement, contractual records etc. that relate to the pain/gain arrangements

2. When the arrangement commenced

3. When the arrangement concluded – it is evident this was in place at the time of the 2016 FOI response

4. the pain/gain submissions

5. All information relating to the challenge by insurers

6. How the pain/gain share impacted upon insurers

7. The correspondence between your contractors and Highways England about the concern raised by insurers, the contractor's consideration and the agreement to change the contractually agreed process

In brief, I am seeking al information relating to the pain/gain share in Areas 9 & 10 from its period of operation to termination and the reasons for this cessation.

16. HE refused the request pursuant to section 14 (2) of FOIA.

**Decision notices**

17. DN1 provides:

1. …

The complainant has requested Highways England (HE) to disclose information relating to the operation of the pain/gain arrangement in all areas and the need for HE's contractors to submit claim costs and recovery costs for reconciliation. Initially HE advised the complainant that the information is not held. However, during the Commissioner's investigation it changed its stance and claimed a late reliance on section 12 of the FOIA.

2. The Commissioner's decision is that HE is entitled to refuse to comply with the request in accordance with section 12 of the FOIA. She has however recorded a breach of section 16 of the FOIA. This is because a late claim was made, and HE had not therefore considered its duty to provide advice and assistance and if this was reasonable or practicable to do so.

3. Although a breach of section 16 of the FOIA has occurred, the Commissioner does not require any further action to be taken on this occasion. This is because HE has explained sufficiently to the Commissioner why it is not in a position to offer any practical advice and assistance to the complainant in relation to this request.

…

11. During the Commissioner's investigation it was established that HE could not categorically state that it does not hold the requested information. It advised that it was almost certain that it did not and any recorded information held relating to the arrangement was in connection with other project work not green claim repairs but, to be absolutely certain, it would need to review thousands of records. As the Commissioner was not satisfied that HE could say with certainty that it does not hold the requested information, HE chose to claim a late reliance on section 12 of the FOIA. It stated that the process of locating, retrieving and reviewing all records to see if it holds any recorded information would exceed the appropriate limit prescribed by the FOIA.

12. The Commissioner therefore considers the scope of her investigation to be to determine whether HE is entitled to rely on section 12 of the FOIA in this case and if it is, whether it has provided appropriate advice and assistance under section 16 of the FOIA (as the application of section 12 triggers the duty to provide advice and assistance in accordance with section 16).

18. After setting out the law, DN1 continues:

19. HE informed the Commissioner that the previous FOIA response issued to the complainant in 2016 (referred to in paragraph 8 above) contained an error and from this a misunderstanding had occurred relating to the existence or not of the pain/gain arrangement. It explained that the 2016 response had regrettably described the arrangement when it has never been part of any Asset Support Contract (ASC). It stated that it had only been part of the predecessor managing agent contract (MAC).

20. It went on to explain further that the pain/gain process compares the outturn cost with the target price of a scheme and any over or underspend is divided between the contractor and HE according to a set share formula. The target price is built up based upon the schedule of rates in the ASC provided at tender stage. The outturn cost is built up from the defined cost fee, in effect the actual cost of undertaking the work.

21. HE confirmed that the use of the pain/gain arrangement for third party claim schemes was terminated as a result of insurance companies not being willing to pay gain shares in the MAC's that were used prior to the ASC's. So, from the earliest days of ASC's the pain/gain formula used routinely for most scheme work was not used for third party claims. It advised that the first ASC contract was in 2012 but the last MAC contract ran into 2014. The arrangement is not in any ASC contract and discussions took place in 2010 to 2012 about the arrangement and whether it should be included in the contract or not. The decision taken was that it should not.

22. The Commissioner noted that HE had stated that MAC's were still running post 2012 and asked HE to establish what recorded information it holds relating to these and the pain/gain arrangement, as this would clearly fall within the scope of the request.

23. HE confirmed that due to the above information, its prior knowledge and a review of a sample of documents selected at random, it is fairly certain that no

recorded information is held. Any information located about the pain/gain arrangement is for other project work; not third-party claims. However, it cannot be absolutely certain about this and to be absolutely certain it would have to review thousands of documents highlighted by the searches it has conducted

…

25. …. HE advised that the searches produced a large amount of documents to be checked and there are no other means or search terms which could be used to pinpoint the specific information requested, if indeed held. HE therefore changed its position during the Commissioner's investigation and confirmed that it now wished to rely on section 12 of the FOIA. It stated that it was obvious from the level of returns that the cost to comply would exceed the appropriate limit by a considerable margin.

26. The Commissioner is satisfied that it would exceed the appropriate limit if HE was to retrieve and review each individual document shown in the above searches. The complainant has asked for information relating to the pain/gain arrangement for all areas in which it operated dating back to 2012. The complainant has not asked for the information for one area but all areas where this arrangement existed. HE has explained that it cannot be absolutely certain none of the information relates to the arrangements for third party claims (although it is fairly certain given its knowledge of its cessation and the fact that the majority, if not all, will relate to other project work), the only way it can be certain is to review each and every document located by the above searches. HE has confirmed that there is no other way of searching and locating any relevant information and there is no more concise or direct search terms it could use. There are thousands of documents potentially within scope and it is obvious that it would take HE more than 18 hours to review each and every one to determine if they are relevant to the request or not.

27. The Commissioner is therefore satisfied that section 12 of the FOIA applies to this request.

19. With respect to section 16 of FOIA, the notice records:

28. The application of section 12 of the FOIA triggers the duty to provide advice and assistance under section 16. Where reasonable and practicable, a public authority should provide the applicant with appropriate advice and assistance to enable them to make a new, refined request if they so wish. However, the Commissioner accepts that in some circumstances there will be no reasonable or practicable advice or assistance that can be provided. When this happens, the public authority should still inform the applicant accordingly.

29. As HE claimed a late reliance on section 12 of the FOIA, it has breached section 16 as it failed to provide appropriate advice or assistance to the complainant or indeed inform him that it is unable to do so. HE has stated that given the large amount of results overall and for individual areas alone, it does not consider it is able to offer any practical advice and assistance on this occasion. It has now informed the complainant accordingly in a revised response.

30. The Commissioner is satisfied that no reasonable advice or assistance can be provided due to the volume of returns for all areas on all search terms. She therefore does not require any further action to be taken.

20. DN2 of 14 October 2020 records:

1. The complainant has requested information from Highways England ("HE") relating to the pain/gain share in Areas 9 and 10 from its period of operation to its termination and the reasons for termination. HE responded by citing section 14(2) of the FOIA, that it was a repeat request, and that it did not hold the information. During the Commissioner's investigation HE withdrew its reliance on section 14(2), instead citing section 12 of the FOIA.

2. The Commissioner's decision is that HE has correctly cited section 12 of the FOIA. However, she has concluded that HE has breached section 16 of the FOIA because it cited its reliance on section 12 too late to make any consideration of what advice and assistance it could provide either reasonable or practicable.

3. Despite this breach occurring, the Commissioner does not require any further action to be taken.

…

5. HE has stressed to the Commissioner that it does not believe that any information is held about the pain/gain process before or after Asset Support Contracts came in.

6. HE responded on 4 March 2020 citing section 14(2) and stating that this was a repeat request. HE argued that it had already provided a response concerning this information on 20 September 2019 and it quoted the relevant reference number. This response had explained that the request stemmed from an error that had occurred in an earlier response from HE and a subsequent misunderstanding by the complainant. The information was not held, though HE conceded that this had not been clearly stated in its 20 September 2019 response to the complainant.

…

10. During the Commissioner's investigation, HE conceded that section 14(2) had not been appropriately cited because there was a "variance in language", the complainant was seeking areas not contracts, and it had not been explicitly stated by HE that the information was 'not held'.

11. In light of the above, HE wrote to the complainant on 2 October 2020 changing its reliance on section 14(2) to a reliance on section 12 – the cost of compliance exceeding the appropriate limit.

Scope of the case

12. The complainant contacted the Commissioner on 3 April 2020 to complain about the way his request for information had been handled. The complainant

also wrote to the Commissioner after HE had changed its reliance from section 14(2) to section 12, indicating that he was not content with this later response either.

13. The Commissioner therefore considers the scope of this case to be whether HE has appropriately cited section 12 and whether HE provided advice and assistance in accordance with its duty under section 16 FOIA.

…

Highways England's view

17. Although HE stated that colleagues were in agreement and had a high degree of certainty that the information being sought was not held, it acknowledged that absolute certainty was required. Therefore, HE carried out a key word search as set out below that produced the following returns for the relevant areas -

… [Table omitted]

18. HE therefore reached the conclusion that the amount of documents returned regarding areas 9 and 10 were so numerous as to exceed the appropriate limit. Even narrowing the search down to a single search term would exceed the fees limit.

The complainant's view

19. The complainant's view is that HE cited another exemption to avoid providing the information. He disputes HE's statement that it does not hold the requested information he sought relating to "pain/gain". The complainant asked HE what colleagues are in agreement that the requested information is not held and, if names cannot be provided, their positions in HE.

20. Similarly, he queries the use of the word "certainty" suggesting that HE means "uncertainty". The complainant repeats the history of whether the information was held or not held including the response that initiated the 'error' which is quoted in his request. The complainant fundamentally disagrees with HE's assertion that the information does not exist. He is clear that it does exist and that a Tribunal hearing in 2019 heard from a witness who explained the pain/gain share to the court, though the complainant says it was not relevant to the issue then under consideration. However, the complainant subsequently sought that information.

The Commissioner's view

21. The complainant provided argument to support his belief that the information is held but the Commissioner is not able to consider many of the matters raised with HE concerning evidence previously given in court and technical matters that are the subject of dispute between the complainant and HE. She has confined her decision to whether searching for this information would exceed the appropriate limit.

22. HE has not provided a great deal of argument, aside from the table in paragraph 17. The Commissioner accepts, however, that section 12 FOIA has

been correctly cited. She agrees that it is not possible to say with certainty that the requested information is held or not because there is simply too much information to search through to make that determination. The complainant has not limited the timeframe, partly because he is himself unaware of the exact timeframe that would encompass the information, if held. Were HE to review the pain/gain arrangement for Areas 9 and 10 solely under one search term in one area for one minute, it would still exceed the fees limit?

21. As regard section 16, the notice says this:

> HE explained to the complainant that the large number of documents returned from the searches meant that no advice or assistance that could be provided would enable the request to be reduced to bring it under the appropriate limit.

> 25. The complainant queried that view, pointing out that limiting the search to "pain/gain share" over five years would be likely to reduce the responses. Limiting it to a contractor or an area would likewise reduce the returns. He then suggested that limiting the search to one day and one area would reduce returns even further. The complainant concluded that this was part of a deliberate intention by HE to withhold the information.
>
> 26. The Commissioner has concluded that reducing the timeframe and/or area for the search would be likely to mean that the search would fall within the fees limit but it would be unlikely to establish whether the requested information was held or not.
>
> 27. In view of the above, the Commissioner finds it difficult to see how advice and assistance could be provided in any meaningful way and does not require HE to take any further steps.

**The appeals and responses**

22. The grounds of appeal in respect of DN1 are unfocussed, unnumbered and difficult to follow. They are for the most part, allegations of wrongdoing on the part of contractors in respect of payments for repairs, in particular that they charge higher rates to drivers (and their insurers) than to HE. It is also submitted that HE have been inconsistent in their explanations; and, that HE has not been honest about the documents they may hold. The Appellant also submits that the searches of material are defective in that their use of keywords is "simplistic" and not properly targeted. In argument before the Tribunal the Appellant asserted that part of what he had sought under DCP rates, and been told was not held, was in fact held as two different sets of "people rates".

23. The Appellant submits that the reliance on s. 12 of FOIA is unfair as being raised at the last minute and also that he has not been provided with assistance, contrary to s.16 of FOIA.

24. The grounds of appeal in respect of DN2 repeat the allegation that the search methods applied by HE are not properly targeted. It is submitted that HE could have narrowed the scope of the information being sought by reference to various criteria.

25. HE's responses set out the background to the contracts and refers [10] to the Appellant's belief that since the introduction of ASC contracts, Contractors in below-threshold DCP claims have been overcharging third parties' insurers for repair costs. It is also submitted that much of the difficulty in relation to the requests arises from a misunderstanding on the part of the Appellant as to the contractual payment arrangements between HE and the Contractors, in that he has conflated an alleged arrangement in ASCs whereby lump sums are adjusted on the basis of an annual reconciliation of Contractors below-threshold DCP reports costs, an arrangement that never existed and target price pain/gain share arrangements in respect of above-threshold DCP repairs which operated in the past. This, HE submits has led to confusing requests which it has on occasion misunderstood; and, that the Appellant has misunderstood and refused to accept how HE's contracts work.

26. HE avers that it sought to clear up misunderstandings and that it sought advice or those who had had some familiarity with how MACs and ASCs had operated in the past, but that it became apparent that in order to determine what information it held within the scope of the requests, it would need to review thousands of documents, there being thousands of DCP repairs and claims each year.

27. Much of the documentation relied upon, and the Appellant's witness statements, repeat the same allegations, and/or focus on earlier FOI requests and Tribunal decisions.

**Directions**

28. On 25 November 2020, further to the Appellant's request, both of these appeals were ordered to be heard together and on 17 December 2020, the second respondent was joined to the appeals.

**The appeal hearing**

29. We heard evidence from the Appellant who was not cross-examined; we put some questions to the Appellant who confirmed that the request of 24 April 2019 related to sub-threshold matters.

30. We also heard evidence from HE's witnesses, Mr Carney and Mr Drysdale both of whom were cross-examined by the Appellant. Much of the cross-examination, however, deviated considerably from the issues under consideration and did not assist the panel.

31. We found the evidence of witnesses to be candid. Mistakes were admitted and we found no element of concealment; on the contrary, as indeed FtTJ Cragg QC found in his recent decision, EA/2019/0390, handed down on 12 April 2021.

**The law**

32. Section 12 of FOIA provides, so far as is relevant:

> *12.* – Exemption where cost of compliance exceeds appropriate limit.
> (1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.
>
> (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
>
> (3) In subsections (1) and (2) *"the appropriate limit"* means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

33. Section 16 of FOIA provides

> 16.— Duty to provide advice and assistance.
>
> (1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.
>
> (2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

34. The Freedom of Information and Date Protection (Appropriate Limits and Fees) Regulations 2004, provided at reg 4(3) that the costs which may be taken into account are those required for:

> (a) determining whether it holds the information,
>
> (b) locating the information, or a document which may contain the information,
>
> (c) retrieving the information, or a document which may contain the information , and
>
> (d) extracting the information from a document containing it"

35. The applicable limit in this case is £450, representing the estimated cost of one person spending 18 hours at £35 per hour in carrying out the activities in reg 4(3)

36. In appeals such as this, the question for the Tribunal is whether the estimate given by the second respondent is "reasonable". An estimate is reasonable if it is "sensible, realistic and supported by cogent evidence": see *Commissioner of Police v IC* [2014] UKUT 0479 (AAC) at [30]. Further, it is open to a requested body to rely on section 12 at a later stage than in its initial response.

37. If a public authority is entitled to rely on s 12 of FOIA then that removes the obligation to comply with the duty to disclose information in section 1. In the

absence of that obligation, section 2 of FOIA does not apply and so there is no public interest test to be applied.

**Discussion**

38. Our task is to consider this matter afresh and in doing so, we 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.

39. We remind ourselves at the outset that the focus of the appeal is s12 and the relevant costs limits. It is not the function of this Tribunal to determine precisely the underlying contractual arrangements between HE and its contractors; still less is it for us to investigate the allegations made about Contractors. Nonetheless, given the misunderstandings that have arisen about the contractual relationships, and a degree of imprecision in the use of terminology such as "Green Claim" and "scheme", we consider it necessary to make some findings about the contractual arrangements as the context in which the nature of the requests made, and HE's response can better be understood.

40. Much of what we say is set out in the evidence of Mr Carney, and in the responses from HE. Mr 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. We found Mr Carney to be an impressive and candid witness who was willing to admit that errors had occurred in the past. It was equally evident from his evidence that he had sought to verify matters by speaking to others. If follows from that, that we accept his evidence and explanation of the contractual relationships between HE and the contractors.

41. As noted above, HE is responsible for operation, improvement, maintenance, renewal and repair of England's strategic road network, a responsibility discharged by engaging Contractors each of whom is responsible for one or more area. Prior to 2012, the contracts issued were known as MACs which were phased out and replaced with Asset Support Contracts ("ASCs"). These, in turn have been replaced.

42. ASCs are complex, high value contracts and cover a number of types of work but the largest part of the work under them is improvement and renewal of the network known as "scheme work". ASCs set out various different pricing mechanisms and provide for a system of lump sum payments to the Contractors.

43. We are concerned here with two pricing mechanisms: National Engineering Contract Option C Target price and National Engineering Option E.

44. Under Option C, broadly, the Contractor's defined costs plus fee is compared to a target price previously agreed between the parties. If there has been an underspend, then the Contractor shares in some of the benefit from that, but it also has to share the cost of any overspend. How much of any over or under spend the contractor may have to gain or bear is set out in an agreed formula. This sort of arrangement is known in the industry as a "pain/gain share".

45. Option E is a reimbursable basis under which the contractor charges HE its defined costs plus a fee. There is no pain/gain share in this case.

46. In addition to scheme work, ASCs also provide for Contractors to repair highways in the case of, for example, accidents known as DCP repairs. The means by which the contractors are paid for DCP repairs depends on whether the estimated cost is above or below the threshold of £10,000.

47. If the estimated cost of repair is over £10,000, (or of any value if there is a linked claim against, HE the incident involves a fatality or a military vehicle) the Contractor does the work and then charges HE for it. HE then seeks to recover the cost from the third party responsible (or more commonly, its insurer).

48. If the estimated cost of repair is under £10,000, the Contractor does the work and the Contractor seeks to recover the cost from the third party or its insurer directly.

49. We accept, on Mr Carney's evidence, that prior to 2015, it was common for the over £10,000 repairs to be done on an option C contract on a pain/gain share basis but now that is rare. That is because that mechanism became impracticable because it required, HE and the contractor to agree a target price before commencing the works, inevitably leading to delays and so fell into disuse although still provided for in the contracts. Whether option C (and a consequent pain/gain share payment) or Option E was used, was for the HE contracts manager depending on the nature of the incident and for the Contractor.

50. The type of pain/gain share which may be applied under Option C was not available when the estimated costs of repair were under £10,000.

51. It is not always possible to recover costs of repair and where the estimated costs of repair are below £10,000, the potential shortfall arising from that is covered under an ASC by a lump sum payable to the contractor and for which they bid during the tendering process.

52. How that lump sum is calculated is a matter of controversy. The Appellant relies on a statement in the 2016 FOI response in which it is said that, in effect, the lump sum varied.

53. Mr Carney's evidence, as well as that from HE in its response and the letter of 20 September 2019 is that this was an error and we accept his observation that people get confused between lump sum and pain/gain share. We accept that

evidence and we reject the Appellant's submission to the contrary. We accept that the lump sum payable in respect of the shortfall in this element is, in turn, potentially balanced, at least in part, by another lump sum payable in respect of other routine matters such as road gritting, drain clearing, and so on. The lump sum is subject to annual adjustments to cover, for example, inflation but it is not increased or decreased by reference to the actual costs incurred and recovered by the contractor when carrying out DCP repairs under £10,000.

54. We find that HE has been candid about this error although it does appear to have caused a significant degree of confusion. So, to a lesser extent, does the use of phrase "Green claims" which Mr Carney explained refers to any claim where a driver or insurer pays, and thus covers claims both above and below the £10,000 threshold. Similarly, there has been some confusion due to "schemes" being used to refer to repairs as well as to construction. Mr Carney explained that "scheme" normally being a planned piece of work, ordinarily paid on a target price basis with pain/gain share but this applied also to above-threshold work done under MACs and under ASCs although (as noted above) that is far less frequent, the default being payment under Option E (without a pain/gain share). We do not, however, consider that this has caused any material difficulty.

55. We now turn to the requests made.

56. The First Request seeks all information about the alleged lump sum payment adjustment or any pain/gain arrangement in relation to DCP repairs under ASCs and MACs in all areas dating back to 2012. That said, the Appellant now says that he does not need to know about MACs.

57. The Second Request encompassed all information about pain/gain arrangements relating to DCP repairs under ASCs and MACs in Areas 9 and 10 and the cessation of those arrangements without time limit. That appears from his email to the Commission of 25 August 2020 to be wider, as he stated:

> "I care not to what contract they are referring, nor to what date, I simply want all associated information. To further clarify, if the pain/gain predates the 2012 contract then I am seeking that information".

58. In assessing where the information sought might be located, Mr Carney identified in his witness statement that there he was aware of two types of files where the information sought could be located, the first type being "scheme" files held by the Operations Team, and "Green Claim files". In this context, "scheme" was normally being a planned piece of work, but this applied also to above-threshold work done under MACs and under ASCs although (as noted above)if Option C was used but that is far less frequent, the default being payment under Option E (without a pain/gain share).

59. With regard to the size of a scheme file, he said in his witness statement:

> 14. Although I have not been involved in scheme work at a detailed level for a number of years, the Operations Team have provided me sight of a typical scheme file and what is contained within it. A scheme file typically consists of a range of documents including correspondence, reports, audits, completion certificates and accounts. The information is detailed and technical. I can confirm that there are thousands of schemes undertaken across the network each year including hundreds of above-threshold repairs. In Area 9 alone, there are an average 167 above-threshold repairs each year and 120 or so schemes.

60. Mr Carney also said:

> 15. Although as I have said, most DCP repair works have been undertaken on a cost-reimbursable basis since 2012, in order to be sure what information if any is held on pain/gain arrangements in relation to DCP repairs, every scheme folder held by the Operations Team would need to be looked at to identify if the scheme was a DCP above- threshold repair scheme, and if so, to identify the cost basis for it. If the repair had been done on a target cost basis, the information about the pain/gain element would then need to be extracted. In my view, these reviews would need to be carried out by someone with technical experience such as a quantity surveyor.

61. As to the second type of folder, Green Claims files he said this:

> 16. I understand that the second type of folder where information requested might be held are files held by the Green Claims Team. These are files relating to each above-threshold incident requiring repair on the network where Highways England are seeking to recover costs from the insurers of the party alleged to have negligently caused the damage. Challenges from an insurer about any pain/gain element of a particular claim may be contained in these files. Jonathan Drysdale in his statement explains further about these files.

62. In his oral evidence, Mr Carney explained that under the contract, the contractors were under a duty to report on Green Claims, so that HE could understand how much it cost to look after the whole network, adding that all Green Claims had now been taken in house by HE. He also countered the appellant's view on the size of these files by explaining that not all of what was held on a Green Claim folder would be disclosed to an insurer or third party.

63. Mr Carney also said that as pain/gain share was used at times that it would not be possible find out if it had been used without looking at each file. As to why it ceased to be used, he said that anecdotally it was because insurers objected to paying the "gain" share, rather than the defined cost.

64. Asked about the size of scheme files, he said that these could run to several thousand pages, in several parts, and that you would need to look at the parts that deal with the financial aspects to determine if it had been done under a pain/gain share.

65. Mr Drysdale is a Freedom of Information Officer employed by HE. As with Mr Carney, we found him to be a witness of truth, despite attempts by the Appellant

to show the contrary. His evidence relates primarily to key word searches made and to his consideration of Green Claim files. He set out in his witness statement a table of the key words searched, adding:

> 10. My searches illustrate that there would be thousands of documents that would need to be reviewed for each request before it could be ascertained whether or not they contained information within scope. This fits with my understanding of the relevant documentation. As explained above, my role at Highways England is confined to the handling of requests under FOIA, and I do not myself deal with any operational matters. I do, however, have some familiarity with the documentation held by Highways England in relation to DCP repairs as a result of dealing with FOI requests (including those made by Mr Swift) over the years.
>
> …
>
> 15. In summary, based on my review of the results from my keyword searches, together with my understanding of the nature of the documentation held, I believe that many thousands of documents would have had to be reviewed in order to identify what information we held which was within scope of the requests. That would take over 18 hours in the case of each request, even if each document was only reviewed for a minute (in practice, I believe much longer than this is likely to be needed given the complex nature of the contractual documentation in issue). It would take longer again, if any documents were found which contained information in scope of the requests, to extract that information.

66. In oral evidence, Mr Drysdale accepted that he had erred when stating in his letter of 3 April 2020 that there had not been a pain/gain arrangements under ASCs. We note that there was no attempt to evade that error and we found his candour and openness in accepting the limits of his knowledge of the contractual arrangements added to his credit as a witness.

67. Mr Drysdale explained that the software he used was known as "Share" which he said was not "SharePoint". He also confirmed that he had used Boolean searches on the material and denied misunderstanding the Appellant's requests.

68. Pausing there to consider again the nature of the requests, we find that both are exceedingly wide in scope and, unfortunately, based on a mistaken premise as to the nature of the contractual arrangements applicable in respect of DCP repairs. Further, although HE has been candid in admitting its errors and in pointing out to the Appellant the nature of his misapprehension of the contractual arrangements, he has, with respect, simply chosen not to believe the reasonable and candid explanations offered.

69. Contrary to what the Appellant now asserts, that he is looking for a needle in a haystack and that with the proper search tools it could be found, he is in his requests seeking a very large volume of material. Both requests seek "all information…" in respect of various issues. The First Request has 8 parts (one with 5 sub-parts) and the Second Part has in effect 14 parts, given that the seven

stipulated criteria are to be applied to two Areas. The reality is that the requests made are wide-ranging and interwoven with other requests already made.

70. As regards the specific issues raised, we consider that HE's response to parts 1 and 2 of the First Request were correct, in that those questions were predicated on a misunderstanding as to the mechanism for payment of sub-threshold DCP claims. As regards parts 3 to 8, the response of "not held" was, in all the circumstances reasonable given how sub-threshold claims are handled.

71. We find that HE was entitled to conduct research and then make an estimate as to the costs, and then rely on section 12 giving reasons.

72. We find no merit in the submissions that search terms used and the skill of the person conducting the searches were inadequate. While the Appellant sought to show the contrary in cross-examination, he has provided no relevant evidence on the sort of Boolean search that could or should have been carried out that would have, as he said, have extracted the relevant information.

73. We accept Mr Drysdale's evidence that there is no reliable way of sorting the information held by HE, whether by keywords or otherwise, which would enable the information the Appellant sought to be identified if held nor extracted if it is held. Mr Swift did not suggest what alternative keywords should have been used or why they would have enabled HE to answer his request within the costs limit.

74. Further, as Mr Carney explained, and we find to be correct, the documentation potentially containing information in scope is huge and it would be difficult to discern if a file contained relevant information.

75. Insofar as the Appellant submits that HE could have reduced the scope of the information it was seeking by, for example, limiting a time period, HE very reasonably based its costs estimates on the requests as formulated by the Appellant. As we have found above, those were very wide.

76. We find from the evidence from HE that the volume of the material to be searched is vast, given the size of the files. We note that the date of the second request was after the Appellant had been told that the information sent to him in 2016 "was incorrect and should not have been sent to you" and accept from the body of the request (see paragraph 115 above) and the evidence it seems the Appellant refuses to accept this statement. Further, and with regard in particular to the Second Request, parts 5 to 7 would require HE to search through many claims files to locate any evidence that insurers complained about the 'gain' cost element in claims above the £10,000 threshold. As Mr Carney said, this evidence was only anecdotal rather than recorded information.

77. In conclusion, therefore, we find that HE's estimate was sensible, realistic and supported by cogent evidence, and thus was entitled to rely on the section 12 exemption. We accept that recourse to s 12 was delayed here, but that it was reasonable to invoke it later, given the confused nature of the initial requests.

Section 16 FOIA

78. It is, we consider, difficult to discern the nature of the ground of appeal with respect to section 16 of FOIA beyond the Appellant's questioning in his appeal in relation to the First Request, what explanation there is for the failure to provide advice and assistance.

79. The Appellant is not unused to making FOI request and indeed has made dozens to HE in relation to the contractual relationships between HE and its Contractors.

80. HE submits that, given the relevant history and background, there was no reasonable advice or assistance that it could have provided. We find this is so for the reasons set out below. The Tribunal also reminded itself that FOI requests are for information held, not for information the requested believes ought to be held or would like sought.

81. As to the scope of the duty imposed by section 16, we note that the Upper Tribunal held in the Commissioner of Police for the Metropolis v IC [2014] UKUT 0479,

> "An authority may be required by s. 16 to suggest obvious alternative formulations of the request which will enable it to supply the core of the information sought within the costs limits. It is not required to exercise its imagination to proffer other possible solutions to the problem".

82. We find that here the Appellant is not seeking obvious formulations; on the contrary, he has suggested himself that complex Boolean searches which he has himself said he could devise, would achieve his aim if not the terms of the specific request.

83. Accordingly, we are not satisfied that the appeal ought to be allowed on the basis of a failure by HE to assist the Appellant to formulate his requests.

84. For these reasons, we dismiss the appeals in their entirety, and uphold the decisions of the Information Commissioner.

85. We regret to say that, as Judge Cragg noted in his decision, there has also been in these appeals a degree to which the Appellant has been overzealous and almost obsessive in his pursuit of HE over the issue. The Appellant has sought to use these appeals as a vehicle for seeking yet more information, and to belittle HE's witnesses. We note that the issue under dispute may well now be historic:

HE explained a new form of contract (Asset Delivery) is now being employed [OB42] under which all recovery of costs is undertaken by HE directly.

Signed Date 7 June 2021

*Jeremy K H Rintoul*
Upper Tribunal Judge Rintoul
(Sitting as a judge of the First-tier Tribunal)