First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2021/0056

Heard by CVP
On 1 and 2 November 2021
Representation:
Appellant: In person
First Respondent: Did not appear
Second Respondent: Ms Ivimy (Counsel)

Before

JUDGE SOPHIE BUCKLEY
NAOMI MATTHEWS
PIETER DE WAAL

Between

PHILIP SWIFT

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

HIGHWAYS ENGLAND

Second Respondent

DECISION

1. For the reasons set out below appeal number EA/2021/0056 is dismissed.
2. This appeal was heard along with appeal number EA/2021/0048. The tribunal has issued separate decisions but much of the content is the same.

REASONS

Introduction

1. EA/2021/0056 is an appeal against the Commissioner's decision notice IC-39411-G7Q7 of 18 February 2021 which held that the cost of complying with the requests exceeds the appropriate limit under s 12(1) of the Freedom of Information Act 2000 and Highways England (HE) were not obliged to comply. HE met its obligation under s 16(1) (advice and assistance). HE breached s 17(5) because it did not provide Mr. Swift with a clear section 12 refusal notice in time. The Commissioner did not require HE to take any steps.

Procedural matters

2. Mr. Swift objected to HE relying on the statements of Mr. Carney and Mr. Drysdale because they were disclosed late. For the reasons given orally in the hearing I determined that it was in the interests of justice to allow HE to rely on the statements. In the event HE did not rely on Mr. Carney's written statement nor did they call him as a witness.

Factual background to the appeals

3. HE is responsible for the operation, improvement, maintenance, renewal and repair of the strategic road network. This work is carried out for HE by contractors. Contracts are divided into 12 numbered areas. Where damage is caused to the strategic road network by a third party, the contractor for the relevant area is responsible for carrying out the necessary repairs (these are referred to in these proceedings as 'DCP' repairs which stands for 'damage to crown property'). DCP repairs are a small part of the contractual operations which mainly consist of planned maintenance projects known as scheme work.

4. Some of the contracts are known as 'ASC' (Asset Support Contracts). Others are known as 'AD' (Asset Delivery). There are different types of AD contracts including 'maintenance and response' referred to in these proceedings as 'M and R'.

5. The contracts provide that DCP repairs are carried out on a costs reimbursable basis. (NEC Option E) This means that contractors claim for their actual costs plus a fee. The elements of those costs which are recoverable are defined by the contract ('defined costs').

6. The requests relate to HE's implementation of the National Schedule of Repair Costs (NSoRC) in June 2019. The use of the NSoRC was suspended in October 2019.

7. This is a brief factual background. It is not necessary for the purposes of these appeals to set out the full history of Mr. Swift's concerns in relation to HE and its operations.

Request and Decision Notice – EA/2020/0056

The requests and responses

8. Mr. Swift made the requests which are the subject of the appeal on 6 November 2019, 30 November 2019 and 3 December 2019.

9. The request on 6 November 2019 is as follows:

> 191105 Suspension of the NSORC - National schedule of repair costs for network damage, Green Claims) – pilot outcome
>
> https://highwaysengland.co.uk/thirdpartyclaims/
>
> I am seeking the following information:
>
> 1. The pre-implementation and ongoing assessment of the benefit to Third Parties and HE
>
> I am particularly interested in the information indicating the recovery rates is £1 in every £5 and how, given HE are bringing claims in-house, the benefit is perceived as being other than for HE and HE alone.
>
> 2. Engagement with the insurance industry; information to and from
>
> 3. Responses for and feedback against the NSORC; all feedback from those involved. I anticipate personal data will be redacted but the identity of commercial entities will remain
>
> 4. Questions raised by all parties (within and without HE) about the process and the responses
>
> 5. Examples in Areas 9, 10 &12 of 'The contractual arrangements between Highways England and its service providers, containing separate regimes for claims above and below a £10,000 threshold, and different pricing methodologies, leading to varying labour and equipment rates and therefore significantly different repair costs being applied to similar repairs'

The defined cost process has been described to us and the Courts as an 'actual cost' or 'base rate' to which an uplift is applied. The defined cost (however it is arrived at) is common to both TP and HE.

6. How could the difference ever be more than the difference between 'fee' to HE and TPCO to a Third Party i.e. no more than 20% approx.. as opposed to the stated 'significant'?

7. How it was determined the costs did not sufficiently reflect the 'open market',

a. which 'open' market and
b. the data relating to this

8. Your better understanding of the he requirements which will need to be met to enable a National Schedule to be successfully implemented

9. Your engagement with contractors following implementing NSORC; all information to and from, to this date. This will include all information to and from contractors setting out the suspension of NSORC; notification, feedback, implications How it affects them, their charging and claims), actions and intentions

10. The final assessment of NSORC, all reports and feedback. NORSC explained 'By introducing a national schedule, we had hoped to provide the insurance industry the benefit of the rates that we had been able to secure in a competitive market.'

11. the rates you have been able to secure in a competitive market

I note you will revert to pursuing claims based on the 'actual cost' of carrying out the repairs and will continue to explore options for a transparent and equitable set of rates.

12. What is meant by 'actual cost' and the actual costs of carrying out the repairs in Areas 6, 9 10 & 12 (as at 01/03/2019) and if different, the:

13. 'actuals' for re-pricing any claims that have been priced under the National Schedule of Repair Costs"

10. The HE wrote to Mr. Swift on 29 November 2019 asking for clarification and reduction of the scope of the request and raising the s 12 exemption (costs exceeding the appropriate limit).

11. Mr. Swift provided some clarification on 30 November 2019 and questioned the application of s 12. His letter included the following:

4. Questions raised by all parties (within and without HE) about the process and the responses

I am referring to the process as was described here until at or about 31/10/2019:

https://highwaysengland.co.uk/thirdpartyclaims/

I am referring to the implementation, use of and subsequent termination (suspension) of NSoRC i.e. the correspondence (in any form) generated by the process from conversations, letters, meetings etc.:

a) commence it, have contractors agree (or otherwise – it may have been forced upon some), the questions arising and explanations provided. These exchanges will include those relating to the costs to be used and agreement / acceptance of them. The exchanges with interested parties such as the Association of British Insurers and their members of representatives (lawyers, adjusters etc.).
s 16
b) this will include any changes in the contract required, particularly where Appendix A to Annex 23 applies i.e. a contractually agreed formula for ensuring a Third Party was charged 'no more than' and the Authority was charged using the same base rates, price list, schedule of defined costs (DCP Rates).

c) the guidelines, policy correspondence, advice etc. issued to contractors, their legal representatives, HE staff, to include Green Claims about the implementation and application i.e. all information pre-commencement to ensure the process was understood and applied evenly, correctly.

d) the questions / statements raised following the implementation from any party, such as the ABI, loss adjusters, insurers, contractors, their legal representatives. I was informed these were being collated and the questions addressed via your web site. This has yet to occur.

e) The questions / statements / correspondence relating to the suspension i.e. the issuance of a 'stop' notice to contractors, Green Claims etc. explaining the suspension of a process prepared over months, engaged for 4 months and terminated.

I do not anticipate this will cause HE any difficulty to provide; the NSoRC was addressed by a specific team and information was being collated, to be presented.

With regard to:

7. How it was determined the costs did not sufficiently reflect the 'open market',
a. which 'open' market and
b. the data relating to this

The statement in my question 'costs did not sufficiently reflect the 'open market'' is the position conveyed to me by Highways England. Indeed, the link to which you referred me, the Third Party Claims page https://highwaysengland.co.uk/thirdpartyclaims/, states:

We are therefore suspending the use of the Schedule while we assess our options for a different set of repair costs that better reflect the open market and the needs of insurers

You are looking to adopt a set of repair costs that better reflect the open market. I therefore repeat:

a. which 'open' market are you referring to in your statement – it is HE who has used the term, please define this.
b. the data relating to this; what is being considered, what was considered

HE made straightforward statements when presenting their NSoRC process. I have also spoken

with those involved for well in excess of an hour. HE have written with regard to NSoRC:

In pricing repair costs this way, Highways England is giving the insurance industry the benefit of the rates that it has been able to secure in a competitive market.

I wish to understand the change from 'competitive' market to 'open' market

My clarification at '7' above will / should address the stated 'needs of insurers' aspect.

The following statement appears to be engaging semantics:

As stated on Highways England explained that it is 'suspending the use of the Schedule while we assess our options for a different set of repair costs that better reflect the open market and the needs of insurers', not that the costs did not sufficiently reflect the open market.

I invite your explanation

You cite section 12 but do not explain whether this relates to specific questions, nor do you indicate how my request could be condensed or adjusted such that it would fall within the scope. Kindly do so.

The information being held by the NSoRC team, I fail to understand how the request could possibly exceed such a limit.

With regard to:

9. Your engagement with contractors following implementing NSORC; all information to and from, to this date. This will include all information to and from contractors setting out the suspension of NSORC; notification, feedback, implications How it affects them, their charging and claims), actions and intentions

I do not accept the above is too generic. I am seeking all information to and from contractors about NSoRC after the process commenced. This is however addressed by my response at '7' above i.e. duplicated and can be ignored.

The contractors involved are those party to NSoRC, those who it affected and therefore you engaged with.. This question appears obtuse but my understanding is NSoRC applied to all Areas (regardless of whether they operate under Asset Delivery or Asset Support Contracts). The only exceptions will be Area 5 which is a 30-year concession, and other DBFO roads where Green Claims will be pursued as per their current contracts.

I am not asking you to approach the contractors but to provide the records you hold; the approaches, responses and agreements reached that subsequently enabled NSoRC to be launched.

Why are you only able to consider providing one quarters (3 months) worth of correspondence?
Are you referring to calendar months, or final year quarters
When did you first approach a contractor about NSoRC and how?

The above will influence my response though I would ask you to reconsider the s12 exemption which appears to inappropriate, onerous.

I am concerned you acknowledged this request 11/11/2019 yet seemingly have delayed raising questions for over 2 weeks. When responding to the above, please explain what enquiries have bene undertaken to locate the information which give rise to a belief the cost exemption may be

engaged.

12. HE provided further explanation in relation to s 12 on 3 December 2019. On the same date Mr. Swift sent two further emails to HE. HE identifies the following as further requests made on 3 December:

> Please explain what part of my request would not be in the locations described, or possibly with Tim Reardon i.e. why you are encountering difficulty.
> …
> [with reference to the meeting held by HE to discuss what information was held and where] Please advise the date of the meeting and ensure I am provided all notes from same – this I expect to receive within 20 working days.

13. Mr. Swift sought an internal review on 28 April 2020. In its internal review response dated 29 May 2020, HE issued a response refusing the request under s 12.

14. Mr. Swift referred the matter to the Commissioner on 29 April 2020.

The Decision Notice

15. The Commissioner noted that the initial 13 part request swelled to a minimum of 25 points following HE's suggestions as to how Mr. Swift might narrow down the scope of the request.

16. The Commissioner concluded that the requests submitted by Mr. Swift were all concerned with broadly the same matter and submitted within a 60 day period. Accordingly HE was entitled to aggregate series of requests when considering its application of s 12(1).

17. The Commissioner considered reasonable HE's estimate that 7.5 hours had been spent discussing the parts of the request, whether any relevant information would be held and where it would be held.

18. Given the breadth and complexity of the multi-part request, the Commissioner was satisfied that the time HE calculated it would take to comply with the requests was credible and that it would take over 18 hours to comply with it. She agreed that it would take at least 25.5 hours and would be likely to take longer than that.

19. The Commissioner was satisfied that HE offered Mr. Swift adequate advice and assistance because it suggested how he might narrow down the scope of his request.

20. The Commissioner found that HE was in breach of s 17(5) because it was not until its internal review that it clearly confirmed that it was relying on s 12 to refuse to comply with the requests.

Grounds of Appeal

21. In his Grounds of Appeal Mr. Swift states that the Commissioner has adopted a biased stance, failed to present an accurate account, ignored HE's conduct/assurances and ignored 'compromise' and Mr. Swift's obvious willingness to assist.

22. The points made in the document attached to his grounds of appeal that appear most relevant to s 12 are as follows:

    22.1. Mr. Swift did not refuse to narrow the scope, he asked why it was necessary. HE said they would return to him about the need for clarification/reduction and did not do so.
    22.2. If the information was not in one place, the solution would have been to provide the information that was in the one place he had identified.
    22.3. Mr. Swift did not add to the request save that he provided clarification and wished to be provided with evidence of the meeting claimed to have taken 1.5 hours.

The Commissioner's response

23. The grounds of appeal do not demonstrate that the decision notice was wrong in law and that the Commissioner was wrong to uphold HE's reliance on s 12. The tribunal has no jurisdiction to review the ICO's conduct.

24. The Commissioner included an application to strike out the appeal which was unsuccessful.

Mr. Swift's response to the request for strike out

25. Mr. Swift makes the following points in this document which are potentially relevant to the appeal.

26. HE has not demonstrated that complying with the request would exceed the cost limit under s 12:

    26.1. The meeting was unnecessary and is uncorroborated.
    26.2. Contacting Area teams was unnecessary and is uncorroborated.
    26.3. The request was not in two parts, this has been misrepresented or, in the alternative, should have progressed as two separate FoIA requests.
    26.4. Acquiring the information was straightforward. Mr. Swift had specifically worded the request to acquire NSoRC information, the

project information held by Martin Gannicott (Highways England) and his team.

26.5. No one has identified where, if other than with Martyn, the information is held.

Response of HE

27. HE estimated that it would exceed the appropriate costs limit (£450, 18 hours1) to determine what information requested by the Appellant it holds, and to locate, retrieve and/or extract it. For these purposes the various parts of the request and clarifications were properly considered together. The reasoning for the costs estimate is set out in the DN and the Commissioner's response.

28. The number of topics and the breadth and complexity of the information sought meant that responding was not straightforward. The information is not all held in one place by the NSoRC team. Other information sought was held in different parts of the business including General Counsel, Commercial and Procurement, and Green Claims as well as different Area teams. Some information sought was very broad in scope, and likely to be held in multiple Areas (e.g. examples of contractual arrangements and methodologies in 3 Areas; actual costs of repairs in 4 Areas).

29. The initial meeting to discuss the request took 4.5 hours (3 x 1.5 hours) in total. Attempts to narrow or clarify the request with the Appellant led to his seeking further information. This meant that there were only 13.5 hours within the costs limit to respond to all 13 original parts of the original request, plus the additional information sought by the Appellant on 30 November 2019 and 3 December 2019.

30. As the Commissioner found, given the breadth and complexity of the request, and the fact that it was not all held by one person or team in H E, it was realistic to expect that the request would take at least 25.5 hours to respond to and was likely to take longer than that.

31. The Commissioner was correct to conclude that HE had complied with its duty under 16(1).

Response of Mr. Swift

32. The information sought is limited to a process created and instigated by a small team, assisted by the General Counsel's department. The process lasted 3 months. The information is readily identifiable and capable of being collated with ease. HE could have provided some of the information. Mr. Swift's clarification should have been treated as a separate request. Mr. Swift is appealing the finding that HR complied with s 16(1).

Evidence

33. We have read an open and a closed bundle of documents, which we have taken account of where relevant. The closed bundle consists of a number of tables containing the tendered contractual rates for people, plant and materials in areas 1, 2, 10, 14 and 13. It also contains the CECA and Construction Industry Joint Council ("CIJC") rates which are publicly available and to which Mr. Swift already has access

34. We read statements and heard evidence from Jonathan Drysdale and Martyn Gannicott on behalf of HE . Although we had been provided with a statement from Mr. Carney, HE did not call him to give evidence and we took no account of the evidence in his witness statement in reaching our decision. We heard evidence from Mr. Swift.

35. We held a short closed session with Martyn Gannicott and Mr. Swift was provided with an oral gist of the evidence given in that session. The gist was as follows:

> Mr. Gannicott gave the following evidence in the closed session.
>
> In the table in the closed bundle the heading 'Area SW' refers to areas 1 and 2. The table contains the contractually tendered amounts used as explained in evidence. Some of the figures are highlighted as a reminder of how the figures are derived. The orange highlights are where the CECA rates have been used and the yellow highlights are where the rates did not necessarily exist and other rates have been extrapolated to create that rate.
>
> Two of the columns contain the CECA and CIJC rates which were public and to which Mr. Swift already has access.
>
> The rates in the table were used to calculate the NSoRC. These costs sit behind the cyclical works but don't sit behind the DCP works contracts. In terms of commercial prejudice the concern is that if the figures are disclosed publicly it might be possible for a competitor to work out what rates were being tendered by the rest of the market. The concern from HE's perspective is that it would limit the ability to negotiate at arm's length commercially with individual contractors if the contractors all knew what others were charging and offering. There would probably be a time limit on that sensitivity, but the rates used in the NSoRC are current or very recently terminated and were the current schedules at the time of the request. They are the figures that were put into the NSoRC adjusted for inflation.
>
> The figures are from AD M and R contracts and do not sit behind the costs reimbursable DCP aspect of the contract, they sit at the side for the other activity. They do not govern what contractors charge for DCP repairs. In AD contracts they govern what contractors charge for cyclical work such as grass cutting and the target price for scheme work. In ASC contracts they are just the target price for scheme work. The rates are for plant, labour and equipment.

36. Mr. Swift had the opportunity to ask questions of Mr. Gannicott after hearing the gist of closed evidence above.

Legal framework

S 12 – costs exceed the appropriate limit

37. Under s 12(1) a public authority is not obliged to comply with a request for information where:

> ..the authority estimates that the costs of complying with the request would exceed the appropriate limit.

38. The relevant appropriate limit, prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') is £450.

39. In making its estimate, a public authority may only take account the costs it reasonably expects to incur in relation to the request in–
(a) determining whether it holds the information,
(b) locating it, or a document which may contain the information,
(c) retrieving it, or a document which may contain the information, and
(d) extracting it from a document containing it. (See regulation 3).

40. The Regulations specify that where costs are attributable to the time which persons are expected to spend on the above activities the costs are to be estimated at a rate of £25 per person per hour.

41. Under regulation 5 of the Regulations:

> (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority—
> (a)by one person, or
> (b)by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,
> the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.
> (2) This regulation applies in circumstances in which–
> (a)the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and
> (b)those requests are received by the public authority within any period of sixty consecutive working days.

42. The estimate must be sensible, realistic and supported by cogent evidence (McInnery v IC and Department for Education [2015] UKUT 0047 (AAT) para 39-41).

43. The test is not a purely objective one of what costs it would be reasonable to incur or reasonable to expect to incur. It is a test that is subjective to the authority but qualified by an objective element. It allows the Commissioner and the tribunal to remove from the estimate any amount that the authority could not reasonably expect to incur either on account of the nature of the activity to which the cost relates or its amount. (see paragraph 20) (**Reuben Kirkham v Information Commissioner** [2018] UKUT 126 (AAC)).

The Task of the Tribunal

44. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

45. The issues we have to determine are as follows:

S 12

1. Was HE entitled to aggregate the requests?
2. Is HE's estimate that the time needed to respond would exceed the relevant limit sensible, realistic and supported by cogent evidence?

Matters raised in the appeal but outside our remit

33. The conduct of the Commissioner in conducting the investigation is outside our remit.

The scope of the appeal – EA/2021/0056

34. Although during the course of the Commisioner's investigation and during these proceedings Mr. Swift has commendably attempted to reduce the scope of the request the question for the tribunal is whether or not HE was entitled to rely on s 12 at the relevant time.

Discussion and conclusions

S 12

Was HE entitled to aggregate the requests?

35. We find that HE was entitled to aggregate any requests for information contained in the correspondence on 6 November, 30 November and 3 December 2019. They relate to the same or similar information, and were received by the public authority within a period of sixty consecutive working days.

36. However, we do not accept that the requests by Mr. Swift for explanations of the application of the s 12 exemption can properly be considered additional requests for information under FOIA and therefore the time taken to respond to those questions cannot properly be taken into account.

37. In our view, the only *additional* request that was made by Mr. Swift in the two later emails was the request for the date and notes of the meeting, and therefore the aggregation of the later emails does not materially add to the time needed to respond to the initial request. The other matters set out in those emails are, in our view, Mr. Swift's attempts to clarify the scope of the initial request.

Was HE's estimate that the time needed to respond would exceed the relevant limit sensible, realistic and supported by cogent evidence?

38. As stated above, in our view, the additional detail provided by Mr. Swift in the correspondence on 30 November and 3 December was clarification of the initial request rather than additional requests. However, there is no doubt that the clarifications provided make very clear the vast extent of the information in scope of the original request.

39. To illustrate this point, the information said by Mr. Swift to be included in the scope of part 4 of the request is set out in the email of 30 November as follows:

> Questions raised by all parties (within and without HE) about the process and the responses
>
> I am referring to the process as was described here until at or about 31/10/2019:
>
> https://highwaysengland.co.uk/thirdpartyclaims/
>
> I am referring to the implementation, use of and subsequent termination (suspension) of NSoRC i.e. the correspondence (in any form) generated by the process from conversations, letters, meetings etc.:
>
> a) commence it, have contractors agree (or otherwise – it may have been forced upon some), the questions arising and explanations provided. These exchanges will include those relating to the costs to be used and agreement / acceptance of them. The exchanges with interested parties such as the Association of British Insurers and their members of representatives (lawyers, adjusters etc.).
>
> b) this will include any changes in the contract required, particularly where Appendix A to Annex 23 applies i.e. a contractually agreed formula for ensuring a Third Party was charged 'no more than' and the Authority was charged using the same base rates, price list, schedule of defined costs (DCP Rates).
>
> c) the guidelines, policy correspondence, advice etc. issued to contractors, their legal

representatives, HE staff, to include Green Claims about the implementation and application i.e. all information pre-commencement to ensure the process was understood and applied evenly, correctly.

d) the questions / statements raised following the implementation from any party, such as the ABI, loss adjusters, insurers, contractors, their legal representatives. I was informed these were being collated and the questions addressed via your web site. This has yet to occur.

e) The questions / statements / correspondence relating to the suspension i.e. the issuance of a 'stop' notice to contractors, Green Claims etc. explaining the suspension of a process prepared over months, engaged for 4 months and terminated.

40. This is only one part of the request and it covers a vastly expansive amount of different types of information, including but not limited to, correspondence, letters, meetings, contractual changes, guidelines, policy correspondence and 'all information pre-commencement to ensure the process was understood and applied evenly, correctly'.

41. The scope of the request in relation to the people with whom that correspondence, guidance etc. was with or issued to is also vast: contractors, their legal representatives, interested parties, the ABI, their members or representatives (lawyers, adjusters etc.), and HE staff, to include green claims. Even if Mr. Swift is right that there were a relatively small number of insurers or loss adjusters involved in the process, the request is not limited to insurers and loss adjusters. Further we accept Mr. Gannicott's evidence that his meeting with insurers was attended by approximately 30 people, and therefore the involvement of insurers is wider than Mr. Swift has assumed.

42. Finally the scope of question 4 is not limited in time, although we accept that it would necessarily be limited to the period of time in which NSoRC was under consideration.

43. Although Mr. Swift stated in the email of 30 November that the information covered by part 9 was a duplicate of the information covered by part 4, this does not reduce the amount information which would fall within the scope of the request.

44. It is clear from the wording of the request, not least from part 4 (including, for example, changes in the contracts required) and parts 12 and 13, that not all the information would be held by the NSoRC team and General Counsel as Mr. Swift assumes. This was also Martin Gannicott's and Mr. Drysdale's evidence. Mr. Gannicott stated in evidence that responding to the request would take 'at least a couple of days of my time alone never mind the people I would be engaging with' and stated that the area teams would have to be involved because most of the data would be held in each of the teams because they do not hold it centrally.

45. In relation to part 9 (or part 4) of the request we accept HE's assertion that, because the information requested covers all engagement with contractors about NSoRC following its implementation, searches would have to be made for this information by 14 different teams including the 11 individual area teams, the Green Claims team, the NSoRC team and probably General Counsel.

46. We accept, even in the absence of a sampling exercise, that it is a conservative estimate that one person in each area team would have to spend at least an hour looking through the various claims folders for feedback. We accept that it would also be reasonable to estimate that other teams would also need to spend at least an hour searching for feedback etc. from contractors. On this basis we accept that it is reasonable to estimate that it would take at least 14 hours to respond to part 4/9 alone.

47. This would leave only 4 hours to respond to the rest of the request. Parts 12 and 13 of the request also cover a vast amount of information, that would not be held centrally by the NSoRC team:

> 12. What is meant by 'actual cost' and the actual costs of carrying out the repairs in Areas 6, 9 10 & 12 (as at 01/03/2019) and if different, the:
>
> 13. 'actuals' for re-pricing any claims that have been priced under the National Schedule of Repair Costs"

48. We accept HE's submission that responding to parts 12 and 13 alone would involve extracting thousands of lines of costs from area teams and the Green Claims department.

49. On this basis we accept that it is reasonable for HE to estimate that it would not be possible to respond to the remaining parts of the request, including parts 12 and 13, within the remaining 4 hours.

50. Based on all the matters set out above, and the vast scope of the request overall, we accept that HE's estimate that the time needed to respond would exceed the relevant limit is sensible, realistic and supported by cogent evidence. We conclude that it was entitled to rely on s 12 to refuse the requests.

S 16 – advice and assistance

51. We accept that it is unfortunate that HE did not issue a proper response to the request until it undertook the internal review. It is on this basis that the Commissioner concluded that HE was in breach of s 17(5).

52. We do not accept that HE failed to provide adequate advice and assistance. HE wrote to Mr. Swift on a number of occasions asking for clarity and suggesting

ways in which he could narrow his request. In our view, HE provided advice and assistance so far as it would be reasonable to expect it to do so.

Conclusion

53. For the reasons set out above the appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 11 November 2021
Promulgated: 11 November 2021