First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2021/0048

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/2021/0048 is dismissed.

2. This appeal was heard along with appeal number EA/2021/0056. The tribunal has issued separate decisions but much of the content is the same.

REASONS

Introduction

1. EA/2021/0048 is an appeal against the Commissioner's decision notice IC-45264-D1R9 of 15 February 2021 which held that the second respondent ("HE") were entitled to rely on section 43(2) (commercial interests) of the Freedom of Information Act 2002 (FOIA) and that it did not hold part of the requested information. The Commissioner found HE to be in breach of s 10(1) by failing to respond to the request in time.

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/2020/0048

The Request

8. Mr. Swift made the request which is the subject of the appeal on 12 August 2019:

> I refer to the information you have provided at:
>
> https://highwaysengland.co.uk/thirdpartyclaims/
>
> in which it is stated:
>
> 'The National Schedule of Repair Costs have been derived from competitively tendered rates from across England. In arriving at the National Schedule of Repair Costs we have taken in to account other information available to us to ensure that they can be substantiated as being reasonable costs.'
>
> I ask to be provided:
>
> 1.All rates and other information used to calculate and/or substantiate the schedule provided 24/06/2019.
>
> The online schedule of rates has changed since they were first posted and now display a new set of
> charges 'Version 1.1 from 23 July 2019'.
>
> I ask to be provided:
>
> 2.All information giving rise to the discovery the original rates were incorrect and
>
> 3.All rates and other information used to calculate and/or substantiate the schedule appearing 'Version 1.1 from 23 July 2019'
>
> I ask to be provided:

> 4. All information about the rates you, the Authority, will be pay; whether they are identical rates to those a Third Party is to be charged and if not, how this differs and why.

9. On 13 August 2019 Mr. Swift added the following:

> 5. all exchanges with your contractors regarding the new process.

10. In the absence of a substantive response Mr. Swift requested an internal review on 12 September 2019.

The Response

11. The HE wrote to Mr. Swift on 11 November 2019 confirming that they held the information requested, releasing some of the information and withholding some of the information relying on s 43 FOIA (commercially sensitive information). In relation to part 1 of the request, the information released was an excel document containing a resource list and the number of resources used to create the rate found in the NSoRC. The withheld information was the tendered contract rates. Mr. Swift repeated his request for an internal review on 11 November 2019.

12. In its internal review response dated 16 December 2019, in response to part 1 HE referred Mr. Swift to some published information and withheld the remainder. HE provided some further information in response to part 4.

13. Mr. Swift referred the matter to the Commissioner on 9 October 2019. During the course of the Commissioner's investigation Mr. Swift stated that he wished the Commissioner to investigate only parts (1) and (4) of his request.

The Decision Notice

14. The Commissioner considered that the scope of the case was whether any information was held by HE under parts one and four of the request beyond what was released or withheld under s 43(2). The Commissioner also investigated the reliance on s 34(2) although Mr. Swift appeared to believe that what he was seeking was part of what was withheld as commercially sensitive information, whereas HE's view was that, if Mr. Swift was seeking DCP rates, it did not hold that information.

15. The Commissioner noted that the matter of whether HE holds DCP rates has been thoroughly examined in several decision notices and was also the subject of a Tribunal decision EA/2019/0119. Therefore on the balance of probability the information requested at parts one and four of the request is not held.

16. The Commissioner accepted, in line with the Tribunal in EA/2018/0104 that the exemption at s 43(2) was engaged because disclosure would be likely to

prejudice the commercial interests of the contractors and HE. The Commissioner accepted the view of the Tribunal in EA/2018/0104 that the public interest in withholding the information was substantial.

17. The Commissioner concluded that HE had breached s 10 because it was two months late in providing a response.

Grounds of Appeal

18. The Grounds of Appeal are, in essence, that HE holds further information within the scope of the request, namely DCP rates.

19. In the Grounds of Appeal Mr. Swift explicitly confirms that 'I have no interest in commercially sensitive information, I am asking for the DCP rates'.

The Commissioner's response

20. The Commissioner conceded that what Mr. Swift believes to be DCP rates do exist in Area 9 since November 2015 at least, as evidenced in the witness statement of David Ash and as found by Judge Cragg in EA/2019/0390. The Commissioner does not concede that DCP rates exist in Area 10 or any other area.

21. The Commissioner noted, that as far as she was concerned, Mr. Swift was not appealing the s 43(2) commercial interest exemption applied to the information HE was withholding.

Mr. Swift's reply

22. In essence Mr. Swift's reply is that DCP rates exist and are not commercially sensitive. He relies in particular on the statements of Mr. Ash and Mr. Read in in EA/2019/0390 and his record of the responses given by Mr. Read under cross-examination.

23. At paragraph 25 Mr Swift makes the argument that the evidence shows that the contractually tendered rates are only valid for a year and thereafter the rates morph into a standard 'one size fits all' arrangement, i.e. effectively became the rates used for DCP and ASC work. On this basis he argues that the 'ASC rates' are not commercially sensitive, because DCP rates are not commercially sensitive.

24. Mr. Swift confirms his grounds of appeal at para 47 as being:

24.1. DCP rates exist, the rates that were considered for the NSoRC
24.2. The account of HE cannot be accepted

24.3. The rates have been withheld because they are commercially embarrassing.

HE's response

25. HE does not understand Mr. Swift to contest that tendered contract rates are commercially sensitive and properly withheld under s 43(1).

26. HE understands Mr. Swift's ground of appeal to be that in addition to tendered contract rates, DCP rates exist in Area 9, i.e. what Mr. Swift maintains are rates contractually agreed in advance between HE and its contractors in Area 9 for carrying out DCP repairs, such rates were used to calculate/substantiate the NSoRC, are not commercially sensitive and should have been disclosed in response to the request.

27. In EA/2019/0119 the Tribunal concluded that HE did not hold 'DCP rates' for area 3. In EA/2020/0390V the Tribunal concluded that certain people costs fell within the scope of the request but that no other DCP rates existed. In relation to area 10 the Tribunal concluded that no DCP rates existed.

28. The tendered contract rates have been properly withheld under s 43(1). What Mr. Swift refers to as the area 9 DCP rates were not used to calculate the NSoRC. All information in relation to what Mr. Swift refers to as Area 9 DCP rates has already been disclosed to Mr. Swift.

Mr. Swift's reply

29. Mr. Swift is not seeking 'tendered contract rates'. He expects to be provided with the DCP rates from all areas. They are not commercially sensitive as evidenced by their partial release.

30. The request seeks the rates used to create the NSoRC as explained by Martyn Gannicott.

31. Even if DCP rates were not agreed at contract commencement, DCP rates were subsequently established and/or agreed. Contractors were charging HE using rates for DCP works. ASC rates became DCP rates.

32. HE is aware that Mr. Swift is seeking the rates contractors charge when recovering the cost of DCP repairs from HE and third parties. HE has stated that it is charged a defined cost plus fee for repairs and the only rates that exist are tendered contract rates. Defined costs are a rate and have been provided: they exist as a number.

33. Under the heading 'Grounds of Appeal' Mr. Swift confirms that he has never sought 'ASC' or 'contract' rates. Reference to s 43(1) is 'unnecessary, a

distraction'. The request does not seek rates that are either agreed or established in advance.

34. HE has explained that people rates for DCP works exist and has provided them, that plant cost is based on rates set by the Civil Engineering Contractors Association ("CECA") minus 30%, that materials are at cost and no costs have been supplied. HE have stated that traffic management costs are held and this is believed to be false. These rates will be held for area 3 too.

35. The Tribunal's conclusion in EA/2020/0390V that no DCO rates existed in relation to area 10 is at odds with the statement and oral evidence of Mr. Read. Luke Ellis, a contractor claims handler, gave evidence to a Court (HHJ Godsmark) that the repair cost of works over £10,000 was calculated by reference to rates agrees with the contractor. Area 10 rates were consistent month after month. Schedules of rates recording DCP charges for operative, staff, plant and traffic management are held on behalf of HE.

36. The evidence shows that the tendered contract rates became the DCP rates.

37. The information disclosed to the March 2021 tribunal hearing are rates used to price DCP works which were used to calculate/substantiate the NSoRC and should have been disclosed in response to this request.

Evidence

38. 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

39. 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.

40. 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.

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

Legal framework

Was information held?

42. This is determined on the balance of probabilities.

S 43 – Commercial interests

43. Section 43(2) provides

> Information is exempt information if its disclosure under this Act, would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it)

44. 'Commercial interests' should be interpreted broadly. The ICO Guidance states that a commercial interest relates to a person's ability to participate competitively in a commercial activity.

45. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice

is real, actual or of substance. The harm must relate to the interests protected by the exemption.

46. S 43 is a qualified exemption, so that the public interest test has to be applied.

The Task of the Tribunal

47. 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

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

Was any other information held?

1. On the balance of probabilities did HE hold further information within the scope of the request?

Commercial interests

2. Are the relevant interests 'commercial interests'?
3. Is the prejudice to commercial interests claimed by HE real, actual or of substance?
4. Has HE shown that there is some causative link between disclosure and the claimed prejudice?
5. Has HE shown that the occurrence of prejudice is more probable than not or, if not, that there is a real and significant risk of the occurrence of that prejudice?
6. If so, does the public interest favour maintaining the exemption?

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/2021/0048

34. It was confirmed in correspondence and with both parties at the start of the tribunal hearing that the appeal is limited to part 1 of the request.

Discussion and conclusions

Was any other information held?

35. Part 1 of the request asks for all rates and other information used to calculate and/or substantiate the NsoRC. Martin Gannicot gave clear evidence that the only information used to calculate and/or substantiate the NSoRC is contained in the closed bundle i.e. the contractually tendered rates in AD contracts in areas 1, 2, 10, 12 , 13 and 14 and the CECA and CIJC rates. He explained why that information had been used, and why those areas had been selected. We accept that evidence.

36. We note that this is consistent with his explanation of the information used to calculcate the NSoRC given by him in his telephone conversation with Mr. Swift on 28 June 2019. He stated that they had looked at 'information around the um tendered rates for those work elements from our contractors' and when asked whether that was tendered rates for damage to crown property he replied, '…not damage to crown property but for…works that are of a similar nature, so the cost of repairing a barrier for example or… replacing a barrier'. He then stated that they had looked at their 'M and R contracts' (which are the AD contracts).

37. Further we note that this is consistent with the information given by 'Ramesh' from HE in the telephone conversation with Mr. Swift on 4 July 2019 where he states that 'these rates are based on what we would err on the AD contract' and later states that in relation to these AD contracts 'we have agreed err schedules of rates, but these schedules of rates are informed by, err by a set of of resource rates, planned material, labour… and we've used those resource rates averaged from the, err, what we have received on the various.. contracts err from five regional areas in England'. He adds later on, 'the planned rates are err for all those activities, are average, I, are built using the average resource rates from other, err from Highways England's AD contracts'.

38. This is clear supporting evidence for Mr. Gannicott's explanation of the information used to calculate or substantiate the NSoRC. We note that area 9 is an ASC contract, not an AD contract and therefore any reference to AD or M and R contracts cannot have included area 9.

39. Mr. Swift has inferred from the latter part of the conversation with Mr. Gannicott that rates from area 9 were also used to calculate or substantiate NSoRC. We accept that this is one possible interpretation of what was said by Mr. Gannicott. However, in the light of all the evidence set out above, and in the light of the clear oral evidence given by Mr. Gannicott that he did not take any area 9 rates into account, we think Mr. Gannicott's explanation that he and Mr. Swift were talking at cross-purposes at that point in the conversation is more likely, and accordingly we accept that explanation.

40. On this basis, we find that no further information is held that falls within the scope of part 1 of the request. Whether or not any agreed rates underpinned the defined costs in relation to DCP work in any areas other than area 9 and in any aspects other than people costs, none of these were used to calculate or substantiate the NSoRC and so do not fall within the scope of the request.

41. We accept Martin Gannicott's evidence that after the NSoRC had been put together HE carried out a 'dip check' of the costs in about 100 claims packs. These costs were not used to calculate or substantiate the NSoRC and therefore we find that they do not fall within the scope of the request.

42. The CECA/CIJC rates used to calculate or substantiate the NSoRC are in the public domain and Mr. Swift has already been signposted to those rates by HE.

Commercial interests

43. Mr. Swift argues, on the basis of the statements of Mr. Ash and Mr. Read, that the tendered contractual rates lost their commercial sensitivity because they effectively became 'DCP rates' after 12 months. Mr. Swift extended this argument in his skeleton argument, arguing that this occurred from the inception of the contract.

44. On the basis of the evidence before us we find as follows. The tendered schedule of rates was not used for costs reimbursable work. It was used for cyclical maintenance work in AD M and R contracts and under ASC and AD contracts was also used to establish a 'target price' for scheme work (which enabled the pain/gain to be shared if the actual cost was above or below the target price). Finally the tendered schedule of rates was used to estimate if a DCP repair was likely to fall above or below threshold. Only tendered rates from AD contracts were used to calculate or substantiate the NSoRC rates.

45. We do not accept that the statements of Mr. Ash and Mr. Read show that the commercially tendered rates were 'reconciled' after a year and used for ASC and DCP works. Mr. Ash's statement shows that in area 9 there was a set of agreed figures, which Mr. Ash refers to as people rates, used to calculate defined costs for ASC and DCP works. Nowhere in the statement does Mr. Ash state that the tendered contractual rates were used to inform those people rates.

46. Mr. Read's statement describes how, when area 10 operated under an ASC rather than an AD, the contractor, BBBM, calculated its defined costs. He sets out the method by which BBBM periodically assessed 'rates', for example for plant, which were then determined to be the defined cost of the item from time to time, removing the need for a single line entry in the costs ledger for each and every element. This method does not include using or making reference to the tendered contractual rates. Further Mr. Read specifically confirms that those rates were not agreed in advance between BBMM and HE.

47. There is no evidence in either of these statements or elsewhere that tendered contractual rates were used as the source for the 'people rates' in Area 9 or used, in Area 9 or 10 or any other area, to calculate any other element of the defined costs.

48. As explained by Mr. Gannicott, given the purpose of the tendered contractual rates, there are a number of reasons why the tendered contractual rates might be set at a lower or higher rate than the contractor's anticipated actual costs. Further there are many reasons why a contractor's actual costs will vary throughout the life of the contract and therefore will, at times, be higher or lower than if they were calculated on the basis of the tendered contractual rates.

49. On this basis we do not accept Mr. Swift's argument that the tendered contractual rates lost their sensitivity because they became 'DCP rates' after 12 months, nor indeed that the tendered rates were the same as 'DCP rates' from the inception of the contract.

50. Throughout these proceedings Mr. Swift has consistently stated that, other than by means of the argument set out above, he does not dispute that tendered contractual rates were commercially sensitive. This is clear from his Grounds of Appeal and his various replies summarised above.

51. In his skeleton argument Mr. Swift states, at para 2 'The rates are not commercially sensitive then, nor are they now'. He expands on this at para 20, where he sets out the argument above i.e. that tendered contract rates are not commercially sensitive because rates for DCP and ASC works are the same, rates for DCP works are not commercially sensitive, ergo neither are the rates for ASC works.

52. At para 33 of his skeleton argument he states 'I readily accept that for some while I have accepted 'tendered contract rates' were commercially sensitive, but it has become evident this is wrong'. It appears that the basis for this is again the argument, set out in para 36, that the rates were used for DCP and ASC works and cannot therefore be commercially sensitive.

53. At the start of the hearing Ms Ivimy raised the issue of whether or not Mr. Swift was now contesting the commercial sensitivity of the tendered contract rates. She pointed out that Mr. Swift had, throughout the proceedings and explicitly at the case management hearing, confirmed that he did not argue that tendered contractual rates were not commercially sensitive. This was the basis on which the case had been prepared by HE. If Mr. Swift was to be allowed to contest this issue HE would need to call additional evidence.

54. I raised this with Mr. Swift at the start of the hearing. He confirmed that his argument was that the tendered contractual rates were not commercially sensitive because he says that they were used for DCP work from the outset of

the contract. He accepted that his argument on commercial sensitivity hung on whether or not the tendered rates were used for DCP rates. On this basis, Ms Ivimy was content to proceed without making any application for an adjournment to adduce additional evidence in support of HE's arguments on the application of s 43(2) to contractually tendered rates.

55. Having rejected Mr. Swift's argument that the tendered contractual rates and 'DCP rates' were the same, Ms Ivimy urges us to conclude that 'no issue properly arises under s 43'.

56. We do not agree that we can simply uphold the Commissioner's decision on this issue having rejected Mr. Swift's argument. The conclusion under s 43 has been appealed, albeit on a limited basis, and accordingly in our view we have to reach a conclusion on whether or not the Commissioner was correct to conclude that HE were entitled to rely on s 43(2).

57. This point was considered by the first tier tribunal in EA/2018/0104 who decided that the tendered contractual rates were commercially sensitive. The tribunal reached that conclusion on the basis of the evidence before them which included letters from five contractors stating that, in their view, disclosure of tendered contractual rates would prejudice their commercial interests. It is therefore perhaps unsurprising that Mr. Swift did not challenge the Commissioner's decision notice on the basis that tendered contractual rates, absent any argument that they were DCP rates, were not commercially sensitive.

58. The prejudice relied on by HE is twofold. HE says that if the figures were disclosed it would be possible for a competitor to work out what rates were being tendered by the rest of the market. This would be likely to put the contractor whose rates had been published at a disadvantage in future tenders. Further HE asserts that it would limit HE's ability to negotiate at arm's length with individual contractors if they knew what others were charging. We accept that the relevant interests are commercial interests and that the prejudice is real, actual and of substance.

59. When considering whether HE has established a causative link or that the occurrence of prejudice is more probable than not, we have to take account of the fact that disclosure has not yet happened. It is a hypothetical, future event. There is therefore unlikely to be concrete or direct evidence of the specific effect of this particular disclosure. We note that we do not have evidence from contractors before us, but we note also that the reason for this is the lack of challenge from Mr. Swift.

60. Mr. Swift suggested in cross-examination that contractors would know each other's rates and that there was little variation in rates. No evidence was called in support of these assertions and we accept Mr. Gannicott's evidence that this is not the case.

61. Given the nature of the withheld information we accept, as a matter of common sense, that there is a clear causative link between releasing the specific tendered contractual rates and the risks set out in the above paragraphs by HE. The rates were, at the time of the request, recent and from current contracts. Again, as a matter of common sense, we accept that there is a real and significant risk that this prejudice will occur.

62. Looking at the public interest balance, we accept that there is a strong public interest in HE being able to operate effectively in a competitive tendering environment in order to ensure that public funds are not wasted. Other than a general public interest in transparency, Mr. Swift has not put forward any specific public interest in the disclosure of the contractually tendered rates. On this basis, we find that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Conclusion

63. 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