First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal No: EA/2019/0119

IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS)

BETWEEN:

PHILIP SWIFT

Appellant

and

(1) INFORMATION COMMISSIONER
(2) HIGHWAYS ENGLAND

Respondents

Before

JUDGE MELANIE CARTER
TRIBUNAL MEMBERS
SUZANNE COSGROVE & STEPHEN SHAW

DECISION

---

1. This is an appeal by Mr Philip Swift ("the Appellant") against the Information Commissioner's ("the ICO") Decision Notice FS50741018 dated 1st April 2019 ("the Decision Notice"). The ICO thereby upheld the refusal by Highways England ("HE") of a request for information made on 8th May 2018 under the Freedom of Information Act 2000 ("FOIA").

2. The Tribunal decided at an oral hearing that the information requested was not held and the appeal is hereby dismissed.

The request

3. The requested information was as follows:

> *"please can you provide the schedule of defined costs for the Area – the schedule to build up the invoice."*

4. This request related to the process by which HE seeks to recover the costs of damage caused to the highways (usually via road traffic accidents) from the members of the public responsible for that damage. This is often referred to as Damage to Crown Property ("DCP"). The particular Area was Area 3, and the particular invoice, one submitted by sub-contractor Keir.

5. HE responded to the request on on 22nd May 2018 and released information to the Appellant comprising a scan of a cost breakdown document. This set out the cost of the repair that Keir had carried out. The Appellant requested an internal review stating he had not requested "an invoice" and he had requested "the schedule of defined costs for the Area". On 22nd June 2018, the Appellant wrote asking HE to supply the schedule of defined costs ie the rates it had agreed with Kier in Area 3 and to which HE and Kier were working. The ICO in the event, treated this as a new request.

6. As set out above, HE refused this request on the basis that the information was not held. The Appellant complained to the ICO who upheld this refusal in its Decision Notice. This is an appeal against the Decision Notice of the ICO. The task for this Tribunal under section 58(1) FOIA, is to determine for itself the question whether the information is held. It is to answer this question by reference to the balance of probabilities, that is, whether it is more likely than not that the information is held.

7. The Appellant's Grounds of Appeal maybe summarised as:

a) The IC was wrong to conclude as a matter of fact that the information requested did not exist and was not held by HE.

b) The IC failed to consider the evidence the Appellant submitted and that there is "overwhelming evidence" the rates existed at the time of the request.

Evidence

8. HE explained that:

"strategic road network for which Highways England is responsible is mainly motorways and A roads. This is divided into twelve numbered areas, each of which is the responsibility of third party contractors (such as Kier & Balfour Beatty Mott MacDonald) who have tended for the work. The contractors in six of these areas operate under a contract known as an Asset Support Contract ('ASC') which are contracts by which Highways England procures services from its contractors in relation to the maintenance and improvements of its road network. Six other areas have moved on to a new contractual arrangement known as Asset Delivery where far more of the operation is retained in –house and not contracted out.

Broadly speaking, there are two ways in which monies are sought to be recovered from members of the public who have caused damage to the road network which relates to the anticipated cost of the repairs:

(1) if repairs are expected to cost more than £10,000 ("above-threshold repairs", the contractor carries out the repairs and then charges Highways England the actual costs incurred plus its contractor's fee. Highways England pays the contractor and then seeks to recover the costs from the insurers of the driver.

(2) if the repairs are expected to cost less than £10,000 ("below-threshold repairs") the contractor is responsible for carrying out the repair and pursuing recovery from the drivers' insurers directly themselves. Under the ASC, contractors are entitled to recover for matters such as administration, legal costs and overheads."

9. Further as is set out by the ICO in the Decision Notice at paragraphs 21 – 28:

"the term 'defined cost' refers to a definition in the contract -the contract does not contain a schedule of defined costs; the defined cost is calculated in accordance with the definition. This is based on actual costs incurred by the supplier and there is no pre-set schedule of defined costs, or other schedule, that is used. The definition is contained at clause 11.1 of the above contract and is stated as follows:

"(27) Defined Cost is the amount of payments due to Subcontractors for work which is subcontracted without taking account of amounts deducted for

- *payments to Others and*
- *the supply of equipment, supplies and services included in the charge for overhead ▪costs incurred within the Working*

Areas in this contract and

- *the cost of the components in Schedule 1 for other work less*
- *the cost of preparing quotations for compensation events where the work affected forms part of the Lump Sum Duties and is allowed Cost."*

22. The Schedule 1 Conditions of Contract in the above contract – which the Commissioner has reviewed -contains the 'Schedule of Cost Components' at page 104. HE notes that this schedule does not contain any figures or rates but sets out the costs that may be recovered by the supplier."

10. This Tribunal had before it six witness statements from the Appellant (most of which were very lengthy). There were voluminous exhibits attached to the Appellant's witness statements. Conversely there was little from the HE either by way of submissions, documentary or statement evidence. The HE had not set out in these proceedings to deal with the majority of the detailed points made by the Appellant in his submissions and witness statements. HE did however rely upon the evidence of Mr Patrick Carney Head of Commercial Delivery for Operations for the South East of England at HE (as it did in First Tier Tribunal in Swift v Information Commissioner EA/2018/0104). It also relied upon the brief witness statements of Sean Kelsey, Government Lawyer and Sharon McCarthy, Director for Corporate Assurance for HE. In addition, the Tribunal had before it the complex contract between Keir and the HE.

11. One of the major difficulties in this appeal, apart from the volume of information from the Appellant before the Tribunal was that there was a significant back story including at least 57 information requests made previously by the Appellant, a number of ICO decisions further to these and two First Tier Tribunal decisions (in relation to one of which the HE had been refused permission to appeal by the Upper Tier Tribunal). These matters were all broadly related to the subject matter of the current appeal.

12. HE argued that the Appellant had fundamentally misunderstood the way the contract operates; "defined costs" in the form of DCP rates did not exist. There were said instead to be the ASC rates in the contract (that is pricing schedules, rates tendered by the supplier during the procurement process to build a target cost model). This position was, it was argued, recently upheld by the First Tier Tribunal in EA/2018/0104. It was held in that decision by the Tribunal (who had seen the withheld information) that these were ASC rates and could not be interpreted as 'DCP rates'.

13. It appeared to the Tribunal that there had been a significant degree of confusion on the part of HE as to what it was they thought the Appellant had been seeking to obtain through many of his requests and most particularly in the recent appeal before the First Tier (EA/2018/0104). Thus, it was clear that in relation to this request, the Appellant was not asking for the ASC rates, which had been the subject of the above referenced First Tier Tribunal decision. That decision as noted, was that the ASC rates which related to contractor's tender bids and target prices was exempt from

disclosure on the basis of commercial sensitivity (section 43 FOIA). The Appellant had clarified in these proceedings that he understood the difference between the ASC rates and the DCP rates and that he had never been seeking the ASC rates. Thus, at this hearing with the benefit of oral evidence, the live issues which the Appellant wished to pursue became clear. This also assisted with understanding the appropriate interpretation of the request for information that was the subject matter of this appeal. In particular, the DCP rates, in terms of what the Appellant was asking for, were not necessarily held in a formal contractual schedule. Importantly the request was for rates that were agreed with the HE. These were rates which the Appellant said, "built up the invoices" submitted by Kier.

14. Mr Carney had at the previous Tribunal hearing, introduced the phrase "DCP rates". Much of the Appellant's belief that such rates must exist came from the fact that Mr Carney had coined this phrase, referring in places in his evidence and letters to contractors, to there being DCP rates. HE's position is that there are no DCP rates and that this had been an unfortunate turn of phrase. It maintains that there is no such schedule or set of rates relating to DCP either held by HE or on its behalf by Kier. The only set of rates as such are the ASC rates (target rates provided during the tender process albeit raised by a set uplift each year). Mr Carney explained that he had referred to there being DCP rates as the Appellant himself had produced information from Keir, given to him voluntarily, which clearly related to DCP. Mr Carney maintained that this was all he was referring to, including that these could not be commercially sensitive as, self-evidently, Keir did not see the information that way, as they had given it to the Appellant.

15. From the oral evidence, the Tribunal ascertained that contractors, in this case Keir, when undertaking work under their contracts with HE would use the ASC rates (which were updated every year) to work out an estimate on a particular job, and then by reference to that, decide whether it fell above or below the £10K threshold. If above, broadly speaking, Keir would pass its invoice to HE who would pay Keir, HE is picking up the responsibility for recovery of the costs from the driver or their insurer who incurred the DCP. The costs charged would be based on the ASC target rates but would then be subject to the 'pain/gain' adjustment process under the contract. The HE staff would carry out a rough and ready check on monthly invoices based on their knowledge of the cost of such schemes. The monthly invoices would contain the actual rates applied for the specific DCP repairs, which the HE staff would expect to be broadly consistent with ASC rates. The Tribunal noted that it might be said that these rates were, in practice, approved by the HE by the invoices going ahead without challenge (this not being formal approval, but rather an absence of challenge).

16. If below the £10k threshold, the sub-contractor would not invoice HE for works undertaken as under the contract, it was left to recover the monies, based on actual costs, directly from the drivers or their insurer. This process was not therefore checked by HE in anyway (other than in theory under Annex 19). The checks and balances on what was charged by the sub-contractor was in effect, carried out by insurers or drivers challenging recovery, and in some cases the courts determining disputes.

Analysis

17. In essence, the Appellant had been asking first the ICO and now the Tribunal not to accept the version of events put forward in the HE's submissions and in particular Mr Carney's evidence. The Appellant suggested variously that Mr Carney was not to be believed and that Kier may have misled Mr Carney. The Tribunal however found him to be a credible witness, there being no reason to consider that he was either lying or seeking to mislead the Tribunal. There was moreover no evidence before the Tribunal that supported the suggestion that Kier would have misled Mr Carney.

18. The Tribunal was also asked to look beyond Mr Carney's evidence, to the actual contractual terms, a raft of documentary evidence and in effect to find on circumstantial grounds that DCP rates must logically exist (whether held by HE or by Kier on behalf of HE). The Tribunal was of the view that none of the grounds below, on their own or taken together amounted to sufficient circumstantial evidence that DCP rates did exist or were held by HE or by Keir on behalf of HE. The Appellant drew the Tribunal's attention to:

    a) the material differences in the invoices above and below the £10k threshold, indicating something untoward in the charging basis. The Tribunal took the view that the differences were all explicable. The Tribunal found that, on the evidence before it, the rates used for operatives who had undertaken repairs and related work, did indeed materially vary depending on whether the works were set as above or below the £10k threshold. It was accepted by the Tribunal however, that below £10k, additional factors were involved, most notably a risk element (the contractors having to undertake their own recovery of fees), variations on account of TUPE conditions (where some workers might be subject to different terms and conditions) and other variable factors in relation to the incident attended to (eg: out of hours, whether having to take a team of workmen away from one job to attend to this one) etc.

    b) the remarkable similarity in rates used in the invoices above threshold, indicating consistency which must mean an established and fixed set of rates. The Tribunal considered that this was not surprising however given that the effectively fixed ASC rates played a larger role in the above threshold invoices;

    c) the fact that (albeit for different contract Areas) a sub-contractor, A-One+, had decided to comprehensively publish its rates and Keir had, on HE's request (further to an ICO Decision Notice) supplied rates for one type of operative, Asset Inspection Watchmen ("AIW"). It was argued therefore if they can do this, either the DCP rates do exist or they could be asked to compile the rates into a disclosable format. The Tribunal concluded that this voluntary disclosure was no more than that, and did not indicate that DCP rates were held by HE or contractors on behalf of HE. If anything, this indicated that contractors were able to compile this information if they chose to do so – the Tribunal noted however that FOIA only relates to information actually held and that the Act gives no right for new information to be created. The Tribunal took the view moreover that the

rates given in relation to AIW, could not easily be viewed as one set of rates given the great range of figures disclosed (even taking account of the factors explained at the hearing by the Appellant);

d) that Mr Carney had written to contractors asking whether they were content for 'the DCP rates' to be disclosed and why would he do this if they did not exist. Mr Carney however explained in oral evidence, that he had been new to these issues at the time and had made a mistake in the way in which he had referred to the rates. The Tribunal accepted this as a credible explanation. It was notable moreover that each contractor avoided the expression in its response and referred to ASC rates. The Tribunal saw no reason not to accept Mr Carney's account of this;

e) that the National Audit Office had been told that DCP rates existed and this had been reflected in a meeting note and letter from the NAO. The HE witness explained again that this had been a misunderstanding and that this had been clarified by way of a subsequent letter to the NAO. Again, the Tribunal saw no reason not to accept this account given that these were indeed complex matters and there had been a degree of confusion on their part as to terminology evidenced by their response to the Appellant over the years (and the confusion over ASC as opposed to DCP rates);

f) that a County Court in a particular dispute, involving a different, contractor, contract and area had referred to the existence of DCP rates. The Tribunal was unable to determine why this had happened, but did not consider this sufficiently proximate to the HE's operations and engagement with its contractors in relation to this request to provide material weight to the Appellant's arguments;

g) The effect of Annexes 19 and 23 of the contract. The Tribunal carefully assessed the contents of both Annexes but concluded that neither provided for contractors to have or to hold on behalf of HE, a schedule or list of DCP rates;

h) finally, that the CEO of HE had said in an interview that the HE had "no visibility" over aspects of the contract's operation. The Tribunal noted that this was an unusual state of affairs for a public contract but took into account that this was in effect the public sector arranging for part of the necessary works to highways to be done by the private sector, using private money. There was nothing in this to support the existence or non-existence of the information requested.

19. Further to this last point, the Appellant was, in effect, alleging that there was either impropriety or a lack of rigour and accountability in the way in which HE managed its contract with Keir and its other contractors (in effect allowing overcharging). The Tribunal had no jurisdiction to assess this issue as it was solely concerned with whether the requested information, that is, agreed DCP rates, was held by HE or Keir on behalf of HE. It was however inclined to the view that, insofar as HE played no role in verifying/checking on monies recovered for works under £10k, the concerns of the Appellant were likely fuelled by a lack of supervision/oversight by HE rather than anything untoward. It was supported in this, by the fact that the KPMG and the NAO

had looked extensively into these issues and not found the kind of impropriety that the Appellant has been alleging (and which might have made any suggestion that the information was not held, less credible). Similarly, the insurance industry, renowned for raising challenges where appropriate, were notably absent in supporting the notion of either there being DCP rates in existence or their being manipulated and ignored in the ways suggested.

20. The other way of viewing the Appellant's arguments was that the DCP rates should be held. It was not within the Tribunal's jurisdiction to comment whether DCP rates should be held or whether, taking a broader view, HE should exercise greater control over the contractors in this regard. The Tribunal was clear that the only rates in existence held by HE or the contractors on HE behalf were indeed the ASC rates. These were a component of how contractors charged for DCP work but no more than that.

Conclusion

21. In the circumstances, the Tribunal found on the balance of probabilities that HE did not hold a set of rates relating to DCP, agreed or otherwise, for work done by Kier in relation to the particular invoice at the date of the request. Kier did not moreover hold such on behalf of HE (there being nothing in the contract indicating that Keir would hold this information on HE's behalf).

22. The appeal is dismissed.

Judge Melanie Carter

Judge of the 1st tier Tribunal *Date 12th December 2019*