

Our ref: FOI 738,640
Your ref:

13th July 2016

OFFICIAL

Dear

I am writing to advise you that we do hold information that is relevant to your request 23 May 2016 but regret to inform you of my decision not to disclose this information.

In your request of 23 May 2016 you asked:

- see https://www.whatdotheyknow.com/request/pricing_methodologies_2
- *What rates are Kier Highways charging to Highways England and others when fixing roads?*
- *Are the rates the same if the rates are the same there would be no reason to keep these secret.*
- *If they are different, why would they be?*

After receiving my email dated 17 June 2016, advising you of the need to extend the original Freedom of Information (FOI) deadline to conduct a public interest test, you responded with the following email on 28 June 2016:

- *I have been advised: "Kier Highways Ltd (KHL) until late 2015 used a 1153 pricing methodology, they divided the cost of supply emergency incident attendance by the number of claims per annum (1153) and the resultant average was then applied to each claim.*
- *However, claims are not priced using 1 method. If the claim is over £10,000 the KHL present the invoice to Highways England (HE) who pay it. If the claim is below £10,000 KHL keep the claim and seek payment from a fleet or insurer.*
- *But, claims presented to HE have not involved the 1153 process. This is of concern. If HE (over £10k claims) are not priced using 1153, it appears they do not form part of the 1153 total. Surely if the 'average' is an appropriate method of charging (which we do not accept) the number should be 1153+HE claims i.e. a larger number of claims resulting in a lower average figure?*
- *As fleets and insurers are paying 100% of the cost of the above aspects, why are HE paying anything? You may wish to view:*
<http://www.englandhighways.co.uk/highways-england-unintended-consequences/>
- *If the rates used to HE and KHL are the same, as you say 'why keep them secret'; there are 1,000's of claims every year and the rates need to be presented in every case – they will have been necessarily disclosed to many. It appears there is a*

desire to keep the rates separate; not to place them alongside one another, to obstruct the ability to compare.

- *It makes no sense that there are two sets of rates, two processes; why would anyone complicate the issue when the repair staff, plant and materials are the same no matter to whom the invoice is presented?*
- *Information suggests the methodologies exist to enable greater returns to be made on sub-threshold, fleet & insurer claims.”*
- *please explain the public interest test and why this has caused a delay*

The information you requested is being withheld in reliance on the exemption(s) in section(s) 43 <http://www.legislation.gov.uk/ukpga/2000/36/section/43> of the Freedom of Information Act 2000 because 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).

In applying this exemption we have had to balance the public interest in withholding the information against the public interest in disclosure. The key public interest factors for and against disclosure are in the table below.

Under the Asset Support Contract (ASC), third party claims are split into:

- *Claims by Third Parties against the Highways England; and by*
- *Highways England against Third Parties for damage to Crown property.*

The FOI request appears to be framed under Highways England’s ASC for Area 3 and what the process for third party claims is, as set out under Annex 23 of this contract.

With regard to the matters raised under this FOI request these relate to the latter type of claim. Generally, the claims against third parties can be further split by value; these are claims over £10,000 and claims under £10,000.

Claims over £10,000 are pursued and settled by Highways England’s internal (*Green Claims*) team using cost and resource allocations provided by its network area service provider. In Area 3 this is currently Kier Highways Limited (KHL). The cost and resources are captured as set out under the amended New Engineering Contract and follows standard practice principles of *Defined Cost plus fee*.

With claims under £10,000 the service provider pursues the third party directly to recover the costs flowing from their actions.

For these claims, the ASC is not prescriptive as to the methodology to be adopted by the service provider. However, it is required to provide such breakdowns and supporting information to justify the cost of repair. The specific processes have been developed and evolved between the insurance industry and our service providers to provide improved granularity and consistency required.

With regard to the stated “*1153 method*”, the number 1153 relates to the assumed amount of third party claims as stated in the Area 3 tender documents. This was a

notional number that the tenderers used to build up their tender submission for the sub £10,000 claims. It was not envisaged as the actual future number of claims but simply a benchmark for submitted tenders by Highways England.

It was found that the 1153 number was used by KHL as a basis for averaging some cost elements. As stated, this process has now been reviewed and revised. For clarity, it is understood that any contentious or unsettled claims - priced under the old methods - have been resubmitted under the new process, as agreed with the insurance industry. Please note these are private matters between the service provider and the third parties' insurers.

It would be incorrect to conclude that 100% of the costs of all claims are met by "fleets and insurers". For traced third parties this would be the expectation by the service provider for the under £10,000 claims. However, for untraced claims under £10,000 or claims over £10,000.00 these are, for the latter, met initially by Highways England and pursued by its Green Claims team based upon the actual costs as captured and justified by the service provider and - with the former - is met on under an ASC 'Lump Sum' payment.

It is accepted that for the sub £10,000 claims an averaging method, as used by the service provider for some elements of the costs, would mean a degree of error (up and down) and the revised methods developed between the service providers and the insurance industry will impact on this possibility. However, it is recognised that a balance is struck between business efficacy in the processing of claims and the costs associated with the pursuit of the precise value.

There is a cost associated with gathering evidence to enable the precise value of a repair. There is sometimes a compromise to accuracy when aiming to reduce the administration in the capture of cost. With the sub £10,000 claims this is a matter between the insurance industry and the service providers and it is evident that over time a moving balance has been struck to assure there is value for money for the taxpayer. Any contentious or unsettled claims have been revised and resubmitted in the latest format, it is, therefore assumed that this balance was accepted or will be made acceptable.

Regarding the release of all labour, plant and equipment rates, this is considered commercially sensitive and inappropriate, particularly given that these rates are detailed individually with each claim form submitted to the insurance company.

If you are unhappy with the way we have handled your request you may ask for an internal review. Our internal review process is available at:
<https://www.gov.uk/government/organisations/highways-england/about/complaints-procedure>

If you require a print copy, please phone the Information Line on 0300 123 5000; or e-mail info@highwaysengland.co.uk. You should contact me if you wish to complain.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner’s Office
 Wycliffe House
 Water Lane
 Wilmslow
 Cheshire
 SK9 5AF

If you have any queries about this letter, please contact me. Please remember to quote reference number 738,640 in any future communications.

Yours sincerely

Request for Kier rate information:	
(Ref 738,640):	
<ul style="list-style-type: none"> • <i>What rates are Kier Highways charging to Highways England and others when fixing roads?</i> • <i>Are the rates the same if the rates are the same there would be no reason to keep these secret. If they are different, why would they be?</i> 	
FOIA Exemption S.43 (1) & (2) – Commercial Interests	
<i>Factors supporting disclosure</i>	<i>Factors supporting non-disclosure</i>
<ul style="list-style-type: none"> • There is a clear public interest in the work of government being closely examined to encourage the discharging of public functions in the most efficient and effective way; • There is an important public interest in the work of public bodies being transparent and open to scrutiny to increase diligence and to protect the public purse; • There is a public interest in disclosing information about public procurements to ensure there is transparency in the spending of public money and that public bodies are getting value for money when entering into contracts; • There is a strong public interest in releasing information which shows the criteria used when assessing options to illustrate that the processes used were fair and appropriate. 	<ul style="list-style-type: none"> • The procurement process must be seen to be fair and that commercial interests of the suppliers of services are not unduly prejudiced by the release of commercially sensitive information. It is important to maintain the confidence of our suppliers in order to achieve best value for the tax payer; • The methodology outlined in the bid may be construed as a “trade secret” in that it is a strategy owned and developed by the consultant. If the methodology was made available to competitors in the market place it would undermine the commercial interests of the consultant when bidding for other contracts by reducing their competitive edge; • To reveal the details of the bid would seriously undermine our ability to negotiate the best value



	<p>for money for the public purse on future contracts as the rates and methodology are still current;</p> <ul style="list-style-type: none"> • The consultants object to the release of their bid information on the grounds that it contains commercially sensitive information in terms of a “trade secret” and rates; and such a release would be actionable
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Conclusion: there are compelling arguments which support withholding the information which outweigh those supporting release.

PIT Members:
Date of PIT: 27 June 2016

