



Ms Kate Breed

By email:

xxxxxxxxxxxxxxxxxxxxxx@xxxxxxxxxxxxxxxxxxx.xxx

Network Rail
Freedom of Information
The Quadrant
Elder Gate
Milton Keynes
MK9 1EN

T 01908 782405
E FOI@networkrail.co.uk

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Dear Ms Breed

Costs relating to Employment Tribunal and court cases

Internal Review reference number: FOI2018/00494

Original request reference number: FOI2018/00378

I am writing in response to your email of 26 April 2018, which requested an internal review of the handling of your original request for information made on 27 March 2018.

Your original request was as follows. For the purposes of this internal review and ease of reference, I have numbered each part of your request:

[Part 1]- Please would you state the number of discrimination claims brought against you in UK courts and/or tribunals, split out by "protected characteristic".

Please do this for each year since the Equality Act 2010 came into force.

[Part 2] - Please say what happened to each case i.e. whether it was lost, won or settled by you.

[Part 3] - Please say how much, if anything, you paid in order to settle.

If you do not have data for each and every year, please disclose what data you do have.

[Part 4] - Please also say how much you have spent on administration and/or defence of these claims, showing clearly what has been paid to the supply chain, including but not limited to solicitors and other advisors.'

For completeness, I have set out the history of your request and included the correspondence you have exchanged with Network Rail in the Annex to this letter.

Issues on review

I should state from the outset that my review has determined that an error was made in the handling of your original request. Put simply, while the Freedom of Information (FOI) team located and retrieved a proportion of the information you had requested and based the decision to apply exemptions on the basis of the information they had retrieved, my enquiries have shown that the FOI team had not successfully located *all* of the information that you had requested.

The location and retrieval of the requested information is one of the first steps to be taken when any request is received; this should be completed and all the information retrieved before any further considerations can take place about whether the requested information may be disclosed.

As the FOI team did not locate all the relevant information in this case, the first point that this review must address is to determine whether all the information you requested can be located and retrieved within the 18-hour 'appropriate limit' set out in section 12 of the FOI Act and the Fees Regulations. While I appreciate that your request for review asked us to re-consider the section 43(2) exemption, I must advise that further exemptions can only be considered and applied if the requested information can be located and retrieved within the 18-hour time limit.

I should also note again that, as I explained in my email of 27 April 2018, I have interpreted your request for review as only appealing part 4 of your request, and the decision to apply section 43(2) to this information. However, I would make clear here that if section 12 should have been applied to your entire request, this would also apply to the use of section 40(2) for that part of the requested information in exactly the same way.

This review will therefore consider:

- whether it was correct to refuse part 4 of your request under section 43(2) of FOIA;
- whether section 12 of FOIA applies to all 4 parts of your request;
- if section 12 applies, the review must demonstrate exactly what steps would be required to retrieve all of the requested information, and should explain what these steps would be.

Summary of decision

My review has concluded that Network Rail should not have applied section 43(2) of the Freedom of Information Act 2000 (FOIA) to the information sought in part 4 of your request. This is because our original response did not locate all of the information you had requested – section 43(2) was applied after consideration of only part of the information you had requested.

I have made further enquiries to determine the full extent of the information held, and whether this information can be retrieved, and I have concluded that a different section of FOIA (section 12) applies to your request because it would take over 18 hours to locate, retrieve and extract all of the information you were seeking in the four parts of your request.

We have explained previously to you (in a letter to you dated 17 May 2017, our reference FOI2017/00362 and FOI/2017/00508) that FOIA sets out that a request consisting of many separate questions may be refused in its entirety if it would exceed the 18 hour limit to retrieve all the information – in these cases there is no requirement to provide any of the information. Rather, the public authority is required to estimate how long it would take to retrieve the information and explain how the cost threshold would be exceeded, and to assist the requestor by suggesting how a future request could be narrowed in scope to focus on information which could be retrieved within 18 hours. This means that as your request asked 4 questions about related information, we are able to ‘aggregate’ the time and cost involved in dealing with each question and refuse the request in its entirety.

In this case, your request would require Network Rail to locate, retrieve and extract detailed information relating to 177 cases, over a period of almost seven years and six months covered by your request.

To give one example, we estimate that it would take 59 hours to locate, retrieve and extract the information sought in part 4 of your request alone and therefore the 18 hour threshold would be significantly exceeded. I have set out below a detailed description of the searches required for your request and provided advice on how you could narrow your request.

Once you have had the opportunity to read through this internal review, if you would like to go ahead with a further narrowed request, please contact me or Dr Lou Lander and we will work with you to try to identify recorded information which could be provided within the limits set out in the FOIA.

Analysis

Whether section 43(2) of FOIA applies to the information sought in part 4 of your request

Network Rail's response to your request applied the exception under section 43(2) of FOIA to part 4 of your request, which asked:

'Please also say how much you have spent on administration and/or defence of these claims, showing clearly what has been paid to the supply chain, including but not limited to solicitors and other advisors.'

The exception under section 43(2) applies to information where disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding the information).

During the processing of part 4 of your request, Network Rail did not determine whether it held all the requested information for that part of your request and did not locate, retrieve and extract all of the recorded information within the scope of that part of your request. I consider that it was therefore not appropriate to apply section 43(2) to the information, because Network Rail had not located, retrieved and extracted the information and had not reviewed that information to determine whether the exception applied and what the balance of the public interest test would be. I have therefore set aside the exception under section 43(2), so far as it might apply to the information sought in part 4 of your request. I apologise for the error in the processing of that part of your request.

I consider that the difficulties in locating and retrieving all of the information mean that a different section of FOIA should have been applied to your request; this is explained in the next section of this letter.

Whether section 12 of FOIA applies to your request

Section 12(1) of the FOIA allows a public authority to refuse to comply with a request for information 'where the cost of compliance is estimated to exceed a set limit known as the appropriate limit.'¹ In the case of Network Rail, the appropriate limit is a total of 18 hours to determine whether information is held and locate, retrieve and extract all of the information sought in a request. I will now consider whether it would be possible to deal with your request within this limit.

¹ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

It may be helpful if I explain the overall difficulty with the request before I consider each individual part. The request, in total, asks four different questions as follows:

- Part 1 - the number of discrimination claims brought against Network Rail in UK courts and/or tribunals, split out by protected characteristic, for each year since the Equality Act 2010 came into force;
- Part 2 - what happened in each case, i.e. whether it was lost, won or settled by Network Rail;
- Part 3 - how much, if anything, was paid by Network Rail in order to settle;
- Part 4 - how much Network Rail has spent on administration and/or defence of these claims, showing clearly what has been paid to the supply chain, including but not limited to solicitors and other advisors.

To help explain the scale of the information which is being sought in your request, I can advise you that the Equality Act 2010 came into effect on 1 October 2010², or almost 7 years and 6 months before your request on 27 March 2018. Therefore, every part of your request relates to this significant period of time.

Network Rail's response to your request confirmed that a total of 177 discrimination claims had been brought against Network Rail during this period and therefore every part of your request also relates to a significant number of claims.

Network Rail's response refused the information sought in parts 2 and 3 of your request under section 40(2) of FOIA and the information sought in part 4 of your request under section 43(2) of FOIA. However, I consider that, due to the time taken to locate, retrieve and extract the detailed information sought in parts 2, 3 and 4 of your request, it would have been more appropriate to apply section 12 of FOIA to the entirety of your request. I will now explain the steps required to locate, retrieve and extract the information requested.

Information on each individual Employment Tribunal case is held on a case management system. However, it would be necessary to review the case management system and other records for each individual case in order to locate, retrieve and extract all of the detailed information sought parts 2, 3 and 4 of your request.

² <https://www.gov.uk/guidance/equality-act-2010-guidance>

In relation to parts 2 and 3 of your request, the searches of our records have located a Microsoft Excel spreadsheet held by our Legal Department, which includes summary information on Employment Tribunal cases and Settlement Agreements between 2009 and 2018.

The spreadsheet has a separate tab for all cases received in each year (for example, 2010, 2011, 2012, etc) and the information recorded on each tab includes the outcome (for example 'settled', 'struck out', 'withdrawn') and - in some cases where a settlement was agreed - the amount paid in settlement. The format of the spreadsheet and the information recorded for each case has changed over time and for some cases, information has not been entered.

As part of this review, I have reviewed one tab of the spreadsheet, for cases received in 2011. It is possible to filter the information on that tab of the the spreadsheet to select Employment Tribunal cases involving alleged discrimination relating to one or more of the protected characteristics as defined in the Equality Act 2010. However, as indicated above, a sampling exercise has indicated that information has sometimes not been recorded within the spreadsheet. To locate all the information you are seeking for each case, further searches would still be required to locate the additional information.

In relation to part 4 of your request, I have been advised that the costs of administration and/or defence of a claim may not all be recorded on the Employment Tribunal case management system. For example, while the system may record the cost of any award made, solicitors' fees might be recorded elsewhere and it would require further searches of Network Rail's records to identify those fees and any other external costs.

I consider that part 4 of your request - how much Network Rail has spent on *'administration and/or defence of these claims, showing clearly what has been paid to the supply chain, including but not limited to solicitors and other advisors'* - should be interpreted to include costs incurred in connection with any Employment Tribunal case for any supplier of goods or services used by Network Rail, such as any travel, accommodation or subsistence costs associated with each Employment Tribunal case. Searching for those costs would involve further searches for records relating to each of those items, for each of the 177 cases over the period of almost seven years and six months covered by your request.

In order to identify any travel, accommodation or subsistence costs associated with each case, it would be necessary to carry out the following steps:

1. For each of the 177 cases, identify all of the Network Rail employees who were involved in each case, such as line managers, Human Resources Business Partners, Human Resources managers and in-house lawyers;
2. Identifying whether each of those employees incurred costs in relation to a case, for example any spending on travel, accommodation or subsistence costs associated with each Employment Tribunal;
3. In addition, a small number of cases have proceeded to the Employment Appeal Tribunal; I consider that the scope of your request would require further searches in order to locate the information sought in part 4 in relation to all of those Employment Appeal Tribunals;
4. Total all identified costs to calculate a total cost of all 177 cases.

I have been advised that our Human Resources department have previously searched for all costs associated with one case and it took 20 minutes to locate, retrieve and extract the information on costs for that one case. That search involved the following steps:

1. Identifying the correct purchase order number for the case.
2. Carrying out a search of the system containing invoice records for the relevant purchase order number.
3. In the case mentioned above, there were multiple entries against the purchase order number. It was then necessary to make a note of the types and amounts of each payment, ensuring that there was no duplication of information and a method to account for any unallocated amounts. The documents for the case ranged from simple invoices, to more complex documents where costs were partly drawn down to different cases.

I should also note that this example did not include searching for the travel and expenses costs of Network Rail employees; it would be necessary to conduct further searches for locate, retrieve and extract this type of information for each case.

On the basis that it took 20 minutes to locate, retrieve and extract all of the costs associated with this one case, we estimate that it would take 3540 minutes to locate, retrieve and extract all of the costs associated with all 177 cases, or 59 hours. This is significantly longer than the appropriate limit of 18 hours which applies under section 12 of FOIA.

I have therefore concluded that section 12 of FOIA applies to your request and your request should be refused on that basis.

Advice and assistance

In order to provide advice and assistance, you may wish to consider narrowing your request as follows:

- Seeking a reduced amount of information for a significantly shorter period of time – if you choose to go forward with this suggestion, it may be useful to contact myself or Dr Lander to discuss the information that you are most interested in. This would enable us to make enquiries and provide further advice to keep retrieval of the information within the appropriate time limit.
- Seeking the information on costs and payments recorded on the spreadsheet held by our Legal Department, mentioned earlier in this letter. Please be aware that while this information is recorded centrally, I would reiterate that the information has been recorded in such a way as part of an informal working document intended for internal use; as noted earlier, it is not intended to be a full and complete record and without further searches and verification (which, as noted earlier, would exceed the appropriate limit) can only provide a part of the full cost and payment information that will be held in other locations.

Once the narrowed request has been received and the information retrieved, we will then be able to proceed to determine whether the information may be disclosed or whether exemptions apply. You will be aware from the original response issued to you that our colleagues have identified concerns about commercial interests and personal information, and while it is not appropriate to refuse a request in advance of it being made, I think it only fair to advise you that any request for detailed personal information will need to be considered very carefully and that the section 40(2) exemption may still apply. As a general 'rule of thumb', higher level aggregated information or annual totals will be less likely to engage the section 40(2) exemption than more detailed information about individual and specific cases.

In addition, as explained in my letter dated 17 May 2017, final decisions in Employment Tribunal decisions have been published from February 2017 onwards at the link below:

<https://www.gov.uk/employment-tribunal-decisions>

Please note that these decisions do not include all of the information sought in your request.

Employment Tribunals and Employment Appeal Tribunals are also published on the following links:

<http://www.bailii.org/uk/cases/UKET/>

<http://www.bailii.org/uk/cases/UKEAT/>

I hope that this further explanation is helpful. Please do contact me or Dr Lander if you wish to discuss further.

Yours sincerely

Colin Bendall
Information Officer – Compliance & Appeals

Next steps

If you are not content with the outcome of this 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

Please remember to quote the reference number at the top of this letter in all future communications.

Annex

Request history

On 27 March 2018, you made the following request:

'Please would you state the number of discrimination claims brought against you in UK courts and/or tribunals, split out by "protected characteristic".

Please do this for each year since the Equality Act 2010 came into force.

Please say what happened to each case i.e. whether it was lost, won or settled by you.

Please say how much, if anything, you paid in order to settle.

If you do not have data for each and every year, please disclose what data you do have.

Please also say how much you have spent on administration and/or defence of these claims, showing clearly what has been paid to the supply chain, including but not limited to solicitors and other advisors.'

For the purposes of the internal review, I have numbered your request as follows:

- Part 1 - the number of discrimination claims brought against Network Rail in UK courts and/or tribunals, split out by "protected characteristic", for each year since the Equality Act 2010 came into force;
- Part 2 - what happened in each case, i.e. whether it was lost, won or settled by Network Rail;
- Part 3 - how much, if anything, was paid by Network Rail in order to settle;
- Part 4 - how much Network Rail has spent on administration and/or defence of these claims, showing clearly what has been paid to the supply chain, including but not limited to solicitors and other advisors.

Network Rail acknowledged your request on 28 March 2018 and responded on 26 April 2018. The response provided the information on the annual total number of discrimination claims brought against Network Rail in UK courts and/or tribunals since 2010; however, Network Rail withheld the total number of claims for each year split by protected characteristic under section 40(2) of FOIA because it believed this was personal information of third parties. Network Rail stated that disclosing the number of

claims relating to a particular protected characteristic would allow specific individual claimants to be identified and this would be unfair to claimants, who would have a strong expectation that this information would be treated as confidential.

The response also applied section 43(2) of FOIA to the information about the outcome of each case, including how much Network Rail had paid to settle the claims and how much had been spent on administration and/or defence of the claims. Network Rail stated that by providing this information, we would in effect be disclosing the average settlement per claim, or, benchmarking what an applicant might expect to receive from a compensation claim. Network Rail stated this would undermine its capacity to negotiate future claims effectively and prevent it getting best value for money for the public purse. In considering the balance of the public interest, Network Rail considered that the factors in favour of disclosing the information (promotion of openness and accountability) were outweighed by the factors in favour of maintaining the exception (ensuring that public authorities are able to negotiate effectively and avoiding a reduction of Network Rail's ability to negotiate robustly means, which would increase spending of public money).

The response also provided advice and assistance (links to publicly available information about Employment Tribunal cases).

You replied on 26 April 2018 as follows:

'Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request an internal review of Network Rail Limited's handling of my FOI request 'Discrimination claims by type and year'.

I don't agree with the justification provided by you for withholding information requested. Network Rail is required to operate in a transparent manner and this includes make publication of accounts on an annual basis. Legal costs must fall under this requirement, otherwise how can the public be assured that it is getting value for money? Furthermore, disclosing what has been paid in a previous year does not determine what will be paid the next - if anything it would encourage competitive tender by firms wishing to break into the supplier base of a lucrative public body. The value of contracts awarded over a certain value are supposed to be disclosed under OJEU and there is nothing to prevent suppliers sharing information between themselves anyway. So your arguments about it not being in the public interest to disclose what has been spent in PREVIOUS years do not stack up.'

On 27 April 2018, Network Rail acknowledged your request for an internal review and explained that your email was being interpreted as relating to the refusal of part 4 of

your request. Network Rail asked you to indicate if there are any other aspects of the response which you would like the internal review to consider; you did not respond to this point.

On 22 May 2018, Network Rail explained that it was still working on the internal review of the handling of your request and considering whether your request had been handled in accordance FOIA; the time for a response was therefore extended to 40 working days and a response would be issued by 25 June 2018 at the latest.

On 4 June 2018, you emailed Network Rail as follows:

'According to whatdotheyknow.com:

"The response to your request is long overdue. You can say that, by law, under all circumstances, the authority should have responded by now"

Please could you tell me what is so difficult about my request.'

Network Rail replied on 5 June 2018 to explain that enquiries had been completed in relation to the internal review and that a decision and response was being prepared.