



Ms Kate Breed

By email:

[request-473889-cc170270@whatdotheyknow.com](mailto:request-473889-cc170270@whatdotheyknow.com)

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

20 July 2018

T 01908 782405  
E [FOI@networkrail.co.uk](mailto:FOI@networkrail.co.uk)

Dear Ms Breed

**Information request**

**Reference number: FOI2018/00786**

Thank you for your request of 21 June 2018. You requested the following information:

*'Thanks Colin, a comprehensive explanation I can see you've taken care over. First things first - please can I have the excel file to which you refer? '*

This was in reference to a Microsoft Excel spreadsheet held by our Legal Department, which includes summary information on Employment Tribunal cases and Settlement Agreements between 2009 and 2018.

I have processed your request under the terms of the Freedom of Information Act 2000 (FOIA).

Our response to your similar request (reference FOI2018/00378) withheld information under section 40(2) and section 43(2) of FOIA in which we argued that disclosure of this type of information would reduce 'our capacity to negotiate robustly means we will spend more public money and place greater demands on the tax payer'. In the current case, your request relates to a smaller quantity of information; however, I consider that these exemptions are relevant in this case. Our response to your internal review (reference FOI2018/00494) advised 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'.

Whilst we do hold this information, in our view the information you have requested is exempt from disclosure under section 40(2) (personal information) of the FOIA, section 41 (information provided in confidence) and section 43(2) (information which would, or would be likely, to prejudice the commercial interests of any person).

Section 40(2) of the FOIA allows us to withhold information if it constitutes the personal information of identifiable individuals, and its disclosure would contravene one or more of the data protection principles of the General Data Protection

Regulation (GDPR) and the Data Protection Act 2018. In this instance, the information you have requested constitutes the personal information of individuals identified in the spreadsheet.

When recorded information is disclosed under FOIA, it is effectively a disclosure to 'the world', including any third parties who may already have some knowledge of an individual, or any 'determined individual' who might seek to link the requested information with any information available to them by other means. The Information Commissioner's guidance says that:

*'When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals...'*<sup>1</sup>

We have withheld information under section 40(2) which could be used to identify individuals concerned, including the date, the case reference numbers and the names of individuals involved in the cases. I consider that disclosing this information would allow the individuals concerned to be identified and is therefore personal information.

Under GDPR, article 5(1) states that personal information must be handled lawfully, fairly and in a transparent manner (the right to be informed). I consider that disclosure of this information would be unfair to the individuals concerned and may lead to the individuals being identified.

In determining what is fair, we need to balance the rights of the individuals with the legitimate interests in disclosure of the information. In this instance, we are of the view that these individuals are not likely to be known in the public domain and it is likely that they would not wish details of cases which were concluded up to nine years ago to be disclosed to 'the world' under FOIA. There would be no expectation on the part of the individuals or their representatives that detailed information about the nature of cases would be disclosed to 'the world' under FOIA. Accordingly, we consider that the disclosure of this information would be unfair and so breach the data protection principle that personal data must be processed fairly and lawfully.

Section 41 of the FOIA provides an exemption for information that was provided to us in confidence, where disclosure would constitute an actionable breach of confidence. In this instance I can confirm that information about the nature of cases was provided to us by individuals or their representatives. The information we are withholding under this exemption is not already in the public domain (and so is not otherwise accessible) and is not trivial in nature. The information was clearly provided to us in circumstances giving rise to a duty of confidence – there is a widely recognised and accepted obligation of confidence in respect of information held as part of such legal matters and the claimants would have a clear and reasonable expectation that information provided to us would be treated confidentially. Our

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

decision is that this information is therefore subject to a duty of confidence. Accordingly, the information is exempt by virtue of section 41 of the FOIA.

Section 43(2) of the FOIA provides an exemption for information that would, or would be likely, to prejudice the commercial interests of any person. Our decision is that disclosure of the information about individual payments would be likely to prejudice the commercial interests of Network Rail. This is because it would disclose what Network Rail had agreed to pay in individual cases and would be likely to harm our ability to negotiate in any current or future cases.

Section 43(2) is a qualified exemption. This means that we are required to consider whether the public interest in disclosure outweighs the public interest in maintaining the exemption. In this case, the key factor in favour of disclosure is the promotion of accountability and transparency in spending by Network Rail, while the key factors against are the likelihood and severity of potential harm to our commercial interests and the resulting additional demands on the public purse which would be likely to occur if our ability to negotiate in any current or future cases was harmed. Having considered the public interest, our decision is to withhold the information on this occasion.

If you have any enquiries about this response, please contact me in the first instance at [FOI@networkrail.co.uk](mailto:FOI@networkrail.co.uk) or on 01908 782405. Details of your appeal rights are below.

Yours sincerely

Colin Bendall  
Information Officer

### **Appeal Rights**

If you are unhappy with the way your request has been handled and wish to make a complaint or request a review of our decision, please write to the Head of Freedom of Information at Network Rail, Freedom of Information, The Quadrant, Elder Gate, Milton Keynes, MK9 1EN, or by email at [foi@networkrail.co.uk](mailto:foi@networkrail.co.uk). Your request must be submitted within 40 working days of receipt of this letter.

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

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