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Dear D Verr

**Internal Review: IR2020/01065**  
**Information request: FOI2020/00938**

I am writing to provide the internal review decision in respect of request FOI2020/00938. The request was made on 12 August 2020, and you asked for the following information:

*"Network Rail states, 'We use the Hay job evaluation scheme to evaluate jobs that are carried out by employees across the organisation. This means that all roles are being considered in the same way by a cross-functional job evaluation panel. The Hay method assesses each job description and gives a score for three factors, the total of which give a total job score. It is this score that places the job in the band in the pay structure. The three factors are; know-how, problem solving and accountability.'*

- 1. Please state the current process for undertaking this evaluation*
- 2. Please provide the documentation applied for undertaking that assessment."*

Network Rail processed your request under the Freedom of Information Act 2000 (FOIA) and the response was issued on 10 September 2020. Information was provided for part 1 of your request, which asked for the current process for undertaking the evaluation.

The second part of your request – for the documentation applied for undertaking the assessment – was refused. The response explained that two exemptions applied to this documentation. Section 41(1) applies when the information has been provided in confidence and disclosure would be an actionable breach of this confidence. Section 43(2) applies when disclosure would be likely to prejudice the commercial interests of Network Rail or any third party.

You contacted us by email on 10 September 2020:

*Thank you for the information submitted, which does not unfortunately Fully respond to the request. The request was for the documentation applied by HR to evaluate jobs, and that has not been provided. There may be, for instance, an evaluation handbook. I therefore await a full response.*

We accepted your email as requesting an internal review of the refusal to provide the documentation sought in part 2 of your request.

### **Issues on review**

You have not raised any objection to the response to part 1 of your request; this review therefore focuses on the second question:

*2. Please provide the documentation applied for undertaking that assessment.*

The review will consider whether the section 41(1) and 43(2) exemptions were correctly applied.

### **Review Decision**

I note that your email of 10 September 2020 does not raise any points about the exemptions themselves, only that you had not received a 'full response' as you had not received the information for part 2 of your request.

I have first considered whether our original response located information relevant to your request. Our searches located a 'Hay Guide Chart' which is used when undertaking Hay evaluations. This corresponds to the information you asked for in this part of your request, as it is the documentation applied when undertaking an assessment. It is this information that the sections 41(1) and 43(2) exemptions have been applied to.

While I appreciate that you did not receive all the information you had asked for, Network Rail's response complied with the provisions of the FOI Act, as it clearly indicated that information for part 2 of your request was held, but this information was being withheld as two exemptions applied. The response explained why the exemptions applied, and included the factors considered in the section 43(2) public interest test. I therefore consider that the refusal for part 2 of the request contained all the requirements for a compliant Refusal Notice under section 17(1) of the FOI Act.

To review the decision to withhold the information, I have considered the information itself and the arguments put forward in support of the exemptions. I will consider the section 41(1) exemption first and have set out below the points that I have looked at. This exemption involves some complex considerations, so I have used extracts from the

Information Commissioner's guidance on this exemption to show how I have reached my decision.

The guidance<sup>1</sup> explains the necessary tests which must be met in order to engage to section 41(1) exemption, which applies when information is provided by a third-party in confidence. I've included parts of the guidance below:

*22. We would advise authorities to use the test of confidence set out by Judge Megarry at the High Court of Justice in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 as a framework for assessing whether a disclosure would constitute a breach of confidence.*

*23. Judge Megarry suggested that three elements were usually required to bring an action for a breach of confidence:*

- *the information must have the necessary quality of confidence,*
- *it must have been imparted in circumstances importing an obligation of confidence, and*
- *there must have been an unauthorised use of the information to the detriment of the confider.*

The guidance goes on to describe the test to determine if the information has the 'necessary quality of confidence':

*29. Information will possess the necessary quality of confidence if;*

- *it is more than trivial; and*
- *not otherwise accessible.*

*30. The information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential.*

*31. It does not have to be highly sensitive, but nor should it be trivial. The preservation of confidences is recognised by the courts to be an important matter and one in which there is a strong public interest. This notion could be undermined if even trivial matters were covered.*

In this case, our response to FOI2020/00938 set out the contractual arrangements that Network Rail has place with Korn Ferry in some detail; these arrangements specifically concern and limit the uses of the information by Network Rail. Particularly important here

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

is the fact that each page of the information is clearly marked as being owned by Korn Ferry; each page contains a clear statement indicating that contents are for Network Rail use only and are not for further distribution.

It is clear from this that the information is not trivial, and not otherwise accessible; it is also clear that Korn Ferry has a genuine – and commercial – interest in the contents of this information remaining confidential. I therefore consider that this test is met, and that the withheld information has the necessary quality of confidence.

The Information Commissioner's guidance provides the following advice about the next stage of the test, whether the information was provided with an obligation of confidence:

*44. The second limb of Judge Meggry's test is concerned with the circumstances in which the confider of information passed it on.*

*45. There are essentially two circumstances in which an obligation of confidence may apply:*

- *The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example in the form of a contractual term or the wording of a letter); or*
- *The confider hasn't set any explicit conditions, but the restrictions on use are obvious or implicit from the circumstances. For example, a client in therapy wouldn't need to tell their counsellor not to divulge the contents of their sessions to others, it is simply understood by both parties that those are the rules.*

In this case, and as noted above, the information is clearly marked as being provided by Korn Ferry, and each page is marked with an instruction that the information is not to be distributed outside Network Rail. As noted in our original response, Network Rail has a confidentiality agreement with Korn Ferry agreeing that we would not reprint, share or distribute the documentation with any third parties. There are therefore explicit conditions of use attached to this information, and I consider that the information was provided in circumstances in which an obligation of confidence exists; as the information itself is marked with instructions which define and limit its use, this obligation of confidence is not in doubt.

The third part of the test is that disclosure would cause a detriment to the party who provided the information. The Information Commissioner's guidance explains this as:

*59. If the requested information is commercial in nature then the disclosure will only constitute a breach of confidence if it would have a detrimental impact on the confider.*

*60. ... for commercial information, the authority will be expected to put forward an explicit case for detriment. Usually the detriment to the confider in such cases will be a detriment to the confider's commercial interests.*

I consider that our response to FOI2020/00938 explained how disclosure of the information would prejudice Korn Ferry's commercial interests:

*Providing this information would give third parties an insight into the specifics of the methodology behind the Hay Evaluation scheme and this would severely undermine the market that Korn Ferry operate within. To explain this point further, the Hay Evaluation methodology can only be evaluated and applied by personnel who have been specifically trained by the data owners, Korn Ferry. As part of their business offerings, they provide substantive training sessions within the market, as part of the agreements in place with organisations using their evaluation. Providing the information under the FOI, would mean that information that they would usually use for commercial use, would be available for free in the public domain, which would have a negative impact on them as a business.*

On this basis, my view is that disclosure would have a detrimental impact on Korn Ferry.

For the final parts of the test, the Information Commissioner's guidance explains that, for the section 41(1) exemption to apply, a 'legal person must be able to bring an action for breach of confidence' (in this case, Korn Ferry, who provided the information to Network Rail), and that the action for breach of confidence must be likely to succeed:

*69. The final part of the test for engaging section 41 is whether the action for breach of confidence is likely to succeed. This is supported by the statements made by Lord Falconer (the promoter of the legislation), during a debate on the Freedom of Information Bill.*

*70. "Actionable", means that one can go to court and vindicate a right in confidence in relation to that document or information. It means being able to go to court and win." (Hansard HL (Series 5), Vol.618, col.416)*

To assess whether the breach would be actionable, we must consider whether there would be a public interest defence for the breach. The Information Commissioner explains there is an important difference between this 'public interest', and the consideration of the public interest for qualified exemptions under the FOI Act:

*80. The test now, therefore, is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.*

*81. This test doesn't function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure*

*unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.*

This guidance makes clear that the test does not begin from a presumption of disclosure as it would for a qualified exemption; rather, the test assumes that the public interest in maintaining the confidentiality of the information is the greater.

The guidance sets out that the key public interest defence arguments are the general public interest in transparency, accountability and in the disclosure of information where this would allow public scrutiny, for example where disclosure would:

- *further public understanding of, and participation in the debate of issues of the day;*
- *enable individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions; or*
- *facilitate accountability and transparency in the spending of public money.*

The guidance also notes that whether these would be sufficient to provide an adequate public interest defence to a breach of confidence will depend upon the facts of the case. In this case, I appreciate that you may have a private interest in this information, and that it's possible that you wish to use this information in order to challenge a particular decision. However, I cannot see that there is a wider public interest in disclosure for this reason – having checked our records, I can see only one other request for similar information in the five years that Network Rail has been subject to the FOI Act. This does not indicate a wide interest in the use of this information for this purpose.

For the public interest in favour of maintaining the confidence, the Information Commissioner's guidance advises that the authority should pay particular regard to:

- *the wider public interest in preserving the principle of confidentiality, and*
- *the impact of disclosure on the interests of the confider.*

The guidance then recommends:

*95. The impact on the interest of the confider could take the form of a commercial impact (if the confider is an organisation) or loss of privacy (where the confider is a private individual acting in a personal capacity).*

*96. In respect of commercial impact, this is most likely to carry weight if the breach of confidence would damage the confider's competitive position or ability to compete, for example where disclosure would:*

- reveal information that would assist competitors;*
- undermine the confider's future negotiations with the authority or other organisations; or*
- negatively impact on the confider's relationship with the authority or other organisations.*

These factors correspond closely to the arguments set out in our original response to FOI2020/00938, which noted how disclosure would impact on Korn Ferry's commercial operations by revealing information which forms part of the commercial services they provide, and how this would impact on their own commercial interest, and their relationship with Network Rail. The respond explained:

*... it is in the public interest to permit the standard rules of commerce apply even when transactions involve public authorities. The public sector needs to work with private companies in order to deliver the best quality public services. By releasing commercially valuable information provided in confidence we would effectively deter private companies from ever doing business with us, thereby depriving us (and the public we serve) of the skills, knowledge and experience of the private sector.*

Having considered all the circumstances in this case, my view is that there is no public interest defence strong enough to overcome the inherent public interest in maintaining the confidentiality of this information.

This internal review therefore finds that the section 41(1) exemption was correctly applied. As commercial prejudice has been identified and discussed throughout these considerations, I see no reason to set aside the previous decision to withhold this information under sections 41(1) and 43(2), and my decision is that these exemptions were correctly applied.

I hope that this further explanation of the reasons for refusing this information is useful.

Yours sincerely

**Lou Lander**  
**Head of Freedom of Information**

**Appeal rights**

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 (ICO) can be contacted at Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF or you can contact the ICO through the 'Make a Complaint' section of their website on this link: <https://ico.org.uk/make-a-complaint/>

The relevant section to select will be "Official or Public Information".