



A Tevendale
By email: request-680804-bee45ecb@whatdotheyknow.com

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

T 01908 782405
E FOI@networkrail.co.uk

6 October 2020

Dear A Tevendale,

Information request

Reference number: FOI2020/00879

Thank you for your email of 31 July 2020. You requested the following information:

You have removed a poster, which states "I love JK Rowling" situated at Edinburgh Waverley Station. This was removed as a result of a campaign by those opposed to women who speak out about their rights.

Please provide all correspondence, internal and external, making reference to this poster and its removal.

We have processed your request under the Freedom of Information Act 2000 (FOIA) and can confirm that we hold the information you have requested.

Before answering your request, it may be helpful if we explain the reason Network Rail removed the poster as it was not due to the number of complaints, as your question suggests. Our advertising code states that we will not display anything calling for the support of a political viewpoint, policy or action, or that promotes one viewpoint over another. The "I Love JK Rowling" poster was paid for by someone affiliated with a group campaigning for a particular position on gender recognition reform, which is an area of live political debate and so in breach of our advertising code.

Please find attached internal and external emails we hold which make reference to this poster and its removal. These emails have been combined into four separate pdf documents. Where content has been removed with the words 'out of scope', this means that these emails, while part of a longer chain, are not relevant to your request.

We have sought to provide as much information as possible in line with the requirements of the FOIA. The Act does allow for some 'exemptions' from disclosure. Firstly, we have withheld any names, contact details and information in the correspondence which

identify individuals, and some emails in full, under section 40(2) exemption of the FOIA (personal information). You will also see that we have withheld a small amount of information from several of the emails under section 41(1) (information provided in confidence) and section 43(2) FOIA (prejudice to commercial interests). These exemptions are explained in more detail below.

Section 41(1) of the FOIA

Section 41(1) of the FOIA permits a public authority to exempt information from disclosure if:

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'*

The email correspondence from JC Decaux was provided to Network Rail as part of a discussion relating to the advertising contract that we have in place with them. There is a general expectation that discussions relating to a commercial contract will carry a level of confidentiality. At the time of writing, JC Decaux's expectation is that these emails were exchanged on a confidential basis and not to be shared more widely. The 'test' for this type of information, and this expectation, under FOIA is whether disclosure of the information would result in an actionable breach by JC Decaux or any other person. The key points in this test are set out below.

Would its disclosure constitute a breach of confidence?

The Information Commissioners' guidance on s41¹ advises authorities to use the test of confidence set out in *Coco v AN Clark (Engineers) Ltd.*² This explains that for such a duty to exist the following conditions must be met:

- *The information must have the necessary quality of confidence* - for the information to possess the necessary quality of confidence it needs to be more than trivial and not otherwise accessible. The information was provided to us as part of our discussions with JC Decaux relating to an advert which was put up at our managed station. JC Decaux has a contract with Network Rail which allows them to place adverts in our stations. JC Decaux are a private company and therefore not subject to the FOIA. This information is not trivial, as it discusses the contractual relationship between Network Rail and JC Decaux, and it is not publicly available.
- *It must have been imparted in circumstances importing an obligation of confidence* – this information was sent to a specific team within Network Rail, for the information of the advertising team only. These discussions relate to the advertising arrangements in place with JC Decaux. Our contract with JC Decaux

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

² <https://swarb.co.uk/coco-v-a-n-clark-engineers-ltd-chd-1968/>

includes a confidentiality clause and discussions relating to this arrangement therefore carry an implicit expectation of confidentiality.

- *There must have been an unauthorised use of the information to the detriment of the confider.* We have given consideration to the detriment caused to JC Decaux if this information were to be released. First and foremost, it would damage the working relationship we have with JC Decaux. We have an information sharing arrangement with JC Decaux, and as part of the advertising management for our stations these discussions are intended for the use of Network Rail only. This relationship operates on the basis of trust and commercial confidentiality; if we were to share this type of information, which had been provided to us in confidence, this would be detrimental to JC Decaux by impacting on their ability to work effectively with Network Rail in the future. The disclosure of the information could also impact on their working arrangement with other companies. It is important here also that JC Decaux conduct commercial activities in a competitive environment, and public disclosure of information about their commercial activities would immediately place them at a disadvantage against their competitors, who are not required to disclose similar information.

Bearing all of this in mind, we are satisfied that the test set out in *Coco v AN Clark (Engineers) Ltd* is met.

Would any action for breach of confidence be likely to succeed?

This test comes down to considering whether there is any defence likely to succeed if an action for breach of confidence were to be brought against us. Any defence formed on the basis of the public interest favouring disclosure would be unlikely to succeed. As the ICO recognises:

‘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.’³

While it is possible to discern some public interest arguments in favour of releasing the information, i.e. it would provide some insight in to our advertising arrangements, it is important to bear in mind that JC Decaux is not subject to the FOIA and they need be able to manage their working arrangements without from the risk of commercial information being revealed to external parties, including those companies in direct competition with them. Taking into consideration the significant amount of information you are being provided in in response to your request, our view is that, overall, there is little further public benefit to be gained from releasing this additional information. Therefore, we remain of the view that the public interest favours maintaining the confidence between the parties.

More broadly, there is also a wider public interest in preserving the principle of confidentiality particularly when it involves a public authority. It is important for public authorities to behave with integrity and stand by the commitments it makes to third parties and maintain trust and confidence.

³ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

Taking all of the above into account we believe that any action brought for breach of confidence would be likely to succeed and, in consequence, we are satisfied that the exemption at s.41(1) applies to certain parts of the information you have requested.

Section 43(2) of the FOIA

As mentioned above, we have also withheld some information from several emails under 43(2) of the FOIA. This exemption allows us to withhold information when disclosure would commercially prejudice any party. In this case disclosure would commercially prejudice both Network Rail and JC Decaux.

The withheld information contains commercially confidential discussions between JC Decaux and Network Rail concerning our advertising agreement. Disclosure of the information would prejudice Network Rail's commercial interests by damaging our reputation as a commercial partner, leading JC Decaux and other third parties to be reluctant to work with us in future. Disclosure of the discussions would also commercially prejudice JC Decaux; disclosure of this information could lead to certain expectations and pressures being placed on their other contractual arrangements, which could lead to increased costs. This would damage the working relationship with Network Rail, also other companies that JC Decaux has longstanding working relationships with.

Public interest test

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.

We have considered the following factors in favour of disclosure

- There is a public interest in transparency and specifically in the disclosure of information where it promotes openness and allows greater insight of public authorities' income and spending.
- Furthermore, disclosure would demonstrate transparency and meet the public interest in accountability for the use of public monies by Network Rail. There is also a public interest in enabling the public to obtain a greater understanding of Network Rail's decision-making processes.

We consider that the following factors favour maintaining the exemption:

- Disclosure of this information would be likely to have a detrimental effect on our relationship with JC Decaux, leading them to being less inclined to engage and freely share information with us for fear of sensitive information of this type being released under the Act. It is not in the public interest to damage a public authority's stakeholder relationships in this way.
- Disclosure of the information could also impact on JC Decaux's working relationships with other companies by creating a certain level of expectation and responsibility on their working practices and advertising management. This could

potentially lead to increased costs. It is not in the public interest to commercially prejudice a private company in this way.

- There is a public interest in ensuring that no third parties are placed at a commercial disadvantage through their dealings with public authorities. Such circumstances act as a deterrent to private companies doing business with us and, where they are content to continue working with us, would likely lead to increased costs to account for the additional risk associated with doing so.

Having considered the public interest, our decision is to withhold this information. Whilst we recognise the arguments in favour of transparency and accountability, our view is that the public interest is best served by ensuring that we and our partners are able to operate commercial enterprises within the standard bounds of commercial confidentiality and without disadvantage to their wider commercial position.

Section 40(2) personal information

As mentioned above we have withheld the names of individuals and job titles from all emails under section 40(2) of the FOIA.⁴ We have also removed a number of lines within certain emails, and a small number of emails in full where the content contains personal details which would make it possible to identify the individuals concerned.⁵

To explain this, section 40(2) of the FOIA allows us to withhold any information which constitutes the personal data of any identifiable individual where its disclosure would contravene one or more of the key principles set out in s35 of the Data Protection Act 2018 and Article 5 of the General Data Protection Rules (GDPR). The withheld details would identify members of the public, third parties not employed by Network Rail, and those employees within Network Rail who are not employed in senior public facing roles.

It is important to bear in mind that disclosures under the FOIA are disclosure to the 'world' rather than one individual, so we have to take into consideration whether any person may be able to identify any individuals concerned; we need to consider that someone with sufficient knowledge of Network Rail teams and structure will be able to identify members of staff, and that personal details we disclose about members of the public and third parties would also identify them.

In each case, the individual concerned would have no expectation that their names and personal details would be publicly disclosed through the FOIA process; this means that the disclosure would be unfair and would breach the first data protection principle, that personal data must be handled lawfully and fairly

We hope that this explanation of the reasons that some information has been withheld is helpful, and that the information provided is useful for you. If you have any enquiries about this response, please contact us in the first instance at FOI@networkrail.co.uk. Details of your appeal rights are below.

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

⁴ Names, job titles and contact details have been marked in black.

⁵ This information is shown on the emails as withheld under s40(2) FOIA

Yours sincerely

Danielle Stratton
Information Officer

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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. 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 (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".