

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 July 2024

Public Authority: Network Rail
Address: The Quadrant
Elder Gate
Milton Keynes
MK9 1EN

Decision (including any steps ordered)

1. The complainant has requested contracts between Network Rail and a third party. Network Rail disclosed the contracts, with information withheld under section 43(2) (commercial interests).
2. The Commissioner's decision is that the withheld information engages section 43(2) and the public interest lies in maintaining the exemption.
3. The Commissioner does not require further steps.

Request and response

4. On 7 September 2023, the complainant wrote to Network Rail and requested information in the following terms:

"I am writing to formally request a copy of the contract between Network Rail and Ganymede under the provisions of the Freedom of Information Act. My request specifically pertains to all information regarding employees, including but not limited to:

Contract Hours

Hours Paid

Hourly Rate

Any Bonuses Included

PPE Quality Requirements

Driver's Rate for Drivers

Information Regarding Working away: Food allowances, Hotel fees

Written agreement regarding rosters

Ideally, I would like to receive the full contract, but if that is not possible, please provide any available information related to the above-mentioned aspects of the contract.

I understand the importance of confidentiality, but as a concerned party, I believe this information is essential for transparency and accountability. If there are any administrative fees associated with fulfilling this request, please inform me in advance, and I will promptly comply."

5. Network Rail responded on 5 October, asking the complainant for clarification.
6. On the same day, the complainant clarified their request:

"After analysing the response, I am still confused by some aspects of why it was fulfilled in the manner that it was.

Why was I contacted so late in the process, if further clarification was required?

To clarify my request, I would like the full supplier contact[sic] between Ganymede and network rail.

The previously mentioned aspects of my request still stand. If the information I requested regarding the employee hours, bonuses, working away conditions etc isn't specified in the contract but some other documents I would like to request those documents.

I understand that section 43 of FOIA specifies exemptions to what information can be released, but it also depends on the public interest test. I strongly believe that this information should be released as it's crucial to me and my co-workers from Ganymede. As Ganymede is in breach of AWR and a whole bunch of other rules including NWR lifesaving rules. It's necessary that the contract is looked over to ensure that it's fulfilled properly by Ganymede.

They have shown a great lack of respect for rules and equality within the company. Not only me but all my colleagues have been mistreated, abused, threatened, and stolen from.

It is in the public interest to find out the true content of the contract and the terms that were agreed upon with Network Rail.”

7. On 2 November 2023, Network Rail informed the complainant that it needed an extension to consider the public interest of the requested information, under section 10(3) of FOIA.
8. On 9 November 2023 Network Rail disclosed to the complainant three contracts between it and Ganymede. The following information was redacted from each contract under section 43(2) (commercial interests):
 - Schedule 2 – Charges
 - Schedule 3 – Management Information and Reporting
 - Appendices to the contract concerning accommodation and vehicle allowances
9. On 26 November 2023 the complainant requested an internal review, disputing the application of section 43(2).
10. Network Rail provided the outcome to its internal review on 26 January 2024. The internal review concluded that appendices C and D of schedule 2 could be disclosed, but Network Rail upheld its decision to withhold all other information.

Scope of the case

11. The complainant contacted the Commissioner on 11 March 2023 to complain about the way their request for information had been handled.
12. The complainant raised concerns that agency workers had been adversely impacted by the arrangement between Network Rail and Ganymede and Agency Worker Regulations had been contravened; so there was a weighty public interest in disclosure of the withheld information.
13. The Commissioner considers that the scope of his investigation is to determine whether information can be withheld under section 43(2).

Reasons for decision

14. Section 43(2) of FOIA states:

'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)'

15. The Commissioner's guidance¹ states 'A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.'

16. In this case, Network Rail is concerned that disclosure of the withheld information could prejudice its own commercial interests, as well as a third party's, Ganymede.

17. Network Rail has explained:

"Disclosure of this information would be particularly harmful to Ganymede as it would make information public to their competitors who may then be likely to use it to harm Ganymede's future negotiations for other projects and contracts. Disclosure would also be likely to harm Network Rail's reputation as a trustworthy and reliable business partner."

18. Looking at the information that's being withheld, the Commissioner is satisfied that there's a causal link between disclosure and prejudice to Ganymede's commercial interests. The withheld information is specifications of the contract between an agency worker supplier, Ganymede, and Network Rail. Disclosure of this information would allow other agency worker suppliers to tailor their offer to undercut Ganymede, putting it at a competitive disadvantage.

19. When a public authority withholds information on the basis that disclosure would damage a third party's commercial interests, it needs to consult the third party in question.

20. Network Rail did so, and the Commissioner has seen evidence that Ganymede expressed concerns about disclosure of the withheld information, to the extent that its future working relationship with

¹ [Section 43 - Commercial interests | ICO](#)

Network Rail would be called into question were the information disclosed.

21. If Network Rail were to disclose this information via FOIA, it is likely that other third party providers would be less likely to offer their services to Network Rail, for fear commercially sensitive information would end up in the public domain.
22. With this in mind, the Commissioner is satisfied that the withheld information engages section 43(2), on the lower threshold of prejudice, disclosure would be likely to prejudice the commercial interests of both Ganymede and Network Rail. The Commissioner will now go onto consider the balance of the public interest.

Public interest test

Factors in favour of maintaining the exemption

23. Network Rail has explained:

“It is not in the public interest that one supplier is at a commercial disadvantage against its competitors. Ganymede is not the only supplier of frontline labour force services used by Network Rail and when we conduct future tender processes for this contract in the Scotland, Kent, Sussex routes or other routes, Ganymede would be disadvantaged in this process, since their competitors would have access to their costs and performance indicators under this contract.

Ganymede would not have access to the same information for other suppliers. This would in turn make it extremely difficult to conduct a fair assessment of suppliers’ bid for such contracts in future where all bidders are not on an equal footing.”

24. The Commissioner acknowledges that it’s not in the public interest to compromise Network Rail’s ability to operate competitively when obtaining services from agency staff.

Factors in favour of disclosure

25. There is always a general public interest in transparency and accountability, which would be further met through disclosure of the withheld information.
26. The complainant has expressed concern to the Commissioner that there’s a public interest in the withheld information because they, and others, have been adversely impacted by worker agencies and their terms with Network Rail, which contravene Agency Worker Regulations.

Balance of the public interest

27. In the Commissioner's opinion, the balance of the public interest is best served by the maintaining of section 43(2).

28. Network Rail has explained:

"Network Rail has various mechanisms in place to ensure those we work with meet our expected standards in terms of safety and employee rights. Clause 17 of the contract, which was disclosed, outlines the expectations of Network Rail from Ganymede to comply with the AWR and states that Ganymede 'shall at all times comply with its obligations' under the AWR. Network Rail takes its responsibilities in relation to workers' rights seriously and we include this clause to make clear our expectations from our suppliers."

29. Furthermore, it's explained:

"There is nothing contained in Schedule 2 that would provide any insight into Ganymede's or Network Rail's compliance with the AWR since it provides no information about comparative rates of pay or benefits at the hiring company, i.e. Network Rail. Furthermore Schedule 2 is not in any way related to safety, therefore would not demonstrate whether Ganymede has failed to comply with Network Rail's lifesaving rules.

The AWR also do not include any requirements in terms of how key performance indicators, service levels or financial penalties should be imposed. There is no information contained in Schedule 3 that would demonstrate Network Rail's or Ganymede's compliance with the AWR."

30. The Commissioner acknowledges the complainant's concerns, and recognises they might be shared by other agency workers. Whilst Network Rail maintain these concerns are unsubstantiated, the Commissioner notes the complainant has begun legal proceedings for what they believe is a breach of AWR.

31. Disclosure under FOIA is disclosure to the world at large. The complainant will, as part of these legal proceedings, have access to the information they need but as Network Rail has explained, the withheld information doesn't actually address their concerns. For this reason, the Commissioner doesn't consider the prejudice to the commercial interests of either Ganymede or Network Rail is justified in this instance.

Right of appeal

32. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
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