

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 September 2014

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
NR1 2DH

Decision (including any steps ordered)

1. The complainant has requested information relating to the number of appliances available during periods of industrial action in Norfolk Fire and Rescue Service. The Commissioner's decision is that Norfolk County Council is not entitled to rely on the exemption for health and safety at section 38 of the FOIA as a basis to withhold the requested information.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the requested information.
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 14 January 2014, Norfolk County Council ('the council') received an information request in the following terms:

"Could you please supply me with the following information for each period of industrial action in Norfolk Fire and Rescue Service over the past 6 months;

- Number of Retained Duty System (RDS) appliances available – minimum and maximum as I realise this can fluctuate.
 - Number of riders on each appliance – as above.
 - Number of RDS appliances that were restricted – as above.
 - Number of resilience pumps available.
 - Number of riders on those appliances.
 - Whether the appliance was restricted or not.”
5. The council responded on 11 February 2014 and refused to provide the requested information citing the exemption for health and safety at section 38 of the FOIA.
6. The complainant requested an internal review on 21 February 2014. An internal review response was provided by the council on 4 April 2014 in which the original position in relation to section 38 of the FOIA was maintained.

Scope of the case

7. The complainant contacted the Commissioner on 2 June 2014 to complain about the way his request for information had been handled.
8. The Commissioner has considered the application of the health and safety exemption at section 38 of the FOIA to the requested information.

Reasons for decision

9. Section 38 states that information is exempt if disclosure would, or would be likely to, endanger the physical or mental health, or safety of, any individual. This is a qualified exemption, and is therefore subject to the public interest test.
10. The Commissioner considers that the term 'endanger' should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions and his view was confirmed by the Information Tribunal in *PETA v ICO & University of Oxford*¹.

¹ Appeal number EA/2009/0076

11. The Commissioner's approach to the prejudice test is based on that adopted by the Information Tribunal in *Hogan and Oxford City Council v ICO*² at paragraphs 28-34. This involves the following steps:

- Identify the "applicable interests" within the relevant exemption
- Identify the "nature of the prejudice". This means:
 - Show that the prejudice claimed is "real, actual or of substance";
 - Show that there is a "causal link" between the disclosure and the prejudice claimed.
- Decide on the "likelihood of the occurrence of prejudice".

12. In its responses to the complainant, the council said that disclosure of the information could undermine or compromise the contingency arrangements the Service has put in place. It said that this could lead to a reduced contingency capacity and overall reduction in emergency response cover which would lead to extended travel times and put the public and crews at greater risk by negatively impacting on health, safety and welfare provisions.

13. In his enquiries, the Commissioner informed the council that it was not clear how disclosure of the information requested in this case would prejudice the contingency plans and requested further details. The council then provided the following explanation:

"The information sought concerns the level of fire and rescue cover available during previous industrial action. The primary concern about disclosure arises not in respect of this information from a historical perspective, but the fact that it is informative of levels of cover available for any future industrial action. In this respect there are two specific and separate ways the disclosure of this information would increase the risk of endangerment to the individuals identified:

(a) By reason that disclosure under the FOIA would mean disclosure into the wider public domain, it would inform anyone of terrorist or other criminal intent of any possible weak or low areas of Fire and Rescue cover during industrial action. In short it would enable any

² Appeal number EA/2005/0026 and 0030

such action to be targeted where public safety services are least able to respond to it.

(b) Separately from this, if any industrial action is planned with an aim of maximising disruption to services, this information would enable such action to be targeted to increase the disruption of usual services and therefore the level of cover available to ensure public safety."

14. Given the role of the Fire and Rescue Service, the Commissioner accepts that the council's arguments in relation to the endangerment of individuals are relevant to this exemption and that the subjects of the endangerment have been identified as the people at risk of fire or other hazard in Norfolk. Therefore the 'applicable interests' have been identified.
15. The Commissioner considers that the nature of the prejudice, that being a threat to the physical safety of individuals, is "real, actual or of substance".
16. The Commissioner considers that there is a logical connection between disclosure in this case and the threat of endangerment to individuals as it is conceivable that release of the withheld information could lead to targeted action in Norfolk which could then put the public and crews at risk due to the reduced level of services at times of industrial action.
17. Establishing the causal link means that the prejudice claimed is at least possible, ie there are circumstances in which it could arise. The next step in engaging the exemption is to consider how likely the endangerment is to occur.
18. In this case, the council stated that the endangerment 'would be likely to occur'.
19. The Tribunal in the aforementioned Hogan case stated that;

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not." (paragraph 33)

20. As stated in the Commissioner's guidance on the prejudice test³, the first limb relates to 'would' and the second to 'would be likely'. 'Would be likely' therefore means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
21. The Commissioner recognises the seriousness of the council's arguments, particularly given the role of the Fire and Rescue Service the potential ramifications were the service to be compromised. However, he has had to consider whether the disclosure of the information in this case would be likely to have the prejudicial effects argued by the council and whether there is a real and significant risk that the prejudice would occur were the information to be disclosed.
22. The Commissioner is not persuaded that the disclosure of this information would be likely to have the prejudicial effects argued by the council. This is because he considers that 'anyone of terrorist or other criminal intent', or anyone planning industrial action with an aim of maximising disruption, could make an educated guess that fire and rescue services would be reduced at times of industrial action and disclosure of the specific information in this case would not necessarily result in action being targeted in Norfolk; figures relating to previous periods of industrial action will not necessarily be indicative of cover for future industrial action; the information requested is for overall figures for Norfolk, as opposed to being broken down into specific areas which could then be targeted; the causal link appears to have multiple stages (disclosure could lead to targeted action which could then put the public and crews at risk due to the reduced level of services at times of industrial action); and the council have not provided persuasive arguments as to the likelihood of this occurring. The Commissioner therefore has no choice but to conclude that the exemption is not engaged. As he has found that this exemption is not engaged, the Commissioner has not gone on to consider the balance of the public interest.

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[http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.pdf](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.pdf)

Right of appeal

23. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

24. 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.
25. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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